



**Mombasa Cement Limited v Ministry of Lands and Physical Planning  
& 3 others; Vipingo Estate Limited (Interested Party) (Petition  
17 of 2018) [2020] KEELC 2856 (KLR) (29 April 2020) (Judgment)**

Neutral citation: [2020] KEELC 2856 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
PETITION 17 OF 2018**

**M SILA, J  
APRIL 29, 2020**

**BETWEEN**

**MOMBASA CEMENT LIMITED ..... PETITIONER**

**AND**

**THE MINISTRY OF LANDS AND PHYSICAL PLANNING ... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**VIPINGO ESTATE LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

**Pleadings Of The Parties**

1. This petition was filed on 30 August 2018 and amended on 10 December 2018. The petitioner is a limited liability company and the registered proprietor of two land parcels identified as Subdivision No. 4391 (Original No. 3545/2/1) of Section III/MN measuring approximately 499 acres, and Subdivision No. 291/2 of Section III/MN measuring approximately 173.7 acres (hereinafter also referred to as the “suit properties”). The suit properties were purchased by the petitioner from Vipingo Estate Limited (the interested party in this petition) and transferred to the petitioner in March of the year 2005. Vipingo Estate Limited had been the proprietor of the parent title from the year 1949. On 16 December 2013, the 3<sup>rd</sup> respondent (the National Land Commission), notified the petitioner that it had received a complaint touching on the suit properties, and since it was mandated to investigate such complaints, had launched investigations into the matter. The petitioner avers that it made a response to



- the 3<sup>rd</sup> respondent, pointing out how it acquired the suit properties, and that there followed a further exchange of correspondences and meetings. It is averred that the 3<sup>rd</sup> respondent wrote a letter dated 22 September 2014 confirming that the suit properties are owned by the petitioner, and that through a report enclosed in a letter dated 8 January 2015, the 3<sup>rd</sup> respondent made a decision that it was clear that the suit properties belonged to the petitioner.
2. In March 2015, the petitioner received a couple of letters from the Clerk of the National Assembly, inviting the director of the petitioner to appear before the Departmental Committee on Lands to “shed more light” on the suit properties. The Petitioner thought that this was unconstitutional, as in its view, the matter had already been determined by the relevant constitutional body, and it proceeded to file the case Nairobi ELC Petition No. 177 of 2015, Mombasa Cement Limited vs The Speaker, National Assembly and the Hon. Attorney General to stop the parallel investigations by the National Assembly. This suit was however dismissed for failure to pay court fees before it could be heard. The petitioner then filed this suit.
  3. It is the contention of the petitioner that it is the National Land Commission which has power to review all grants and dispositions of public land in order to establish their propriety or legality and thereafter make a determination. It is the assertion of the petitioner that the Departmental Committee of the National Assembly on Lands has no constitutional or legal mandate to take over or purport to undertake actions and powers which are within the exclusive mandate of the National Land Commission. The petitioner avers that by purporting to undertake a function constitutionally reserved for the National Land Commission, the Departmental Committee of the National Assembly on Lands acted in violation of the Constitution. It is argued that in carrying out its oversight role, Parliament must respect the independence of the National Land Commission and other independent offices, and that Parliament’s oversight role is not *carte blanche*. It is further contended that the Departmental Committee of the National Assembly has no power to sit on appeal over the decision of the National Land Commission. The petitioner states that the Speaker of the National Assembly (the 2<sup>nd</sup> respondent) has failed, refused and/or neglected to perform his constitutional responsibility of giving constitutional guidance to the House and has permitted the Departmental Committee on Lands to undertake an illegal exercise in gross violation of the Constitution. The petitioner has sued the Cabinet Secretary of the Ministry of Lands and Physical Planning (1<sup>st</sup> respondent) because on 28 July 2017, the 1<sup>st</sup> respondent wrote to the petitioner informing the petitioner of the report of Parliament and directing the petitioner to give immediate vacant possession of the land parcel MN/III/4391, and advising that failure to do so will result in the Ministry physically taking possession. It is thus the position of the petitioner that its right to own property under Article 40 of the Constitution has been violated or is at risk of being violated. The petitioner contends that it has also suffered a breach of its right to Fair Administrative Action under Article 47 of the Constitution and a breach of its right to Legitimate Expectation.
  4. In this petition, the petitioner asks for the following orders :-
    - i. A declaration that the National Land Commission as a constitutional commission is not subject to the control or direction of the National Assembly and any of its departmental committees established under the National Assembly Standing Orders, including the Departmental Committee of Lands, or of the Cabinet Secretary Ministry of Lands and Physical Planning in the lawful discharge of its constitutional mandate under Article 67 of the Constitution particularly when dealing with all those properties known as LR No. MN/III/291/2 and MN/III/4391.



- ii. A declaration that the attempt by the Cabinet Secretary Ministry of Lands and Physical Planning and National Assembly Departmental Committee on Lands seeking to curtail, undermine and/or deprive the National Land Commission of its constitutional powers and mandate also purporting to sit on appeal on the decisions of the National Land Commission with regard to all those properties known as LR No. MN/III/291/2 and MN/III/4391 is unconstitutional, null and void.
- iii. A declaration that the actions of the National Assembly Departmental Committee on Lands purporting to investigate and inquire on a matter constitutionally provided as a function of the National Land Commission is ultra vires the Committee's functions and powers under the Constitution and National Assembly Standing Orders and therefore unconstitutional, null and void.
- iv. A declaration that the actions of the National Assembly Departmental Committee on Lands purporting to investigate and inquire into LR No. MN/III/291/2 and MN/III/4391, a matter already determined by the National Land Commission, violates Article 67 and 249(2) of the Constitution.
- v. A declaration that the decision and/or actions of the National Assembly Departmental Committee on Lands of summoning the petitioner for purposes of conducting any proceedings whatsoever and howsoever concerning LR No. MN/III/291/2 and MN/III/4391 so far as those matters have conclusively been determined by the National Land Commission is a violation of the Petitioner's right to fair administrative action protected by Article 47 of the Constitution.
- vi. A declaration that the actions and/or decision of the National Assembly Departmental Committee on Lands of summoning the Petitioner for purposes of conducting any proceedings whatsoever and howsoever concerning LR No. MN/III/291/2 and MN/III/4391 so far those matters have conclusively been determined by the National Land Commission outside the appeal procedures provided for under the National Land Commission Act is a violation of the Petitioner's right to equality before the law and the secure protection of the law protected by Article 27 of the Constitution.
- vii. An order of prohibition restraining the Cabinet Secretary Ministry of Lands and Physical Planning whether by herself, her agents, servants or any person claiming under her from taking any action to repossess, interfere, alter and or cancel the Petitioner's title to LR No. MN/III/291/2 and MN/III/4391 so far those matters fall within the exclusive constitutional purview of the National Land Commission.
- viii. An order of certiorari be issued to remove into the honourable court for quashing the proceedings conducted by the National Assembly Departmental Committee on Lands relating to investigations and inquiries into LR No. MN/III/291/2 and MN/III/4391.
- ix. An order of certiorari be issued to remove into the honourable court for quashing the report of the National Assembly Departmental Committee on Lands dated 24<sup>th</sup> November 2015.
- x. An order of certiorari be issued to remove into the honourable court for quashing the decisions of the Cabinet Secretary Ministry of Lands and Physical Planning contained in the letters dated 28<sup>th</sup> July 2017 and 15<sup>th</sup> February 2018.
- xi. That the respondents be condemned to pay the costs of this petition/application.



