



**Okoiti v Attorney General & 2 others; National Land Commission & 3 others
(Interested Parties) (Petition E349 of 2021) [2025] KEHC 17900 (KLR)
(Constitutional and Human Rights) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E349 OF 2021
EC MWITA, J
NOVEMBER 28, 2025**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE MINISTRY OF LANDS AND PHYSICAL PLANNING .. 2ND RESPONDENT

THE PARLIAMENT OF KENYA 3RD RESPONDENT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

KENYA TEA GROWERS ASSOCIATION INTERESTED PARTY

EASTERN PRODUCE KENYA LTD INTERESTED PARTY

KERICHO COUNTY GOVERNMENT INTERESTED PARTY

JUDGMENT

Petitioner's case

1. The petitioner filed this petition challenging the constitutionality of sections 14(1), 14(9), 15(3) (e), 15(10) and 15(11) of the [National Land Commission Act](#) No. 5 of 2012 (the Act) and sought several declarations and orders.
2. The petitioner's concern was that the impugned provisions limit the mandate of the National Land Commission (NLC) and more so, the time within which NLC can exercise its mandate to review grants



- or dispositions of public land to establish their propriety or legality, to admit, register and process claims on historical land injustices and that the provisions impose a lifespan on the decisions by NLC.
3. The petitioner asserted that the time limits are arbitrary, unreasonable and infringe on the rights of victims of historical land injustices, majority of whom are poor and cannot afford litigation in ordinary courts. The petitioner asserted that the limits were imposed to advance improper motives and promote corrupt practices.
 4. The petitioner contended that the impugned provisions are unconstitutional because *the Constitution* does not set time limits and does not donate power to Parliament to set time lines within which NLC is to execute any of its mandates. According to the petitioner, under article 67(3) of *the Constitution*, Parliament can only enact legislation to add onto NLC's mandate but not to diminish that mandate.
 5. The petitioner argued that section 14(9) of the NLC Act is also unconstitutional because it gives Parliament discretion to allow or block NLC from performing its constitutional mandate and functions. The petitioner asserted, therefore, that the impugned provisions violate several articles of *the constitution*, including 67 (2) (e) and 68 (c) (v).
 6. The petitioner maintained that Parliament's legislative mandate is donated by the people and must be exercised as provided in *the Constitution*. According to the petitioner, articles 68 (c) (v) and 186(4) of *the Constitution* do not vest any powers on Parliament to limit the mandate of NLC. To the extent that the time limits impact on the rights and fundamental freedoms enshrined in articles 48 and 50(1) of *the Constitution*, Parliament should have complied with the requirement in article 24 of *the Constitution*.
 7. The petitioner asserted that *the Constitution* is prescriptive and any powers it donates are clearly enumerated and should have expressly stated the intention to impose time limits on the mandate of NLC. The petitioner took the view, that Parliament's mandate is limited by *the Constitution* (articles 1(1), 1(3), 2(1-4), 10(1) (b) and 2(a) & (b), 73(1) (a) (i), 93 (1) & (2), 94(4) and 259(1)) and therefore the provisions in petition to Parliament Act do not oust the jurisdiction of this court or affect the rights under articles 22 and 258 of *the Constitution* to institute these proceedings. The doctrine of exhaustion does not also apply. He relied on Peter Orengo Migiro (suing on behalf of the Late Christopher Orengo Makori) v Samwel Omagwa James & 2 others [2022] eKLR.
 8. The petitioner maintained that the right to fair hearing where historical injustice is concerned cannot be time bound, a fact acknowledged by Parliament in section 15(3) (b) of the NLC Act.
 9. The petitioner went on to argue, that Parliament does not have mandate to enact legislations that contradict *the Constitution*. He relied on articles 67(3) and 249(2)(a) of *the Constitution* for the position that NLC is a creature of *the Constitution* and may perform extra functions assigned by national legislation. Parliament can only enact legislation to add onto the mandate of NLC but cannot diminish it.
 10. The petitioner again argued that under article 2(4) any law that contravenes *the Constitution* is void to the extent of the contravention so that an unconstitutional statute is void and any actions based on such a law are equally unconstitutional. The petitioner relied on the decisions in Carr v State (1890) 127 Ind. 204, 26 N. E. 778; 11 L.R. A. 370; Chicago, Indianapolis & Louisville Ry. v Hackett (1912) 227 U.S. 559, S. Ct., 57 L. Ed. 966 and Louisiana v Pillsbury (1881) 15 Otto 287, 26 L. Ed. 1090, among others and urged the court to allow the petition.

1st and 2nd respondents' case

11. The 1st and 2nd respondents opposed the petition through grounds of opposition. They contended that, the NLC Act enjoys a general presumption of Constitutional validity which the petitioner



has not rebutted; the action of the National Assembly to enact the NLC Act also enjoys the presumption of legality and constitutionality having been enacted pursuant to the legislative mandate of Parliament under article 94 of *the Constitution*. According to the 1st and 2nd respondents, the petitioner misapprehended the purpose and effect of the impugned provisions.

