REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC PETITION NO. E012 OF 2024

IN THE MATTER OF ARTICLE 1,2, 3, 6, 10, 19, 20, 21, 22, 27, 28, 40, 47, 60, 61, 62, 63, 64, 94, 95, 96, 119, 152, 153, 227, 232, 258, AND 259 OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF AGRICULTURAL DEVELOPMENT CORPORATION ACT

AND

IN THE MATTER OF THE COMMUNITY LANDS ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF RESIDENTS OF KISIWANI IN RELATION TO ADC LANDS

BETWEEN

TAIRENI ASSOCIATION OF MIJIKENDA …… PETITIONER

AND

THE NATIONAL ASSEMBLY ……1ST RESPONDENT

CABINET SECRETARY,

MINISTRY OF LANDS AND PHYSICAL PLANNING ……2ND RESPONDENT

AGRICULTURAL DEVELOPMENT CORPORATION ……3RD RESPONDENT

THE HON. ATTORNEY GENERAL …… 4TH RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF NATIONAL TREASURY AND

PLANNING .....5TH RESPONDENT

THE NATIONAL LAND COMMISSION .....6TH RESPONDENT

THE CHIEF REGISTRAR OF LANDS ..... 7TH RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT ..... 8TH RESPONDENT

RULING

1. The Petitioners filed this lawsuit through an Amended Petition dated January 22, 2025, challenging the process by which land reference numbers 456, 467, 470, 480, 485, 488, 489, 513, 29, M53, M3B, M33, and L.R No. 1949, all approximately 4,000 acres and located within the Kisiwani area southeast of Malindi Town, were allegedly acquired from residents by Kisima Farm and later transferred to the 3rd Respondent. In the Petition, the Petitioners seek, among other remedies, declarations that their constitutional rights have been violated and an order of certiorari directing the Registrar of Titles to deregister and

cancel all certificates of title issued to any person or entity for the suit properties. Simultaneously with the Petition, the Petitioners filed an Amended Notice of Motion dated January 22, 2025, made under Rules 4, 10, 13, and 19 of the Kenya Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and section 24 of the Government Proceedings Act. This application is the focus of the current ruling.

2. The orders sought in the Amended Notice of Motion are as follows:

> ***1) Spent.***
>
> ***2) That, pending the hearing and determination of the application or petition and/or further orders of the court, a conservatory order does issue. Such an order will act as a stay of the certificates of title issued by the 7th Respondent to any person, institution, or entity arising from or in respect of the subdivisions from any suit land(s) or from direct transfers and disposals of any of the following suit lands: L.R. No. 456, 467, 470, 480, 485, 488, 489, 513, 29, M53, M3B, and L.R. No. 1949.***

3) ***That pending the hearing and determination of the application or petition and or further orders of court, an order of injunction does issue to restrain and or stop the entities and or persons holding the certificates of titles or registered as proprietors from carrying any subdivisions or direct transfer of L.R No. 456, 467, 470, 480, 485, 488, 489, 513, 29, M53, M3B and L.R No. 1949 and prohibit them and their agents, servants, assignees and or any person (s) acting on his/her/its/their instructions to carry any development, occupation, mortgage, lease, rent, sublet, sell and or to do anything whatsoever on the said suit lands or any certificates of titles arising from subsequent registrations and or transactions derived from the suit lands.***

4) ***Pending the hearing and determination of the petition or further orders from this court, an order of injunction is issued against the 7th Respondent to produce and disclose all deed plans related to the home and top farms, as well as subsequent subdivisions and registrations. The Respondent must also provide all details of the proprietors, land reference numbers, and sizes for each parcel of land mentioned above.***

5) ***That this honorable court is pleased to order that the instant petition raises substantial and important legal issues and direct that it be remitted to the Chief Justice for the appointment of an uneven bench of judges to hear and decide the matter.***

6) ***That the costs of the application and the petition are provided for.***

3. The application was based on the grounds outlined in the Amended Notice of Motion and supported by an affidavit sworn on January 22, 2025, by Peter Ponda Kadzeha, who described himself as the Chairman of the Petitioner. The affidavit generally summarized the historical context of land tenure and ownership on the Coast, tracing the origins of ongoing disputes caused by colonial and post-independence land allocation systems that marginalized local residents. According to the deponent, the Kisiwani area, like many other coastal settlements, was occupied by indigenous inhabitants under customary tenure. However, successive allocations to private entities, including foreign and corporate interests, deprived them of formal ownership despite their continued occupation. He claimed that the current dispute is a continuation of these

historical injustices, as the residents were never consulted, compensated, or given a chance to participate in the transfer of their ancestral land.