- xii. Any other relief this court may deem just and fit to grant.
5. The supporting affidavit to the amended petition is sworn by Hasmukh Patel, a director of the petitioner. He has more or less reiterated what is pleaded in the petition and has annexed various documents, including the sale agreement with Vipingo Estate Limited dated 17 February 2004, a transfer of lease dated 1 March 2005 in respect of the suit properties, and the requisite consents of the Land Control Board and the Commissioner of Lands for the sale. He has deposed that the petitioner took vacant possession of the suit properties in the year 2006 and successfully applied for change of user from agricultural to industrial. In the year 2007, the petitioner built a cement factory on the suit properties. On 16 December 2013, the petitioner received from the National Land Commission (the Commission or NLC), a letter of even date, titled “Forceful Occupation of Local’s land – Plot No. 289 & Plot No. 290-MN/3.” The letter requested the petitioner to supply the Commission with ownership documents of the properties and any relevant information. The petitioner responded through a letter dated 18 December 2013 and forwarded its title documents. On 21 February 2014, the petitioner received a call from the Commission informing it that a meeting will be held on 24 February 2014 to discuss the response of the petitioner. The meeting was held and chaired by the Vice-Chairman of the Commission, Mrs. Abigail Mbagaya Mukolwe. Later the petitioner received a letter dated 5 March 2014 requesting for additional documents over the properties including the original titles. This was responded to through a letter dated 20 March 2014 written by M/s Onyony & Company Advocates. The Commission wrote another letter dated 9 April 2014 again asking for additional documents and there followed a ground visit on 13 May 2014. On 13 August 2014, the petitioner through the law firm of M/s Kanyi J & Company Advocates, made its submissions over the suit properties after an invitation by the Commission through an advertisement that appeared in the Standard Newspaper of 4 August 2014. Through a letter dated 22 September 2014, the Commission wrote to the petitioner confirming ownership of MN/III/291/2 and by a further letter dated 8 January 2015, the Commission wrote to the Governor of Kilifi County, enclosing a report and documents relating to the suit properties. He has deposed that in the report, the Commission held the view that the suit properties were of the petitioner.
6. Mr Patel annexed the letters dated 11 March 2015 and 31 March 2015 from the Clerk of the National Assembly inviting the director of the petitioner to appear before the Departmental Committee on Lands and avail various documents. He has deposed that the petitioner is being unlawfully targeted in advancement of political agendas. He has contended that on 16 April 2015, the Clerk of the National Assembly, wrote to the petitioner’s Managing Director, threatening him and expressing the Committee’s annoyance because the petitioner had involved lawyers in the matter. A copy of the letter is annexed. He has deposed that a group of persons illegally entered the land and demolished its perimeter wall causing the company a loss of at least Kshs. 3,200,000/=. He annexed a copy of the letter dated 28 July 2017, from the Cabinet Secretary Ministry of Lands and Physical Planning which letter informed the petitioner of the Parliamentary Report and demanded that the petitioner vacates the suit properties immediately. A further directive, through a letter dated 15 February 2018, was written by the Cabinet Secretary, indicating that a team had been constituted to oversee the restitution of the land. He has averred that this was despite there being a letter dated 28 March 2016 by the Ministry of Lands and Physical Planning confirming that the petitioner is the lawful owner of the suit properties. He has deposed that following the report of the Parliamentary Committee, the Directorate of Criminal Investigations conducted investigations on the ownership and transfer of the suit properties and concluded that the transactions were above board. He has asserted that the report of Parliament dated 24 November 2015 was unconstitutional and illegal.



7. The 1<sup>st</sup> and 4<sup>th</sup> respondents (the Ministry of Lands and Physical Planning and the Attorney General respectively), filed Grounds of Opposition and a list of documents. The grounds of opposition are drawn as follows :-
- i. That the petition lacks merit and is frivolous.
  - ii. That ownership of the suit property Land Parcel No. MN/III/291/2 and MN/III/4391 is not disputed. That the petition be determined based on the documents produced by the parties.
  - iii. That the County Land Registrar through the Attorney General relies on the List of Documents dated 16<sup>th</sup> October 2019 and the same is not disputed.
  - iv. That the main issue (sic) for determination are; the Letters by the Cabinet Secretary dated 28<sup>th</sup> July 2017 and 15<sup>th</sup> Feb 2018, the Documents availed by the 2<sup>nd</sup> respondent both compared with a survey report on the subject suit parcels amalgamation and subdivision schemes/plans.
  - v. That all parties bear their costs in this suit since it is a matter of public interest.

The list of documents referred to in the Grounds of Opposition are title documents and searches of the suit properties.

8. The 2<sup>nd</sup> respondent filed a replying affidavit sworn by Jeremiah W. Ndombi, the Senior Deputy Clerk of the National Assembly (also referred to as NA). He has deposed inter alia that the Lands Committee is established under Standing Order 216 of the National Assembly Standing Orders made pursuant to Article 124 of the Constitution. He has mentioned that under Standing Order 216(5), the functions of the Lands Committee are to :-

Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;

Study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;

Study and review all legislation referred to it;

Study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;

Investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;

Vet and report on all appointments where the Constitution or any law requires the NA to approve, except those under Standing Order 204 (Committee on Appointments); and

Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

9. Mr Ndombi has deposed that the above functions of the Lands Committee are to be carried out within the purview of the role of the National Assembly stipulated in Article 95 (2) of the Constitution, which provides that “the National Assembly deliberates on and resolves issues of concern to the people.” He has deposed that under Article 95(5), the National Assembly exercises oversight over all State Organs, including the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. He has then referred to the provisions of Article 117 and 125 of the Constitution, Section 14 of the National Assembly (Powers and Privileges) Act (repealed) and Standing Order 191, on the powers of Parliament inter alia to summons persons and take evidence from them.



10. He has deposed that through a letter dated 21 September 2014, a group known as Bambani Kilio Community Based Organisation (Bambani Kilio Group), wrote to the Member of Parliament (MP) for Kilifi North Constituency, complaining that land parcels MN/III/289 and MN/III/290, which had been allocated to them by the Ministry of Lands, were occupied by the petitioner and that they had been forcefully evicted from the land. He has stated that the MP for Kilifi North Constituency wrote to the Clerk of the National Assembly on 28 November 2014, asking that the matter be referred to the Lands Committee. The matter was then referred to the Lands Committee, which subsequently met and in exercise of its mandate, resolved to inquire into the complaint. He has averred that the Lands Committee made field visits to check on the status of the land parcels MN/III/289, MN/III/290, MN/III/291, and MN/III/4391. He has stated that during the field visit, the Lands Committee established that the petitioner acquired the land where the residents, who had already acquired allotment letters from the Ministry prior to the petitioner, were still in occupation of. He has contended that the allotment of the land to the petitioner was done unprocedurally, illegally and without the residents' consent and participation. He has averred that the Lands Committee requested the director of the petitioner to appear before the Committee on 24 March 2015 to shed light on the issues relating to the land parcels MN/III/289, MN/III/290, MN/III/291, and MN/III/4391. The Lands Committee also received various documents over the matter which he has outlined in his affidavit. The documents include those relating to the investigation by the National Land Commission. He has averred that the Lands Committee concluded that this is an issue that constituted a matter of concern to the people. He deposed that despite being requested to appear before the Lands Committee, the director of the petitioner did not appear and later instructed his advocates to write to the Committee that its Group Human Resource Manager will be the one to appear. Soon after, the petitioner filed the first petition (Nairobi ELC Petition No. 177 of 2015). He has averred that the interaction between the petitioner and the Lands Committee demonstrates that the petitioner submitted to the jurisdiction of the Lands Committee but later changed its mind midway, in bad faith.
11. Mr. Ndombi has contended that this court lacks jurisdiction owing to the provisions of Article 125 of the Constitution and Section 12 of the National Assembly (Powers and Privileges) Act (repealed) as the same would amount to violation of the principle of separation of powers. He has averred that the prayers sought in the petition are an affront to the values and principles of good governance under Article 10 (c) of the constitution which provides for "good governance, integrity, transparency and accountability" and a violation of the principle of separation of powers, and that the court ought to exercise restraint from interfering with the role and mandate of Parliament. He has stated that the petitioner's right to property was not in any way prejudiced because the Lands Committee was only inviting the petitioner to appear before it in its inquiry into matters raised by the Bambani Kilio Group.
12. On the powers of the National Land Commission, Mr. Ndombi has deposed inter alia that the Constitution does not provide that the Commission will conduct its functions, under Article 67 (e) of the Constitution, in exclusivity or in exclusion of the National Assembly exercising its powers of oversight under Article 95(b) of the Constitution. He has contended that Article 95 (b) of the Constitution gives the Committee power to exercise oversight over the Ministry of Lands and Physical Planning, the Hon. the Attorney General and the National Land Commission. He has further contended that the Lands Committee has power under Article 95 (2) of the Constitution to deliberate and resolve issues on land, such as the instant issues, that are of concern to the people.
13. He has disclosed that he is aware that the National Land Commission in exercise of its constitutional role, independently reviewed the grant and disposition of the land parcels MN/III/289, MN/III/290, MN/III/291/2, MN/III/4391, MN/III/4392 and MN/III/4393. He has deposed that the Clerk of the National Assembly invited the National Land Commission to appear before the Lands



Committee, and when the Commission appeared, it presented three reports dated 17 September 2014, 9 April 2015, and 28 April 2015, which he has contended reveal glaring contradictions. He has averred that these contradictions called for an inquiry by the Lands Committee and the National Assembly in the exercise of its constitutional powers of oversight over State Organs.

14. He has deposed that the Lands Committee finalised its investigations and prepared its report titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County”, which was tabled and adopted by the National Assembly on 24 November 2015. He has outlined the following as being the recommendations of the Committee :-

The Ministry of Lands, Housing and Urban Development (the 1<sup>st</sup> respondent), immediately takes possession of the public land in use by Mombasa Cement Limited (the petitioner), Land Reference Numbers MN/III/290, MN/III/289, and MN/III/3454, to be administered by the NLC; and

The NLC and the Ministry of Lands, Housing and Urban Development ( the 1<sup>st</sup> Respondent), in accordance to Section 134 (5) of the Land Act, 2012, immediately reserve the said land for settlement of the affected community in the area.

