



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MILIMANI COMMERCIAL COURTS**  
**JR. NUMBER 117 OF 2016**

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

THE TRUSTEES, KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....INTERESTED PARTY

**EX-PARTE**

CECILIA CHEPKOECH LETING,

MAUREEN CHEPTOO LETING AND

ANTONIO KIPROP LETING

(Suing as the Executors of the Estate of Joseph Tendenei Arap Leting)

**RULING**

**Introduction**

1. By a Notice of Motion dated 18<sup>th</sup> March, 2016, the *ex parte* applicants herein seek the following orders:

1. That an Order of Certiorari do issue to remove into this Court and quash the decision by the National Land Commission to issue a Notice and conduct a review and hearing in respect of the property known as Land Reference Number 209/6506/1 belonging to the Estate of **Joseph Tendenei Arap Leting (Deceased)** which said decision appeared in an advertisement in the Standard Newspaper and the Daily Nation issues of 22<sup>nd</sup> January, 2016 by the National Land Commission.

2. That an Order of Prohibition do issue to forbid the National Land Commission from conducting any hearing or review over the complaint in regard to the property known as

**Land Reference Number 209/6506/1 whether on the 15<sup>th</sup> March 2016 or any other date.**

**3. That a declaration do issue that the National Land Commission has no jurisdiction to hear or adjudicate and determine any proceedings touching on the property known as Land Reference Number 209/6506/1 either in the manner suggested by the Commission or at all.**

**4. That an Order of stay of all the impugned proceedings by the National Land Commission in respect of the property known as Land Reference Number 209/6506/1 be issued until the hearing and determination of this Application**

**5. That the costs of this application be provided for.**

**Ex Parte Applicant's Case**

2. According to the applicants, on 22<sup>nd</sup> January, 2016, the **National Land Commission**, the Respondent herein (hereinafter referred to as "the Commission") published a notice in the *Standard Newspaper* of that date requiring the property owners named in the Notice, including the deceased, to appear before the Commission on "a Wednesday, 27<sup>th</sup> February, 2016 at 10.00 a.m." to attend to a public hearing regarding the "affected plots" which day turned out to be a Saturday and not a Wednesday as stated in the Notice.

3. As the applicants were not sure of the actual date intended in the Notice, they instructed the firm of A. H. Malik & Company Advocates to represent the Estate of the deceased in the matter and the said Advocates sent an Advocate from the firm to the Commission on Wednesday 24<sup>th</sup> February, 2016 to confirm whether the hearing aforesaid was scheduled for that date or the 27<sup>th</sup> February, 2016 which was on a Saturday and the said advocate was informed that the hearings were actually intended to be on 24<sup>th</sup> February, 2016 and not 27<sup>th</sup> February, 2016 a Saturday. The said advocate was however informed that the matter relating to Estate of the deceased was not to be heard on that day and the same had been postponed to a date to be advertised in a Daily Newspaper later and which, he said would be on or about 15<sup>th</sup> March, 2016. According to the applicants, the advocates were informed that a Public Notice to that effect would be issued in the local dailies and the Advocates would be duly notified.

4. According to the applicants, the aforesaid Notice relates to the deceased's Property known as Land Reference Number 209/6506/1 measuring approximately 0.3479 of a hectare situate in Upper Hill area, Nairobi. It was the applicants' case that on 14<sup>th</sup> November 1988, the Commissioner of Lands had issued the deceased with a Letter of Allotment on terms, *inter alia*, that the deceased pays a total consideration of Kenya Shillings 49,946.70 for the Property. Upon full compliance with all the terms contained in the said Letter of Allotment including full payment of the said sum of Kenya Shillings 49,946.70, on 13<sup>th</sup> April, 1989, the Commissioner of Lands issued the deceased with a Grant of Title to the aforesaid Property for a term of 99 years from 1<sup>st</sup> November, 1988 and thereafter and upon compliance of the terms of the Grant of Title, the deceased proceeded to construct 19 Flats on the said property presently valued at approximately Kenya Shillings 450,000,000/-.