4. Mr. Kadzeha stated that the land in dispute, covering approximately 4,000 acres across different parcels, is ancestral land located within the historical 10-mile strip and is currently occupied by the 3rd Respondent, the Agricultural Development Corporation (ADC). The residents assert their heritage as descendants of ancestors who settled in the area between 1875 and 1890. The deponent argued that the subsequent acquisition of this land, allegedly by Kisima Farm and later transferred to the 3rd Respondent, occurred through misrepresentation or collusion, making the process unconstitutional and the resulting possession unlawful.

5. Crucially, the deponent relied on the 1st Respondent's Select Committee Report dated November 25, 1977 (PPK-4), which found that the land tenure system in the 10-mile strip caused significant problems, resulting in indigenous residents being treated as squatters. More recently, a Parliamentary Committee Report dated July 31, 2019 (PPK-5), specifically

regarding the ADC Kisiwani Home Farm, recommended that the 6th Respondent (National Land Commission) investigate the historical land injustice claims and consider revoking titles issued for the ADC Kisiwani Home Farm.

6. The deponent further stated that despite these clear legislative findings, the 1st, 2nd, 4th, and 5th Respondents have failed, declined, or refused to implement the necessary constitutional and legal mandates. The 6th Respondent was explicitly cited for having abdicated its duty by failing to act on a petition filed by the residents of the Sabaki area concerning the said historical injustices since March 2015.

7. The deponent further highlighted material contradictions in the official record regarding the 3rd Respondent's title acquisition, noting that while a 2010 court judgment in ELC Case No. 16 of 2010 (PPK-6) indicated the suit property was purchased from private entities, the 2019 Parliamentary Report (PPK-5) suggested the government repossessed the land and then transferred it to the 3rd Respondent. The deponent claimed this created inconsistency over whether the 3rd Respondent bought the land for value or benefited from a state allocation.

8. He further asserted that these contradictions reveal misrepresentations and concealment regarding the actual acquisition process and raise concerns about possible misuse of public funds. Annexed as “PPK-7” is a letter dated November 2, 1969, from Hon. F.B. Tuva, then Member of Parliament for Malindi North, to the District Officer in Malindi, concerning Plot No. M33. The letter described the land as public land and referenced disputes between cultivators and private individuals, namely Bahasan and Salim Timini. The deponent noted that this correspondence, written after independence, contradicted the claim that Kisima Farm had already acquired the land before independence, exposing further inconsistencies in the ownership history.

9. He further annexed as “PPK-8” a letter dated June 30, 1988, from the District Officer, Malindi, to Councilor T. Mwambogo, referencing the adjudication and subdivision of some of the suit lands, allegedly pursuant to a presidential directive of 1986. He questioned the legality of such a directive, arguing that Kisima Farm, being a private entity, could not be subjected to state-driven adjudication or redistribution. The Deponent added that

the disposal of the suit properties, as noted in the 2019 Committee report, began in 1990, shortly after the presidential directive, and that the 3rd Respondent's actions appeared aimed at preventing the transfer of the land to local residents, contrary to its stated objectives.

10. He stated that, according to the residents of Kisiwani, the disputed lands were initially owned by the Sultan of Zanzibar. In 1927, the Sultan leased L.R. No. 540 (411.5 acres) to Mr. Harold George Robertson, a European sugarcane farmer. After Robertson's family vacated the land around 1950, it was transferred successively to Gulamu Hussein and then to Gulamu Ali. However, after being convicted of arson and assault, I sold it to Kisima Farm. The residents believed Kisima Farm had only acquired L.R. No. 540 but later unlawfully expanded onto community land, causing disputes that persisted until its sale to Lands Limited between 1971 and 1977.