15. Mr. Ndombi has stated that the Implementation Committee of the 1<sup>st</sup> respondent commenced implementation of the findings of the Lands Committee in respect of the land parcels MN/III/291/2 and MN/III/4391, Kilifi County. He has averred that the National Assembly does not intend to control or direct the NLC in carrying out its mandate under Article 67 of the Constitution; that the National Assembly does not intend nor has it attempted to sit on appeal of the decision of the NLC with regard to the land in question; that the National Assembly only exercised its powers under Article 95 (2) and 95 (5) (b) of the Constitution and Standing Order 216 (5) and that it did so bona fide and in accordance with the law.

16. The 3<sup>rd</sup> respondent (the National Land Commission) filed Grounds in Support of the petition drawn as follows :-

- i. That the merits of the determination by the 3<sup>rd</sup> respondent made under Section 14 of the National Land Commission Act cannot be reopened by Parliament or its Committees and the same are conclusive and final on the issue of legality and propriety of the said title and only this Honourable Court can by way of Review or Appeal overturn the decision of the 3<sup>rd</sup> respondent.
- ii. That the merits of the determination by the 3<sup>rd</sup> respondent herein cannot be reopened by the Honourable Court unless there are procedural and administrative flaws in the decision making process to make the decision amenable to the supervisory jurisdiction of this court and no evidence of the same has been presented before the Court by any Party herein.
- iii. That under Article 159(1) and Article 50 (1) of the Constitution, judicial authority is derived from the people of Kenya and vests in and shall be exercised by the Courts and tribunals established by or under the Constitution.
- iv. That under the said Section 14 of the National Land Commission Act, the 3<sup>rd</sup> respondent sits as a tribunal exercising judicial authority in line with the provisions of Article 159(1) of the Constitution.
- v. That the Constitution does not envisage the exercise of judicial authority by Parliament or its Committees and any purported exercise of judicial authority by Parliament or its Committees is unconstitutional to the extent that it is inconsistent with the provisions of Article 50 (1) of



the Constitution and Article 159(1) of the Constitution and a gross violation of the principles of separation of powers.

- vi. That any involvement of Parliament in the proceedings of a tribunal can only be as a party and only before the tribunal of the 3<sup>rd</sup> respondent has made its determination but not after the 3<sup>rd</sup> respondent has made its determination since in any event the 3<sup>rd</sup> respondent would be *functus officio* upon rendering a determination.
  - vii. That the Standing Orders empowers Parliament to have oversight roles over Ministries and Departments or agencies and the 3<sup>rd</sup> respondent is neither a Ministry or agency or department of a Ministry but an independent Constitutional Commission.
  - viii. That I am aware that the Parliamentary Committees of the 2<sup>nd</sup> respondent like the 3<sup>rd</sup> respondent herein are all subject to the Constitution and the provisions of the Constitution and they derive their powers from the Constitution.
  - ix. That nowhere has the law designated the 2<sup>nd</sup> respondent as an appellate body over the decisions of any tribunal and any attempt by the 2<sup>nd</sup> respondent to purport to exercise such powers would be unconstitutional to the extent that it is inconstant (*sic*) with the provisions of the Constitution that establishes the High Court and the Court of Appeal with supervisory jurisdiction and appellate jurisdiction over the decisions of bodies exercising judicial powers such as the 3<sup>rd</sup> respondent herein.
  - x. That further the 3<sup>rd</sup> respondent is an Independent Constitutional Commission under Chapter 15 of the Constitution and it is only subject to the law and not control or directions by the 3<sup>rd</sup> respondent (*sic*) (probably meant 2<sup>nd</sup> respondent) on how to execute its mandate.
  - xi. That the Chief Land Registrar can only revoke a title upon the directions of the 3<sup>rd</sup> respondent under Section 14(5) of the National Land Commission Act or upon the issuance of a Court order but not upon directions of the 3<sup>rd</sup> respondent herein (*sic*) (probably meant 2<sup>nd</sup> respondent) or any other body.
  - xiii. That where the Constitution and the law vests a mandate on a particular body only that body can perform that mandate and another body attempting to perform that function would be acting *ultra vires* and without jurisdiction. That there are remits to the oversight mandate of the oversight role of the 3<sup>rd</sup> respondent (*sic*) (probably meant 2<sup>nd</sup> respondent) and such oversight does not extend to usurping the lawful mandate of other Constitutional creatures and bodies.
17. The interested party (Vipingo Estate Limited) filed an affidavit sworn by Fredrick Murimi and it is indicated that the same is in support of the petition. It is deposed *inter alia* that Vipingo Estate Limited was the registered proprietor of the suit properties and in occupation without any interruption. He has deposed that the petitioner acquired an indefeasible title for the suit properties from Vipingo Estate Limited. He has stated that the National Assembly Departmental Committee on Lands has no lawful mandate to review the validity of titles issued in private land transactions and no mandate to review the decisions of the National Land Commission. He believes that the petition is fully merited.

## **B. Submissions Of Counsel**

18. I invited counsel to make both written and oral submissions and I have taken note of the said submissions.
19. In his submissions, Mr. Onyony, learned counsel for the petitioner, *inter alia*, referred me to the provisions of Article 40 of the Constitution, on the right to own property, and specifically Article 40



- (3) which bars the State from depriving a person of property. He submitted that his client purchased the suit properties and a transfer was effected in its favour after all legal requirements were met. He submitted that the petitioner is now the registered proprietor of the suit properties and that the Parliamentary Departmental Committee on Lands arbitrarily tried to rid the petitioner of its title. He submitted that no other party has proved that it has a registered interest over the suit properties. He referred me to various authorities which hold that a registered owner is the absolute proprietor of the land in issue. He submitted that the Committee based its report on alleged allotment letters issued to members of the Bambani Kilio Group and he proceeded to direct me to a couple of authorities which hold that a title is superior to an allotment letter. He further pointed out that even then, the alleged allotment letters have not been tabled before this court. He submitted that no fraud and/or misrepresentation has ever been proved against his client in the manner in which it acquired title, and that no evidence has been tendered to show that the petitioner acquired title illegally, unprocedurally, or through a corrupt scheme. He submitted that four independent organs, being the National Land Commission, the Ministry of Lands and Physical Planning, the Directorate of Criminal Investigations, and the Ethics and Anti-Corruption Commission, wrote detailed reports concluding that the properties belong to the petitioner. He submitted that the Parliamentary Committee wantonly failed to consider these reports and completely disregarded the evidence tendered by the petitioner. He stated that the Committee failed to summon the previous owners and also failed to call the National Land Commission, the Directorate of Criminal Investigations and officials of the Ministry of Lands and Physical Planning to give their input.
20. He referred me to Article 67 of the Constitution, which establishes the National Land Commission, and further to Article 249 (2) of the Constitution, which inter alia makes provision for the independence of Commissions and holders of independent offices. Counsel referred me to the provisions of the National Land Commission Act, Act No. 5 of 2012, particularly Sections 5 and 6, which provide for its functions and powers. He further made reference to the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017, and the National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017, and their provisions on the power of the Commission to make decisions which are then appealable to the Court. He directed me to Standing Order 216 of the National Assembly Standing Orders, made pursuant to Article 124 of the Constitution, and submitted that there is no express provision in the Standing Orders that supports the actions of the 2<sup>nd</sup> respondent of directing the National Land Commission in any way. He submitted that in directing the National Land Commission, the 2<sup>nd</sup> respondent was acting ultra vires and outside the tenets of the Constitution and all other enabling laws.
21. Mr. Onyony submitted on what entails the National Assembly's oversight authority and anchored his submissions on the High Court decision in the case of *Judicial Service Commission vs Speaker of the National Assembly & 8 others* (2014) eKLR, the holding of which, in a nutshell, was that the National Assembly through its departmental committees, is not entitled to supervise and sit on appeal on the decisions of the Judicial Service Commission when the Commission is lawfully discharging its mandate under the Constitution. He submitted that similarly, the 2<sup>nd</sup> respondent cannot sit on appeal on matters or decisions of the National Land Commission, and further, that by recommending the revocation of the Petitioner's titles, the Committee illegally usurped the powers of the National Land Commission. He submitted that the actions of the Committee were in contravention of the provisions of the Constitution and relied on the South African case of *De Lille & Another vs The Speaker of the National Assembly* (1998) (3) (SA) 430 which was quoted with approval in the case of *Judicial Service Commission vs Speaker of the National Assembly*.
22. Counsel posed the question whether Parliamentary Departmental Committees and the Ministry of Lands have power to rid someone of their property. He referred to Article 47 on the right to fair



