



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 638 OF 2016

**IN THE MATTER OF AN APPLICATION BY THE APPLICANT, FRANK
LOGISTICS LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION

DIRECTED TO THE NATIONAL LAND COMMISSION

-AND-

**IN THE MATTER OF THE CONSTITUTION OF KENYA, THE
NATIONAL LAND COMMISSION ACT, 2012 AND THE FAIR**

ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLIC.....APPLICANT

-AND-

THE NATIONAL LAND COMMISSION.....RESPONDENT

EX-PARTE FRANK LOGISTICS LIMITED

-AND-

NAZMUDIN HABIB KASSAM KURJI.....INTERESTED PARTY

RULING

Introduction

1. In these proceedings, the applicant's case is that it is the registered owner of the property known as Land Reference Numbers 1870/1/337 and LR 1870/1/338 (the suit properties), whose allocation the applicant applied for to the Government of Kenya on 18th December, 2008. Consequently, by a letter of allotment dated 6th January, 2009 the Commissioner of Lands allotted the applicant the suit properties, which letter

of allotment required the Applicant to fulfil certain conditions.

2. According to the applicant, he communicated his acceptance to the offer for allocation of the suit properties as required and made payment in settlement of the sums set out in the letters of allotment in respect to the property known as LR. No. 1870/1/337. Upon receipt of the sums set out in the letters of allotment, the Department of Land processed the documents in relation to the suit properties and issued the Applicant with a lease agreement for execution and the Applicant was subsequently issued with certificate of title for the suit properties on 16th July, 2016.

3. The applicant averred that the Nairobi City County has since the allocation of the suit properties to the Applicant been issuing demand notes for payment of land rate, the latest demand note being issued to the Applicant on 24th November, 2016.

4. However, the applicant averred, on or about 3rd October, 2016 certain individuals not known to the Applicant harassed the Applicant's guards manning the site and demanded that they vacate the suit properties, alleging that they were the registered proprietors of the suit properties. Subsequently, on 6th December, 2016 the Applicant was served with a letter dated 2nd December, 2016 from the National Land Commission (the Commission) indicating that a complaint had been made by the estate of **Sadrudin Habib Kassam Kurji** deceased and **Nazmudin Habib Kassam Kurji** (the complainants) with respect to the ownership and title of the suit properties. By this letter, the Commission only communicated its intention to review the legality of the grants and a notice was published by the Commission in the *Daily Nation* Newspaper in this regard on 6th December, 2016 indicating that the Commission would conduct a public hearing on 9th December, 2016.

5. The applicant however averred that the Commission did not supply it with a copy of the complaint that was allegedly lodged by the complainants and it was also not made aware of the nature of the complaint, the witnesses that would testify at the hearing nor the evidence that would be presented at the hearing on 9th December, 2016. On the said 9th December, 2016 the Applicant was served with suit paper in *ELC petition Number 1524 of 2016 - Nazmudin Habib Kassam Kurji -vs- National Lands Commission & 9 others* (the petition) and civil case Number 1530 of 2016 - *Pyarali Gulamhussein Nanji & 3 others v Frank Logistics & 4 others* (the Civil case).

6. The applicant believed, from the list of the witnesses disclosed in the civil case, that it is the same witnesses, who are supposed to testify in favour of the Plaintiff in the civil case are the ones who will deliver the verdict of the Commission as to who between the Applicant and the complainants is the owner of the suit properties. It was averred, during the public hearing on 9th December, 2016 the Commission was informed that the complainants had filed the civil case and the petition simultaneously with applications and that the pending applications in petition and the civil case were slated for mention on 15th December, 2016 and that the commission should defer its investigation since the Environment and Land Court was properly seized of the matter. The Commission was further informed that the complainants had filed the petition and the civil case seeking orders that they be declared as the lawful owners of the suit properties. It was averred that during the hearing of 9th November, 2016 the applicant castigated the impartiality by of some Commissioners including **Abigael Mbagaya** – the Vice Chairperson of the Commission and **Tom Chavagi** - the Chief Executive Officer of the Commission who had been listed as the Plaintiffs' witnesses in the civil case, yet were the same Commissioners that are expected to deliver a decision on the complaint. Apart from that the Applicant's representative also made a request that the investigation by the Commission be stayed pending the hearing and determination of the rightful owner of the suit properties by the Court.

