Khalif v Principal Secretary Ministry of Lands and Physical Planning & 4 others; National Land Commission & another (Interested Parties) (Petition 479 of 2017) [2025] KEHC 13714 (KLR) (Constitutional and Human Rights) (23 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13714 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 479 OF 2017

EC MWITA, J

SEPTEMBER 23, 2025

BETWEEN

ABDULKADIR A KHALIF ..... PETITIONER

AND

THE PRINCIPAL SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

DIRECTOR OF SURVEYS ..... 3RD RESPONDENT

PUBLIC SERVICE COMMISSION ..... 4TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 5TH RESPONDENT

AND

THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY

DAVID KIBIWOTT ACHIKWA ..... INTERESTED PARTY

JUDGMENT

Petition

1. The petitioner filed this petition against the respondents, claiming that certain provisions in the *land Act* violate various constitutional provisions in so far as the mandate of the National Land Commissions is concerned visa a vis those of the Ministry of Lands and Physical planning. The petition is supported by the petitioner's affidavit and two supplementary affidavits.

2. In 2009, the government enacted the National Land Policy (Sessional paper No. 3 of 2009) whose clause 41 established the National Land Commission (NLC). After the promulgation of the 2010 Constitution NLC became one of the Constitutional Commissions established under article 67. The *National Land Commission Act* (NLC Act) was also enacted to operationalise the NLC with the mandated to manage public land on behalf of the National and County governments.

3. The promulgation of *the Constitution* saw the repeal of the old land laws and enactment of new land law statutes, including The *Land Act*, *Land Registration Act* and the *National Land Commission Act*

4. The petitioner stated that following the establishment of the NLC, the office of the Commissioner of Lands ceased to exist and so was its overall responsibility over land management in the country. The NLC was then mandated to manage and administer public land while the Ministry retained the function of registration of leases relating to public land. The functions of survey and mapping were devolved to the county governments by virtue of section 8 of Part II of the Fourth Schedule to *the Constitution*.

5. The petitioner asserted that by virtue of section 31 of the NLC Act, the staff who, immediately before the commencement of the NLC Act were employees of the government in the Ministry in any of the departments whose functions had been transferred to the NLC were by operation of law deemed to be employees or members of staff of the NLC.

6. The petitioner further asserted that by virtue of section 32 of the NLC Act, NLC inherited all property, assets, rights, liabilities, obligations, agreements and other arrangements existing at the commencement of the Act and vested in, acquired, incurred or entered into by or on behalf of the Ministry with respect to the departments whose functions were transferred to the NLC.

7. The petitioner averred that despite the clear position in law, the Ministry and the NLC never came to a consensus on the appropriate body to execute the various functions in the land management and administration which ultimately stalled the land reform process. As a result, the NLC sought an Advisory Opinion from the Supreme Court on its functions and powers on the one hand and those of the Ministry on the other hand to wit; Re the Matter of the National Land Commission [2015] eKLR.

8. Regarding land administration and management functions, the NLC sought to establishthe meaning of the words 'to manage' and 'to administer' public land, unregistered trust land and unregistered community land by virtue of articles 62(2) & (3), 67 (2) (a) & (3) of *the Constitution* and sections 5(1) (a) and 2(e) of the NLC Act and the functions that were previously performed by the Ministry, before the establishment of the NLC, that were transferred to the NLC.

9. On human resources, the NLC sought determination of various issues, among them, whether the officers who perform functions that were previously performed by the Ministry and which had been transferred to the NLC, are answerable to the NLC or the Cabinet Secretary of the Ministry andwhether the Ministry should transfer to the NLC part of the staff that previously worked in the departments of the Ministry, whose functions had been transferred to the NLC or transfer the entire staff in such departments and whether the Ministry can rescind the appointment of the members of staff deployed to the NLC.

10. On transfer of assets the question the NLC sought determined was whether the Ministry was obliged to transfer to the NLC all property and assets of the departments whose functions were now, by operation of the law, transferred to the NLC; and if yes, by what date. On the issue of private land, the NLC sought to establish which agency had the mandate to administer and manage all dealings pertaining to private land; including, but not limited to, processing of development applications and management of the special conditions as contained in the certificate of lease.

11. According to the petitioner, on 15th July 2014, the Attorney General raised a preliminary objection challenging the jurisdiction of the Supreme Court to render an Advisory opinion. However, on 30th October 2014, the Supreme Court overruled the preliminary objection and rephrased the issues for determination on the proper relationship between the mandate of the NLC, on the one hand, and the Ministry of Lands and Urban Development, on the other in the context of Chapter five of *the Constitution*; the principles of governance (Chapter 10) and the relevant legislation.

12. The petitioner stated that despite addressing this issue, the Supreme Court did not address the issues raised in the reference, including those that needed to be addressed with finality such as whether there is need for the existence of a department dealing with land administration in the Ministry; and if so, why should such a department be the one executing leases for public land yet NLC is constitutionally and statutorily tasked with management and administration of all public land and whether maintenance of status quo post the Supreme Court Advisory opinion in 2015 can be construed as contempt of court.

13. In addition to the advisory opinion, a petition was filed in the High Court; (Petition No. 54 of 2015- Anthony Otiende Otiende v Public Service Commission and 2 others (Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR) raising two issues. Of concern was the promulgation of regulations and forms by the Cabinet Secretary for the purpose of effecting section 110 of the *Land Registration Act*, 2012. The court declared the regulations and forms unconstitutional for want of consultation with the NLC and Parliament's approval but suspended the declaration for 12 months to allow the Ministry initiate meaningful engagement with the public, seek and consider the advice of the NLC. In default, the regulations and forms were to be null and void.

14. The petitioner asserted that following those cases the Ministry and the NLC held various meetings and sought expert opinions on the interpretation of the advisory opinion in relation to their functions, one of which culminated in the gazettement by the Cabinet Secretary of Guidelines for Extension and Renewal of Leases through Gazette Notice No. 75 Vol. CXIX.

15. The petitioner stated that despite the foregoing there were still operational challenges that had been caused by the Ministry to the detriment of the NLC. The Ministry is still benefitting from funds in the accounts of the defunct office of the Commissioner of Land which are supposed to be used by the NLC in the management and administration of public land; the ministry is signing and registering leases relating to public land without the approval of NLC and maintaining custody and control of the correspondence files, among others functions.

16. The petitioner stated that on 5th September 2017, the Ministry through the Head of ICT circulated an internal memo making reference to a meeting of the Registrars, Land Administration Officers and the ICT Unit in the ministry in which a dry test of a lease printing system was done without consulting the NLC. The petitioner contended that article 67 of *the Constitution* had been violated owing to the existence of two departments, one in the Ministry and the other at the NLC, dealing with administration of public land and by the Ministry which still retains personnel and office infrastructure, including all correspondence files relating to public land instead of transferring them to the NLC.

17. The petitioner asserted that to the extent that the 2nd respondent had failed to register any instruments relating to public land delivered by the NLC in accordance with sections 13 and 23(2) of the *Land Act*, articles 40, 67 and 252(1)(d) of *the Constitution* had been violated. Further, to the extent that the Ministry continued to use invalid instruments and forms and backdating them contrary to section 110 of the *Land Registration Act*; article 67 of *the Constitution* had been violated.

18. The petitioner contended that the Ministry had violated article 67 of *the Constitution* when operationalizing a lease printing system without consulting the NLC and by running and benefiting financially from funds in the account of the defunct Commissioner of Lands meant for the administration of public land a function of the NLC.

19. The petitioner further asserted that to the extent that the NLC is not allowed to assess and collect land-based revenues in accordance with section 28 of the *Land Act*, is a violation of articles 67(2) (g) and 209 of *the Constitution*. Further still, to the extent that the Public Service Commission continued to appoint persons to hold or act in the abolished land administration department in the Ministry violates articles 232 (1) (b), 233, 234 and 249 of *the Constitution*.

20. The petitioner stated that there are two distinct land files generated in the course of the administration of public land- the correspondence file for the administration of leased public land and deed file for registration of land rights that have been determined either from public land leasing or other processes that include land adjudication, settlement and subleases created from freehold holdings.

21. The petitioner postulated that in land administration there are two main processes- the process of allocation or leasing of public land which creates records that are held in a correspondence file and in the ministry of Lands, the correspondence files make up the correspondence files registry/records office. The correspondence files and the office holding them (records office) is under the directorate mandated to administer public land under articles 62 (2) and 67(2) and should be under the NLC.