5. It was averred that the said construction took place with the express consent and approval of the Commissioner of Lands in compliance with Special Condition Number 1 of the Grant of Title and that upon completion of the construction which too was with the approval of the City Council of Nairobi, the Council duly approved the buildings and issued the deceased with a Certificate of Occupation of Buildings dated 3<sup>rd</sup> September, 1991.

6. It was the applicants' case that upon issuance of the Grant of Title the applicant became protected by the provisions of section 23 of the **Registration of Titles Act** as the absolute and infeasible owner of the property and the title to this property cannot be subject of any challenge. Further, as this Property is and was private property as at the date the Commission came into being on 27<sup>th</sup> August, 2010, the Commission has had no jurisdiction to deal with any dispute in respect to the same. In addition, the said Property having been transferred to the deceased upon payment of consideration, and the deceased having

had no Notice of any wrong doing involving him, either from the Commissioner of Lands or the Commission, the Commission lacks jurisdiction to adjudicate on any dispute relating to the ownership of this Property.

7. According to the applicants, the notice by the Commission aforesaid did not indicate the nature of claim or complaint against the deceased or his Estate relating to ownership of the Property and yet the Notice required the deceased to respond to the notice within a very short period of time. It was therefore contended that the notice was not only inappropriate and unreasonable but inadequate and confusing in regard to the date and day of hearing.

8. The applicants revealed that both on 18<sup>th</sup> February, 2016 and 2<sup>nd</sup> March, 2016, the deceased's Estate's Advocates aforesaid wrote to the Commission requesting it for a copy or copies of any complaint or complaints against the Estate of the deceased in relation to the property in dispute, but the same was not provided by the Commission.

9. The applicants reiterated that the Commission has no jurisdiction to undertake any hearings or review over the deceased's title to property which is indefeasible under the provisions of section 23 of the **Registration of Titles Act** and as the Deceased's property is private land, it is outside the jurisdiction of the Commission whose jurisdiction is in respect of Public land. The applicants were however apprehensive that unless the Commission is prohibited from conducting the hearing on the deceased's property which is private land, it would proceed to conduct a review of the Deceased's Title to the property contrary to the Constitution and the law and in excess of its jurisdiction. Further unless the Commission is stopped, the Applicants would be subjected to an unnecessary hearing process by a body which has no jurisdiction to do so.

10. It was submitted on behalf of the applicant that the Commission herein is a Commission created under both Article 67 of the Constitution of Kenya and the **National Land Commission Act**, Act Number 5 of 2012 and that the subject property being Land Reference Number 209/6506/1 is private land as defined under Article 64 of the Constitution of the Respondent herein. However, the jurisdiction of the Commission as stipulated in Articles 67 and 68 of the Constitution only relates to Public land. Therefore the Applicant's property being private land as defined above and particularly under Article 64(b) of the Constitution, the jurisdiction of the Commission as provided under the **National Land Commission Act** leaves no doubt that the same only extends to public land and no more.

11. It was the applicant's case that once the Commissioner of Lands issued the Applicant with the Grant of Title, upon the Applicant complying with all the requisite conditions set out in the Letter of Allotment, the Applicant's property became private land as defined under Article 64(b) of the Constitution and the same is outside the jurisdiction of the Commission. Besides, the moment the Applicant paid the sum of Kenya Shillings Forty Nine Thousand Nine Hundred and Forty Six and Seventy Cents (Kshs. 49,946.70), he became an innocent Purchaser for value without Notice of any wrong doing and his property rights are protected by section 14(7) of the **National Land Commission Act**. At all material times prior to and up to the time the said Grant was made to the deceased in respect of Land Reference Number 209/6506/1 this property belonged to the Republic of Kenya, and no other party had any right to it. It was submitted that at the time the Applicant was issued with the Grant of Title, the property herein was governed by the provisions of the registration of Titles Act, Chapter 281 (now repealed) laws of Kenya.