11. He argued that the colonial government never removed the residents because the area was under the Sultan's jurisdiction within the 10-mile coastal strip, not the British Colony. He also

stated that although the 1963 Independence Constitution devolved Crown land, it did not include the Sultan's land, which only became part of Kenya when the Republic was established on December 12, 1963. He referenced the Select Committee Report of November 25, 1977, noting that the integration of coastal communities and their lands into the national framework had never been formally established.

12. The deponent further traced the formation of the 3rd Respondent under the Agricultural Development Corporation Act, Cap. 346 (1965), which was tasked with transferring land from white settlers to locals after independence. He clarified that the ADC's authority was limited to lands in the former British colony and did not cover the 10-mile coastal strip where the suit properties are located. The deponent stated that the alleged acquisition of the disputed land between 1971 and 1977 went beyond the ADC's legal powers. He also noted that although the 3rd Respondent's goals were later expanded under Cap. 444 (1986), the corporation has unlawfully subdivided and sold the properties in violation of Rule 2 of the Special Farms Rules, 2001. He presented and marked as "PPK-

10” a bundle of title deeds from the subdivisions of the suit properties.

13. The affidavit of Jeremiah Ndombi, M.B.S., Deputy Clerk of the National Assembly, sworn on May 13, 2025, on behalf of the 1st Respondent, opposed both the Petition and the Notice of Motion. Mr. Ndombi stated that the Sabaki Petition, filed on March 1, 2019, and presented by Hon. Michael Kingi Thoya, was appropriately referred to the Departmental Committee on Lands. The committee conducted field visits, met with relevant agencies and Petitioners, and compiled a report (SN-1). He added that the Committee observed that the disputed ADC Kiswani Farm land was public land that had been illegally subdivided and sold. He recommended investigations by the National Land Commission (NLC) and the Ethics and Anti-Corruption Commission (EACC), as well as restrictions on further dealings. Additionally, he presented the 1976 Select Committee Report on land ownership along the 10-mile coastal strip, as SN-2, which recognized longstanding historical injustices and proposed guidelines to address landlessness.

14. The deponent stated that the National Assembly passed laws to address land reforms and historical injustices, including the Community Land Act (2016), Land Act (2012), Land Registration Act (2012), and National Land Commission Act (2012), enacted under Article 67(2)(e) to empower the NLC to investigate such injustices. He argued that the Petition does not show any direct violation or omission by the 1st Respondent and requests that the Petition and application be dismissed with costs.

15. The 2nd and 4th Respondents relied on the opposition grounds dated September 23, 2024, as follows:

1) ***The application and petition are misguided, malicious, and constitute an abuse of the court process.***
2) ***The application lacks merit for failure to meet the condition precedent for granting the injunction orders sought, as set out in the case of Giella v Cassman Brown (1973) E.A. 358.***
3) ***The application is devoid of merit as the applicants have not met the threshold for granting of conservatory orders.***

4) ***The Petitioner does not have any demonstrable legal or beneficial title to the said suit lands. Accordingly, the Petitioner has no locus standi to institute any suit seeking any relief in connection with them.***
5) ***The petition is a white elephant for its party imprecision, evident in the manner in which the 2nd Respondent has been described, considering the broad spectrum of the National Executive.***
6) ***The constitutional rights alleged to have been breached are not absolute but limited, and the Petitioners have not demonstrated that they are deserving of the remedies they are seeking.***
7) ***The Petition is imprecise regarding the rights alleged to have been violated by the as it makes a general reference to omnibus provisions of the law, thus violating the criteria set out in Anarita Karimi Njeru v R (1979).***
8) ***No prima facie case is established from the Petition that would remotely suggest that the "2nd Respondent's conduct amounted to a violation of the Petitioner's rights.***