22. According to the petitioner from the contents of the correspondence file, it is evident that it is created out of the functions of the NLC as an administrator of public land through determination of land rights and maintained by the managerial aspects of the NLC which include managing the conditions of use under a lease. It is a misconception therefore that once an allotment is issued public land becomes private and hence not within the jurisdiction of the NLC. As the Lessor on behalf of the county and national government has to create the relationship between the lessor and the lessee by executing a lease as per section 23 (2) of the *Land Act* thus, the correspondence file is within the domain of the NLC.

23. Regarding deed files, the petitioner contended that the files are kept in a land registry which is under the Chief Land Registrar thus, fall within the jurisdiction of the Chief Land Registrar and not the Director of Land Administration in the Ministry. The petitioner further contended that the Chief Land Registrar does not require a correspondence file to register a lease or any transaction on that lease because what he receives is an instrument for registration prepared elsewhere by other parties. On the other hand, the NLC does not require a deed file to administer and manage leased public land besides enquiring on the status of the land through the process of undertaking searches like any other party.

24. The petitioner averred that the functions that are exclusive to the land administration directorate of the NLC as part of its management and administration of public land mandate include land administration and management before allocation; land allocation; authorization of payments for legal fees; preparation of land leases and transfers of land; documentation of public institutions; issuance of land rent clearance certificate and consents for various transactions and any other role assigned by the NLC.

25. According to the petitioner, once a lease is registered, the land becomes private property of the lessee so long as there is no alteration on the character of the grant. However, if there is an alteration, the underlying reversionary interest kicks in and the land ceases to be private and becomes public land thereby falling within the mandate of the NLC.

26. Regarding private leases, the petitioner posited that the management function of the NLC on leaseholds constitutes ensuring that the lessee adheres to the special conditions attached to the letter

of allotment and carried forward to the lease for prudent management of public leases. It also ensures that consents are given whenever a transaction is being undertaken and that revenue (land rent) is paid as per the lease terms and comes in when there are alterations to the character of the grant.

27. On collection of taxes, the petitioner maintained that paragraph 241 of the Supreme Court advisory opinion clarified the collection function of the NLC and made specific reference to section 28 of the *Land Act*. The petitioner denied the respondents' assertion that NLC's mandate in so far as preparation of leases and grants is concerned ends with the issuance of letters of allotment. The petitioner maintained that one of the functions of the land administration directorate of the NLC in the Process and Procedures Handbook of NLC is preparation of leases. NLC as the administrator of public land is mandated with managing the conditions of use under a lease.

28. The petition denied that the petition is res judicata. According to the petitioner, the issues in this petition are different from those that were in petition No. 250 of 2016: Okiya Omtatah Okoiti v Ministry of Lands, Housing & Urban Development & 2 Others (Consolidated with) JR Case No. 261 of 2016: Republic (John Mutwori Njue & Another) v Attorney General &2 others.

29. The petitioner urged that those cases were challenging the validity of the report of the Joint Technical Implementation Committee that was mandated to interpret the Advisory Opinion of the Supreme Court. Parties in those cases trying to re-litigate issues that had been determined by the Supreme Court in its Advisory opinion and were struck out by the High Court for the reason that the proper forum to ventilate the issue whether the purported interpretation and application of the Supreme Court advisory opinion is correct was the Supreme Court. The proceedings in the consolidated cases were caught up by the doctrine of collateral estoppel. The present petition, on the other hand is not assaulting the validity of the report, but faulting failure to implement it.

30. Based on the above concerns, the petitioner sought the following reliefs:

    A. A declaration that article 67 of *the Constitution* has been gravely violated on account of the Ministry of Lands having a fully functional department dealing in the management and administration of public land despite that being the reserved Constitutional and statutory mandate of the National land Commission.

    B. A declaration that articles 40, 67 and 252(1)(d) of *the Constitution* have been gravely violated on account of the Ministry's refusal to register instruments prepared, executed and presented by the NLC for registration as well as its continuous use of invalid instruments and forms and backdating them.

    C. A declaration that articles 67(2) (g) and 209 of *the Constitution* have been gravely violated on account of the Ministry's continual use of the account of the defunct Office of Commissioner of Lands.

    D. A declaration that articles 232 (1) (b), 233, 234 and 249 of *the Constitution* have been gravely violated on account of the Public Service Commission's continual appointment of persons to hold or act in the abolished land administration department in the Ministry.

    E. An Order of Mandamus compelling the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons to register any and/or all instruments relating to public land prepared, executed and delivered to them by the National Land Commission in accordance with section 13 of the *Land Act* and articles 67 and 252(1)(d) of *the Constitution* of Kenya.

F. An order of mandamus be issued compelling the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons to shut down the account of the Commissioner of Lands with immediate effect, account for the funds therein and the funds be and are hereby transferred to the National Land Commission for its use in the functions of management and administration of public land and collection of land based revenues as per the law on the functions and powers of the National and County governments and to account for those funds in line with the provisions of article 67(2) (g) and 209 of *the Constitution* of Kenya and section 28 of the *Land Act*.

G. An order of mandamus compelling the Public Service Commission and/or its employees, authorized agents, assigns or any other authorized persons to disband the Land Administration Directorate in the Ministry which is currently duplicating the Constitutional and Statutory roles of managing and administering public land which of the National land Commission.

H. An order be issued that the parallel structure between the Land Administration Department in the Ministry of Lands and Physical Planning and the National Land Commission be and is hereby dissolved and the function of administration of public land together with all personnel and office infrastructure in respect of the departments whose functions have been transferred to the National Land Commission by virtue of article 67 of *the Constitution* and sections 31 and 32 of the NLC Act be vested exclusively in the National Land Commission.

I. An order of mandamus compelling the Director of Surveys to avail to the National Land Commission all the Registry Index Maps and Deed Plans relating to public land that has been surveyed so as to enable the National land Commission prepare leases relating to public land effectively.

J. An order of mandamus be issued compelling the Ministry of Lands and Physical Planning to transfer the full control, custody and management of all the correspondence files relating to public land under article 62 of *the Constitution* of Kenya, 2010 to the National land Commission so as to enable the National Land Commission prepare leases relating to public land effectively.

K. An order of Prohibition be issued prohibiting the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons from undertaking any dealings in relation to public land without the express approval of the National Land Commission.

L. An order of Prohibition be issued prohibiting the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons from registering leases inrelation to public land without the same having been prepared and executed by the National land Commission.

M. An order of Prohibition be issued prohibiting the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons from utilizing the already operationalized Lease Printing System and/or using a Lease document that has not been prepared and/or executed by the National Land Commission; which is the body authorized to execute leases relating to public land; to register leases relating to public land.

N. The costs of this petition be borne jointly and severally by the respondents.

O. Any such other order(s) as this Honourable Court shall deem just in the circumstances.

1st, 3rd and 5th respondents' response

31. The 1st, 3rd and 5th respondents opposed the petition through a replying affidavit sworn by Edward Kosgei. They stated through Mr. Kosgei that the office of the Commissioner of Lands was abolished upon the repeal of the Government Lands Act (Cap 280), after the promulgation of the 2010 Constitution.

32. The 1st 3rd and 5th respondents admitted the establishment of NLC under article 67 (1) of *the Constitution* with the mandate and functions stipulated in Clause (2). They however contended that from that mandate, all other functions which were previously performed by the Commissioner of Lands were retained by the Ministry except those touching on public Land. In their view, the NLC is only to administer and manage public land while community land and private land was left to the Ministry.

33. The three respondents asserted that land which had been allocated by the Commissioner of Lands prior to the promulgation of *the Constitution*, constitutes private land under article 64 of *the Constitution* and does not fall under mandate of the NLC. Any land which had been allocated by NLC post the effective date (27th August 2010) also constitutes private land under article 64 of *the Constitution*.

34. The 1st, 3rd and 5th respondents denied the petitioner's assertion that the Ministry only retained the function of registration of land. They stated that by virtue of article 66 (1) of *the Constitution*, the State has the authority to regulate the use of any land, or any interest in or right over any land in the interest of defence, public safety, public order, public morality, public health or land use planning.

35. The respondents asserted that Executive Order Number 1 of 2016 assigned both the Ministry of Lands and Physical Planning and the NLC specific functions that they ought to perform independently. The Land Administration Directorate at the Ministry of Lands and Physical Planning performs various functions which include; processing of leases and grants and processing of subdivision and amalgamations, among others.

36. It was their position, that the Ministry does not prepare and execute leases relating to public lands but is only involved in registration. The Ministry has never transferred the management of private lands, including processing of development applications for subdivisions, preparation and extension of leases; changes of land user; consents to transfer, charge and lease to the NLC.

37. The 1st, 3rd and 5th respondents asserted that the Supreme Court advisory opinion was categorical that the NLC had no role in the registration of titles to land, (public, community or private) and that the task of registering land and titles lies with the national government (Ministry). In the advisory opinion, they maintained, the Supreme Court also stated that the functions of the NLC are consultative, advisory, oversight and safeguard oriented.