12. It was the 1st and 2nd respondents' position, that this court lacks jurisdiction to entertain this petition because the substratum of the petition relates to the determination of time limit with regard to investigations of historical land injustices; review of grants or dispositions of public land. They relied on article 162 (2) (b) of *the Constitution*, section 13(5) of the *Environment and Land Court Act* and the decision in *Republic v Karisa Chengo & 2 others* [2017] eKLR for the position that this is a matter for the ELC.
13. The 1st and 2nd respondents asserted that the function of reviewing grants or dispositions of public land to establish their propriety or legality under section 14 flows from article 67 (3) as read with article 68 (c) (v) of *the Constitution*. Article 67 (3) empowers NLC to perform such additional functions as given under legislation while article 68 (c) (v) is on the directive for specific legislation on review of grants or dispositions of public land to establish their propriety or legality. The function of investigations on present or historical land injustices flows from article 67 (2) (e) of *the Constitution*.
14. The 1st and 2nd respondents contended that under article 68 (c) (v) of *the Constitution*, a review of grants or dispositions of public land is to be regulated by legislation and *the Constitution* does not define the contours of such regulatory regime thus, left it to the legislative wisdom of Parliament. Article 68 (c) (vi) further gives Parliament a constitutional discretion to provide for any other matter necessary to give effect to the provisions in Chapter Five.
15. The 1st and 2nd respondents relied on the decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR urging the court to employ a purposive interpretation in evaluating the constitutional standing of the time limits. They asserted that prescription of time limits serves two purposes; the historical need of the function and the need to safeguard the sanctity of titles. They again relied on the decision in *In the Matter of the National Land Commission* [2015] eKLR for the historical need function.
16. On safeguarding the sanctity of land holding in Kenya, the 1st and 2nd respondents urged the court to be persuaded by the factual position as captured in the 2nd interested party's replying affidavit to the effect of the intersection between the time limits and the right to fair hearing on the one hand and the time limit and the need for security of titles to further commercial transactions, on the other.
17. On whether the time limit affects the right of access to justice, the 1st and 2nd respondent argued that the right is not absolute under article 25 of *the Constitution* and may be limited in terms of article 24 of *the Constitution*, a position also supported by article 19(3) (c) of *the Constitution*. They relied on the decision in *Seventh Day Adventist (East Africa Limited v Minister for education & 3 others* [2017] eKLR, for the position that limitation on the right of access to justice is anchored in law.
18. On reasonableness, justifiability and proportionality of the legislation, the 1st and 2nd respondents urged the court to be persuaded by the decisions in *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR and *R v Oakes* [1986] 1 SCR 103.
19. The 1st and 2nd respondents contended that time limit of between 5 to 10 years is long enough to accommodate fair hearing. Further, section 14(9) of the Act enables NLC to apply to Parliament for extension of time provided under the section.



20. The 1st and 2nd respondent further contended that the time limits do not take away jurisdiction of the ELC to entertain a claim regarding historical land injustices and the grant or disposition of public land. The limitations do not also prejudice the right of access justice. They relied on articles 22 (1), 159 (2) (c), 162(2) (b) of *the Constitution*, section 13(2), (7) of the ELC Act and the decision in Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR.
21. The 1st and 2nd respondents again relied on the decision in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & another [2015] eKLR for the position that the question of time limits under section 15 of the NLC Act is non justiciable, that section having been repealed by dint of section 15(11) of the Act on 2nd May 2022. The Attorney General urged the court to dismiss the petition.

3rd respondent's case

22. Parliament of Kenya, the 3rd respondent, opposed the petition through a replying affidavit. The 3rd respondent asserted that the impugned provisions were enacted in exercise of its constitutional mandate under articles 68 (c) (v), 94 (5) and 186(4) of *the Constitution*. It was also asserted that the law limiting the time within which litigation may be brought is common in legal systems to avoid inordinate delays in presenting claims and damage the interests of justice.
23. The 3rd respondent contended that the object of any limitation enactment is to prevent a party from prosecuting stale claims and to protect a respondent who may have lost relevant evidence for his defence, including witnesses who may not be available due to long passage of time. Limitation of actions ensures there is an end to litigation.
24. The 3rd respondent further contended that limitation of time brings certainty, finality and ensures quality adjudication of claims. The limitation is therefore reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
25. According to the 3rd respondent, declaring the impugned provisions unconstitutional would pose the danger of exposing the entire statutes and principles of limitations to challenge with undesirable effects and consequences. Further, by virtue of article 119(1) of *the Constitution*, the petitioner ought to have sought extension of the five-year period for admission of claims before filing the present petition.
26. The 3rd respondent argued under articles 1 and 186 of *the Constitution*, it has legislative authority on matters regarding NLC, including the impugned provisions and the court should not interfere unless there is constitutional breach. The 3rd responder relied on the decision in Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR.
27. The 3rd respondent took the view, that the impugned provisions enjoy presumption of constitutionality and relied on Hamdard Dawakhana (Wakf) Lal v Union of India Air and Others 1960 AIR 554.
28. It was asserted that article 67(3) of *the Constitution* allows NLC to perform functions prescribed by national legislation which implies that the 3rd respondent has mandate to define additional functions and limitations within the framework of *the Constitution*. The 3rd respondent maintained that the impugned provisions provide specific mechanisms and timeframes for NLC to execute its mandate efficiently.
29. The 3rd respondent went on to argue, that the impugned section 14(1) is constitutional since the five-year review period is a reasonable timeframe for NLC to carry out a comprehensive review of all grants



