

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO E052 OF 2025

SUDHABEN AMRITLAL SHAH & ANOTHER
PLAINTIFFS

VERSUS

CHIEF LAND REGISTRAR & 4 OTHERS
DEFENDANTS

RULING

1. The Notice of Motion dated 20th May, 2025 is seeking the following orders:

- a.Spent;
- b. An interim inhibition order against the registration of any dealings on plot number Chembe/Kibambamshe/366 as issued by the Land Registrar to the 5th defendant herein Dawagi Investments Limited pending the hearing and determination of the application inter partes or until further orders;
- c. A temporary order of injunction restraining the defendants by themselves, their servants or agents from transferring, occupying, alienating, disposing, charging or engaging and any development whatsoever or in any way dealing with plot number Chembe/Kibambamshe/366 pending the hearing and determination of this application inter partes or until further orders;
- d. That upon inter partes hearing, this court be pleased to issue an order of inhibition against registration of dealings on plot number Chembe/Kibambamshe/366 as issued by the Land Registrar to the 5th defendant herein Dawagi Investments Limited pending the hearing and determination of this application and suit;
- e. That upon inter partes hearing, this court do issue an order of injunction restraining the defendants by themselves, their servants and or agents or any personal acting and/or claiming under their authority from transferring, occupying, alienating, disposing, charging or engaging and any development whatsoever or in any way dealing with plot number Chembe/Kibambamshe/366 pending the hearing and determination of the application and the suit;
- f. That the costs of the application be borne by the defendants;
- g. That the court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this application.

2. The application is premised on the grounds set out at its foot and it supported by the affidavit of Sudha Amritlal Shah alias Sudhaben Amritlal Shah. The grounds upon which it is made are as follows: Amritlal Rupshi Shah together with Bharantkumar Nathalal Shah were registered proprietors of **Chembe/Kibabamshe/366**, having been issued with title on 6th November 1980 in a first registration then under Registered Land Act (RLA) Cap 300, now repealed. The deceased enjoyed quiet and peaceful possession of the suit property as absolute proprietors. It also ceased to be available to the government of Kenya for alienation to any third party. They never sold the suit property and they never surrendered the suit property title to the government of Kenya. Neither was the suit property title canceled amended or revoked. In **1986** the then Commissioner of Lands purported to recall all titles issued in respect of the Kilifi, Chembe, Kibabamshe, Madeteni, and Jimba Registration Sections by way of **Kenya Gazette Notice Number 2505 Of June 1986** and the Commissioner of Lands **Circular Number 1139336/55**. The two documents have now been declared to be unConstitutional and illegal by court of law.
3. In circumstances unknown to the plaintiffs, on 10th March, 2015, the suit property was illegally and unprocedurally transferred to the 5th defendant Dawagi Investments Limited and the title deed was issued on the same day in its favour. Those transactions were registered despite the fact that the plaintiff's title to the suit property had not been revoked, cancelled or

surrendered. It is averred that there are no provisions under the repealed Registered Lands Act Cap 300 or any other Act that bestowed upon the Commissioner of Lands or the Chief Lands Registrar or the (2nd respondent) or the National Land Commission (fourth respondent) or the government of Kenya, power to revoke a registered title in the absence of a court order. The 1st and 2nd defendants have created a new register for the parcel file and caused the suit land to be transferred to the 5th defendant, which is said to be illegal and unprocedural. The 5th defendant is said to hold a title issued on 10th March, 2015. The argument of the applicants is that the title held by the 5th defendant is not indefeasible under the law since its root of title is tainted with illegalities that the action of the government of issuing title to third parties over the plaintiff's land amounts to an illegal compulsory acquisition of land. Family members of the late owners made a formal complaint to the 4th defendant regarding the fraudulent dealings with the suit land. The National Land Commission requested the Chief Land Registrar to place a restriction on the suit title before Dawagi Investments Limited was issued with a title on 10th March, 2015. A similar letter was written by the National Land Commission to the District Land Registrar Kilifi seeking a restriction on the suit title. The National Land Commission then dealt with the issue of the dispute regarding the ownership of the Land and in exercise of its mandate and **Article 68 (c) v** of the Constitution of Kenya as read with **Section 14** of the **National Land Commission Act 2012** while

undertaking investigations with regard to historical land injustices, conducted public hearings in Malindi and heard all the interested parties. It eventually issued a decision dated **19th April** 2016 stating that the suit land legally belongs to the deceased. The said decision was later gazetted via **Gazette Notice Number 6862 Volume CXIX Number 97** in favour of the deceased and the 1st and 2nd defendants were ordered revoke any subsequent titles and uphold the deceased's title to the suit property as required by Section 14(5) of the National Land Commission Act 2012. The determination of the National Land Commission has not been varied revoked or set aside. However, the 1st and 2nd defendants have refused to implement the said decision.