7. However these concerns were dismissed by the Chairperson of the Commission on the basis that the Court did not have power over the Commission in deciding the issue and that their finding had already been pre-determined. According to the applicant, during the hearing of 9th December 2016, the Chairperson of the Commission stated:

- a. The documents presented by the applicant were forgeries and the land does not belong to it.
- b. The applicant will be forced to compensate the petitioner and the plaintiff in the civil case and the petition.
- c. The Commission found that the suit properties do not belong to the Applicant but the complainants.
- d. The Applicant has never been in possession of the suit properties and it should not interfere with the complainant's possessory rights.

8. It was averred that the Commission adjourned the public hearing on 9th December, 2016 and indicated that it would deliver its decision on notice.

9. According to the applicant, its key witness in the matter received summons to attend court and take plea in Milimani Criminal Case Number 1998 of 2016 – Republic v Francis Nyaga NJeru on 9th December 2016, the same day when the public hearing was supposed to take place before the commission, which criminal case touched on his personal liberty hence he had to give it priority over the public hearing scheduled for 9th December, 2016. For this reason, the Applicant instructed its advocate to apply for an adjournment before the Commission, which application was however disallowed.

10. It was the applicant's case that the entire process including the public hearing of 9th December, 2016 ran afoul of Article 47 of the Constitution as the Commission did not allow the Applicant sufficient time to prepare for the hearing and also declined an application to enable the Applicant's witness testify.

11. It was averred that despite the applicant's request that the said proceedings be set aside, the Commission never responded to the same.

12. To the applicant, the Commission does not have jurisdiction to hear and determine the dispute between the Applicant and the complainants as it involves the question of ownership of private property. Further, on 7th December 2016 the Court in ELC petition Number 1524 issued a conservatory order restraining the Commission from allocating, revoking, registering any transaction and or in any other manner interfering with the complainant's proprietorship rights over the suit properties, which order was brought to the attention of the Commission before the hearing on 9th November, 2016, hence the Commission ought to have deferred the hearing pending the hearing and determination of civil case and petition.

13. Consequently the applicant sought the following orders:

1. An Order of prohibition directed to the National Land Commission to prohibit the National Land Commission from proceeding with any further hearing or determination of the complaint regarding the ownership of and title to Land Reference Numbers 1870/337 and 1870/338 respectively.

2. An Order of prohibition directed to the National Land Commission to prohibit the National Land Commission from commencing, instituting or proceeding with any other investigation and/ or hearing in relation to the ownership of or title to Land Reference Numbers 1870/1/337 and 1870/1/338 respectively.

3. An Order of certiorari to remove to the Court and quash the proceedings, directions and orders made by the National Land Commission during the hearing of the complainant regarding the ownership or title to Land Reference Number 1870/1/337 and 1870/1/338 respectively.

4. The Costs of this Application be awarded to Ex-parte Applicant.

Respondent's Case

14. The application was opposed by the respondent Commission.

15. 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.

16. 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.

Interested Party's Case

17. The interested party similarly opposed the application.

18. According to him, he is the registered owner of all that parcel of land known as Land Reference Number 1870/1/338 measuring approximately 0.0489 hectares and situated in Parklands along Jalaram Road within Nairobi County (the **Suit Property**) having acquired the same for valuable consideration sometime on or about 29th April, 1971.

19. According to the interested party, on 29th April 1971, **Kurbanali Habib Kassam Kurji, Nasirbanu Habib Kurji, Kulsum Sadrudin Darvesh, Sadrudin Habib Kassam Kurji** and himself purchased the then LR No. 1870/1/290 Parklands, Nairobi for valuable consideration from M & H Corporation Limited. Sometime in September 1986, **Kurbanali Habib Kassam Kurji, Nasirbanu Habib Kurji, and Kulsum Sadrudin Darvesh** made a gift of their undivided three fifth share in LR No. 1870/1/290 Parklands, Nairobi to his late brother **Mr Sadrudin Habib Kassam Kurji** and himself. Thereafter, the two brothers applied for sub-division of LR No. 1870/1/290 which sub-division was duly approved by all the relevant offices. Subsequent thereto the two brothers were issued with separate Deed plans from the Director of Surveys and the two sub-divisions became Land Reference Nos. 1870/1/337 and 1870/1/338 Parklands, Nairobi.