12. It was submitted that once the deceased was issued with the Grant of Title on 13<sup>th</sup> April, 1989, the deceased became the absolute and indefeasible proprietor of the property and the National Land Commission has no jurisdiction to revoke or even investigate the deceased's Title to the land. In support of these submissions the applicants relied on **Nairobi Permanent Markets Society and Others vs. Salima Enterprises and Others (1995-98)1 EA 232** , **Bwambale and Another vs. Matte And Others (2005) 2 EA 49**, and **Moya Drift Farm Limited vs. Theuri (1973) EA 114**

13. It was submitted that prior to the Notification in Newspapers, neither the deceased nor his family had been served with any Notice of Complaint whether by the Commission or by any third parties and further that no hearing notice served on the deceased prior to his demise or on his family at any given time or at

all. To the applicants, this practice by the Respondent is against all the known Rules of Natural Justice which entitle the Applicant to be adequately informed of any Complaint either by the Respondent or any Third parties.

14. It was further submitted that apart from the known rules of natural justice section 14(3) of the **National Land Commission Act** requires the Commission to provide the Applicant or any other person concerned with a review of Grant of Title with a notice of such review but in this case, neither the deceased nor his family have ever been served with such mandatory notice nor been provided any complaint relating to the Grant of Title. In addition, the deceased and his family have not been afforded any relevant documents at all.

15. It was submitted that the provisions of section 14(8) of the **National Land Commission Act** imposes an obligation on the Respondent to apply the principles set out under Articles 47 of the Constitution of Kenya. Hence the Applicant is entitled to written reasons (read complaint) for the Respondent's actions of summoning the Applicant to attend a Hearing and Review of Grant of Title. The Respondent has a constitutional obligation to provide the Applicant with its complaint or that of any Third party that has necessitated the review of the Grant of Title. As the Respondent was in breach of the requirement to provide the Applicant with the reasons for the hearing and review which the Applicant is being asked to attend, it was submitted that it was procedurally unfair for the Respondent to summon the Applicant to attend a hearing without the Applicant knowing what the complaint he is expected to answer is about.

16. According to the applicants, under the provisions of Article 68(c) (vi) of the Constitution, the Respondent is under an obligation to protect the rights of the dependants of a deceased person and his widow and that the Respondent's conduct of calling for a hearing and review of the deceased's Grant without even notifying the widow of the same and further, without providing the widow and the children of the deceased with reasons for such a hearing and review is in breach of the provisions of Articles 68(c) (vi) of the Constitution.

17. It was submitted that the deceased being an innocent purchaser for value of Kenya Shillings Forty Nine Thousand Nine Hundred and Forty Six and Seventy Cents (Kshs. 49,946.70), from the Government of Kenya, the Respondent has no power to review this Grant of Title, especially, if to do so may lead to revocation of the same. In the applicants' view, the Respondent's Notice for Review of Grant is accordingly in breach of the mandatory provisions of section 14(7) of the **National Land Commission Act**.

18. It was therefore the applicants' case that the Respondent has breached the Applicant's rights to a fair administrative action as well as all other rights the Applicant is entitled to under the Article 47 of the Constitution and the urged the Court to allow this Application with costs.

### **Respondent's Case**

19. The application was opposed by the respondents.

20. According to the Respondent, it is an independent commission established under Article 67(1) of the Constitution and is operationalized by the Act, and has as its fundamental functions, the management of public land on behalf of the National and County Government. In addition to the functions denoted to it under the Constitution, the respondent is also mandated under section 14 of the Act to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. In the exercise of this mandate the respondent operates as a quasi-judicial body within the full meaning of Article 169(1) of the Constitution and the procedure for carrying out this mandate is clearly set out under section 14 of the Act.