38. These respondents contended that from the foregoing, the NLC's mandate is limited to public land management. Further; the NLC does not charge for services rendered to public institutions and collection of other land-based revenue had been transferred to the E-payment platform which is a government initiative to harmonize and streamline operations of government ministries, department and agencies in so far as revenue collection is concerned.

39. It was their position that when the NLC came into existence, there were officers working at the Ministry who decided to retire and join the NLC; some were seconded to the NLC for a particular period of time and others opted to remain and work in the Ministry. There is therefore no officer in the Ministry who ought to be employed or appointed a member of staff of the NLC.

40. The three respondents asserted that both the Ministry and the NLC have their properties, assets, rights and obligations and as such, there is no institution that should claim any overriding interest over the other. By virtue of article 206 of *the Constitution*, all the money collected by the Ministry is sent to the Consolidated Fund and as such, no money should be transferred to the NLC.

41. The 1st, 3rd and 5th respondents maintained that the meeting the held by the ICT department with registrars and land administrators was a normal interdepartmental meeting to discuss internal administrative issues. It is also not true that the Ministry had refused to register instruments which are validly prepared, executed and presented by the NLC or any other entity for registration. It is again not true that the Ministry uses invalid instruments and forms or backdates any documents as alleged.

42. The three respondents asserted that the position of the director of land administration in the Ministry was established in accordance with the law; the issue of the functions of the Ministry vis a vis those of the NLC had been addressed in various decisions including; The Supreme Court Advisory Opinion No. 2 of 2014- The National Land Commission v The Ministry of Lands, Housing & Urban Development &7 others; Nairobi High Court Petition No.54 of 2015-Anthony Otiende Otiende v Public Service Commission & 2 others; Nairobi HC Petition No. 250 of 2016 Okiya Omtatah Okoiti v Ministry of Land, Housing & Urban Development & 2 others (Consolidated with) Judicial Review case Number 261 of 2016-Republic (Jackson Mutwiri Njue & Another) v Attorney General & 2 others and Eldoret ELC Misc App. No. 18 of 2017- David Kibiwott Achikwa v Cabinet Secretary for Lands & Physical Planning & Another.

43. It was these respondents' view, that the issues raised in the petition are res judicata. Further that the ultimate solution is the regulations to operationalize land laws, which had already been forwarded to the office of the Attorney General for onward transmission to Government printer for publication.

2nd respondent's response

44. The 2nd respondent opposed the petition through a replying affidavit sworn by Pauline N. Muriithia (Ms. Muriithia). The 2nd respondent largely agreed with the position taken by the 1st, 3rd and 5th respondents regarding the issues raised in the petition and that they had been determined; the mandate of NLC and that of the Ministry and what constitutes private land.

45. The 2nd respondent denied the allegation that the office of the Chief Land Registrar had usurped any of the functions of the NLC. The 2nd respondent maintained that the Supreme Court advisory opinion was categorical that the NLC had no role in the registration of titles to land whether public, community or private and that the task of registering land titles lies with the national government through the Ministry. According to the 2nd respondent, the Supreme Court further stated that only the Ministry has authority to register and issue titles for the reason of the State's role as guarantor of the sacrosanctity of titles.

46. The 2nd respondent maintained that it is only the Chief Land Registrar who is mandated to register leases; that the director of surveys forwards Registry Index Maps and Deed Plans to the office of the Chief Land Registrar because it is the only office that can register title to land. The 2nd respondent asserted that by virtue of section 108 of the *Land Registration Act*, until the Cabinet Secretary had made the regulations contemplated under section 110, any rules, or other administrative acts made, given, issued or undertaken before the commencement of the *Land Registration Act* under any of the Acts of Parliament repealed by *Land Registration Act* or any other law, continued to be in force and were to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the *Land Registration Act*.

47. The 2nd respondent stated that the regulations had been prepared and were awaiting publication and approval by Parliament. Until the regulations come into force, the Ministry and its departments were operating under the transitional provisions in section 108 of the *Land Registration Act*.

1st interested party's response

48. The 1st interested party informed the court that it supported the petition through an affidavit sworn by Edmund Kiplagat on 27th November 2017. The affidavit was however not in the court file at the time of preparing this judgment.

2nd interested party's response

49. The 2nd interested party opposed the petition his application for joinder dated 23rd November 2017, further affidavit sworn on 28th November 2017 as well as supplementary affidavit sworn on 6th December 2017. The 2nd interested party sought to have the orders and directions issued on 8th November 2017 varied and the dismissal of the petition.

50. The 2nd interested party stated that while the petition was filed on 27th September 2017, he had instituted a suit in Eldoret, Judicial Review Application No. 19 of 2017-Republic v The Cabinet Secretary for Lands and Physical Planning & The National Land Commission on 27th July 2017 challenging the legality of the Gazette Notice No. 5734 of 2017 which purported to confer on NLC the mandate to prepare and execute leases in relation to public land that has been allocated to private persons and conditions for allocation fulfilled.

51. The 2nd interested party stated that prior to the Gazette Notice, the NLC had no role to play in respect to preparation and execution of leases over land that had been allocated and condition satisfied. According to the 2nd interested party, the Judicial review application contended that public land under article 62 of *the Constitution* ceases to be such once the NLC allocates land to a private person who complies with conditions in the letter of allotment.

52. The 2nd interested party asserted that the Environment and Land Court (ELC) made an order on 1st August 2017 staying the decision contained in or proceedings taken pursuant to the guidelines for extension of Leases and Renewal of Leases, Gazette Notice No. 5734 of 2017. The court further directed that the procedure to extend and renewal of leases, subdivision and change of user for the leasehold titles in relation to private land to remain as it was before the Guidelines and to be undertaken by the same persons before the Guidelines, pending the hearing and determination of the judicial review application.

53. The 2nd interested party was therefore of the view, that the orders issued by this court on 8th November 2017 conflict with the orders issued by the ELC, which prevail over those issued by this court. The 2nd interested part was of the further view, that the ELC is properly seized of the dispute of whether NLC should prepare and execute leases over land in relation to which allottees have complied with the conditions. This court should halt its proceedings to avoid a possibility of conflicting outcomes.

54. The 2nd interested party asserted that this petition relates to the exercise of functions by the NLC in relation to land over which ELC has original and appellate jurisdiction by virtue of article 162 (2)(b) of *the Constitution* as read with section 13 (1) of the ELC Act thus, this court lacks jurisdiction to determine the petition.

55. The 2nd interested party contended that the court papers and orders issued in the judicial review application on 1st August 2017 were served on the NLC on 3rd August 2017, where the petitioner was a commissioner.

56. The 2nd interested party reiterated that by reason of the foregoing, there was a pending litigation where the question of whether NLC should prepare and execute leases in relation to land that had been allocated was directly and substantially in issue. Further, the ELC had made an order allowing the Ministry through its department of land Administration to, among others, prepare and execute leases in relation to land that had been allocated, pending the hearing and determination of the judicial review application.

57. It was the 2nd interested party's view, that the petition is an abuse of the court process and the orders of this court issued on 8th November 2017 were obtained by reasons of material non-disclosure and should be set aside.

Submissions

58. This petition was disposed of through written submissions with oral highlights.

Petitioner's submissions

59. Mr. Kanjama, SC, learned counsel for the petitioner, submitted highlighting their written submissions that this court has jurisdiction to determine the petition by virtue of article 165 (3) of *the Constitution*. Senior counsel argued that it would be an affront to justice if citizens are denied their fundamental right to property on account of the tussle between the Ministry and the NLC and relied on the decision in Multiple Hauliers East Africa Limited v Attorney General & 10 others [2013] eKLR.

60. Mr. Kanjam, SC, urged the court to apply the purposive approach in interpreting *the Constitution* as required by article 259 of *the Constitution*. Senior counsel relied on the decisions in re the matter of The Principle of Gender Representation in the National Assembly and The Senate [2012] eKLR (the Dissenting Opinion of Dr. Willy Mutunga CJ & PSC) and In the Matter of the Interim Independent Electoral Commission [2011] eKLR.

61. Learned Senior Counsel argued that the interest of the NLC in managing and administering public land continues throughout the subsistence of a lease, especially where a private land user alters the character of a grant. Senior Counsel gave a historical background on what informed the establishment of the NLC from the Commission of Inquiry into the illegal/irregular Allocation of Public Land (Ndungu Commission Report) to the Truth Justice and Reconciliation Commission (TJRC Report) and argued that the NLC effectively succeeded the Office of the Commissioner of Lands and took over the functions of the land administration directorate.