and dispositions of public land. Under article 67 (2) (e) of *the Constitution*, the five-year timeline is a reasonable exercise of legislative discretion.

30. The 3rd respondent argued that the absence of timelines in *the Constitution* gives flexibility to the legislature to determine appropriate durations based on logistical, administrative and social considerations. The period ensures that the review process is not open-ended thus, provides clarity, certainty and structure to both NLC and the public regarding the duration of the review process.
31. Regarding the three-year period stipulated in section 15(10), the 3rd respondent argued that a defined period ensures administrative efficiency and prevents indefinite delays in the review process. The timeline creates a sense of urgency and ensures that NLC prioritizes the review process thereby upholding the principles of good governance and effective public administration as required by *the Constitution* and promotion of article 60(1) (d) of *the Constitution*.
32. The 3rd respondent asserted that the term “law” as used in article 249(2) of *the Constitution*, encompasses laws it enacts provided they are consistent with *the Constitution*. The 3rd respondent maintained that the impugned provisions do not subject NLC to control of direction by any person or authority beyond what is constitutionally permissible but establish a structured process for NLC to follow thereby enhancing accountability and transparency. Reliance was placed on the decision in *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR.
33. The 3rd respondent went on to argue, that NLC operates as a quasi-judicial body with authority to conduct hearings, make determinations and issue orders similar to those of a court of law when investigating claims of historical land injustices, hearing disputes and providing resolutions. Limitation of time is therefore important to NLC’s operations especially in the context of addressing land historical injustices and, therefore, the imitations are reasonable.

2nd and 3rd interested parties’ case

34. Kenya Tea Growers Association and Eastern Produce Kenya Ltd, the 2nd and 3rd interested parties, opposed the petition through replying affidavits. The 2nd and 3rd interested parties asserted that there were pending historical land injustice claims which had been filed against their members and nullifying the time limits provided for in section 15 of the Act would impact on their right to fair hearing in any future claims. The effect of nullifying the time limits will be to leave a vacuum whereby filing of claims and implementation of any recommendations by NLC would be open ended which would be contrary to the intention of Parliament.
35. The 2nd and 3rd interested parties contended that time limits on filing of claims are important constitutional safeguards for defendants under article 50(1) of *the Constitution*. Without time limits, it would be difficult for their members to mount plausible defences due to the long passage of time. It would also impact on their legitimate expectation. The limitations are thus, reasonable and justifiable.
36. The 2nd and 3rd interested parties asserted that most commercial transactions are based on land as a form of security and nullification of the time limits would lead to the institution of time barred claims thereby negating the sanctity of title deeds issued under the repealed land laws with dire consequences on the country’s economy.
37. The 2nd and 3rd interested parties took the view, that any extension of time or nullification of time limits in section 15 of the Act, would derogate from the accrued rights in respect of time barred claims. It will also be contrary to the principal of certainty and finality in any laws that are enacted.
38. The 2nd and 3rd interested parties relied on the decision in *Ibrahim v Ministry of Health and 2 others; British American Tobacco (Interested Party)* [2022] KEHC 15443 (KLR) to argue that the Act has



a presumption of constitutionality and the petitioner who bears the burden of proof rebutting that presumption failed to do so.