21. To the respondents, review of grants and dispositions of public and simply entails the respondent analysing the process under which public land was converted to private land and making findings of the legality of the grants in question and once the Commission has determined on its own motion that a particular grant warrants review or a complaint is determined to warrant review of a particular grant, the

respondent will publish a notice of intended review in the dailies notifying all interested parties the dates and venue of the scheduled review, as well as the period within which interested parties are required to submit their documents. After expiry of the notice of a particular grant commences at the scheduled date and venue prescribed in earnest, wherein all interested parties are first established after which parties are directed to disclose and exchange all documents.

22. It was averred that under section 14(1) of the Act, the Respondent commenced review proceedings seeking to establish the legality of the grant over LR No. 209/6506/1, amongst other parcels which process commenced following receipt of a complaint from the Kenya Railways Staff Retirement Benefits Scheme requesting the Respondent to review the legality of the grant on the grounds that it was unlawfully acquired.

23. It was averred notices were duly published in various dailies notifying the public about the parcels of lands due for review but due to an error the notice in respect of the suit land apparently scheduled the date of review as a Saturday when the intended date was Monday, 29<sup>th</sup> January, 2016 and that this fact was explained to a representative of the Estate of the deceased who appeared on 24<sup>th</sup> February, 2016.

24. It was however averred that as a result, the review process has not commenced in earnest and that no proceedings in relation to the subject parcel have been taken. In the Respondent's view the ex parte applicant's rights to natural justice have therefore not been breached by the Respondent as the applicant shall have the opportunity to inspect all relevant documents the Commission intends to rely on and parties shall be directed to disclose and exchange documents including the complaint.

25. In the Respondent's view, since it is mandated to review all grants and dispositions of public lands even where there is no complaint, lack of a complaint does not necessarily invalidate the proceedings of the Respondent.

26. It was the Respondent's view that the orders sought cannot issue as to do so would amount to curtailing a proper constitutional process and the Respondent's mandate. In any case there are no sufficient reasons why the Respondent should not discharge its constitutional mandate. It was however submitted that in the event that the Court finds that the rules of natural justice were not adhered to the option would be to direct the same to be complied with instead of prohibiting the Respondent from carrying out its mandate.

27. In the Respondent's view, the right to ownership is not absolute as it does not extend to property found to have been unlawfully acquired and since the legality of the grant held by the estate of the deceased is in issue, it is in public interests that the same be reviewed and that the Applicants stand to suffer no prejudice in the process.

28. In the premises the Respondent urged the Court to dismiss the instant application with costs.

29. It was submitted on behalf of the Respondent that whereas Article 40 of the Constitution guarantees the right to ownership of property of any description in any part of the Country, this right does not extend to any property that is found to have been acquired in an unlawful manner and that similar sentiments are echoed under section 26 of the **Land Registration Act, 2012**.

30. According to the Respondent, prior to the overhauls in land management in the country, the three major laws governing land in the Country were the **Government Lands Act, Registration of Titles Act** and the **Registered Land Act**. None of these laws, however, provided a framework for the review of titles and the issue of illegally acquired titles could therefore only be addressed by the Court. This meant that the various land institutions mandated with management and coordination of land matters in the country could not address the issue of fraudulent titles other than by moving the Court. However, following promulgation of the new Constitution in 2010 and the enactment of the **Land Act 2012, Land Registration Act** and the **National Land Commission Act**, Kenya witnessed positive and tangible overhauls in land management in the country. For instance, for the first time in the history of the country, the Constitution and the **National Land Commission Act**, provided a framework through which the

legality of titles could be addressed without necessarily having to invoke the jurisdiction of the Court. In this respect the Respondent relied on section 14(1) of the **National Land Commission Act** which provides as follows:-

***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.***

31. It was the Respondent's position that from the above, it is clear that with the current legislative set up, other than the Court, the Respondent has authority to review the legality of grants and dispositions of public land and that this authority, conferred upon the Respondent by law and by extent Article 68 of the Constitution, is equal to that of the Court. Therefore, anyone with a complaint regarding legality of a title may elect to seek redress from either the Environment and Land Court or the National Land Commission and in this respect, reference was sought in **Republic vs. Land Registrar Mombasa & 2 Others Ex Parte Bhangra Limited [2012] eKLR** where **Tuiyott, J** observed as follows:-