16. There were no responses from the 3rd, 5th, and 6th Respondents.

Submissions

Petitioner's Submissions

17. In the written submissions dated April 3, 2025, counsel for the Petitioner argued that the Petitioner filed this petition under Articles 22(1) and 258(1) of the Constitution to serve the public interest. The goal was to protect the community and the customary land rights of the residents of Kisiwani, who had been historically dispossessed of their ancestral land and the properties involved. Relying on historical records and parliamentary reports, counsel stated that the 3rd Respondent, a public entity holding the land in trust, violated Articles 10 and 62(4) of the Constitution and the Agricultural Development Corporation (Special Farms) Rules, 2001, by unlawfully subdividing and selling public land. Counsel contended that these violations have infringed on the residents' socio-economic and cultural rights guaranteed under Articles 27, 28, 29, 40, 47, 60, and 63 of the Constitution. The case raises important constitutional and legal questions about community land, past injustices, and the responsibilities of the 1st through 6th Respondents in upholding constitutional principles. Counsel

emphasized that these issues require a panel of at least three judges to review under Article 165(4) and make an informed decision.

18. Counsel further submitted that the Petitioner has met the criteria for granting conservatory orders as outlined in Makumi & 4 others v Speaker, County Assembly of Kitui & another (Constitutional Petition E001 of 2024) [2024] KEHC 2812 and Bundid & another v Ministry of East African Community (EAC), the Asals and Regional Development & 3 others (Petition E002 of 2024) [2024] KEHC 3479. He argued that a conservatory order, a judicial remedy intended to preserve the subject matter while a petition is pending, serves to maintain the status quo and prevent the proceedings from becoming merely academic. Counsel contended that the Petitioner has demonstrated the required conditions for such orders: the existence of a prima facie case with a likelihood of success, the risk that the petition might become nugatory if the orders are not granted, and that the public interest supports preserving the suit property until the petition is heard and decided.

1st Respondent's Submissions

19. In their submissions dated December 2, 2024, the 1st Respondent opposed the empanelment of a bench under Article 165 (4) of the Constitution. Counsel argued that the guiding principle is that an expanded bench should only be convened when the issues before the court are of significant public importance, the matter raises new constitutional questions, or there are conflicting decisions among courts that need to be harmonized.

20. Guided by Article 165(3)(b) and (d)(i) and (ii), as well as Article 165(4) of the Constitution of Kenya, 2010, and the case of Stanley Livondo v Attorney General (Petition 14 of 2020) [2020] KEHC 843 (KLR) (Constitutional and Human Rights) (17 December 2020) (Ruling), and Peter Nganga Muiruri v Credit Bank Limited & Another Civil Appeal No. 203 of 2006, counsel pointed out that the Petition challenges the processes and procedures used to acquire the suit properties from residents of Kisiwani by Kisima farm or its agents. The Petitioner believes that the Parliament of Kenya failed to resolve disputes arising from a Public petition filed by residents of Sabaki on March 1, 2019, and the Report of the Select Committee on land

ownership along the 10-mile Coastal strip of Kenya. To counsel, the issues raised in the Petition involve the straightforward interpretation and application of the Constitution and other laws, which are questions that single judges of the Superior Courts handle regularly as part of their constitutional responsibilities under Article 165(3) of the Constitution.

2nd & 4th Respondents' Submissions

21. Counsel proposed three issues for determination: whether a conservatory order should be issued, whether an injunction should be issued, and whether the application is merited.

22. Counsel argued that the Petitioner did not meet the legal threshold for granting conservatory orders as established in Board of Management of Uhuru Secondary School v City County Director of Education & Others (Petition 359 of 2015) [2015] KESC 2174. Citing Gachagua & 40 Others v Speaker, National Assembly & 15 Others [2024] KESC 13473, counsel reiterated that a prima facie case requires a clear demonstration of rights infringement that warrants judicial intervention. It was contended that the Petition was fundamentally flawed for lacking specificity, as the Petitioner failed to identify the

particular organ or department of the National Executive allegedly responsible for the violation, making the application vague, unenforceable, and lacking a factual basis. Therefore, counsel urged the Court to determine that no prima facie case or imminent prejudice had been shown and to deny the issuance of the conservatory orders sought.

23. Counsel further argued that the application for an injunction was fundamentally flawed due to a lack of clarity in specifying the particular organ or department of the National Executive against which the order was requested, noting that the term “National Executive” was too broad.