- administrative action, Section 6 of the Land Act, 2012, which provides for the powers of the Cabinet Secretary of Lands in the management and administration of land, and the case of *Republic vs Land Registrar, Taita Taveta District & Another* (2015) eKLR, where it was held that the Land Registrar has no power to revoke titles to land. He submitted that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents have no legal power to revoke title to land and can only exercise powers donated to them by the Constitution, and other legislation so long as the same is in accordance with the Constitution. He submitted that by purporting to revoke the petitioner's title, the 2<sup>nd</sup> respondent acted ultra vires the provisions of the Constitution. He pressed the point that his client deserves the costs of this suit.
23. Counsel made supplemental submissions, to address issues raised by the 2<sup>nd</sup> respondent. On jurisdiction, he submitted that it is this court which has jurisdiction and relied on the cases of *Christopher Ngusu Mulwa & 28 Others vs County Government of Kitui & 2 Others* (2017) eKLR; *Kipsiwo Community Self Help Group vs Attorney General & 6 Others* (2013) eKLR; *Samuel Kamau Macharia vs Kenya Commercial Bank Limited & 2 Others* (2012) eKLR; *Re Interim Independent Electoral and Boundaries Commission* (2011) eKLR; and *Law Society of Kenya, Nairobi Branch vs Malindi Law Society & 6 Others* (2017)eKLR. He further expounded on the independence of the decisions of the National Land Commission vis-à-vis the powers of oversight of Parliament, and referred me to the cases of *County Government of Kiambu & Another vs Senate & Others* (2017) eKLR and *The Supreme Court Advisory Opinion in Re National Land Commission* (2015) eKLR. He submitted that in so far as issues of historical land injustices are concerned, upon receipt of a complaint, Parliament's options are either to refer the matter to the National Land Commission or the Court. He submitted that for Parliament to summon independent officers of the National Land Commission is to curtail and undermine the Constitution.
24. In his oral submissions, Mr. Onyony, reiterated that the report of the Committee was a parallel inquiry without any mandate given by the Constitution, and this breached his client's right to property and the right to a fair hearing. He pointed out that the National Land Commission had cleared his client and the inquiry by the Committee was an interference with the independence of the Commission. He submitted that all organs, including Parliament, are under the Constitution, and that its oversight authority is not unregulated and must be within the four corners of the Constitution.
25. Mr. Wachira Nguyo, learned counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents, in his written and oral submissions, submitted inter alia that his client was only acting on the deliberations of the 2<sup>nd</sup> respondent, and that his client had no option, or the remedy of appeal, or judicial review. He submitted that whatever decision the court makes, his client ought not to be subjected to payment of costs, and any adverse effects should be borne by the 2<sup>nd</sup> respondent who instructed his client to act. On the report of the Committee, he submitted that the same cut across the jurisdiction of this court under Article 162 (2) of the Constitution, as a decision was made affecting the ownership of title which falls under the mandate of this court.
26. For the 3<sup>rd</sup> respondent, Mr. Mbuthia, learned counsel, submitted that the jurisdiction of the National Land Commission to review grants is not disputed. He submitted that the issue of ownership of the suit properties are not for determination in this case. He posed the question whether a person aggrieved by a decision of the National Land Commission, ought to challenge that decision in Parliament or in Court. He submitted that Standing Order 216(5) only empowers Parliament to exercise its authority to Ministries, Departments of Ministries, and Agencies of Ministries, and underscored that the National Land Commission does not fall under either of these categories. He submitted that under Article 249 of the Constitution, Constitutional Commissions, including the National Land Commission, are not subject to control by any person or body, and that includes Parliament. He submitted that it is only the Environment and Land Court, which has supervisory jurisdiction over the National



Land Commission when the latter is exercising its quasi-judicial powers and sitting as a tribunal. He submitted that judicial authority can only be exercised by Courts and Tribunals and that nowhere has the Constitution donated to Parliament appellate powers over quasi-judicial bodies, more so where the question in issue is validity of title to land. He mused that we will not need the Environment and Land Court if Parliament sits to determine issues of validity of title. He submitted that Parliamentary oversight does not mean that Parliament should encroach into the mandate of other constitutional commissions and that we have courts which check how these bodies exercise their powers. He argued that the action of the National Assembly in purporting to re-write the decision of the National Land Commission was a violation of the Constitution and an attempt to usurp the powers of this court. In his written submissions, he relied on a number of authorities all of which I have taken note of.

27. For the 2<sup>nd</sup> respondent, Mr. Mbarak, learned counsel, submitted inter alia that this Court has no jurisdiction to interpret whether any matter done is in accordance with the Constitution and cannot therefore interpret the constitutionality of the report of the National Assembly. He submitted that this jurisdiction rests with the High Court. He further submitted that this suit is an abuse of the Court process as the petitioner had filed a previous suit that is Nairobi ELC Petition No. 177 of 2015, which was dismissed. He submitted that Parliament has several mandates, one being legislative, and the other being deliberative under Article 95 (2) of the Constitution, which he submitted empowers Parliament to “deliberate on and resolve issues of concern to the people”. He submitted that it is for the National Assembly to assess for itself what may be a matter of concern to the people and it is not for the court to set limits. He submitted that if the court does so, it will be encroaching on Parliament’s mandate and he referred to the case of *Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another* (2017) eKLR. He submitted that the issue is whether the petitioner was accorded a fair hearing by the National Assembly, and he thought that it was, as the petitioner’s director was invited to give his views but he failed to appear despite several opportunities being given to him. He submitted that the jurisdiction of this court extends only to review the manner in which the National Assembly carried out its mandate, and that the court lacks jurisdiction to carry out a merit review of the Committee and the decisions of the House. He submitted therefore that there was no violation of the fundamental rights and freedoms of the petitioner. He further submitted that the orders herein cannot be granted without Bambani Kilio Group being party to this suit as it was a necessary party to these proceedings. He submitted that failure to do so renders this petition incompetent. On the submissions by the Attorney General that his hands were tied, he submitted that this is not the case, because the recommendations by the National Assembly under Article 95 (2) of the Constitution are not binding. He submitted that Parliament is aware that it has no mandate to revoke title and stated that nowhere did Parliament command such. On the submissions that the National Assembly interfered with the National Land Commission, he submitted that the National Assembly did not interfere because it commenced its deliberations after the Commission had finished its report. He relied on various other judicial decisions all of which I have taken note of.

### **C Analysis And Decision**

28. In my opinion, the following issues arise for determination :-
- i. Whether this court has jurisdiction;
  - ii. Whether this petition is filed in bad faith and dirty hands and thus needs to be dismissed;
  - iii. Whether this petition is incompetent for failure to enjoin Bambani Kilio Group;
  - iv. Whether the recommendations of the Committee on Land and the National Assembly were legal;



- v. Whether there was a violation of the petitioner's right to property; and
- vi. Final Orders.

### **Whether this court has jurisdiction**

29. The 2<sup>nd</sup> respondent has contested the jurisdiction of this court to handle this petition and I feel that I need to tackle this first, for if I am to find that this court has no jurisdiction, then I will need to down my tools. The position is discernible from the words of Nyarangi, J.A. in *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1*, at p14, where the learned Judge stated as follows :-

“Without jurisdiction, 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

30. In the replying affidavit of Mr. Ndombi, sworn on behalf of the 2<sup>nd</sup> respondent, it was contended that this court lacks jurisdiction owing to the provisions of Article 125 of the Constitution and Section 12 of the National Assembly (Powers and Privileges) Act (repealed) as the same would amount to a violation of the principle of separation of powers. In his submissions, counsel for the 2<sup>nd</sup> respondent added that this court lacks jurisdiction to interpret the Constitution and seemed to suggest that this jurisdiction rests with the High Court.

31. I find that the attack on jurisdiction is thus on two limbs; first, that the court has no jurisdiction to interpret the constitution, and secondly, that to assume jurisdiction would be a violation of the principle of separation of powers. I will now proceed to address these two grounds.

### **Whether this court has jurisdiction to interpret the constitution or handle a constitutional petition**

32. It is argued that the Environment and Land Court has no jurisdiction to interpret the Constitution and that this is a matter for the High Court.

33. The Environment and Land Court is a creature of the 2010 Constitution, and is established pursuant to the provisions of Article 162 (2) (b) of the said Constitution. Article 162 (2) provides as follows :-

162 ....

(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.

Following the above dictate of the Constitution, Parliament did pass the Environment and Land Court Act, Act No. 19 of 2011 (ELCA). Section 13 provides for the jurisdiction of the Court and is drawn as follows :-

13. Jurisdiction of the Court

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.
5. Deleted by Act No. 12 of 2012, Sch.
6. Deleted by Act No. 12 of 2012, Sch.
7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
  - a. interim or permanent preservation orders including injunctions;
  - b. prerogative orders;
  - c. award of damages;
  - d. compensation;
  - e. specific performance;
  - f. restitution;
  - g. declaration; or
  - h. costs.

[Act No. 12 of 2012, Sch.]

34. It will be seen from the above, that the ELCA, at Section 13 (1) does provide that the ELC has jurisdiction to hear all disputes falling under Article 162 (2) (b) of the Constitution. Article 162 (2) (b) which I have reproduced above, does state that the ELC will have jurisdiction to hear disputes relating to “the environment and the use and occupation of, and title to, land.” Disputes relating to land can come to court in various forms. They may be filed through a plaint, an Originating Summons, or through a Constitutional Petition. I will find it curious for one to argue that the ELC can hear a suit



relating to say, title to land, only if such suit has been commenced through a plaint or an Originating Summons, but the ELC will not have jurisdiction to hear the suit if it is commenced by way of a Constitutional Petition. It is a tenuous and rickety argument that with respect, makes little sense. In any case, it will be seen that under Section 13 (3) of ELCA, the statute is explicit that the ELC will have jurisdiction to hear disputes relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. That of course will also include the jurisdiction to interpret these Constitutional provisions. Where then does the argument come in that the ELC does not have jurisdiction to interpret the Constitution?