62. According to Mr. Kanjama, SC, the transfer of staff and assets from the Ministry to the NLC included the infrastructure such as all the correspondence files that were in the custody and control of the Ministry that relate to public land prior to the establishment and operationalization of the NLC in 2013. Mr. Kanjama, SC. submitted that in order to prepare leases relating to public land effectively, the NLC requires unrestricted access to the Registry Index Maps and Deed plans that come about as a result of the survey functions of the Directorate of Surveys. However, presently, the NLC has limited access to the survey documents on account of the Directorate of surveys forwarding them directly to the Ministry. As a result, the Ministry, through its employees, agents and other authorized persons prepares and executes leases relating to public land, a function reserved for the NLC.

63. Senior counsel argued that the Supreme Court advisory opinion insisted on the complementary nature of the constitutional organs and that no organ may purport to carry on its functions in isolation. The survey department therefore should avail the requisite survey maps in the spirit of collaboration and consultation thus, the court should grant prayers A, H, I, J and L of the petition.

64. Regarding violation of articles 40, 67 and 252 (1) (d) of *the Constitution*, Mr. Kanjama, SC argued that the Supreme Court advisory opinion enunciated functions exclusive to the Ministry and those for the NLC, and submitted that pursuant to that opinion the Ministry has the task of registration of interest in land while the NLC is mandated to manage and administer public land. Senior counsel argued that in exercise of that function, the NLC is required to prepare and execute leases relating to public land then forward them to the Ministry for registration. However, since December 2016, the Ministry had on numerous occasions refused to register leases relating to public land that had been prepared and executed by the NLC contrary to sections 13 and 23(2) of the *Land Act*. The Ministry had also on several occasions prepared, executed and then registered leases relating to public land.

65. Learned Senior counsel maintained that the High Court decision in the Otiende case (supra) suspended the invalidation of the regulations and forms promulgated by the Cabinet Secretary for one year. The Cabinet Secretary was obligated to promulgate new regulations and forms in compliance with the procedure within the specified period but was yet to comply.

66. Mr. Kanjama, SC. submitted that the matter arising from public land, including initialization and operation of a new lease printing system must be done with the consent of the NLC. However, the Ministry went ahead and ran a dry test of a lease printing system without consulting the NLC in violation of article 67 of *the Constitution* and section 110 of the *Land Registration Act* thus, the court should grant prayers B, E, K and M in the Petition.

67. Regarding violation of articles 67 (2)(g) and 209 of *the Constitution*, Senior Counsel submitted that according to the Supreme Court advisory opinion, the NLC has mandate to issue licenses, leases and grants in respect of public land subject to the conditions set out in law. Section 28 of the *Land Act* provides for the collection of rent charged on the use of land and further requires the NLC to account for the payments received under any lease or license to either the national or county government. Despite this delineation, the Ministry is presently collecting and receiving payments accruing to public land using the account of the defunct office of Commissioner of Lands and benefiting from the same at the detriment of the NLC. Learned Senior counsel urged that prayers C and F in the petition be granted.

68. Senior counsel again submitted that with the establishment of the NLC, in 2013 meant that all personnel in the Ministry departments whose functions were now within the mandate of the NLC had to be transferred to NLC. This included the land administration directorate by virtue of article 67 and sections 5 and 6 of the NLC Act. Despite the foregoing the department is still operating thus, duplicating the function of the NLC in violation of articles 232 (1) (b), 233 and 249 of *the Constitution*.

69. Mr. Kanjama, SC, reiterated that the 4th respondent's action of appointing persons to the land administration directorate department in the Ministry is a violation of *the Constitution* and interferes with the function of the NLC hence prayers D and G should be granted.

70. On jurisdiction, Senior Counsel relied on the decisions in Ernest Kevin Luchidio v Attorney General & 2 others [2015] eKLR and In the Matter of the Interim Independent Electoral Commission [2011] eKLR for the position that this court has jurisdiction to hear and determine this petition. Learned senior counsel argued that the ELC only handles disputes that fall within its jurisdiction by virtue of article 162(2) of *the Constitution* and section 13 of the ELC Act. Senior counsel relied on the decision

in Ernest Kevin Luchidio case (supra); David Ramogi & 4 others v The Cabinet Secretary, Ministry of Energy & Petroleum & & others [2017] eKLR and Anthony Otiende Otiende v Public Service Commission & 2 others [2016] eKLR. Senior counsel maintained that this petition seeks various reliefs under article 23 of *the Constitution*, including declarations that various articles of *the Constitution* had been violated.

71. Mr. Kanjama, SC. went on to argue, that the present petition does not relate to a specific parcel of land; does not revolve around ownership, possession and petitioner's legal rights with regard to a specific parcel of land. Rather, the petition relates to the fact that the Ministry is interfering with the constitutional and statutory functions of the NLC, including preparation of leases relating to public land. This court therefore has jurisdiction to determine the petition.

Respondents' submissions

72. Mr. Kuria, learned counsel for the 2nd., 3rd and 5th respondents submitted that the petition is res judicata because the issues raised have been substantively determined by various courts, including the Supreme Court advisory opinion which determined and settled with finality the issue of the functional overlaps between the NLC and the cabinet Secretary through the Ministry.

73. Learned Counsel argued that the issue framed by the Supreme Court in its advisory opinion having been determined, this court is barred from determining the same issues. Counsel relied on articles 163(7) of the Constitutions and the decisions in Peter Nganga Muiruri v Credit Bank Limited & 2 others [2008] eKLR and Macharia & Another v Kenya Commercial Bank & 2 others [2012] KESC 8 (KLR).

74. Mr. Kuria relied on the contents of the replying affidavit on behalf of the 2nd respondent and also argued that the High Court has previously declined the invitation to determine matters related to those in issue in this petition. Learned counsel urged the court to decline this petition on grounds that it is res judicata following decisions from courts of concurrent jurisdiction.

75. Mr. Kuria denied the petitioner's argument that the respondents were duplicating roles of the NLC on the establishment of the land administration directorate. Counsel relied on article 61(2) of *the Constitution* for the position that management of private and community land falls within the mandate of the Ministry.

76. Mr. Kuria further argued that the NLC's role is to administer and manage unalienated public land. The process of alienation of public land ends with the issuance of a letter of allotment and acceptance thereof by virtue of section 9 (2) (a) of the *Land Act*. Further, that the Supreme Court advisory opinion was categorical that the NLC has no role in the registration of titles to land (public, community or private) and that the task of registering land titles lies with the national government, a function that falls under the mandate of the office of the Chief Land Registrar.

77. Learned counsel asserted that the NLC has no role in the preparation of leases in so far as private land and community land is concerned. The documents for preparation of leases after allocation of public land should be forwarded to the Ministry for preparation of the lease. Learned Counsel submitted that land that had already been allocated by the defunct Commissioner of Lands under the repealed Government *Land Act* does not fall within the mandate of the NLC.

78. According to Mr. Kuria, the Supreme Court was categorical in the advisory opinion that the role of NLC is consultative, advisory, oversight and safeguard oriented. The Supreme Court also held that the relationship between the NLC and the ministry is interdependent in that the NLC formulates policies and the Ministry implements those policies. Learned counsel reiterated the contents in the replying

affidavit by the 2nd respondent regarding employees and staff and asserted that the issue does not arise. Counsel urged the court to dismiss the petition with costs.

2nd interested party's submissions

79. The 2nd interested party filed written submissions urging that the petition be dismissed for three reasons. First; that this court lacks jurisdiction to hear and determine the petition which concerns administration and management of public and private land; second, the issues raised in the petition were directly and substantially in issue in Eldoret Judicial Review Application No. 8 of 2017 which was pending in court; third, the petition was filed and the orders of 8th November 2017 obtained without disclosure of material facts.

80. The 2nd interested party submitted that by virtue of rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule, 2013 (Mutunga Rules), this court has inherent jurisdiction to reconsider or review its earlier finding that it has jurisdiction to hear this petition and make appropriate orders. Counsel relied on the decisions in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] eKLR and David Ramogi & 4 others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 others [2017] eKLR.

81. The 2nd interested party cited articles 162 and 165 (5) of *the Constitution* to argue that this Court has no jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court or falling within the exclusive jurisdiction of the ELC. Reliance was placed on the decision in David Ramogi & 4 others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 others (supra).

82. The 2nd interested party urged this court to consider the implication of section 13(2) (c) of the ELC Act and submitted that this petition concerns a dispute relating to land administration and management, which is a preserve of the ELC. On this basis this court should set aside the orders of 8th November 2017 and dismiss the petition for want of jurisdiction.