20. The interested party averred that the Suit Property together with his late brother's title known as Land Reference Number 1870/1/337 (together the Properties) were the subject matter of the proceedings conducted by the National Land Commission (the NLC) on 9th December, 2016 held for the purposes of determining the true owner of the Properties (the NLC Proceedings). The interested party however averred that he had owned the Suit Property for the last four decades and had occupied it with his family since his tenant moved out sometime in 2008.

21. The interested party averred that it was not until sometime in early 2007 when himself and his family were going through their documents and records that they noticed that the lease to the Suit Property had expired. He immediately went about processing documentation to apply for a renewal and on 2nd April, 2007, applied for the extension of his lease over the Suit Property which application was received by the Commissioner of Lands (the Commissioner). Following receipt of the said application, the Commissioner, on the same date forwarded the application to the Director of Physical Planning, Director

of Surveys and Director of City Planning seeking their comments on the application before processing the same.

22. It was averred by the interested party that on 5th April 2007, he wrote to the Director of City Planning requesting that he provide his letter of recommendation at the earliest opportunity so that the lease extension process in relation to the Suit Property could be expedited, which letter was received by the now defunct Nairobi City Council as evidenced by the stamp affixed thereon. On the same day, he paid Kenya Shillings twenty thousand (Kshs 20,000) to the Nairobi City Council in respect of his application.

23. Thereafter, the interested party made several enquiries as to the progress of his application with the defunct Commissioner's office, the Ministry of Land, Housing & Urban Development (the Ministry) and with the Chief Land Registrar (the Registrar) and received several verbal assurances from their officers that the lease would be extended following finalization of administrative processes at the Lands Registry. In the meantime the interested party remained in uninterrupted ownership and occupation (since 2008) of the Suit Property from the date of his application until December 2016 when his family and himself were forcefully evicted from the Suit Property by the Applicant's agents, thugs and goons on threat of death and grievous bodily harm. During the entire period between 2007 and 2016, he continued to diligently pay land rent and rates following receipt of demands from the Registrar and the Nairobi City County (NCC).

24. According to the interested party, sometime in November, 2016, the properties began experiencing unprecedented hostile activity. On 24th November, 2016 the agents of the Applicant forcibly gained entry to the Suit Property and confronted and interrogated the interested party on the ownership of the Suit Property. Being in suspicion that a plot was being hatched to deprive him of this Suit Property, a family member registered a complaint of this visit on the interested party's behalf with the NLC as the interested party was thoroughly distressed by the events occurring in November 2016. Pursuant thereto, the NLC issued a letter to the Registrar requesting the Registrar to endorse restrictions on the Suit Property.

25. It was averred by the interested party that in the early hours of the morning of 4th December, 2016 the agents of the Applicant who were mostly hired thugs and goons forcibly gained entry to the Suit Property, attacked his family, their employees and the interested party and illegally evicted them from the Suit Property. The agents of the Applicant then bulldozed their town house on the Suit Property without allowing his family to salvage their possessions which were looted and some of which are now covered in the debris of the demolished house.

26. The interested party averred that on 6th December, 2016 he filed a Petition in the Environment and Land Court, being Petition No. 1524 of 2016 against the Applicant and his agents as well as other state agencies for the purposes of enforcing and seeking redress for the violation of his constitutional right to property which had been compromised by Frank Logistics Limited (FLL) – the corporate vehicle which the Applicant used to perpetrate the fraud against the Suit Property (the Civil Case). According to the interested party, the Applicant's allegation that FLL is the registered owner of the Suit Property are untruthful and part of a fraudulent land grabbing scheme orchestrated and/or participated in by the Applicant to deprive him of the Suit Property which his family and himself have owned for close to forty (40) years.

27. It was disclosed that on 3rd December, 2016, the interested party received a notice from the NLC summoning him to attend a public hearing on the 9th December, 2016 for the purposes of determining the ownership of the title to the Properties. An agent of FLL who was in hostile occupation of his late brother's adjoining property was also served with a similar notice by the NLC officers. On 9th December, 2016 the NLC conducted the hearing proceedings to investigate the issues surrounding the ownership of the Suit Property and after the hearing concluded, the NLC stood over the proceedings for purposes of making a determination on the evidence that had been presented. The Chairman of the NLC stated that a written determination would be made by the NLC in the week or so following the Proceedings.