**“...It is common ground, I think, that The Land Registrar has no power either under the Constitution or The Registered Land Act (now repealed) to revoke Title. A string of decisions have restated this rather uncontested position of the law. That power has until recently rested exclusively with the Court. From 2<sup>nd</sup> May 2012, when The National Land Commission Act commenced, power to review grants or dispositions of public land was given to The National Land Commission. Section 14 of The Act makes provision on how that power is to be exercised...So in respect to public land the Court shares this authority with the National Land Commission...”**

32. The Respondent further relied on the decision of **Korir, J** in **JR 376 of 2014 - Muktar Saman Olow vs. National Land Commission**. The Respondent therefore urged this Court to uphold a similar position as that of **Korir, J** and find that the Respondent has power to review grants and dispositions of public land as well as private titles in order to establish their legality or propriety.

33. It was submitted that the question of what a grant of public land is, includes any conveyance, agreement for sale, lease or license, made by and on behalf of the Government, and includes a certificate of title issued by the Land Registration Court, and a certificate of title issued pursuant to the provisions of any Act of Parliament. Public land on the other hand is undoubtedly defined under Article 62 of the Constitution as to also include a reversionary interest in land. Under Section 3 of the **Government Lands Act**, the President had the special power to make grants or dispositions of any estates, interests or rights in or over unalienated government land. The process of making grants or disposition of unalienated government land by the President or by the office of the former Commissioner of Lands is what was commonly referred to as allocation. Under section 7 of the **Land Act**, allocation is one of the many ways in which interests in land are acquired.

34. In this case, it was submitted that by *ex parte* Applicants' admission the subject parcel was allocated to the deceased by the Commissioner of Lands, the subject parcel was therefore previously Government land thus the Respondent has jurisdiction to determine whether the allocation was done in proper manner and whether the title in the name of the deceased was lawfully acquired.

35 It was further submitted that the Respondent is not in breach of the rules of natural justice or the *ex parte* Applicants' right to fair administrative action because the proceedings of the Respondent looking into the legality of the grant of the subject parcel are yet to commence in earnest and it can therefore not be said that the Respondent is in breach. In this case, the circumstances surrounding the erroneous publication of dates have been given, and new dates for review of the legality of the subject parcel shall issue.

36. According to the Respondent therefore, the *ex parte* Applicant has not proved his case and the application should therefore be dismissed since the actions of the Respondent are anchored in law and the

orders sought are therefore not deserving.

37. To the Respondent, the present application is in bad light and aimed solely at dragging the Respondent through needless litigation on frivolous, vexatious and scandalous grounds as the *ex parte* Applicants have not established a single ground under which the orders sought should be granted which just goes to show how frivolous the suit is. The Respondent therefore prayed that the application be dismissed and the *ex parte* Applicant be condemned to bear the costs of the suit.

### **Interested Party's Case**

38. In opposing the application the interested party herein, **The Trustees, Kenya Railways Staff Retirement Benefits Scheme**, (hereinafter referred to as "the Scheme") averred that this Court established as the High Court of Kenya has no jurisdiction to preside over matters relating to land as such matters are exclusively reserved for determination by the Environment and Land Court. It was the interested party's case that from the contents of the verifying, it is clear that the applicants are before this Court to agitate on the merits of the title and nothing else.

39. It was nevertheless contended that from a perusal of documents in possession of the interested party, the Government of Kenya did grant the East Africa Railways and Harbour Administration all that parcel of land described as L.R. No.209/6525 situate at upper Hill, Nairobi for a term of 99 years from 1<sup>st</sup> January 1932 (hereinafter referred to as "mother title") and that **Kenya Railways Corporation** (hereinafter referred to as "the Corporation") as a successor of the East African Railways and Harbour Administration, was vested with all that property of its predecessor, inclusive of the said L.R.No.209/6525, the mother title.