83. The 2nd interested party again argued that the issues raised and the orders sought in the petition are similar to those sought in the judicial review application before the ELC thus, the petition offends the doctrine of sub judice. Counsel relied on the decisions in Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & Another [2016] eKLR and Vallerie Namtilu Wafula & another v Kenya National Union of Teachers (KNUT) & 2 others [2012] eKLR.

84. The 2nd interested party again relied on the decision in Heritage Insurance Company Limited v Patrick Kasina Kisilu [2015] eKLR for the position that if the court had jurisdiction, it would have stayed these proceedings. However, since the Court lacks jurisdiction, it should dismiss the petition.

85. According to the 2nd interested party, the petitioner was a Commissioner of the NLC which is a party in the judicial review application and court papers in the judicial review application were served on the NLC on 3rd August 2017. The petitioner therefore knew or ought to have known of the existence of the Judicial review application raising similar issues and the orders issued therein, but filed this present petition without disclosing the existence of the Judicial Review application. He relied on the decision in Aviation & Airport Service Workers Union (K) v Kenya Airport Authority & another [2014] eKLR and urged the court to dismiss the petition with costs.

86. The 1st interested party did not file submissions and did not participate in these proceedings.

Determination

87. Having considered the pleadings and arguments by parties, the issues that arise for determination are; whether this court has jurisdiction; whether the petition is res judicata and depending on the answer

to these issues, whether there is violation of *the Constitution* in relation to the functions and mandate of the NLC.

Jurisdiction

88. The respondents and the 2nd interested party argued that this court has no jurisdiction to determine this petition on grounds that the petition concerns a dispute relating to land administration and management, a preserve of the ELC and therefore falling within the jurisdiction of the ELC.

89. The petitioner, on his part, maintained that this court has jurisdiction to hear and determine the petition. According to the petitioner, the ELC only deals with disputes falling within its jurisdiction by virtue of article 162(2) of *the Constitution* and section 13 of the ELC Act. Further, that this petition seeks various reliefs under article 23 of *the Constitution*, including declarations on violation of several articles of *the Constitution*.

90. The petitioner argued therefore that this petition does not relate to a specific parcel of land; does not revolve around ownership, possession or legal rights with regard to a specific parcel of land. The petition relates to the fact that the Ministry is interfering with the constitutional and statutory functions of the NLC such as preparation of leases relating to public land thus, the court has jurisdiction to determine the petition.

91. Jurisdiction is the power or authority given to a court to hear and determine disputes presented before it. A challenge to jurisdiction is a threshold and fundamental question that should be determined at once. If the court finds that it has no jurisdiction to hear the matter, that must be the end. The court should not take any further step, but must down its tools. (See Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KECA 48 (KLR))

92. Jurisdiction of a court to hear a matter being a threshold question, has to be determined based on the facts of the particular matter before it. Where the court determines that it has no jurisdiction to hear that particular matter, it will have no power to proceed beyond that point.

93. In Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR, the Supreme Court stated:

> (68) 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... without jurisdiction, the Court cannot entertain any proceedings...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.

94. In re the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (supra), the Supreme Court observed:

> [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

95. It follows therefore that jurisdiction of a court must flow from *the Constitution*, statute or both. The court should only exercise jurisdiction as conferred on it by *the Constitution* or the law. It must not act without jurisdiction.

96. The argument by the respondents is that the issues raised in the petition fall within the jurisdiction of the ELC, a position supported by the 2nd interested party. The petitioner took the opposite view, that the issues raised fall within this court's jurisdiction. To resolve this issue, the court has to look at *the Constitution* and the law, namely; the ELC Act.

97. Article 162(2) of *the Constitution* required Parliament to establish courts with equal status to 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 also to determine respective jurisdiction and functions of those courts.

98. Parliament enacted the ELC Act which established the ELC in compliance with article 162(2)(b) with section 13 of the ELC Act providing for the jurisdiction of that court.

99. Section 13(1) provides that the court shall have jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of *the Constitution* and the provisions of the Act or any law applicable in Kenya relating to environment and land. Section 13(2) provides that in exercise of its jurisdiction under Article 162(2) of *the Constitution*, the ELC has power to hear and determine-

    a. 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. land administration and management

    d. 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 land.

100. Section 13(3) provides that nothing in the Act should preclude the ELC from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*. Section 13(7) further enumerates the orders and reliefs the ELC may grant, which include prerogative orders, award of damages and compensation.

101. The jurisdiction of this court, on the other hand, is donated by article 165(3) of *the Constitution*. This court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear an appeal from a decision of a tribunal appointed under *the Constitution* to consider removal of a person from office, other than a tribunal appointed under article 144; jurisdiction to hear any question respecting interpretation of *the Constitution*, including the determination of—whether any law is inconsistent with or in contravention of *the Constitution*; whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*; any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; questions of conflict of laws and any other jurisdiction, original or appellate, conferred on it by legislation.

102. In short, article 165(3) authorises this court to hear and determine a wide range of matters while exercising both original and appellate jurisdiction. However, the broad jurisdiction of this court is not without caveat. Article 163(5) limits this court's jurisdiction in respect of matters reserved for the Supreme Court and matters falling within the jurisdiction of the courts contemplated in Article 162(2), namely; the ELRC and the ELC.

103. I have considered the arguments by parties, the facts of this petition and constitutional and statutory provisions. Article 162(2)(b) is clear that the ELC is to deal with disputes relating to environment and the use and occupation of, and title to, land. It also exercises the jurisdiction expounded in section 13 of the ELC Act.

104. On the other hand, *the Constitution* and in particular, article 165(3) is clear on the jurisdiction of this court so that when this court's jurisdiction is challenged, as it has in this petition, the challenge has to be viewed through the prism of article 165(3)(d)(ii) namely, determination of the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.

105. Based on the broad issues raised in the petition which require interpretation of *the Constitution* on the functions and mandate the two organs of State, the Ministry acting through the Cabinet Secretary and other officers and the NLC, it is my finding that the issues raised in the petition fall within the jurisdiction of this court and therefore this court is well seized of this petition.

Res judicata

106. Having disposed of the issue of jurisdiction, the next issue is whether this petition is res judicata. The respondents argued that the petition is res judicata because the issues raised were dealt with by the Supreme Court in the advisory opinion; Nairobi High Court Petition No.54 of 2015-Anthony Otiende Otiende v Public Service Commission & 2 others; Nairobi HC Petition No. 250 of 2016 Okiya Omtatah Okoiti v Ministry of Land, Housing & Urban Development & 2 others (Consolidated with) Judicial Review Number 261 of 2016-Republic (Jackson Mutwiri Njue & Another) v Attorney General & 2 others and Eldoret ELC Misc App. No. 18 of 2017- David Kibiwott Achikwa v Cabinet Secretary for Lands & Physical Planning & Another.

107. The petitioner maintained that the issues raised in the petition were not determined in the advisory opinion. According to the petitioner, the advisory opinion explained functions exclusive to the Ministry and those for the NLC. Pursuant to that opinion the Ministry's task is to register interest in land while the NLC's mandate is to manage and administer public land. However, the Ministry had on numerous occasions refused to register leases relating to public land that had been prepared and executed by the NLC in violation of the law (sections 13 and 23(2) of the *Land Act*) thus, the petition challenges actions that are deemed not only unconstitutional but also contrary to law.

108. Section 7 of the *Civil Procedure Act* provides that "No court shall try any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally determined by such court."

109. Res judicata is therefore a bar to subsequent litigation over issues that have been previously litigated upon between the same parties in a court of competent jurisdiction and the court determined the issues with finality. That is; the doctrine of res judicata protects finality in litigation over similar issues between the same parties in courts of competent jurisdiction preventing re litigation of the same issues.

110. In Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another (Motion No 42 of 2014) [2016] eKLR, the Court of Appeal stated on the essence of res judicata:

> Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....[T]he doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.

111. The Supreme Court had occasion to deal with the issue in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR), stating:

> (58) [W]henever the issue of res judicata is raised, the court will look at the decision claimed to have settled the issue in question; the entire pleadings and record of that previous case and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.

112. The position in law is that for the plea of res judicata to succeed, the issues in the previous suit and in the new suit should be similar; parties in the two cases be the same or litigating under the same title and issues in the former suit should have been finally determined by a court of competent jurisdiction. In making that determination, the court dealing with the plea of res judicata, should look at the pleadings and prayers sought in the two suits; the parties in the former suit and the subsequent suit and the decision of the court in the previous suit to ascertain whether the matter was before a court of competent jurisdiction; the issues were indeed, similar and they had been determined with finality.

113. To prove res judicata in the present petition, the respondents had to demonstrate that the issues in this petition had been determined with finality in the advisory opinion and the previous petitions. To this extent, the respondents argued that the issues were determined in both the petitions and the advisory opinion contending, therefore, that this petition is res judicata.