28. It was the interested party's case that during the NLC Proceedings, details concerning the manner in

which FLL and the Applicant had fraudulently dispossessed the interested party of the Suit Property became apparent. The fact that Frank Logistics Limited (FLL), a company which the Applicant is a director of, had obtained fraudulent title documents with the connivance and compromise of several public officers in the offices of the Ministry, the Registrar and the NCC was confirmed by the testimonies of various individuals indicated on the face of FLL's title documents as having been prepared and executed the title documents. These individuals disowned the title documents as unlawfully and irregularly obtained and claimed that their signatures on the documents had been forged. The proceedings of that day together with these testimonies were recorded verbatim in the NLC's Hansard.

29. It was the interested party's case that Aware that the testimonies presented before the NLC vindicated his rights over the Suit Property, the Applicant moved this Court to apply for the orders of judicial review whose effect would be to nullify the entire NLC Proceedings. To the interested party the Applicant is not entitled to the judicial review orders sought against the NLC since it has abused this Court process since there are several allegations set out in the Applicant's Statement of Facts dated 19th December, 2016 (the **Statement**) and the Supporting Affidavit of FNN dated 19th December, 2016 (the **Affidavit**) which are misleading and evident of material non-disclosure by the Applicant.

30. According to the interested party, whereas it is alleged in the Affidavit and in the Statement that the Applicant is the registered owner of the Suit Property and that the Applicant was issued with the Allotment Letter and that he complied with its conditions, this is however incorrect and untrue as the Allotment Letter contains a condition that the offer to allocate the Suit Property to the Applicant must be accepted within thirty (30) days by submission of a banker's cheque of Kenya Shillings one hundred and six thousand two hundred and seventy (Kshs. 106,270), which was never done. Further, the banker's cheque allegedly issued by the Applicant was issued on 28th October, 2015, almost seven (7) years after the Allotment Letter. Accordingly, even if the Allotment Letter were to have been issued regularly, it expired after thirty (30) days when the Applicant failed to make the necessary payments.

31. It was similarly noted that whereas the payee of the banker's cheque allegedly issued by the Applicant was the Commissioner of Lands, in 2015 there was no public office known as the Commissioner for Lands, since the NLC took over the functions of the Commissioner under the auspices of the Constitution and the National Land Commission Act (No. 5 of 2012) (the **NLC Act**). Accordingly, the cheque is worthless and evident of a sloppy method of covering up a fraudulent enterprise. It was the interested party's case that any receipt purportedly issued pursuant to the cheque is clear evidence of fraud since no cheque could have been issued to and banked by the Government in an account known as the Commissioner for Lands since that office was non-existent.

32. It was deposed that the fact that the Allotment Letter was fraudulently obtained as part of the deceptive scheme orchestrated by the Applicant, FNN and related parties was made apparent during the NLC Proceedings when the lands officer, **Mr. Onyino Mukobe**, indicated as having issued the Allotment Letter, is the same officer who received the interested party's application for the extension of his lease on 2nd April, 2007 and subsequently sought approvals for the extension from the Director of Physical Planning, Director of Surveys and Director of City Planning on the same day. During the NLC hearing, **Mr Mukobe** categorically denied issuing and executing the Allotment Letter to the Applicant in respect of the Suit Property since he had already received the interested party's application for extension of lease, confirmed receipt of my application and assisted in obtaining the approvals for the extension. **Mr Mukobe** informed the NLC that once an application for renewal of lease has been made by the owner, the land is no longer available for allocation. It was also pointed out that the short period, being under one month, within which the Applicant obtained the Allotment Letter was unusual and not in accordance with standard practice and the processes that ought to be undertaken prior to the issuance of such a letter which included a site inspection of the property in question.

33. It was the interested party's case that during the period from 18th December, 2008 to 6th January, 2009, the dates the Applicant allegedly applied for the allocation of the Suit Property and was issued with the Allotment Letter, his application for the extension of lease had already been lodged and was being processed by the Commissioner. Before the aforesaid period, the interested party did not receive any

communication from the Commissioner that his application had been unsuccessful or that a decision had been made not to extend his lease. In fact during the aforementioned period and thereafter, he continued to be in possession of the Suit Property, received rent and rate demands from the NCC and the Registrar which, he faithfully paid.