35. The point whether the ELC has jurisdiction on constitutional petitions is indeed now settled. In the case of *Kipsiwo Community Self Help Group vs Attorney General & 6 Others*, Eldoret ELC Petition No. 9 of 2013 (2013) eKLR, I had occasion to state as follows:-

“ 22. ...it is the ELC which has jurisdiction to hear matters touching on environment and land. The manner in which such suits are commenced is immaterial. Whether instituted by plaint, originating summons, judicial review, or a constitutional petition, matters of land and environment fall within the domain of the ELC. The argument that the ELC can only hear petitions touching on violations of Articles 42, 69, and 70 is therefore misguided. The ELC can hear any petition so long as the petition touches on the environment and the use and occupation of, and title to land.”

36. This was reiterated by Angote J, in the case of *Christopher Ngusu Mulwa & 28 Others vs County Government of Kitui & 2 Others*, Machakos ELC, Case No. 63 of 2017, (2017)eKLR. This was a constitutional petition challenging a construction project and an issue was raised that the court has no jurisdiction. The Court was of opinion that the matter related to a dispute over land and or the environment, and thus it is the ELC which had jurisdiction.

37. There is clearly no substance in the argument that this court is incapable of handling a constitutional petition or that this court has no jurisdiction in interpreting the constitution.

38. It should be recalled that what the petitioner claims in this case is that its rights over certain parcels of land have been infringed. The orders sought in this petition relate to the right to title to land and the right to occupy and use land. They are in fact orders that essentially seek the protection of the right to property under Article 40 of the Constitution. I find that it is this court which has jurisdiction to determine this suit and that the petitioner has properly approached this court for redress.

**Whether this court does not have jurisdiction based on the doctrine of separation of powers and Section 12 of the National Assembly (Powers and Privileges) Act (repealed)**

39. The other argument on jurisdiction is that this court has no jurisdiction because entertaining this suit will contravene the principle of separation of powers and will be in breach of Article 125 of the Constitution and Section 12 of the National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya (then operative but repealed by the Parliamentary Powers and Privileges Act, Act No 29 of 2017 which commenced on 16 August 2017). I have looked at Article 125 of the Constitution and I really do not see how it impacts on the jurisdiction of this court. The said provision is drawn as follows :-

125. Power to call for evidence

(1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.



- (2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—
- (a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;
  - (b) to compel the production of documents; and
  - (c) to issue a commission or request to examine witnesses abroad.

40. The above provision of the Constitution does nothing more than give power to Parliament to call for evidence and summon witnesses. It has nothing to do with the jurisdiction of this court.

41. Section 12 of the National Assembly (Powers and Privileges) Act, (repealed), which was operative at the time that the matters herein took place, has also been cited as barring this court from hearing this case. The said provision of the law is drawn as follows:-

12. Proceedings not to be questioned in courts

No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.

42. I understand the argument of the 2<sup>nd</sup> respondent to be that since the issues at hand relate to a resolution or proceeding of Parliament, then this court has no jurisdiction to interfere with that resolution, based on the doctrine of separation of powers and Section 12 of the National Assembly (Powers and Privileges) Act (repealed), as outlined above.

43. This is now a tired argument, as there is a chain of authorities which have held that the decisions of Parliament are subject to the Constitution and thus subject to scrutiny by court, so as to determine their constitutionality. The matter has indeed been settled by the Supreme Court, the highest court in the land, in *Re Speaker of the Senate & Another, Supreme Court of Kenya, Advisory Opinion Reference No. 2 of 2013, (2013) eKLR*. In the said case, the Speaker of the Senate sought an advisory opinion over the passage by the National Assembly of a Bill without first referring it to the Senate. The Senate was of opinion that the Bill was one that touched on the County Governments, and needed to be referred to Senate before being passed, as provided for in Article 110 of the Constitution. The Speaker of the Senate thus moved the Supreme Court to give an advisory opinion on the matter. There was a contest on the jurisdiction of the Court and the Supreme Court stated as follows :-

“61] ...While Parliament is within its general legislative mandate to establish procedures of how it conducts its business; it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

(62) However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not



commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.”

44. It will be seen that in the above case, the Supreme Court asserted the authority of the Court in determining the constitutionality or otherwise of the conduct of Parliament. The court emphasised that Parliament must operate within the confines of the constitution, and if there is a challenge on the constitutionality, or otherwise, of the conduct of Parliament, the Courts must intervene.

45. A contest on jurisdiction, on the grounds of separation of powers also arose before the High Court in the case of *Okiya Omtatah Okoiti & 3 Others vs Attorney General & 5 Others* (High Court at Nairobi, Constitutional and Human Rights Division, Petitions No. 227, 281 & 282 (consolidated) (2014) eKLR and this is what the Court had to say :-

“To agree with the National Assembly that this Court cannot interrogate its work will amount to saying that the National Assembly can fly beyond the reach of the radar of the Constitution. That is a proposition we do not agree with. Our view is that all organs created by the Constitution must live by the edict of the Constitution. Indeed, Parliament is commanded by Article 94(4) of the Constitution to protect the Constitution and promote democratic governance in the Republic of Kenya.”

46. The Court, in arriving at the above decision, cited with approval the Court of Appeal dictum in the case of *Commission for the Implementation of the Constitution –vs- The Attorney General and Another*, Nairobi Civil Appeal No. 351 of 2012, where the Court of Appeal asserted as follows :-

“We respectfully endorse the sentiments of Ringera J. and state that it cannot be open to any organ of state to act in any manner that violates the Constitution. The doctrine of parliamentary supremacy that once gave parliament near-unbridled right to legislate as it pleased is now of only historical significance in an epoch when the Constitution and the Constitution alone lays claim to supremacy and every act of every organ must be judged against its peremptory requirements. That task of judging whether an action passes constitutional muster is placed upon the superior courts.”

47. The same question was similarly addressed by the Court of Appeal, in the case of *County Assembly of Kisumu & 2 others vs Kisumu County Assembly Service Board & 6 others*, Court of Appeal at Kisumu, Civil Appeals No. 17 and 18 of 2015 (consolidated) (2015) eKLR. A suit was filed challenging the resolution of the County Assembly of Kisumu to inter alia impeach the Speaker of Kisumu



County Assembly and suspend the Kisumu County Assembly Service Board. These resolutions were challenged as being unconstitutional at the Employment and Labour Relations Court and an order of certiorari sought. The Court allowed the suit and the County Assembly of Kisumu filed an appeal before the Court of Appeal. In determining the appeal, the Court of Appeal, on the issue of jurisdiction, stated as follows at paragraph 35 of the decision :-

“ Article 2(1) of the Constitution declares that the Constitution is “the supreme law of the Republic” which “binds all persons and all state organs at both levels of government.” Every person, organ or institution is therefore enjoined to respect, uphold and defend the Constitution. It follows that Parliament or any County Assembly cannot seek refuge under the National Assembly (Powers and Privileges) Act, if it violates any provision of the Constitution.”

48. The argument that the Court cannot look into the mechanics or decisions of Parliament or County Assemblies was also dispelled in the case of County Government of Kiambu & Another vs Senate & Others, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 229 of 2015, (2017) eKLR; the case of Samuel Tunoi vs The Speaker, Nakuru County Assembly & 2 Others, High Court at Nakuru, Petition No. 44 of 2015, (2019) eKLR and in the case of Judicial Service Commission vs. The Speaker of the National Assembly, High Court at Nairobi, Constitution and Human Rights Division, Petition No. 518 of 2013 (2014) eKLR (supra).
49. The issue whether this Court has jurisdiction on an issue concerning Parliament and the doctrine of separation of powers, as can be seen from the authorities that I have quoted above, is now a well-trodden path. Nothing new has been raised by the 2nd respondent that would move me to go against the wealth of these decisions and that is why I started by saying that this is now a “tired” argument. There is consensus in all the above decisions that Parliament is not beyond the scrutiny of the Court. The Court has mandate to determine whether or not a decision, proceeding, or resolution of Parliament, is unconstitutional, and if it is of the view that it is unconstitutional, make such orders that will result in the rectification of that position. As pointed out, and indeed stressed in the above decisions, we operate in a dispensation that emphasises the supremacy of the Constitution and not the supremacy of Parliament. This is well articulated in Article 2 (1) of the Constitution which provides that “this Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.” Parliament is a State organ and thus bound by the Constitution. The Court being vested with judicial authority, under Article 159 (1) of the Constitution, has power to interpret whether or not Parliament has conducted itself within the confines of the Constitution. That being the case, any person has the liberty to approach Court to argue that Parliament has acted in violation of the Constitution.
50. That is precisely what the petitioner has done in this case, and this court has the duty to make an assessment of whether the conduct of the National Assembly in the issue of hand, was one that violated the constitution or any of the rights of the petitioner enshrined in the Constitution. The petitioner has presented a case that the National Assembly and/or a Committee of the National Assembly acted in a manner that led to a breach of the Constitutional rights of the petitioner. Whether or not the National Assembly and the Committee acted within the confines of the Constitution is a subject that this court has a duty to interrogate.
51. The argument that this Court has no jurisdiction based on the doctrine of separation of powers is thus dismissed.