Otiende petition

114. I have perused the judgment in Anthony Otiende Otiende v Public Service Commission & 2 others [2016] KEHC 938 (KLR). The petition raised two core issues. One concerned the promulgation of regulations and forms by the Cabinet Secretary who was the 3rd Respondent, for purposes of effecting the provisions of the *Land Registration Act*.

115. The second issue was on the appointment of the Chief Land Registrar by the Public Service Commission which was named as the 1st Respondent; the manner of appointment as well as qualifications. The appointment was challenged for being unconstitutional, irregular and illegal.

116. Regarding the appointment of the Chief Land Registrar, the court was of the view that the dispute had become moot and was no longer live or an existing controversy as the appointee no longer occupied the position. "Mootness in and of itself barred the court from determining that aspect of the dispute as the appointment and occupation of office as the Chief Land Registrar had both since terminated." There would be no benefit to the larger public. Neither would any legal certainty be achieved by determination of the issue as raised in the petition.

117. Regarding regulations and forms, the petitioner's argument was that even though the Cabinet Secretary had powers under section 110 of the Act to make regulations which may prescribe forms to

be used in connection with the Act as well as any other matters for the better carrying application of the Act, such regulations had to take into account advice from the NLC as well as meet Parliamentary approval as required under section 110(2) of the Act. According to the petitioner, the Cabinet Secretary disregarded this statutory requirement; did not seek NLC's advice or Parliamentary approval before promulgating the regulations and statutory forms. The Cabinet Secretary also failed to conduct public participation prior to the promulgation of the regulations and forms.

118. The Cabinet Secretary contended that advice from the NLC was not necessary since the NLC's only mandate under article 67(2) of *the Constitution* was to advise the national government on a comprehensive land registration programme.

119. In its decision, the court observed that it is clear that while the functions and powers were isolated to individual officers and bodies, with the aim of rationalizing the registration of title, no individual office or body is expected to operate and act in isolation. The NLC is an independent constitutional commission vested with powers, inter alia, to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya under Article 67(2) (c) of *the Constitution* and section 6(1) of the *National Land Commission Act*. The NLC does not however act and operate in isolation as independent a commission as it is.

120. The court made reference to the Supreme Court advisory opinion thus:

> [253]...the relationship between the NLC and the National and County Government is one of mutual cooperation, coordination and consultation. The functions of these constitutional organs are complementary and no organ may purport to carry on its operations in isolation. This element is a recurring theme throughout the [Land Registration] Act".

121. The court made reference to further pronouncement by the Supreme Court that "The Cabinet Secretary, while undertaking these functions, is to take into consideration the advice of the NLC, on the comprehensive programme for the registration of title to land in Kenya, in accordance with *the Constitution*" (para 265).

122. The court then stated:

> [57]. In my view, a programme for the registration of title to land in Kenya should not and cannot constitute, at this stage of revising consolidating and rationalizing registration of titles to land, a one stop blue-print. It is a continuous process involving all the players, namely the NLC, the designated offices under both the *Land Act* and the LRA, the Cabinet Secretary responsible for matters relating to land, the NLC officers and staffers appointed under the *National Land Commission Act* and the County Government officers/executives responsible for matters relating to land. None ought to act in isolation.

123. The court went on to state that for the impugned forms which included prescribed statutory leases to take effect, the Cabinet Secretary was obligated to comply with three steps. Firstly, the advice of the NLC as required under the statute. Secondly, the need of public participation in such subsidiary legislative process and, thirdly, obtain Parliamentary approval of the prescribed regulations, forms or rules. The court concluded that the Cabinet Secretary having failed to comply with the law the regulations and forms were invalid, but suspended the declaration of invalidity for one year.

124. There is no doubt that the Otiende decision, appreciated the collaboration between the Cabinet Secretary and the NLC under article 67(2) of *the Constitution* and the statutes as pointed out in

the Supreme Court advisory opinion that one organ could not act in isolation in discharging their collaborative mandate.

Omtatah petitions

125. The respondents again relied on Okiya Omtatah Okoiti v Ministry of Land, Housing & Urban Development & 2 others [2017] KEHC 8782 (KLR) (Petition 250 of 2016 (consolidated with Judicial Review No. 261 of 2016). I have perused the decision in those petitions where the court noted that parties were in agreement that the genesis of the dispute in those consolidated cases was the advisory opinion of the Supreme Court which clarified the functions and powers of the Ministry vis-à-vis those of the NLC.

126. The court further noted that subsequent to the advisory opinion, the two institutions appointed a special joint committee to interpret and implement the Supreme Court advisory opinion. The committee submitted its report on 25th April 2016 which was adopted on 20th May 2016, prompting that litigation.

127. According to the petitioners, it had been resolved that:

a. All the functions of the Land Administration Department, including processing of leasehold titles both for public and private land be transferred to the Commission which according to the Petitioners is contrary to the express provision of Article 67 (2) (a) which specifically restricts the commission to the management of public land as defined by Article 62 of *the Constitution*.

b. The Commission was also allocated the function of processing all the development applications including, subdivision of Private Land, Extension of lease and change of user on leasehold private land, issuance of consents including transfers on private land.

c. The Commission was given the authority to collect land rent, stand premium and other land taxes contrary to the provision of the Supreme Court's Advisory Opinion at paragraphs 361, 362, and 363. It was however averred that in the meantime, the Commission has delegated the function of collecting land rent to the Ministry and that this is contrary to the management principle that provides that delegation must come from a higher Authority -to a Lower Authority yet the Commission is not superior to the Ministry (the National Government).

128. According to the court, what provoked those proceedings was the decision by the Cabinet Secretary and the NLC to transfer the functions of the Land Administration Department to the NLC. The petitioners were of the view that the transfer of functions would adversely affect Land Administrators employed by the Land Administration Department of the Ministry without their involvement in violation of Article 47 of *the Constitution* and the *Fair Administrative Action Act*.

129. The petitioners argued that the separate and relative functions of the Ministry and the NLC must remain as provided for in *the Constitution* and statutes, and as pronounced in the Supreme Court advisory opinion and cannot be determined or changed through an inter-agency report. They wanted the court to annul the report.

130. However, the petitions did not proceed to hearing as the NLC raised a preliminary objection under the doctrine of collateral estoppel on the basis that hearing the petitions would be a re-litigation of issues that had been raised and determined by the Supreme Court in the advisory opinion regarding the proper relationship between the Ministry and the NLC. The NLC contended that the petitioners were putting forth the same question before the court yet that question had already been answered conclusively. “If perhaps, the litigants seek a different answer to this question, or a simple interpretation

of the Advisory Opinion, again, the proper forum to seek that assistance is the Supreme Court, and not, this Court." The court stated.

131. The court considered the objection and arguments by parties as well as the Supreme Court's advisory opinion and took the view, that the decision determining the respective functions of two state organs, as was the matter before the Supreme Court, cannot be said to be restricted to the parties before that Court. Such a decision is a decision in rem defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely.

132. The court was of the further view, that the proper forum to ventilate the issue whether purported the Ministry and NLC interpretation and application of the Supreme Court's advisory opinion was correct must be the Supreme Court itself. The court noted that the substance of the issue was commenced by invoking the original jurisdiction of the Supreme Court under Article 163(6) of *the Constitution*. It would therefore be improper to subject the interpretation of the decision of the Supreme Court in the exercise of its original jurisdiction to a determination by the High Court.

133. The court upheld the preliminary objection that the proceedings in Petition 250 of 2016 and Judicial Review No. 261 of 2016 were caught up by the doctrine of collateral estoppel and struck out the consolidated petitions on 22nd May 2017.

134. The respondents again relied on Eldoret ELC Misc App. No. 18 of 2017- David Kibiwott Achikwa v Cabinet Secretary for Lands & Physical Planning & Another to support their argument on res judicata. The respondents did not show that the Kibiwott case had been determined; how, if so, and how that determination rendered this petition res judicata.

135. The respondents again relied on the Supreme Court advisory opinion to argue that the petition is res judicata. As already stated in the preceding paragraphs, courts in the Otiende petition and Okiya Omtatah petitions made reference to the Supreme Court advisory opinion in the course of determining those petitions.

136. I have also read the advisory opinion which related to the functions and powers of the NLC on the one hand and the functions and powers of the ministry on the other hand. The issues that the Supreme Court was called upon to render its advisory opinion on were set out at paragraph 1 of the advisory opinion. The Attorney General raised a preliminary objection on the jurisdiction of the Supreme Court to render the advisory opinion sought. The preliminary objection was however disallowed.