24. Further relying on Order 29 Rule 2 of the Civil Procedure Rules and Section 16(1) and (2) of the Government Proceedings Act (Cap. 40), which explicitly prohibit issuing injunctions against the Government, counsel emphasized that injunctions are remedies available in private law and therefore not applicable against the State. Reference was made to Alamin Sheikh Ahmed v Registrar of Lands, Kilifi County [2022] eKLR. In conclusion, counsel urged the court to dismiss the application as fundamentally misconceived.

3rd Respondent's Submissions

25. Counsel for the 3rd Respondent filed submissions dated May 9, 2025, stating that the prayer for empanelment is meritless, premature, misconceived both legally and factually, and merely aims to delay its prompt resolution. The counsel argued that the legal basis for such an empanelment is Article 165(4) of the Constitution, which mandates that the applicant must meet a strict and well-defined threshold, specifically that the issue raised must constitute a "substantial question of law" under Article 165(3)(b) or (d).

26. Citing Harrison Kinyanjui v A.G & Another [2012] eKLR, Community Advocacy and Awareness Trust v A.G [2012] eKLR, Judy Wakhungu v City Council of Nairobi [2012] eKLR, Okiya Omtatah Okoiti v A.G [2014] eKLR, and Delmonte Kenya Ltd v County Government of Murang'a [2018] eKLR, counsel argued that empanelment is a discretionary and exceptional remedy, reserved for cases raising novel, complex, or nationally significant constitutional questions. To the counsel, the present petition involves factual and settled legal issues, not substantial constitutional questions. He also contended that no

novel interpretation of Articles 40, 60, 63, or 67 is necessary, nor has the Petitioner shown any broader public or national importance. Therefore, counsel requests that the Court reject the prayer for empanelment and proceed with the case before a single judge.

5th Respondent's Submissions

27. In its submission dated March 26, 2025, counsel for the 5th Respondent argued that none of the issues raised in the petition involve a substantial question of law within the meaning of Article 165(4) of the Constitution. Like the 1st Respondent, counsel stated that the guiding principle is that an expanded bench should only be convened if the issue before the court is of significant public importance, involves novel constitutional questions, or if there are conflicting decisions from different courts that need harmonization. According to counsel, the issues raised in the petition pertain to ordinary interpretation and application of the Constitution and other laws, which are questions routinely handled by single judges of the Superior Courts in their daily discharge of the constitutional mandate under Article 165(3) of the Constitution; and do not

meet the criteria for certification under Article 165(4). Counsel cited cases including Sir Chunilal V Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314; Santosh Hazari v Purushottam Tiwari [2001] 3 SCC 179; Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR; and Peter Nganga Muiruri v Credit Bank Limited & Another Civil Appeal No. 203 of 2006.

Analysis and Decision

28. Having reviewed the application, supporting affidavit, replying affidavits, annexures, and submissions filed, I outline the following issues for resolution:

i) Whether a conservatory order should be issued to operate as a stay against the certificates of title issued by the 7th Respondent to any person, institution, or entity arising from or related to the subdivisions of any of the suit lands, or from any direct transfers or disposals thereof, pending the determination of this petition.

ii) Whether an order of interim injunction should be issued to restrain and prohibit the entities and/or persons holding certificates of title or registered as owners from carrying

out any subdivisions or direct transfers of the suit properties, and from undertaking any development, occupation, mortgage, lease, rent, subletting, sale, or other dealings with the properties.

iii) Whether an order of injunction should be issued to compel the 7th Respondent to produce all deed plans related to the suit properties, including subsequent subdivisions and registrations, and to provide full details of the proprietors, land reference numbers, and acreage of each resulting parcel.

iv) The Amended Petition dated January 22, 2025, raises substantial legal questions that warrant certification before the Chief Justice for the formation of an uneven judge bench.

29. There is no doubt that conservatory orders are a creation of the Constitution of Kenya, 2010, and are available as a remedy in proceedings for the enforcement of fundamental rights and freedoms under Article 23(3) of the Constitution. Conservatory orders were defined in the case of Judicial Service Commission v Speaker of the National Assembly & Another (2013) eKLR as follows:

"Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individual against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

30. The Supreme Court outlined the principles for granting interim conservatory orders in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eKLR as follows:

"Conservatory orders beat a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on

the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes."