### **Whether this petition is filed in bad faith and dirty hands and thus needs to be dismissed**

52. It has been raised by the 2nd respondent that this petition is filed in bad faith and that the petitioner has approached the court with dirty hands, and because of that, this petition deserves to be dismissed. The 2nd respondent claims that the petitioner has come to court with tainted hands for the reason that it had not disclosed in its original petition that it had earlier filed the suit Nairobi ELC Petition No. 177 of 2015. I find this argument to be completely unmerited. This petition was filed after Nairobi ELC Petition No. 177 of 2015 was dismissed at a very preliminary stage before it could be heard, for the reason that no filing fees had been paid. Nothing barred the petitioner from presenting this petition after the previous petition had been dismissed. There had indeed been filed an application by the 2nd respondent which was substantively argued and a decision made that this petition is not res judicata, and that there was nothing which barred the petitioner from filing this suit. That ruling was rendered on 24 April 2019 by Omollo J and I really have nothing more to add on that point.
53. The other issue raised is that the petitioner came to court after it had promised to make an appearance before the National Assembly's Committee and that failure to appear, and instead file this suit, is in bad faith. Simply because the petitioner had written to the Committee promising to appear, did not oust its right to come to court to challenge that process. The fact that it had written a letter and signalled intention to appear was not a waiver of its right to contest the exercise being undertaken by the National Assembly.
54. I therefore find nothing wrong in this suit and I am unable to dismiss it on the ground that the same is an abuse of the court process. In my considered view, this Petition is properly filed and the petitioner is not guilty of any abuse of the Court process.

### **Whether this petition is incompetent for failure to enjoin Bambani Kilio Group**

55. The 2nd respondent has submitted that this petition is incompetent for failure to enjoin Bambani Kilio Group, which is the entity that sought intervention by Parliament. I don't think I need to say much under this ground, for my finding is that it was not necessary to enjoin Bambani Kilio Group to this Petition. What the petitioner is aggrieved with, is a resolution and/or decision of Parliament, and the subsequent course of action taken by the Cabinet Secretary of the Ministry of Lands. It is these decisions which are the subject of this proceeding, not the move by Bambani Kilio Group of asking Parliament to act in the matter. There would have been nothing wrong in enjoining Bambani Kilio Group to this suit, but in the same breath, there is nothing wrong in not having enjoined Bambani Kilio Group to this Petition. Moreover, if the 2nd respondent thought that the presence of Bambani Kilio Group was so important, nothing stopped the 2nd respondent from making an application for its joinder to this petition. On my part, I do not see how this petition can fail on the ground that Bambani Kilio Group was not enjoined to this Petition. I find that this Petition is properly before this court even without the joinder of Bambani Kilio Group.

### **Whether the recommendations of the Committee on Land and the National Assembly were legal**

56. Before I delve into the issue, I need to recap the facts of the case. Bambani Kilio Group alleged that they are the owners of the land comprised in the suit properties on the basis that they had been issued with allotment letters. They posited that the lease held by the petitioner was fraudulent because it fell on the land that had been allocated to them. The complaint was addressed by the National Land Commission which found the allegations of Bambani Kilio Group to be baseless. The Commission was of the view that the lease held by the petitioner was good, and that it was the petitioner who was entitled to the land under a leasehold tenure. Bambani Kilio Group then approached the National Assembly through



the Member of Parliament for Kilifi North Constituency and the issue was then presented before the National Assembly Departmental Committee on Lands. The Committee commenced investigations, and made the following “recommendations”:-

1. The Criminal Investigations Department and the Ethics and Anti-Corruption Commission :
    - i. Conducts a forensic audit of the documents in possession of Mombasa Cement Limited to establish individuals involved in their fraudulent preparation and prosecute with immediate effect those found culpable;
    - ii. Investigates Dr. Mohammed Swazuri and Mr. Cyrus Kiogora Mburugu to determine abuse of office in their personal conduct on the matter and prosecute them if found culpable pursuant to the 4<sup>th</sup> Schedule of the NLC Act 2012;
    - iii. Investigates the Managing Director for Mombasa Cement Limited to establish how he took possession of the land and how he acquired illegal documents purporting to be the owner of LR No. MN/III/290, LR No. MN/III/289 and LR No. MN/III/3545;
    - iv. Investigates the (sic) Mr. Charles Munga Janji, a former Councillor and the former Chief of Bambani on how he acquired allotment letters belonging to the squatters in Bambani Settlement Scheme and sold the same to the Managing Director, Mombasa Cement Limited, and also investigates the Managing Director’s collaboration in the saga.
  2. The Ministry of Lands, Housing and Urban Development immediately takes possession of the public land in use by Mombasa Cement Limited, LR No. MN/III/290, LR NO. MN/III/289 and LR No. MN/III/3545 to be administered by the National Lands (sic) Commission.
  3. The National Lands (sic) Commission and the Ministry of Lands, Housing and Urban Development in accordance to Section 134 (5) of the Land Act 2012 immediately reserve the said land for settlement of the affected community in the area.
57. After the report was adopted, the Ministry of Lands and Physical Planning wrote to the petitioner the letter dated 28 July 2017, inter alia stating as follows :-
1. That this Ministry hereby wishes to notify you of the existence of the said Parliamentary Report and Recommendations thereof (attached).
  2. That you are hereby directed to immediately give vacant possession of the above captioned parcels of land and have the illegal titles, held by yourselves returned to the Land Registrar, Mombasa for cancellation.
  3. That failure on your part to comply with (2) above and upon lapse of seven (7) (sic), this Ministry will without further notice to yourselves move to the ground with a view to mark out the said parcels and physically take possession of the same.
- Prof. Jacob T. Kaimenyi  
Cabinet Secretary.
58. The land parcels in the Report of the Committee and in the letter of the Cabinet Secretary, are noted to be the parcels MN/III/290, MN/III/289 and MN/III/3545. The suit properties are MN/III/291/2 and MN/III/4391. I have gathered from documents availed in this case, that the parcel MN/III/4391 emanates from the original parcels of land MN/III/289 and 290. The land parcel MN/III/289 was subdivided into two portions in the 1920s and one portion of 422 acres allocated



by the colonial government to Khamis Bin Rashid Bin Sood, who later sold it. That land was subsequently surrendered to the Government on 22 September 1971. The remainder of the parcel No. 289 (289R) and the parcel MN/III/290 were in the year 1949 allocated to Vipingo Estate Limited (the interested party). An amalgamation of these two parcels of land, (that is 289R and 290) was done by Vipingo Estate Limited resulting into the land parcel MN/III/3545. This land parcel No. 3545 was then subdivided into three portions which brought forth the land parcels MN/III/4391, 4392 and 4393. MN/III/4391 was sold to the petitioner and is one of the suit properties. The other property MN/291/2, from the description, seems to have been carved out of the original parcel No. MN/III/291 (not covered in the above history and which may have been an independent neighbouring parcel of land). It will thus be noted that the recommendations of the National Assembly which comprised the land parcels MN/III/290, MN/III/289 and MN/III/3545, certainly affected the suit properties and so too the resultant intention of the Ministry of Lands to take possession.

59. It is of course the position of the petitioner that the National Assembly went outside its mandate in making the recommendations that it did. On the part of the 2<sup>nd</sup> respondent, it was argued that what the National Assembly deliberated on, was an issue that is of concern to the people, and it could do this through its Committees.
60. The role of the National Assembly is set out in Article 95 of the Constitution which provides as follows:-
95. Role of the National Assembly
1. The National Assembly represents the people of the constituencies and special interests in the National Assembly.
  2. The National Assembly deliberates on and resolves issues of concern to the people.
  3. The National Assembly enacts legislation in accordance with Part 4 of this Chapter.
  4. The National Assembly—
    - a. determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;
    - b. appropriates funds for expenditure by the national government and other national State organs; and
    - c. exercises oversight over national revenue and its expenditure.
  5. The National Assembly—
    - a. reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and
    - b. exercises oversight of State organs.
  6. The National Assembly approves declarations of war and extensions of states of emergency.
61. Standing Order 216 (5) which has been cited as setting out the roles of the Committees provides as follows:-
- (5) The functions of a Departmental Committee shall be to—



- a. investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
- b. study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
- c. study and review all legislation referred to it;
- d. study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e. investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
- f. to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments); (fa) examine treaties, agreements and conventions;
- g. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- h. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- i. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- j. examine any questions raised by Members on a matter within its mandate.