137. Before the Supreme Court could hear parties, it gave parties ninety (90) days within which to engage in good faith towards reconciliation and harmonious division of responsibility. In default, the Court reframed the issue for its advisory opinion on as follows:

> What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Land, Housing and Urban Development, on the other hand- in the context of Chapter Five of *the Constitution*; the principles of governance (Article 10 of *the Constitution*); and the relevant legislation?

138. Parties did not reach settlement as directed. The reference proceeded to hearing leading to the advisory opinion the basis of which the respondents argued that the petition is res judicata.

139. I have read the pleadings and decisions in the cases relied on. It cannot be said with equivocation that the Otiende petition had everything to do with the issues raised in the present petition. However, that decision pointed out the importance of collaboration and consultation between the Cabinet Secretary and the NLC with regard to formulation of regulations and forms as a way of discharging

their respective functions, a requirement in both *the Constitution* and the relevant statutes. The court agreed with the petitioner that the Cabinet Secretary failed to consult the NLC leading to nullification of the regulations and the attendant forms. The issue of appointment of the Chief Land Registrar was found to be moot thus, was not determined, though it was relevant to the present petition.

140. The Okiya Omtatah petitions were against the Cabinet secretary, the NLC and Attorney General as respondents while the issue was on the discharge of functions of the two organs, the Ministry through the Cabinet Secretary and the NLC.

141. The NLC raised a preliminary objection to the hearing of those petitions, arguing that issues raised had been determined in the advisory opinion. The court sustained the preliminary objection and struck out the petitions. The issue in the petitions was relevant to what is in the present petition, namely; functions of the two organs, the ministry through the Cabinet Secretary and the NLC which were also the issues in the advisory opinion.

142. The NLC sought the advisory opinion regarding the functions and powers of the two offices and the issues were reproduced at paragraph 1 of the advisory opinion. The question then is whether the issues determined in the advisory opinion and the subsequent petitions in the Otiende petition and Okiya Omtatah petitions render this petition res judicata.

143. As pointed out earlier, res judicata prohibits the court from trying a suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent and such issue has been heard and finally determined.

144. In Satyadhyan Ghosal v. Deorajin Debi & Anr. 1960 SCR (3) 590; 1960 AIR 941, the Supreme Court of India elucidated on the concept of "directly and substantially in issue" stating that it is not necessary that the entire subject matter of the subsequent suit should have been directly and substantially in issue in the former suit. Rather, it suffices if the matter in issue was relevant for the determination of the former suit.

145. For proper context it is important to reproduce the issues the NLC raised for advisory opinion which the Supreme Court captured as follows:

> The Reference relates to the NLC's functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development (the Ministry), on the other hand. The issues raised by the applicant were as follows:
>
> (a). On land administration and management functions
>
> (i) what meaning is to be assigned to the words "to manage", and "to administer" public land, unregistered trust land, and unregistered community land- by virtue of Articles 62(2), 62(3), 67(2)(a) and 67(3) of *the Constitution* of Kenya; and Sections 5(1)(a) and 5(2)(e) of the *National Land Commission Act* No. 5 of 2012 [NLC Act]?
>
> (ii) are Land Registrars (recorders of titles) and Land Surveyors answerable to the NLC, or to the Cabinet Secretary of the Ministry?
>
> (iii) which functions that were previously performed by the Ministry, before the creation of the NLC, have now been transferred to the NLC?
>
> (iv) when Article 62(2) and (3) of *the Constitution*, and Section 5(2)(b) of the NLC Act provide that the NLC is to administer public land "on behalf of" the National and

County Governments-do these provisions envisage an agency relationship between the National and County Governments, the latter being the principals?

(v) are the provisions of Executive Order No. 2 of 2013 consistent with the terms of *the Constitution*?

(b) On land taxation and revenues

(i) should the Ministry relinquish the land-tax function, roles, records and powers to the NLC; and if so, by what date?

(ii) should the Ministry account for, and remit to the NLC the rent (annual ground rent and stand premium), royalty and payments under any lease or licence that the Ministry has collected, as well as the records for such collection since the 27th February, 2013 and if so, by what date?

(iii) are the monies received, earned, or accruing to the NLC, and the balances at the close of each financial year, in the nature of monies excluded from payment into the Consolidated Fund under Article 206(1)(a) of *the Constitution*?

(iv) is the NLC entitled under Article 206(1)(b) of *the Constitution* to retain monies received, earned, or accruing to the NLC, and the balances at the close of each financial year, for the purpose of defraying the expenses of the Commission?

(v) has the ministry, in failing to account for and to remit to the NLC the funds due to the Commission under Section 26(1)(a) of the NLC Act, been in breach of the terms of *the Constitution*?

(c) On human resources and staff issues

(i) are officers who perform functions that were previously performed by the Ministry before the creation of the NLC, and which have now been transferred to the NLC, answerable to the NLC, or to the Cabinet Secretary of the Ministry?

(ii) should the Ministry transfer to the NLC part of the staff that previously worked in departments of the Ministry, whose functions have been transferred to NLC, or transfer the entire staff in such departments?

(iii) can the Ministry rescind the appointment of the members of staff deployed to the NLC?

(iv) is the Ministry obliged to remit to the NLC money for the payment of salaries of the members of staff that the Ministry deploys to the NLC, and if so, by what date?

(v) is the NLC entitled to recover from the Ministry monies that the Commission has so far used to pay salaries of the Members of Staff that the Ministry deployed to the NLC?

(d) On land registration and issuance of title

(i) what does the phrase “to monitor the registration of all rights and interests in land provided for in Section 5(2)(b) of the NLC Act”, entail?

(ii) are Land Registrars accountable to the NLC, or to the Ministry?

(iii) is land registration a function of the NLC, or the Ministry?

(iv) is it practical that the NLC be charged with the task of creating registration units, registration sections, or registration blocks; of prescribing nomenclature for land titling; of regulating rectification of land registers by Registrars; and of annually reporting to the President and Parliament as regards the progress made in the registration of title in land-when the NLC is not the agency mandated to control the process of registration of land?

(e) On the National Land Information Management System (NLIMS)upon which agency does the development of NLIMS fall?

(f) On transfer of assets is the Ministry obliged to transfer to the NLC all property and assets of the departments whose functions have now, by law, been transferred to the NLC; and if so, by what date?

(g) On private land which agency has the mandate to administer and manage dealings in private land?

(h) On land settlement is the Ministry obliged to transfer to the NLC the Land Settlement Fund; and if so, by what date?

146. The Supreme Court however reduced those questions into a single broad question for determination, namely:

> What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Land, Housing and Urban Development, on the other hand-in the context of Chapter Five of *the Constitution*; the principles of governance (Article 10 of *the Constitution*); and the relevant legislation?

147. Juxtaposing the facts in this petition and the declarations sought against the issues the NLC sought advisory opinion on which the Supreme Court rephrased as well as the issues in the Okiya Omtatah petitions, leaves no doubt that the issues are indeed substantially similar.

148. In fact, the petitioner admitted that the issues had been raised in the reference for advisory opinion but the Supreme Court did not answer them sating that the Supreme Court did not address the issues raised in the reference such as whether there is need for the existence of a department dealing with land administration in the Ministry; and if so, why should such a department be the one executing leases for public land yet the NLC is constitutionally and statutorily tasked with management and administration of all public land and whether maintenance of status quo post the Supreme Court advisory opinion can be construed as contempt of court.

149. The advisory opinion was responding to questions the NLC placed before the Supreme Court and even if the issues were rephrased, that did not change the position. The Supreme Court did not have to answer the questions as framed by the NLC. That Was why Supreme Court framed the issue the best way it understood the concerns by the NLC.

150. Indeed, one has to read the entire advisory opinion as well as this petition to appreciate the extent to which the Supreme Court addressed the concerns raised by the NLC regarding the functions and mandate of the two offices, the Ministry, through the Cabinet Secretary and the NLC.

151. The Supreme Court pointed out that in the course of giving advice it would involve consideration of certain provisions of *the Constitution*, and the statute law; namely; Article 10 of *the Constitution*; Chapter 5 of *the Constitution* (specifically Articles 62 and 67); the *National Land Commission Act*, (Sections 5 (2) and 18); the *Land Registration Act* (Sections 6, 7, 9, 12, 14, 15, 17, 19, 22, 23, 36, 38,

39, 55, 74 and 86); and the *Land Act* (Sections 6, 8, 9, 10, 12, 13, 15, 20, 23, 107, 110, 111, 112, 113 and 134).

152. The Supreme Court went through the land question in the country and its history; *the constitution* making process and recommendations thereof and finally the realisation of *the Constitution*, 2010 which dedicated an entire chapter to land.