39. The 2nd and 3rd interested parties cited articles 68 (c) (vii), 94(1), 94 (5), 186 (4) and 109(1) of *the Constitution* for the position that that Parliament acted within its legislative mandate; there is no caveat under articles 67(2) (e) and 68 (c) (v) in respect of introducing time limitations in section 15 of the Act. They argued that time limits for filing of claims in respect of historical land injustice claims is an important constitutional safeguard under articles 47(1) and 50(1) of *the Constitution*.
40. The 2nd and 3rd interested parties again argued that time limitations are reasonable and justifiable; they ensure that NLC's administrative actions will be expeditious and that the respondents will not have to deal with old, outdated and stale claims.
41. The 2nd and 3rd interested parties asserted that the effect of nullifying the time limitation in section 15 of the Act would be to leave a void where filing of claims with NLC and implementation of NLC's recommendations would be open ended violating their constitutional rights. They relied on the decisions in Kenya National Chamber of Commerce & Industry -KNCCI (Muranga Chapter) & 2 others v Delmonte Kenya Limited & 3 others; County Government of Kiambu (Interested Party) [2020] eKLR; Mutwiwa v Komarock Ranching Society [2022] KEELC 2811 (KLR) and Kenya Human Rights Commission v Attorney General and another [2018] eKLR.
42. According to the 2nd and 3rd interested parties, laws that restrict time within which litigation may be instituted and considered are common in a country's legal system. Limitation of actions also ensures that litigation comes to an end in accordance with article 159 (2) (b) of *the Constitution* and urged the court to dismiss the petition.

4th interested party's case

43. The 4th interested party supported the petition through a replying affidavit and written submissions. The 4th interested party agreed with the petitioner that Parliament does not have constitutional mandate to enact legislation aimed at limiting the period within which claims of land injustices are to be investigated and addressed; to set expiry period upon which claims of land injustices are to be addressed and inhibit, curtail or limit the Constitutional mandate of NLC.
44. The 4th interested party asserted that multinational Tea companies operating in its jurisdiction are beneficiaries of historical land injustices, a fact established by NLC. Investigation by the United Nations Human Rights Council found the Government of the United Kingdom actively participated in human rights abuses and violations and pursued racial discriminatory policies that led to huge losses of land by communities Kericho District and Bomet counties.
45. The 4th interested party contended that section 15(10) of the Act cannot be interpreted to mean that if the recommendation is not enforced within 3 years, it ceases to have effect. In the 4th interested party's view, it can only be purposefully and objectively interpreted to mean that recommendations must be acted upon expeditious and within 3 years
46. According to the 4th interested party, the communities in Kericho and Bomet Counties have legitimate expectation to have their constitutional rights guaranteed and acted upon. Further, the participation of the 2nd interested party is not in good faith because they lodged a judicial review application in Nairobi ELC (JR) Application No. 3 of 2020 where it is enjoying stay of execution of the award made by NLC.



47. According to the 4th interested party, all human rights claims have no limitation of time and ought to be addressed effectively. Failure to address them within 3 years will not release the public officials from undertaking their statutory duty.
48. The 4th interested party argued that article 67 of *the Constitution* gives the oppressed and exploited communities hope of having their grievances addressed based on a constitutional framework. In this respect, NLC is mandated to investigate on its own motion or on application, historical land injustices and make binding recommendations. This is a constitutional remedy which cannot be defeated by provisions of a statute. Parliament could not therefore have intended to defeat a constitutional provision by enacting the impugned provisions.
49. The 4th interested party associated itself with the petitioner's position and relied on the decisions in Timothy M Njoya and 6 others v Attorney General and 3 others [2004] eKLR and Chrispus Karanja Njogu v Attorney General & another [2005] eKLR for the proposition that article 67 of *the Constitution* ought to be given effect.
50. The 1st interested party, though served, did not take part in these proceedings

Determination

51. I have considered the petition, responses, arguments by parties and the decisions relied on. The main issue for determination is whether the impugned provisions are unconstitutional. However, before dealing with the main issue, there is a preliminary question of jurisdiction that the court should dispose of first.

Jurisdiction

52. The Attorney General representing the 1st and 2nd respondents argued that this court has no jurisdiction to determine this petition. According to the Attorney General, the issue raised in this petition falls within the jurisdiction of the ELC under article 162(2)(b) of *the Constitution* read with section 13 of the ELC Act.
53. Jurisdiction is the power or authority given to a court to determine disputes brought before it. A court's jurisdiction must flow from *the Constitution*, the law or both. This position was well articulated by the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR, thus:
 - (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.
54. In re the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, the Supreme Court, after referring to Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (supra), 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*.

55. Jurisdiction of this court is not and should not be in doubt since article 165(3) confers on the court unlimited original jurisdiction in criminal and civil matters. Under article 165(3) (b), the court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and (d) jurisdiction to respecting the interpretation of *the Constitution* including determination of the question whether any law is inconsistent with or in contravention of *the Constitution* and 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*.
56. On the other hand, article 162(2)(b) provides that Parliament shall 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 land occupation of, and title to, land.” Parliament was also to determine jurisdiction and functions of those courts. Parliament dully enacted the Environment and *Land Act*, 2011 (the ELC Act) which established the ELC in compliance with article 162(2)(b). Section 13 of the ELC Act provides for the jurisdiction of the ELC.
57. 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) further 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.
58. 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. They include, among others, prerogative orders, award of damages and compensation.
59. There can be no doubt that the ELC has jurisdiction to interpret and apply *the constitution*. However, this jurisdiction is limited to disputes falling within the jurisdiction of the ELC as opposed to the High Court which has unlimited jurisdiction. The fact that ELC and therefore courts of equal status exercise limited jurisdiction was appreciated by the Court of Appeal in Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others [2020] eKLR which, though dealing with the jurisdiction of the ELRC, the position is applicable to this petition.
60. The Court of Appeal took the view, that the dispute in that case had a constitutional connotation and could not be said to strictly fall under section 12 of the *Employment Act*, pointing out that the jurisdiction of the ELRC is limited rather than unlimited and that whereas the ELRC has jurisdiction in appropriate cases to interpret and apply *the Constitution* in matters that arise in the context of disputes on employment and labour relations, the ELRC has no original or unlimited jurisdiction to interpret and apply *the Constitution*.