4. In contravention of the law, the 4th defendant also published another Kenya gazette notice dated 8th February, 2019 containing the same contents as those of the gazette notice of 17th July, 2017, but with an addendum regarding the suit land where it was indicated that Dawagi Investment Limited was the registered owner, and the said notice gave no directions to the Chief Lands Registrar either to cancel the plaintiff's title or to register the plot in the name of Dawagi Investments Limited; that Dawagi Investments Limited did not participate in the earlier public hearing held on 7th to 17th September, 2015 and no appeal has been lodged as per **Rule 30** of the **National Land Commission (Review Of Grants And Dispositions Of Public Land) Regulations 2017** with regard to the determination in favour of the deceased. It is stated that the

said addendum is illegal and unprocedural and that the plaintiffs were not involved or consulted in its making. The plaintiffs have written letters dated 5th June, 2025 and 14th May, 2025 to the 1st, second and 4th defendants requesting them to regularize the title of the suit property in favour of the plaintiffs as per the decision of the National Land Commission dated 19th April, 2016 and gazetted on 17th July, 2017, but in vain. They stated the purported cancellation of the deceased's title and issuance of title deed to the 5th defendant and its predecessors in title violates the provisions of **Article 47** of the Constitution of Kenya as read with **Section 4** of the Fair Administrative Action Act 2014 in that no reasons were given to the plaintiffs for the said acts or decisions, thus violating the principles of fair hearing and specifically the right to be heard.

5. The Preliminary Objection and the grounds of opposition filed by the 5th defendant dated 26th May, 2025 in opposition to the application were withdrawn on 4th June, 2025 vide a Notice of Withdrawal of that date. Parallel to the withdrawal the 5th defendant also filed grounds of opposition also dated **4th June 2025** stating as follows:
 - a. The application is an abuse of process to the extent that they seek to injunct government institutions contrary to obtaining jurisprudence which forbids such relief;
 - b. The application is an abuse of the court process to the extent that it is brought to circumvent laid down procedure applicable to decisions made by the National Land Commission pursuant to Article 67 of the Constitution of Kenya 2010;

- c. The application lacks merit to the extent that it is grounded on a purported decision of the National Land Commission without taking into account that the correct decision was published in the Kenya gazette by the National Land Commission and the same stands in favour of the 4th defendant and over right the purported decision asserted by the plaintiffs,
 - d. This Court lacks jurisdiction to consider and determine matters canvassed before and decided by the National Land Commission save on appeal within the ambits of the **National Land Commission Review of Grants and Disposition of Public Land Regulations 2017**;
 - e. The facts set out in the application and affidavit annexed thereto to do not demonstrate that the threshold for grant of orders sought has been reached;
 - f. The 5th defendant being in possession of the suit property, having been declared by the National Land Commission as the lawful proprietor thereof ought not to be dislodged by the frivolous application that is laid before the court;
 - g. The application is vexatious and contemptuous of the decision of this court (Olola J) made on 30th June, 2022 upholding the 4th defendant's title and the 4th defendants right to enjoy the suit property to the exclusion of all others.
6. The 5th defendant also filed a Notice of Preliminary Objection dated 4th June, 2025 setting out the following grounds:
- a. The suit is an abuse of the process in so far as the same flouts **Rule 30** of the **National Land Commission Review of Grants and Disposition of Public Land Regulations 2017** which provides that any aggrieved person may within 14 days of the Commission's decision appeal to the court;
 - b. This court therefore lacks jurisdiction to hear and determine the suit canvassing and challenging a decision of the National Land Commission made pursuant to its mandate under Article 67 of the Constitution of Kenya 2010;
 - c. The suit is time barred being a claim for vacant possession on the force of a title allegedly issued in 1980. The 5th defendant reiterates the stipulations under the Limitation of Actions Acts Chapter 22 of the Laws of Kenya;
 - d. The suit is time barred under the Limitation of Actions Act Cap 22 Laws of Kenya, being a claim challenging revocation of title allegedly effected in 1986;
 - e. The suit is an abuse of process and an affront to Article 67 or the Constitution of Kenya 2010 and the National Land Commission Act and Rules created thereunder.