153. The Supreme Court noted the functions of the NLC in Article 67 of *the Constitution* with all the safeguards of the other Chapter 15 commissions and stated:

> [209] Thus the NLC is not to work in isolation, but rather in consultation and co-operation with the Ministry. This is an interdependent relationship, with one body formulating the policy, whereas the other implements the policy; it is not prudent for any State organ to be the one formulating, implementing, and at the same time overseeing the implementation of the policy. This apportionment of responsibility does not invalidate the doctrine of separation of powers, but rather, redefines and consolidates the essential principle that separation is not the goal in itself, but is a vital means to assert checks upon each organ of Government, so as to achieve constitutionally-restrained governance.

154. At para 221, the Supreme Court addressed itself on section 5(2) of the NLC Act on other functions assigned to the NLC, the *Land Act* on the meaning of alienation of public land pointing out that alienation of public land can only be done by the NLC as one of the ways the NLC "administers" such land. The Supreme Court pointed out at para 224 that section 5(2) (e) of the NLC Act mandates the NLC to manage and administer all unregistered trust land and unregistered land on behalf of county governments.

155. The Supreme Court again turned to section 18 of the Act on the establishments and functions of County Land Management Boards, stating:

> (228) The functions assigned to the Board, with regard to the processing of land allocation; change and extension of user; conducting subdivision of land; and renewal of leases-give indications as to the essence of the phrase, "administering and managing public land." The functions undertaken by the Board are ordinarily, the preparatory steps towards acquisition of ownership to land, which culminates in registration and issuance of title by the National Government. It can thus be inferred, that the purpose of the Board is to effect the devolution of land-administration to the counties.

156. The Supreme Court further addressed itself to various sections in the *Land Act* (at para 229) which enjoin the NLC and the Cabinet Secretary responsible for land to undertake certain functions for effective management of land such as sections 6 and 8 which prescribe the functions of the Cabinet Secretary and the Commission with regards "management" and "administration" of land.

157. The Supreme Court then stated:

> (231) It emerges clearly from the foregoing provisions that neither the Ministry nor the NLC is in a position to perform its tasks in isolation. The Ministry is required to develop and facilitate land policies on the basis of advice and recommendations from the NLC; while the land database to be prepared and kept by the NLC has to be geo-referenced and authenticated by the statutory body in charge of survey, which is the Land Surveyors' Board, established under the *Survey Act*. The officers serving on that Board are appointed by the Public Service Commission, and, by Section 6(e) of the Act, are to be regulated by the Cabinet Secretary, as an aspect of quality

control. This is a typical instance in which it falls to the Executive to exercise check-and-balance upon a different State organ.

158. The Supreme Court again dealt at length with the provisions in the *Land Act*, including section 12 on how the Commission may allocate public land on behalf of the two levels of government and section 13 on the powers of the Commission on renewal and extension of leases and factors to be considered in that regard, as well as sections 15 and 19; section 20 on administration of public land and section 23 on making grants in the name of the Commission, and then observed:

> (241) It is clear that the responsibility of the NLC to issue licences, leases and grants in respect of public land, is subject to the conditions set out in law. Section 28 provides for the collection of rent charged on the use of land, and requires the NLC to account for the payments received under any lease or licence, to the respective Governments.

159. As can be seen from the portions of the advisory opinion referred to above, the Supreme Court dealt with the issue of functions and mandate of the NLC both in terms of administration and management of public land, including issuing of licences, leases and grants in respect of public land.

160. Summing up with regard to the *Land Act*, the Supreme Court observed at para 246 that "The provisions entrust the NLC with the responsibility of protecting and overseeing the public's rights and interest, under *the Constitution*. However, the NLC's mandate in that regard is not held single-handed, and is not unqualified: provision is made for approval from the National Assembly; and the consent of the National Government, or relevant County Government. This provides a check and-balance, to ensure that the NLC operates within the prescribed limits."

161. The Supreme Court again took time to deal with the *Land Registration Act* which confers powers on the Registrar of Land, the Cabinet Secretary, the NLC and other officers and went ahead to outline the scope of such powers, their mode of conferment and appointment of some of the officers. The Supreme Court made a thorough review of the provisions in the *Land Registration Act* on the mandate of the various organs and officers involved in land management and administration and their functions under the Act in relation to *the Constitution*.

162. From para 272 of the advisory opinion, the Supreme Court dealt with the question of "to administer" and "to manage" pointing out at paragraph 273 that at the heart of the reference was the issue of 'land administration and management', which arises from the wording of Articles 62(2) and 67 (2)(a) of *the Constitution*. The Supreme Court observed that these Articles have expressly stipulated the mandate of the NLC while reproducing the Articles verbatim.

163. The Supreme Court then stated that the interpretation of the terms 'manage' and 'administer' as applied by the two Articles of *the Constitution* is inescapable-especially so, because the same terms are replicated in the NLC Act, the *Land Act* and the *Land Registration Act* "which are the primary statutes dealing with land management and administration in Kenya."

164. The Supreme Court reiterated the need to interpret the two terms as applied in *the Constitution*, and consider whether the intent of *the Constitution* is being reflected in the three primary statutes that deal directly with land management and administration, or any other statute that has a bearing on the same issue.

165. The Supreme Court spent a significant amount of time dealing with the constitutional interpretive principles. Thereafter, it dealt with the term "land administration" at paragraphs 286 through 289. At paragraphs 291 and 292, the Supreme Court addressed the term "management" and then observed:

(293) In conclusion, the application of the term 'management' and 'administration', in all the three statutes, is consistent with the functions of the Commission as expressly donated by *the Constitution*. It is clear to us that the function of "registration of title" is not with reference specifically to "public land". Registration is conceived to entail all categories of land; and in our view, fragmenting title issuance—such a crucial indicia of the fundamental right of property—could not possibly have been in contemplation during the legislative process. For such would not only negate constitutional principle, but would probably breed such anarchy and abuse, as would certainly harm the public interest. Land title, the symbol of a vital asset, requires the effectual and conclusive mechanisms of the State's most central agency. A proper interpretation of the provisions of *the Constitution* and the statute law, in this context, should be aimed at achieving coherence, clarity, and certainty.

166. Of relevance and in buttressing the answer to the question whether this petition is res judicata, is the Supreme Court's observation that:

> [309] From the foregoing assessment, it is clear that the applicant's specific request, that this Court delineate the respective functions of the NLC and of the Ministry of Land, is already answered with sufficient clarity: the allocation of discrete functions to the one or the other is not possible, or indeed necessary. The essence of the Supreme Court's Advisory Opinion is that the vital subject of land-asset governance runs in functional chains, that incorporate different State agencies; and each of them is required to work in co-operation with the others, within the framework of a scheme of checks-and-balances—the ultimate goal being to deliver certain essentials to the people of Kenya.

167. Flowing from the above analysis, it is clear to this court that the Supreme Court sufficiently addressed the questions the NLC sought advisory opinion over. In that regard, and taking into account the totality of Supreme Court's advisory opinion, and in particular the assertion that "the applicant's specific request, that this Court delineate the respective functions of the NLC and of the Ministry of Land, is already answered with sufficient clarity", asking this court to render itself on this petition which essentially seeks determination of functions of the same organs, is akin to urging the court to review the Supreme Court's advisory opinion. That is not only contrary to Article 163(7) of *the Constitution* which provides that all courts, except the Supreme Court, are bound by the decisions of the Supreme Court, but also Article 165(6) which decrees that the High Court has no supervisory powers over a superior court, namely; the Supreme Court, the Court of Appeal, the ELC and the ELC.

168. It is also necessary to point out that following the advisory opinion, the ministry and the NLC appointed a team to implement the advisory opinion. The team presented a report whose recommendations were adopted for purposes of implementation. The recommendations in the report were challenged in the Okiya Omtata petitions as not only being contrary to the Supreme Court's opinion but also *the Constitution*. The NLC raised an objection on grounds that the issues had been determined in the advisory opinion which was sustained and the petitions were struck out for being res judicata leaving the parties to proceed and implement the recommendations.

169. The 2nd interested party also argued that his case challenged, among others, the legality of the Gazette Notice No. 5734 of 2017 for purporting to confer on the NLC the mandate to prepare and execute leases in relation to public land that has been allocated to private persons and conditions for allocation fulfilled. The issue of the Gazette notice was not addressed by the petitioner.

170. Although the requirement in law is that for a matter to be res judicata parties should be the same in both the former and the present suits, and whereas the petitioner in the present petition was not a

party in the previous cases, there is no doubt that the advisory opinion was sought by the NLC and this petition was brought for the benefit of the NLC. In the premise, the test for res judicata has been met thus, the objection that this petition is res judicata succeeds.

171. Consequently, and for the reasons given above, the petition is declined and struck out for being res judicata. This being a public interest litigation, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 23RDDAY OF SEPTEMBER 2025

E C MWITA

JUDGE