61. In the same vein, and by parity of reasoning, whereas the ELC has jurisdiction in appropriate cases to interpret and apply *the Constitution* in matters that arise in the context of disputes on environment and the use and occupation of, and title to, land it has no original or unlimited jurisdiction to interpret and apply *the Constitution*.
62. This petition not only calls for interpretation of *the Constitution*, but also determination of whether the provisions and actions of the NLC is takes in accordance with the impugned provisions are inconsistent with or in contravention of *the Constitution*. That is, the issues raised in the petition fall within the core constitutional mandate of this court. This court has jurisdiction to determine this petition.

Constitutional validity

63. The petitioner argued that the impugned provisions are unconstitutional a position that was supported by the 4th interested party. The respondents, supported by the 2nd and 3rd interested parties, maintained that the provisions are constitutional and valid. It is important before dealing with this issue, to briefly consider the principles that guide courts in determining the constitutionality of statutes or statutory provisions.
64. There is a general, but rebuttable presumption, that a statute enacted by the legislature should be presumed to be constitutional, unless the law is clearly unconstitutional or violates a fundamental right. The burden is on the person alleging unconstitutionality to prove the invalidity. This is because it is assumed that the legislature, as the people's representative, understands the problems people face and, therefore, enacts legislation with the intention of solving those problems. (See *Hamdard Dawakhana v Union of India* Air (1960) 354).
65. This principle was reiterated in *Ndynabo v Attorney General of Tanzania* [2001] EA 495, that an Act of Parliament is presumed to be constitutional and the burden is on the person contending otherwise to prove the contrary.
66. The court should also examine the purpose or effect of a statute or statutory provision to determine its constitutionality. The purpose of enacting legislation, or the effect of implementing such legislation, may lead to nullification of the statute or its provision if found to be inconsistent with *the constitution*.
67. In *R v Big M. Drug Mart Ltd*, [1985] 1 SCR 275; 1986 LRC (Const.) 332, the Supreme Court of Canada stated that:

[80] Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus, its validity.
68. The Court was clear that the initial test of constitutionality must be whether or not the legislation's purpose is valid; the legislation's effect would only be considered when the law under review has passed the purpose test. The effect test can never be relied on to save legislation with an invalid purpose.
69. In *Olum and another v Attorney General* [2002] 2 EA, the court again stated:

To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its



purpose does not infringe a right guaranteed by *the Constitution*, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the Constitution*, the impugned statute or section thereof shall be declared unconstitutional.

70. The same point was made in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act, and this can be discerned from the intention expressed in the Act itself.
71. With these principles in mind, the task of the court is to determine whether all or any of the impugned provisions are inconsistent with *the Constitution* and, therefore, of no legal force or effect.
72. The petitioner, supported by the 4th interested party, impugned sections 14(1); 14(9); 15(3)(e); 15(10) and 15(11) as unconstitutional and invalid. They argued that these provisions limit the constitutional mandate of NLC more so, the time within which NLC can exercise its mandate to review grants or dispositions of public land to establish their propriety or legality, and admit, register and process historical land injustice claims; grant Parliament power to legislate on time within which NLC should discharge its functions and impose lifespan on the decisions made by NLC.
73. The petitioner maintained that the time limits are arbitrary, unreasonable and infringe on the rights of victims of historical land injustices many of whom may not afford litigation in ordinary courts.
74. The petitioner took the view, that the impugned provisions are unconstitutional since *the Constitution* does not set time limits and does not donate power to Parliament to set time lines within which NLC is to execute any of its mandates. It is the petitioner's position, that by virtue of article 67(3) of *the Constitution*, Parliament can only enact legislation to add onto NLC's mandate but not to diminish that mandate.
75. The respondents, supported by the 2nd and 3rd interested parties, argued that the provisions are constitutional and that time limits are necessary to protect the sanctity of title deeds and that litigation must come to an end. According to the respondents, a review of grants of disposition of public land under article 68 (c) (v) of *the Constitution*, is to be regulated by legislation. *The Constitution*, they argued, does not define the contours of such regulatory regime leaving it to the legislative wisdom of Parliament. In their view, that is why article 68 (c) (vii) gives Parliament a constitutional discretion to provide for any other matter necessary to give effect to the provisions in Chapter Five.