31. In the case of Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Other [2016] eKLR, the court summarized the principles for granting conservatory orders as follows:

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that, unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution;

b. Whether if a conservatory order is not granted, the petition alleging violation of or threat of violation of rights will be rendered nugatory; and c. The public interest must be considered before the grant of a conservatory order.

32. The remedy of injunction, especially interlocutory or temporary injunctions, is governed by well-established principles outlined in Giella v Cassman Brown & Co. Ltd [1973] EA 358 and clarified in later decisions. An applicant must satisfy certain requirements, such as demonstrating a prima

facie case with a likelihood of success; showing that irreparable harm would occur if the injunction is not granted; and, if the court has doubts, deciding the case based on the balance of convenience.

33. It has been established in various decisions that a prima facie case is not necessarily a case that must succeed at the hearing of the main case, but rather one that discloses arguable issues in a case alleging rights violations. In Kevin K Mwiti & Others v Kenya School of Law & Others (2015) eKLR, the court stated:

> ***"A prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues."***

34. The Petitioner's case strongly argues that the suit properties are ancestral and community lands historically occupied by the residents of Kisiwani. These lands were allegedly acquired, subdivided, and transferred in violation of Articles 10, 40, 60, 63, and 67 of the Constitution, and against statutory laws governing public land and the management of special farm

lands by the 3rd Respondent. The evidence presented to the Court at this interlocutory stage includes Parliamentary reports calling for an investigation and possible revocation of titles, as well as admissions by public agencies regarding unresolved historical claims. Without making any definitive conclusions at this point, the material presented, in my view, raises significant constitutional questions.

35. Be that as it may, I observe that the prayers as framed seek a stay of certificates of title issued concerning the suit properties and an injunction against the owners of those titles. In my view, the prayer requesting a “stay” of certificates of title is conceptually invalid. I say this because a title, once issued, is not an act that can be stayed. Furthermore, the Petitioners themselves admit that several of the resulting titles have already been transferred or subdivided to third parties who are not before this Court. Issuing adverse orders against property held by non-parties would violate the rules of fair hearing and would be unjust. The same reasoning also applies to dismiss the parallel prayer for an injunction.

36. Regarding the prayer calling on the 7th Respondent to produce deed plans, subdivision records, and proprietary particulars, the Petitioners have not shown that they made any prior request for this information from the 7th Respondent before bringing the matter to this Court. The Access to Information Act, No. 31 of 2016, requires an applicant to first request the information directly from the relevant public body before seeking Court intervention. Only if such a request is denied, ignored, or left unanswered can one turn to the Court for help. This statutory framework is also based on Article 35(1) of the Constitution, which states that:

> ***35. (1) Every citizen has the right of access to—***
>
> ***(a) information held by the State; and***
>
> ***(b) information held by another person and required for the exercise or***
>
> ***protection of any right or fundamental freedom.***

37. Section 4(1) of the Access to Information Act affirms every citizen's right to access information held by the State or another person when such information is needed to protect a right. Section 4(3) further requires a public entity or private organization to disclose this information quickly and without

unnecessary delay. Section 8(1) outlines the process for submitting a formal request for information, while Section 9(1) mandates a response within twenty-one days. If an applicant is unhappy with a decision or omission, Section 14 provides a review process before the Commission on Administrative Justice.

38. In effect, the Access to Information Act outlines the process for obtaining information from public entities and private organizations. It is therefore the responsibility of a litigant to show compliance with that legal procedure before seeking the Court's intervention. In this case, the Petitioner has not demonstrated that they made any formal request for the information now being requested, nor that such a request was denied or ignored. This Court thus concludes that the prayer is premature and unsustainable at this stage.

39. The final issue to decide is whether this case should be referred to the Chief Justice for the appointment of an uneven Judge bench. The general rule is that any single Judge of this Court has the authority and power to address a question of law within their jurisdiction. Therefore, the decision to certify a

matter as involving a significant question of law deserving such empanelment is a matter of judicial discretion, not a right. This decision should be made only when necessary and in strict accordance with relevant Constitutional and statutory provisions.