62. I do not think that there is any contest that the National Assembly possesses the power to make inquiries, or to debate, or deliberate, on any matter that may be presented before it, as being one that is of concern to the people. It can indeed do this through its Committees. I think what is in issue here is the extent of such deliberation, the decisions/recommendations that can be made, and whether the National Assembly can affect a decision already made by a competent constitutional body. With regard to matters touching on land, the following two questions are also pertinent :-

- i. Whether the National Assembly has power to hear disputes over land, or make decisions on ownership or occupation of land, or order the cancellation of title to land, or direct the Ministry of Lands to cancel a person's title and hand title to another person; and,
- ii. Whether Parliament, by use of its deliberative or oversight role, has power to reverse or sit on appeal from a decision of the National Land Commission.

63. To answer these questions, it is important that we understand the constitutional set up on land and the organs that the Constitution has created to deal with land. The Constitution has devoted Chapter 5 to address land and environment. Part I of Chapter 5 deals with land whereas Part 2 of Chapter 5 deals with the environment. It is only Part 1 which applies here and it sets out the principles of land tenure, and categorises land into public land, community land and private land. Public land is generally land that is held by the State; community land is land that is held communally and vested in communities; and private land is land that is alienated and registered to specific person/s. It is under Part I of Chapter 5 of the Constitution that the National Land Commission is established through Article 67 of the Constitution.



64. The National Land Commission is recognised as one of the constitutional commissions under Article 248 (2) of the Constitution, which provision deals with constitutional commissions and independent offices. Article 249 sets out the objects of the Commissions and independent offices and how they are to relate with other organs. Article 249 (2) provides for the independence of such commissions and independent offices and is drawn as follows :-

249. ) The commissions and the holders of independent offices—

- a. are subject only to this Constitution and the law; and
- b. are independent and not subject to direction or control by any person or authority.

65. The functions of the National Land Commission are set out in Article 67 (2) of the Constitution and the National Land Commission Act, Act No. 5 of 2012. The whole of Article 67 of the Constitution is drawn as follows:-

67. National Land Commission

1. There is established the National Land Commission.

2. The functions of the National Land Commission are—

- a. to manage public land on behalf of the national and county governments;
- b. to recommend a national land policy to the national government;
- c. to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- d. to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- e. to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- f. to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- g. to assess tax on land and premiums on immovable property in any area designated by law; and
- h. to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

66. The National Land Commission Act, at Section 5 reiterates the above roles of the Commission. Section 14 of the same statute empowers the Commission to make a review of grants and dispositions of public land to establish their propriety or legality. That law provides as follows :-

14. Review of grants and dispositions

1. Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.



2. Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).
3. In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
4. After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
5. Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.
6. Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
7. No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.
8. In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.
9. The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

67. From the foregoing, it will be seen that the National Land Commission is a key institution when it comes to administration of public land. It will be observed that it is the institution which is obligated to manage public land on behalf of the National and County Governments. Apart from its management role, it is also a quasi-judicial body, since it has been given the power to review grants and dispositions of public land (although as can be seen from Section 14 (1) above, this power has some time limitations.) This power to review grants and dispositions of public land is elaborated in subsidiary legislation made under the National Land Commission Act, specifically, the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017. The regulations provide for the manner in which the Commission is to conduct its hearings on review of grants of public land, and at regulation 20 provides for the decision of the Commission. Regulation 21 provides for appeals and is drawn as follows:-

### 30. Appeals

A person aggrieved by the decision of the Commission may, within fourteen days of the Commission's decision, appeal to the Court.

In the interpretation section of the regulations, "court" is defined to be the Environment and Land Court.

68. It will thus be seen from the above that the Constitution and statute have set out an elaborate mechanism for the determination of issues related to grants and dispositions of public land. At the time the matters herein took place, it was the National Land Commission which had the power to review grants and dispositions of public land. It will further be seen that if anyone was aggrieved by a decision of the Commission, such person had the right to appeal to the Environment and Land Court. The Environment and Land Court certainly has residual judicial power for the determination of disputes over land which may not be specifically donated to other institutions including the National Land



Commission. Thus, when it comes to private disputes over land, and since this calls for a judicial determination, the power to do so would be with the Courts pursuant to the provisions of Article 159 (1) of the Constitution which provides inter alia that judicial authority “vests in and shall be exercised by the courts and tribunals established by or under this Constitution.”

Let me now get back to the two questions that I posed.

a. Does the National Assembly have power to make decisions on ownership of land or make orders for the cancellation of title to land or decide a dispute over ownership of land?

69. I have elaborated the applicable law in relation to land disputes and it will be observed that nowhere does the Constitution, or statute, give the National Assembly the power to handle a dispute over land, or make a decision on who should get title to certain land, or who has the right to occupy it. What can be seen is that for purposes of resolving land disputes, the Constitution has established the National Land Commission (to among other matters review grants and dispositions of public land subject to limitations) and the Courts. The National Assembly and its Committees cannot therefore purport to utilise their deliberative or oversight role to hear disputes over land. Neither does the National Assembly have the power to cancel title, or direct the Ministry or the National Land Commission to cancel a title, or make decisions on occupation of land. In short, land disputes do not fall within the jurisdiction of the National Assembly.

70. I have also not seen any law that empowers the National Assembly to declare that a certain title is illegal, or fraudulently acquired, or direct the rectification of a land register. That power rests with the Court pursuant to Section 80 of the Land Registration Act, Act No. 3 of 2012, which provides as follows :-

80. Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

The above implies that title cannot be declared as fraudulent or illegal by fiat of the National Assembly. In my view, if the National Assembly, through its deliberations, is of opinion that a certain title may be tainted, it is not for the National Assembly to make any declaration that the title is bad. It can only make a note of its suspicions and let other bodies undertake their independent investigations and come up with the finding of illegality and corrective action. It would be improper for the National Assembly to purport to sit as a court would, and proceed to make final declarations over the authenticity of title to certain land.

### **Can the National Assembly sit on appeal against a decision of the National Land Commission?**

71. The National Land Commission as we have seen is an independent constitutional Commission under Article 248 of the Constitution, and pursuant to Article 249(2), it is not subject to direction or control by any person or authority. What at the very least this means is that there is decisional independence. In essence, the National Land Commission has the independence to make decisions without control by any person or authority and that includes the National Assembly. I have seen nowhere that the National Assembly has been given power to sit on appeal or reverse a decision of the National Land Commission. Indeed, what can be noted is that a person aggrieved by the decision of the National



Land Commission, when it comes to review of grants and dispositions of public land, is supposed to appeal to the Environment and Land Court. That being the case, the National Assembly cannot by craft, attempt to stretch its power of oversight, or its deliberative power, so as to reverse decisions of the National Land Commission.

72. Indeed, the boundaries of the deliberative role of Parliament, vis-à-vis the independence of other constitutional bodies was extensively covered in the case of *Judicial Service Commission vs. The Speaker of the National Assembly (JSC vs. The Speaker)*. The brief facts of the case are that the Judicial Service Commission (JSC) took disciplinary action against the then Chief Registrar of the Judiciary (CRJ) and made a resolution to send her on compulsory leave to facilitate investigations and inquiry into various allegations levelled against her. Following this action, the Committee on Justice and Legal Affairs of the National Assembly summoned the Judicial Service Commission for a meeting to deliberate the process, issues and circumstances surrounding the suspension of the CRJ, and the general state of the judiciary. The JSC did respond and informed the National Assembly that in suspending the CRJ, it was executing its mandate under the Constitution. It otherwise forwarded various financial reports that had been requested by the Committee of the National Assembly. Shortly, a petition was lodged to the National Assembly, to remove six commissioners of the JSC. The JSC thought that this was tied to its decision on the CRJ and proceeded to file suit, seeking inter alia, orders for a declaration that the JSC as a constitutional commission is not subject to the control or direction of the National Assembly, or any of its Departmental Committees, in the lawful discharge of its constitutional mandate; a declaration that the attempt by the National Assembly through the Committee on Justice and Legal Affairs to supervise and sit on appeal on the decisions of the JSC is a violation of the Constitution; and an order of Certiorari to quash the Petition presented seeking the removal of members of the JSC. In determining the suit, the learned judges of the High Court seized the moment to elaborate the deliberative and oversight roles of the National Assembly.

On Parliament's oversight mandate, the court had this to say:-

“

- “227. In our considered view, the Constitution of Kenya contains inbuilt limits to the scope and purpose of Parliamentary oversight. A proper reading of Articles 254(2), 171(2), and 249 on one hand and Articles 95 and 125 on the other, does not support the proposition advanced by the AG. Parliament's oversight mandate is not a *carte blanche*. It must be exercised in obedience and full perspective of all provisions of the Constitution and the law. The power to oversee organs of state including independent commissions like the JSC does not extend to a violation of the independence of the commission acting within their mandate. Such is the construction that accords with Article 259 of the Constitution...”

At paragraph 237, the Court proceeded to state as follows:-

“237. In carrying out its oversight role, Parliament must respect the independence of the JSC and other independent offices. ...”