Section 14(1)

76. Section 14 provides that:
 - (1). Subject to Article 68(c) (v) of *the Constitution*, the Commission shall, “within five years of the commencement of this Act”, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or depositions of public land to establish their propriety or legality. Sub article (2) allows NLC, subject to articles 40, 47 and 60 of *the Constitution*, to make rules for the better carrying out of its functions under subsections (1).
77. Sub section (3) requires NLC while exercising its powers under subsection (1), to give every person who appears to have an interest in the grant or deposition concerned, notice of such review and an opportunity to appear before it and inspect any relevant documents. After hearing parties in accordance with sub article 3, subsection (4) requires NLC to make a determination. Sub section (5) states that where NLC finds that the title was acquired in an unlawful manner, it shall, direct the



- Registrar to revoke the title. Subsection (6) provides that where NLC finds that the title was irregularly acquired, it shall take appropriate steps to correct the irregularity and may also make consequential orders. Sub section (7) however provides that a revocation of title shall not be effected against a bona fide purchaser for value without notice of a defect in the title.
78. Sub section (8) states that in the exercise of its power under this section, NLC shall be guided by the principles set out under Article 47 of *the Constitution* (fair administrative action), while subsection (9) provides that NLC may, where it considers necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).
79. The petitioner impugned section 14(1) on grounds that it limits the constitutional mandate of NLC thereby undermining the mandate of a constitutional commission. Subsection (1) which though subject to article 68 (c) (v) of *the Constitution*, requires NLC to within five years of the coming into force of the Act, commence, on its own motion or upon a complaint by national or a county government, a community or an individual, a review all grants or depositions of public land to establish their propriety or legality.
80. NLC is established under article 67(1) of *the Constitution* with its functions delineated under subsection (2). One of the functions is (e) to initiate investigations, on its own initiative or on a complaint, into “present or historical” land injustices, and recommend appropriate redress. Complaints on historical land injustices may include aspects of disposition or acquisition of public land. In that regard, investigating complaints is one of the core functions of NLC, so that it has mandate to initiate investigations on its own motion or on application by national or county governments, a community or any person, over a claim of land injustices-by reviewing a grant or deposition of public land to establish its propriety or legality.
81. Article 68(c) requires Parliament to enact legislation to, among others, (v) enable NLC review all grants or depositions of public land to establish their propriety or legality. Parliament enacted the Act with the now impugned section 14(1). Whereas under article 68 (c) (v) NLC is to be enabled to review all depositions of public land to establish their propriety or legality, the section 14(1) requires NLC to undertake this mandate within five years of the coming into force of the Act.
82. The Act was assented to on 27th April 2012 and commenced on 2nd May 2012. Section 14(1) would appear to suggest that at the expiry of five years from 2nd May 2012, the mandate of NLC to review all grants or depositions of public land to establish their propriety or legality would come to an end. Section 14(9) however provides that NLC may, where it considers necessary, petition Parliament to extend the period for undertaking review specified in subsection (1).
83. A reading of section 14(1) against articles 67(2)(e) and 68(c) (v) shows that whereas article 67(2) (e) confers on NLC the mandate to investigate historical land injustices and article 68 (c) (v) requires Parliament to enact legislation to enable NLC review grants or depositions of public land and establish their propriety or legality, article 67 (2) (e) read with article 68 (c)(v) does not suggestion that this function or mandate is a one-time affair. If that was the intention, *the Constitution* would have expressly or by necessary implication stated so. That does not however appear to be the case from the language of these articles of *the Constitution*. In the circumstances, section 14(1) is inconsistent with articles 67(2) (e) and 68 (c) (v) of *the Constitution* in so far as it purports to require NLC to investigate historical land injustices and review grants or depositions of public land to establish their propriety or legality within 5 years of the coming into force of the Act.
84. Article 67(2)(e) read with article 68(c)(v) shows that review of grants and depositions of public land is a continuing function which cannot be tied to a period of time as the impugned section 14(1) purports to do. A constitutional provision cannot be rendered superfluous by a statutory provision that is