40. According to the Scheme, in or about the year 2005, it was established by its sponsor, the Corporation, with a primary objective of providing pension to the past and current employees of the Corporation and that it is duly registered as such a pension scheme under the provisions of the **Retirement Benefits Act** (Act No.3 of 1997) (hereinafter referred to as "the Act") the Act.

41. According to the Scheme, to enable it meet its said primary obligation of paying pension, the sponsor, the Corporation, did vest unto the Scheme listed parcels of land as the only source of income to enable it meet its obligation, by among others, leasing and disposing off the vested properties amongst which is a portion of the said mother title.

42. It was therefore averred that as the bona fide owner of the said transferred and vested property, L.R.No.209/6525 (part), the interested party was duty bound to not only trace but also preserve the same for its intended purpose and it was in the process of tracing and preserving the said vested property that it came to the interested party attention that the subject property, a portion of the mother title as transferred and vested unto the Scheme, had been subdivided into smaller portions and vested unto private developers, one such subdivision being parcel of land described and known as L.R.No.209/6506/1 and occupied by the applicant herein. It was averred that it has been the consistent Scheme's position that the subdivision of the mother title, L.R. No. 209/6525, and more so a portion thereof as transferred and vested unto the Scheme, culminating into, among others, L.R. No. 209/6506/1 was and remains irregular, illegal, null and void. The interested party's pursuit for recovery of the suit land has been undiminished and which matter has been lately subjected to the Respondent herein, as the Constitutional and statutory body mandated to investigate and or review the legality or otherwise of land ownership within the Republic of Kenya.

43. Based on legal advice, the Scheme believed that since the proceedings before the Respondent are still pending determination, it would be *sub judice* and highly prejudicial to the parties therein for the interested party or any other party in the instant suit to seek, through this court's proceedings, to discuss the merits and the demerits of either parties' case as submitted before the Respondent. It was however averred by the Scheme that the alienation of the suit property was done in flagrant breach of section 14(4) and (5) of the Kenya **Railways Corporation Act**, Cap 397, Laws of Kenya. According to the Scheme, it is not in doubt that prior to the subdivision or conversion of a portion of public land described as LR No.

209/6506 and thus creation of LR No. 209/6506/1, no Deed of Surrender or transfer was done by the Kenya Railways Corporation, there was no consent from the Minister for Lands and resultantly the suit property cannot pass the test of validity or legality upon review.

44. The interested party insisted that the mother title from which the suit property emanated was a government land owned by the Corporation and governed by the provisions of the **Railways Corporation Act** Kenya Railways and that the ex parte applicant's acquisition thereof was ultra vires the provisions of the said Act. It was therefore the Scheme's case that the Respondent has the mandate to investigate how public land changed into private hands and that land acquired unprocedurally and fraudulently as is the case herein is not protected under section 23 of the **Registration of Tiles Act**, a clear abuse of the judicial review process and the Division when the subject matter herein clearly falls within the purview of the ELC.

45. It was the Scheme's position that a notice was served by the Respondent through the print media notifying any interested persons to appear before the Respondent on indicated dates. Since it was expressly indicated in the notice that the Respondent's mandate was the reviewing of all grants and dispositions to determine their legality or propriety and that it would conduct public hearing in respect of the listed plots, including the suit property, in line with sections 6 and 14 of the **National Land Commission Act**, it is not true that the nature of the claim was not disclosed to the ex parte applicants.

46. It was reiterated that to date the proceedings before the Respondent have neither been heard nor concluded hence the applicants have every opportunity to prosecute or present their defence before the Respondent for determination on merit. It was therefore averred that these proceedings are premature, unwarranted and speculative.

47. The Scheme averred that in the absence of the letters of administration, the applicants have no locus standi to bring this suit and are mere busybodies before this Court.