7. Alongside the new grounds of opposition and notice of preliminary objection was filed a Replying Affidavit of **Anthony Safari Kitsau** a director of the 5th defendant. In that affidavit the deponent states that the 5th defendant is the registered owner of the suit land, having acquired date by way of purchase in **2015** for the sum of Kenya shillings 10,500,000/- while the plaintiffs are not and have never acquired in a lawful title the suit land in the past. It is denied that the deceased ever enjoyed quiet and peaceful occupation of the suit property. That due diligence was carried out which established that the suit land was ancestral land of what he calls the Mranzi family who were in peaceful occupation at the material time; that the adjudication officer determined that the land was the lawful property of that family which finding was recorded in the relevant register. The consent of the Land control board was obtained; the SFT loan was settled together with other dues and government levies owed to the Department of Land and the Collector of Stamp Duties and therefore due process was followed. The 5th defendant has also developed the suit property by fencing it and constructing an all-weather private access road to it. The deceased should have pursued vacant possession within 12 years from 1980 by way of suit or complaint to authorities but did not do so and the suit is now time barred under the provisions of Cap 22 of the Laws of Kenya and should be struck out; that the National Land Commission did not make any determination over the suit property in favour of the deceased; that the National Land

Commission's determination was to the effect that the suit property belonged to the Mlanzi family by virtue of the Adjudication Register and subsequent ground verification by the Commission. The Gazette Notice relied on by the plaintiffs was an error which was subsequently corrected by the addendum dated 8th February 2019 which reflected the true proceedings before the National Land Commission. The 5th defendant avers there is even more recent correspondence from the National Land Commission showing that the property was adjudicated in the 5th Defendant's favour after the NLC hearings; that the Mranzi family and the 5th defendant fully participated in the proceedings before the Commission at the Commission's invitation; that the plaintiffs should have filed an appeal after the *addendum* was published but did not do so; that this court lacks jurisdiction to hear and determine this matter; that in **Malindi ELC 20 Of 2021 Mayungu Real Estates Limited Versus Dawagi Investment Limited And 4 Others** this court made findings upholding the decision by the National Land Commission in favour of the 5th defendant.

8. A defence dated **4th June 2025** was also filed.
9. The Attorney General on behalf of the 1st, 2nd and 3rd defendants filed the sworn affidavit of Mohamed Billow, Land Registrar based in the Kilifi Land Registry, dated 16th June 2025 in which the deponent states as follows: parcel number Chembe/Kibabamshe/366 was created pursuant to adjudication of the Chembe Kibabamshe Adjudication Section in **1978** and

the First Edition of Land Register (green card) was opened on **30th May 1978**, and the first registration was entered in favour of Leah Naisiane and Frederick Gachogo Mwai who sold it to the deceased and a transfer was registered on 6th November 1980; that on the **17th November 1981** deceased had charged their title to Jimba Credit Corporation Limited for Kenya shillings **155,000/-** as indicated on the Encumbrances Section of the title; that due to disputes in the area, the government cancelled the titles issued to the landowners in the section and requested them to surrender their titles to it. Title to the suit land was however not surrendered to the government since it had been charged to Jimba Credit Corporation Limited. Subsequently the National Land Commission entertained disputes over land within the section including the suit land and made findings and recommendations vide its **Gazette notice number 6866 dated 7th July 2017** and vide that notice, it recommended to the Chief Land Registrar to regularize the title held in the deceased's names and that any other subsequent title issue to third parties be revoked and that the embargo against the title be lifted; that however the National Land Commission also published the *addendum* vide Gazette Notice 1156 of 8th February, 2019 and placed Dawagi Investments Limited as the registered owner in respect of the suit land, and gave no further description or direction in the said gazette. However, before the involvement of the National Land Commission through its hearings and determinations, deceased's next of kin had written several

letters to the Chief Land Registrar and the National Land Commission seeking further investigations, implementation and reconstruction of parcel registers for land registered in the deceaseds' names. In **June 2023** an application for registration of the caution over the suit land title was lodged by one Biren Shah. The caution was noted in the Presentation Book of 26th June, 2023 as PB NO 208/6/2023 but was not registered on the grounds that the register reflected other parties, and not the deceased, as registered owners; that an application was made by the advocate for the estate of the deceased in **2024** to have the register for the suit land reconstructed to restrict dealings in the said parcel. Subsequently the Chief Land Registrar on **13th June 2024** forwarded a letter to the County Land Registrar, citing the 2 National Land Commission notices in favour of two different parties and Case No **Malindi ELC No 20 Of 2021** and further requested that a restriction be registered against **Chembe/Kibabamshe/366** pending the determination of the suit. Subsequently restriction was registered against the title held by Dawagi Investments Limited, restricting any dealings pending the hearing and determination of the litigation in court, but it was not signed against because ruling was made in the matter, striking out the suit. Thereafter the estate of the deceased was directed to the Environment and Land Court for redress.