- subservient to it. Accepting the respondents' argument that Parliament had discretion and mandate to legislate the impugned section 14(1), would be to allow Parliament to amend *the Constitution* by subterfuge.
85. The respondent's reliance on article 68 (c) (vii) to argue that Parliament acted within its legislative mandate cannot be correct. Article 68 (c) (vii) gives Parliament mandate to provide for "any other matter necessary for "giving effect" to the provisions in Chapter V-on land. Parliament is to provide through legislation any other matter that would assist NLC in discharging its constitutional mandate. This can only be in addition to what *the Constitution* has provided for as the mandate of NLC and should be an enabler to discharging the constitutional functions but not to limit or diminish the functions. Parliament exceeded its mandate in this regard.
86. This view is informed by the fact that article 159(2) (e) requires the court to be aware of its obligations when exercising its judicial authority, including in interpreting *the Constitution*, to ever have present in mind, the obligation to protect and promote the purpose and principles of *the Constitution*. Article 259(1) further calls on the court to adopt an interpretive approach that promotes the purposes, values and principles of *the Constitution*; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.
87. In that regard, *the Constitution* should be holistically and purposively interpreted so as to advances its purposes, give effect to its intents and illuminate its contents. (Re the Speaker of the Senate & another v Attorney General & 4 others – Supreme Court Advisory Opinion No 2 of 2013 [2013] eKLR para 155-157).
88. The court should also bear in mind that *the Constitution* is a living document meant to serve all times and not for a limited or shorter time unless it declares so. *The Constitution* must therefore be read and interpreted in that context. The court should, when interpreting *the Constitution*, have this in view: That constitutional provisions have to be read and interpreted as an integrated whole, each provision supporting and not destroying the other. (Tinyefuze v Attorney General of Uganda [1997] UGCC 3).
89. As PN Bhagwati, J. also observed in S P Gupta v Union of India & another 1982 AIR 149; 1982(2) SCR 365, *the constitution* is an organic instrument intended to endure and its provisions must be interpreted having regard to the constitutional objectives and goals so that the court should not rewrite *the constitution* in the guise of interpretation. That means the court must pay attention to the language of *the Constitution*.
90. Applying the above principles to this petition, I can only agree with the petitioner, that the impugned section 14(1) falls afoul article 67(2) (e) as read with article 68(c) (v) of *the Constitution* for purporting to require NLC to review grants or dispositions of public land to establish their propriety or legality within 5 years of the coming into force of the Act.
91. On the same basis, section 14(9) is inconsistent with *the Constitution* in purporting to confer on Parliament discretion to extend time for enabling NLC discharge its mandate to review grants or depositions of public land since that function is not tied to a period of time and therefore cannot be limited by Parliament.

Section 15

92. The petitioner again impugned section 15 (3)(e) on grounds that it is inconsistent with the mandate of NLC. Section 15 is on historical injustices and provides that pursuant to article 67 of *the Constitution*, NLC shall receive, admit and investigate all historical land injustice complaints and recommend redress.



93. Sub section (2) states that for the purpose of this section, a historical land injustice means a grievance which-(a) was occasioned by a violation of right in land on the basis of any law policy, declaration, administrative practice, treaty or agreement; (b) resulted in displacement from habitual place of residence; (c) occurred between 15th June 1895 when the Kenya became a protectorate under the British East African Protectorate and 27th August 2010 when *the Constitution* was promulgated; (d) has not been sufficiently resolved and subsists up to 27th August 2010 (c) and (e) meets the criteria set out under subsection (3) of this section.
94. Sub section (3) provides that a historical land claim may only be admitted, registered and processed by the Commission if-(e) “it is brought within five years from the date of commencement of this Act.” This is the provision, the petitioner contended that violates *the Constitution*, a position supported by the 4th interested party. The respondents and the 2nd and 3rd interested parties maintained that the provision is constitutional. In their view, the time limits are necessary to protect the sanctity of title deeds and that litigation must come to an end.
95. As already pointed out, one of the functions of NLC under article 67 (2) of *the Constitution* is to initiate investigations on its own initiative or on a complaint, into “present or historical” land injustices, and recommend appropriate redress. *The Constitution* envisages that NLC will conduct not only historical but also present land injustices either on its own motion or on application by a party. This provision does not limit the period the complaint should relate to. It may be past or present land injustice claim. In that regard, it was not for Parliament to limit the period or time within which to present a claim for land injustice to five years from the commencement of the Act.
96. A statute or statutory provision cannot undermine the functions of a constitutional body by limiting one of its core functions through introduction of timelines within which the mandate or function is to be discharged or performed when *the Constitution* itself does not mandate Parliament to set such timelines either expressly or impliedly. Where either the purpose or the effect of implementing a provision infringes a right guaranteed by *the Constitution* or contradicts *the Constitution*, the section or its provision will be declared unconstitutional. (R v Big M. Drug Mart Ltd (supra); Olum and another v Attorney General supra).
97. In the present petition, *the Constitution* confers on NLC mandate to investigate both present and past land injustices. This mandate is not tied to a specific timeline. It is an all-enduring function. Parliament could not and cannot therefore purport to limit this mandate through legislative manoeuvre. To the extent that Parliament enacted section 15(3)(e) to provide that a historical land injustice claim should be admitted, registered and processed by the Commission only if it is brought within five years from the date of commencement of the Act, or even after any other period that may be extended by Parliament, is inconsistent with article 67 (2)(e) which mandates NLC to initiate investigations on its own initiative or on a complaint, into “present or historical” land injustices, and recommend appropriate redress. Present land injustice must mean a claim that may have arisen after the promulgation of *the Constitution*. The mandate is for an indeterminate period, thereby rendering section 15(3) (e) constitutionally infirm.
98. The petitioner again impugned section 15 (10) which provides that upon NLC determining a historical land injustice claim, any authority mandated to act on the redress recommended shall be required to do so within three years.
99. The petitioner, supported by the 4th interested party, argued that the provision imposes lifespan on the decisions of NLC thus, violates the victims’ right of access to justice guaranteed under article 48 of *the Constitution*. They argued section 15(10) cannot be interpreted to mean that if the recommendation