48. Based on Article 162(2)(b) of the Constitution as read with sections 13 of the **Environment and Land Court Act, 2011**, it was submitted that since these proceedings relate to title, acquisition and or use of land, this Court has no jurisdiction to preside over these matters as such matters are exclusively reserved for hearing and determination by the Environment and Land Court. In this respect the interested party relied on the Supreme Court Petition No. 5 of 2015- **Republic vs. Karisa Chengo & 2 Others** for the position that the three courts; High Court, Employment and Labour Relations Court and Environment and Land Court exercise the same power as the High Court in performance of judicial functions in their specialized jurisdiction.

49. It was therefore submitted that Article 165(5) of the Constitution precludes this Court from entertaining matters reserved for the ELC. Given that there are serious substantial questions as to how the suit property was acquired, it was submitted that those issues cannot be heard and determined in a summary manner by way of judicial review proceedings.

50. With respect to the issue whether the ex parte applicants herein had the locus standi to bring and prosecute these proceedings, it was submitted that though the applicants described themselves as Executors of the Estate of **Joseph Tendenei Arap Leting**, without authenticating and proving the will and obtaining grant of probate, the ex parte applicants do not have authority to initiate and/or continue with these proceedings.

### **Determination**

51. I have considered the issues raised herein. One of the issues raised for determination of this Court is this Court's jurisdiction to entertain these proceedings.

52. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA** expressed himself as follows:

**“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

53. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”**

54. In this case it is contended that these proceedings ought to have been instituted in the ELC. The interested party’s issue on jurisdiction as I understand it is twofold. The first ground for questioning the jurisdiction of this Court is the existence the ELC. Article 165(3) of the Constitution provides as follows:

***(3) Subject to clause (5), the High Court shall have—***

***(a) unlimited original jurisdiction in criminal and civil matters;***

.....

***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

55. Article 165(5)(6) and (7) thereof on the other hand provides:

***(5) The High Court shall not have jurisdiction in respect of matters—***

***(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or***

***(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).***

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

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

56. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

57. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

58. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

59. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

60. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30<sup>th</sup> August 2011. Section 13 of the said Act provides as follows:

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

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

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

***(b) relating to compulsory acquisition of land;***

***(c) relating to land administration and management;***

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

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

***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for***

*redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

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

*(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;*

*(g) restitution;*

*(h) declaration; or*

*(i) costs.*

61. In My view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

**“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”**

62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Justice Mohammed Ibrahim in Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR**:

**“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court”.**

63. In this case, in determining the issues herein it would be necessary for the Court to determine what in effect amounts to a public land for the purposes of the jurisdiction of the Environment and Land Court.

That in my view is an issue that ought to be dealt with by that Court. According to **Korir, J** in **JR 376 of 2014 - Muktar Saman Olow vs. National Land Commission**:

**“Under section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent.”**

64. Whereas this Court had in the past entertain disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in **Petition No. 5 of 2015-Republic vs. Karisa Chengo & 2 Others** it has become clear that such matters ought to be dealt with by the specialised courts, when the Court expressed itself *inter alia* as hereunder:

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

65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant’s contended right to be heard stem from their yet to be determined interest in the suit land.

66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in **Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012**, [para. 29-30] where it was held:

**“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with ‘general’ original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework”.**

67. Similar sentiments were expressed in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

**“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”**

68. Having considered the issues raised herein I associate myself with the sentiments of the Court in East African Railway Corp vs. Anthony Sefu [1973] EA 237, where it was held that **“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”** It is my view that in the circumstances of this case, it would not advance the course of justice to terminate these proceedings.

69. In the premises the order which commends itself to me and which I hereby make is that these proceedings be heard and determined by the ELC since the said Court is a Court of equal status as the High Court.

70. The costs will be in the cause.

71. Orders Accordingly.

**Dated at Nairobi this 7<sup>th</sup> day of February, 2018**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

**Mr Ongicho for the Applicant**

**CA Ooko**