And at paragraph 243:-

“243. Parliament's Standing Orders cannot override the Constitutional insulation provided to independent commissions in the lawful exercise of their mandate. The question relating to the sending of the CRJ on compulsory leave and issues and circumstances thereof were matters of which the JSC was properly seized under Article 172 (1) (c). Consequently, the attempt by the Committee to interfere with the matter even before the JSC could



complete its own inquiries cannot be defended under the banner of Parliamentary oversight. In the circumstances, the summons to the JSC by the Committee must be seen to reflect an intention to direct and control the JSC's exercise of its mandate under Article 172 (1) (c). Parliamentary exercise of the oversight mandate and authority to summon under Article 95 and 125 of the Constitution must be balanced against the independence of the commission as long as it was acting lawfully.”

73. The court in the JSC vs The Speaker case was thus persuaded that the attempt by the Committee to engage in the matter of the suspension of the CRJ was not a legitimate exercise of its oversight role.
74. I draw a lot of similarities between the case before me and that in JSC vs The Speaker. In the JSC matter, there had been a decision made by the JSC in exercise of its constitutional mandate, and the same issue that the JSC had decided was presented to Parliament for discussion. In our case, the National Land Commission had already made a decision on the matter submitted by Bambani Kilio Group, yet the same issue was again presented to the National Assembly. In the JSC case, the National Assembly proceeded to make certain pronouncements including the resolution to have a tribunal set up to investigate members of the JSC. In our case, the National Assembly proceeded to make a pronouncement that the land in dispute be given to the local community. The High Court found that the National Assembly in interfering with the decision of the JSC, was not acting within the confines of the Constitution, and that in so interfering, it was making an attempt to control and affect the independence of the JSC, which independence is enshrined in Article 249 of the Constitution. In the case at hand, I also do find that the decision of the National Assembly, to interfere with a decision that had been made by the National Land Commission, and for all intents and purposes proceeding to overturn it as if it was sitting on appeal, was also not a legitimate exercise of the power of the National Assembly to deliberate on a matter concerning the people under Article 95 (2) of the Constitution, and neither was it a legitimate exercise of its oversight mandate.
75. The deliberative or oversight role of Parliament cannot extend to overturning a decision of the National Land Commission or directing the National Land Commission to make a decision in a certain way. If a person is aggrieved by a decision of the National Land Commission, that person needs to move the court to quash that finding. He is not supposed to move Parliament to come up with a contrary verdict.
76. It was submitted by counsel for the 2<sup>nd</sup> respondent that what is in issue is whether the petitioner was given a fair hearing. That is not what is in issue here. It matters not that a body goes through the process of what one would constitute to be a fair hearing when it has no jurisdiction (not that I am convinced that in this case the Committee did so, but I need not go much into detail for it really does not matter). Its decision would still be null and void.
77. It was also submitted that the National Assembly is aware that it does not have power to revoke title. Clearly however, its conduct in this case was to the contrary. The 2<sup>nd</sup> respondent acted as if it had power to decide on who should get title between the petitioner and the Bambani Kilio Group or the local community. It also acted in a manner to suggest that it had power to revoke the title of the petitioner, or review the grant of the leasehold title to the petitioner, or make declarations on the legality or otherwise of the petitioner's title. That, as I have demonstrated above, is a power that the National Assembly does not possess.
78. There was an argument that what the National Assembly issued were only “recommendations” which were not binding. In as much as the word “recommendations” was used, what followed cannot be termed as “recommendations”, but for all intents and purposes, were “decisions”. If we go back to these “recommendations”, it will be observed that in the directions to the EACC and DCI, the National Assembly uses emphatic words, to the effect that the title of the petitioner is illegal and fraudulently



acquired. It does not say that there is a “suspicion” that the title “could” be illegal or fraudulent. The “recommendations” to the Ministry of Lands are also nothing short of a directive or command. One cannot be allowed by way of craft of words to escape his true intention. In the report of the Committee, the word “recommendations”, in the manner that it was used, was nothing but a disguise for the words “order” or “direct”. These were intended to be so, and that is indeed what the Cabinet Secretary for Lands construed the “recommendations” to mean. That is why the Cabinet Secretary directed the petitioner to submit its titles for cancellation. Not surprisingly, the National Assembly, has not been heard complaining that the Cabinet Secretary went on a frolic of his own, and purposed to do what the National Assembly did not intend.

### **Whether there was a violation of the petitioner’s right to property**

79. The result of the deliberations and “recommendations” of the National Assembly, and the subsequent action taken by the Cabinet Secretary of the Ministry of Lands, directly and adversely affected the right of the petitioner to property enshrined by Article 40 of the Constitution. The pronouncement of the National Assembly went contrary to the provisions of Sections 24 and 25 of the Land Registration Act which provide as follows :-

24. Interest conferred by registration

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

80. The intention of the recommendations by the National Assembly and the subsequent action by the Cabinet Secretary was to have the petitioner denied the right to enjoy its property. It will in fact be noted that the National Assembly directed the Ministry of Lands and Physical Planning to immediately take possession of the land of the petitioner. The petitioner was to be deprived of its proprietary rights over the suit properties since the same were ordered to be administered by the National Land



Commission and reserved for the settlement of other people within that locality. That was a direct affront to the provisions of Section 24 and 25 of the Land Registration Act, and the right to own property as provided for by Article 40 (1) of the Constitution. It also contravened Article 40 (3) of the Constitution, which bars the State from depriving a person of property unless such acquisition is for a public purpose and with full compensation.

81. I have no hesitation to come to the conclusion that in the case at hand, the National Assembly Departmental Committee on Lands, and by extension, the National Assembly itself, proceeded to discuss an issue that they had no jurisdiction to do so, since a decision had already been made by the National Land Commission. I have also held that the National Assembly had no power under the law to make any declarations of the legality or otherwise of title to land. The National Assembly could not thus pronounce that the title of the petitioner is illegal and fraudulently acquired. Its directive to the Ministry in charge of land was illegal and unconstitutional. The report of the National Assembly was thus unconstitutional, ultra vires, and null and void, and needs to be quashed. That report is hereby quashed. The letters of the Cabinet Secretary were written pursuant to a directive that I have held to be unconstitutional. Those letters also need to be quashed and they are hereby quashed.
82. I have not forgotten that there were very elaborate submissions by counsel for the petitioner arguing that the petitioner holds a good title to the suit land and that its title is better than that of Bambani Kilio Group. These issues, in my view, fall outside the ambit of this petition and I need not make any specific orders on the same. In any case, a decision was already made by the NLC and the suit herein does not seek any orders to reverse that decision.
83. I think I have dealt with all issues raised in this petition other than costs. The petitioner's woes were caused by the act of the National Assembly entertaining a matter and making declarations that it had no jurisdiction to do so. The petitioner has been made to suffer tribulations and expense in defending its rights. It will be unfair to deny the petitioner costs and its costs will need to be paid by the 2<sup>nd</sup> respondent. I make no orders for costs for or against the other parties.

### **Final Orders**

84. I am aware that the petitioner sought declarations for various orders. I need not grant or address them word for word, but I have the same in mind when making my orders.
85. The following are the final orders of this Court :-
  - i. That it is hereby declared that the National Land Commission when conducting its functions under the Constitution is not subject to control or direction by the National Assembly or any of neither its Committees nor the control or direction of the Cabinet Secretary of Lands and Physical Planning.
  - ii. That it is hereby declared that a decision of the National Land Commission following its functions under the Constitution is not subject to appeal or review by the National Assembly or any of its Committees.
  - iii. That the National Assembly and its Committees, including the Departmental Committee on Lands, do not have power to review grants and dispositions of public land, this power being vested in the National Land Commission (subject to the limitations in Section 14 of the National Land Commission Act) and to the Courts.
  - iv. That the National Assembly and its Committees, including the Departmental Committee on Lands, do not have power to hear disputes over title to land, or make decisions on who has good title or the right to occupy land.



- v. That the National Assembly does not have power to cancel title to land, and does not have jurisdiction to issue directives to the Ministry of Lands and Physical Planning to cancel title to land, or issue orders and directives on the occupation of such land.
- vi. That it is hereby declared that the act of the National Assembly in proceeding to investigate the title of the petitioner when the National Land Commission had already done so was unconstitutional and thus ultra vires.
- vii. That the report of the National Assembly, Departmental Committee on Lands, titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County” is unconstitutional and null and void.
- viii. That an order of certiorari is hereby issued quashing the report of the National Assembly, Departmental Committee on Lands titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County” and all subsequent actions and directives made pursuant to the said report are hereby declared null and void.
- ix. That an order of certiorari is hereby issued quashing the decision of the Cabinet Secretary contained in the letters dated 28 July 2017 and 15 February 2018 addressed to the petitioner.
- x. That an order of prohibition is hereby issued, prohibiting the Cabinet Secretary, Ministry of Lands and Physical Planning from implementing the report of the National Assembly, Departmental Committee on Lands titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County”.
- xi. That the 2<sup>nd</sup> respondent will shoulder the petitioner’s costs.

86. Judgment accordingly.

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF APRIL 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