is not acted upon within 3 years, it would cease to have effect. They took the view, that the section can only be purposively and objectively interpreted to mean that recommendations must be acted upon expeditious and within 3 years.

100. Section 15(10) on its face is a positive provision which requires that any authority mandated to act upon recommendations made by NLC for redressing a historical land injustice claim, do so within three years. The section does not however state what should happen if the recommendation is not acted upon within the three years.
101. That gap does not on its own render the provision unconstitutional. A purposive and objective reading of the section would mean that the decision does not lapse after three years because the reason for assigning three years for implementing the decision is to encourage quick action by the authority mandated to act to avoid delay in resolving what has been adjudged historical land injustice. Failure to act within three years does not render the decision stale nor is the provision unconstitutional. The successful party can move to enforce the decision in a manner authorised by any other law since this is a decision made by a constitutional Commission with powers to render enforceable decisions. The lapse of three years does not on its own render the decision unenforceable or the provision unconstitutional.
102. Finally, the petitioner took issue with section 15(11) which provides that the provisions of this section (section 15) shall stand repealed within ten years. All the court can say, is that Parliament was mandated to enact an enabling legislation so that NLC can discharge its constitutional mandate. The mandate of NLC is not timed and, as the court has already stated, is a continuing function. Repeal of section 15 cannot mean the end of the function and mandate of NLC with regard to receiving, admitting and investigating complaints on present or historical land injustices and recommend appropriate redress. NLC has an obligation to discharge its constitutional mandate and promote constitutionalism whether section 15 is repealed or not.

Conclusion

103. Having considered the pleadings, arguments by parties, *the Constitution* and the law and having laid the impugned provisions against *the Constitution* generally and articles 67 and 68, in particular, the court comes to the following conclusions:

First; section 14(1) is inconsistent with article 67(2) (e) read with article 68 (c) (v) of *the Constitution* in so far as it purports to require NLC to review grants or dispositions of public land to establish their propriety or legality within 5 years of the coming into force of the Act. The function of reviewing grants and depositions is not a one-off function at least not from the language of *the Constitution*.

Second, section 14(9) is inconsistent with *the Constitution* in purporting to confer on Parliament discretion to extend the mandate of NLC to review grants or depositions of public land to determine their propriety or legality since this function is not tied to a period of time and therefore cannot be limited by legislative subterfuge.

Third, section 15(3) (e) is unconstitutional to the extent that it requires NLC to only admit, register and process a historical land claim if it is brought within five years from the date of commencement of the Act, or even after any other period that may be extended by Parliament. This provision contravenes article 67 (2)(e) which mandates NLC to initiate investigations on its own or on a complaint, into “present or historical” land injustices, and recommend appropriate redress. Present land injustice must mean a claim that arises after the promulgation of *the Constitution*. The section in purporting to limit the mandate of NLC, if accepted, would render a constitutional provision superfluous.

Fourth, section 15(10) which requires that any authority mandated to act upon recommendations by NLC for redress over a historical land injustice claim should do so within three years, does not in my



view, limit the lifespan of the decision to the three years. A purposive reading of the section can only mean that recommendations must be acted upon expeditious, without delay and within 3 years. The decision or recommendation can still be acted upon even after the three years since it is an enforceable decision. The section is constitutionally valid.

Fifth, section 15(11) on the repeal of section 15 does not affect the discharge by NLC of its constitutional mandate.

104. Consequently, and based on the above conclusions, the court makes the following declarations and orders it considers appropriate.

1. A declaration is hereby issued that *the Constitution* does not provide time limits or anticipate imposition of statutory time limits on any of the mandates or functions of the National Land Commission.
2. A declaration is hereby issued that article 67 (3) of *the Constitution* does not vest Parliament with power to enact legislation to oust or impede the constitutional mandate and functions of National Land Commission.
3. A declaration is hereby issued that sections 14(1), 14(9), 15(3) (e) of the *National Land Commission Act* (No. 5 of 2012) are inconsistent with *the Constitution* and are therefore unconstitutional, null and void.
4. This being a public interest litigation, each party shall bear their own costs of this petition.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2025

E C MWITA

JUDGE