40. Majanja, J (may his soul rest in peace), in **Harrison Kinyanjui v Attorney General & Another [2012] eKLR**, held that:

> ***"The meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."***

41. The constitutional provision that permits the formation of a bench with more than one Judge is Article 165 (4), which states that:

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

42. The question that follows, therefore, is: what is a substantial legal question that requires the empaneling of an odd number of judges to hear this petition? The Supreme Court of India in Chunilah v Mehta v Century Spinning and Manufacturing Co. [supra] held that:

> ***"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying***

those principles or that the plea raised is palpably absurd, the question would not be a substantial."

43. Similarly, in National Super Alliance (NASA) v The Independent Electoral and Boundaries Commission H.C Pet No. 328/2017, the court observed that the Chunilah case (Supra) provided appropriate guidelines and insights for determining whether a matter involves a substantial question of law under Article 165(4) of the Constitution. The guidelines considered were as follows:

"(i) Whether, directly or indirectly, it affects substantial rights of the parties or

(ii) Whether the question is of general public importance, or

(iii) Whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or

(iv) The issue is not free from difficulty, or

(v) It calls for a discussion for alternative view."

44. Still in the **NASA case**, the court further stated that:

"The court may also consider whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature

requires substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition. These are mere examples since the article employs the word "includes". Accordingly, the list cannot be exhaustive and courts are at liberty to expand the grounds as occasions demand."

45. Based on the above, it is evident that empanelment is not solely determined by a party's request or preference. For the Court to refer a matter for the formation of a non-uniform bench, it must first be satisfied that the constitutional threshold has been met in the particular case—specifically, that the issue involves a significant legal question warranting such empanelment. Recently, this court in Ngolo & others v Nuclear Power Energy Agency (NuPEA) & 2 others; County Attorney-Kilifi County Government & 2 others (Interested Parties) [2024] KEELC 14071 (KLR) referred the matter to the Chief Justice for the appointment of an uneven number of judges of the ELC to determine whether the country was prepared to establish its first nuclear plant. The court, having recognized

that the issues raised in the petition were novel and significant, concluded that:

> ***"Having said so, I reckon that the current petition raises substantial constitutional and novel issues around the operationalization of the first nuclear power plant in this Country, its impact on a clean and healthy environment under Article 42 of the Constitution, and the participation of the people of Kenya in making that decision. The establishment of the first nuclear plant in Kenya is being tested to determine whether, as a Country, we have the wherewithal, human capacity, and stamina to sustain the same given the disasters highlighted herein. Nuclear power is, of course, green energy, but is it safe? How do we as a Country compare its safety and investment with other green energy sources like geothermal, solar, or wind? What are the world's trends on nuclear power? Is it sustainable?***
>
> ***42.To my mind, these questions will require that the Honourable the Chief Justice of the Republic of Kenya, under Article 165(4) of the Constitution and Section 21(2) of the ELC Act, appoint an uneven number of ELC judges to address the same."***

46. In my view, the core issue of the petition is the alleged violation of constitutional rights under Articles 40, 60, 63, and 67 of the Constitution. The Petitioner also challenges the acquisition of the suit properties, claimed to be ancestral land, by the 3rd Respondent and the subsequent transfers to third parties. The issues raised are clearly articulated and thoroughly detailed. While they may involve elements of public interest, it is worth noting that nearly every constitutional petition includes a public interest component.

47. My review of the pleadings and reliefs sought does not persuade me that this petition justifies forming an expanded, uneven bench. Courts have, over time, issued many decisions on claims of rights violations arising from historical land injustices. Although the facts may differ, the core principles are well established. In my opinion, the issues involved clearly fall within the usual scope of the Court and can be adequately and effectively decided by a single judge. The petition shows no new, complex, or unresolved constitutional questions that would warrant a three-judge bench.

48. Based on the above premises, the Amended Notice of Motion lacks merit and is hereby dismissed with costs.

Dated, signed, and delivered virtually at Malindi on October 29th , 2025.

E. K. MAKORI

JUDGE

In the presence of

Mr. Ochieng for the Petitioners

Mr. Cheboriyot for the 1st Respondent

Ms. Ndungu for the 3rd Respondent

Mr. Munga for the 2nd and 4th Respondents

Happy: Court Assistant

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