34. The interested party noted that the Applicant's title documents exhibited to the Affidavit as having been issued to the Applicant contains numerous errors and irregularities demonstrating that these documents could only have been obtained illegally, unprocedurally and/or through illegitimate and fraudulent dealings orchestrated and/or participated in by the Applicant and FNN:

35. These errors were noted by the interested party as hereunder:

a. the Deed Plan submitted by the Applicant and FLL was improperly and fraudulently obtained due to the fact that it was allegedly issued on 20th October, 2015 which was a public holiday. Further, the licensed surveyor indicated as having undertaken the survey, **Mr Benson Meshack Okumu**, categorically informed the NLC that: he did not survey the Suit Property nor prepare the survey report for the Suit Property. He categorically denied his office's involvement in the preparation of the survey and that he did not forward the Deed Plan to the Director of Surveys for certification;

b. the Director of Surveys, **Mr Peter Njoroge**, (the **Director**) indicated as having allegedly certified the Deed Plan for FLL's title, categorically informed the NLC that he did not handle the Deed Plan and he did not execute it. The Director believed that his signature on the Deed Plan had been forged. According to the Director, the only Deed Plan he was aware of is the one dated the 28th May, 1971 (the **Initial Deed Plan**) submitted with my title documents. Further, the Director confirmed that the Deed Plan was not registered and that the only registered Deed Plan is the Initial Deed Plan;

c. the reference to the 'Original Number – Nil' appearing on the Certificate was used for virgin or undeveloped land. In this case, the Suit Property had been developed and there was a structure on the Suit Property. This reference was therefore incorrect as the Original Number for the Suit Property was LR 1870/1/290 not 'Nil'.

d. the Registrar of Titles, Mr Ng'etich, indicated as having executed and registered FLL's Certificate of Title, informed the NLC that the IR Number indicated on the Certificate was also erroneous as this number had been allocated for a different property. The IR number allegedly in the name of FLL was erstwhile issued in June 2016 for a property owned by Francis Munene Hiram who had no connection to FLL or the Suit Property. Mr Ng'etich stated that once an IR Number has been issued, it is not available for allocation in respect of another property or other LR Numbers.

e. Mr Ng'etich categorically informed the NLC at the NLC Proceedings that his signatures appearing on the Certificate of Title were forged and that the same did not originate from his office, was not registered with his office and that such registration was not indicated in the internal records kept by his office.

f. the Lease has not been registered as the registration particulars are blank. The details of the Registry Index Map No/ Deed Plan are also blank. Accordingly, the Certificate could not have been issued under a lease which was never registered. Furthermore, the certification by the lawyer Celestine Anyango Opiyo is also not dated.

36. It was the interested party's case that the Commission carried out its mandate within the law and urged the Court to dismiss the Applicant's application for judicial review with costs.

Determination

37. I have considered the issues raised herein.

38. 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”.

39. 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.”

40. 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.

41. 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.

42. 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.

43. 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.**

44. 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.

45. 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.

46. 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 30th 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.

47. 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.”

48. 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”.

49. 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. Whereas the applicant's position is that the land in question is private land hence does not fall within the subject matter that the Commission is empowered to deal with, the respondents' position is that the interested party's lease having expired the land reverted to the Government hence became a public land and therefore the dispute falls within the jurisdiction of the National Land Commission. That issue, in my view, is an issue that ought to be dealt with by the Environment and Land 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.”

50. The demarcation of the jurisdiction between the High Court and Courts of equal status was the subject of Supreme Court's decision in Petition No. 5 of 2015- **Republic vs. Karisa Chengo & 2 Others** where 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.”

51. 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 ***Environment and Land Court 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 rights stem from their yet to be determined interest in the suit land.

52. In this case, I am satisfied that the dispute can be properly dealt with by the ELC where it is alleged there is another matter pending determination. 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”.

53. 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.”

54. 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.

55. 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 and is empowered to grant the reliefs sought herein.

56. The costs will be in the cause.

57. Orders Accordingly.

Dated at Nairobi this 7th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ateka for Miss Raori for the interested party

CA Ooko