10. The affidavit states that the proprietorship of Dawagi Investments Limited with regards to the suit land emanates from a transfer of land and

a discharge dated **25th January, 2015** from the Settlement Fund Trustees and registered on **10th March, 2015** pursuant to an application for registration made vide **PB No 113** dated **26th January, 2015**. A green card was opened erroneously to indicate that it is a first edition opened on **12th August, 1976** in the name of the Settlement Fund Trustees which is a date way before the adjudication of the Chembe Kibabamshe Section was done; that the accurate 1st Edition green card for Chembe Kibabamshe was opened in **May, 1978** immediately after the adjudication of the section. The 2nd Edition of the land register for Chembe Kibabamshe was opened on December **1986** after cancellation and surrender of Title pursuant to **Gazette Notice number 2505 of 30th May, 1986**.

11. The deponent also disclosed that Mayungu Estates Limited once held title over the suit land which was extinguished by the ruling in **ELC No. 20 of 2021** and the National Land Commission determination gazetted on 17th July, 2017 vide **Gazette Notice Number 16866**, and that Mayungu's title had been premised on a letter of offer dated **8th December, 1998** written by the Director of Land Adjudication and Settlement.

SUBMISSIONS

Plaintiff's Submissions

12. The plaintiff's counsel submitted that the Preliminary Objection is not merited as it does not meet the threshold of such an objection since there

are factual matters which need to be ascertained by this court, considering the glaring irregularities with regard to the process culminating in the National Land Commissions two decision issued on different dates. In this regard it is pointed out by counsel that the decision of 8th February, 2019 vide **Gazette Notice Number 1156 Volume CXXI No 16** maybe illegal because the National Land Commission had already made an earlier determination with regard to the suit property in favor of the deceased and no appeal had been lodged against that earlier decision. That the conflicting nature of the two gazette notices issued by the same Commission is indicative of illegality with regards to the second gazette notice. That there was no involvement of the deceased with regard to the second decision that led to the second gazette notice. Parallel to this, counsel pointed out that the 5th defendant had also not been involved with regard to the proceedings leading to the earlier gazette notice and the earlier decision of the Commission dated 19th April, 2016. That it will be the task of this court to determine which of the two decisions is valid. Counsel submitted that the decision made in Malindi ELC Number 20 Of 2021 by Olola J. was made after non-disclosure by the parties as the court was not informed of the material fact that the National Land Commission had already issued a decision on 19th April, 2016. That thus, the Notice of Preliminary Objection not having raised matters which were pure points of law but which involve matters of fact,

ought to be dismissed and the suit sustained so that the issues can be ventilated at the trial.

13. Regarding Limitation under Cap 22, counsel, relying on **JN & 5 Others Versus Board of Management St G School Nairobi & Another 2017 eKLR** submitted that this is not a proper Preliminary Objection since there are substantive issues which need to be ascertained from the pleadings. He also submitted that striking out the suit on the basis of limitation is too draconian and that would offend the plaintiffs' right to fair hearing and the right to be heard as envisaged by **Articles 40 47 and 50** of the Constitution of Kenya. Counsel relied on **Malindi ELC Number E069 of 2024 Sudhaben Amritlal Shah & Another Vs Sandy Beach Limited & Others** for the proposition that the issues raised in the present case are sufficiently fundamental to warrant trial so as not undermine the plaintiff's right to be heard on their right to property.

14. Regarding whether the prayers in the motion are warranted counsel submitted that the plaintiffs have satisfied the conditions for the grant of an interlocutory inhibition order in terms of prayer **number 4** of the application. Counsel pointed out that the land had already been registered in the name of the deceased under the Registered Land Act which legal regime is still applicable by dint of **Section 107** of the **Land Registration Act 2012** and **Section 162** of the **Land Act 2012**; that title had issued in their names under that Act; that the deceased had enjoyed quiet and peaceful occupation of the suit property as the

absolute proprietors, and they were entitled to enjoy all the legal rights of proprietorship that went with ownership and possession; that the deceased never sold the land to anybody else; that the land also ceased to be available for allocation by the government to any other person upon titling in the deceased's favour. The deceased also never surrendered the land to the government at any time. Citing **Republic Versus Kisumu District Lands Officer & Another 2010 eKLR**, counsel for the plaintiff submitted that **Section 143(1)** of the repealed Registered Land Act stated that the court could order rectification by directing that a registration be cancelled or amended where it was satisfied that any registration had been obtained or made by fraud or mistake. Further, **Section 28** of the repealed Registered Lands Act as well as **Section 26** of the Land Registration Act 2012 provided for indefeasibility of title and **Article 40(6)** envisages that due process ought to be followed to have any title that offends the provisions of the RLA cancelled or revoked. Relying on **Giella Versus Cassman Brown and Company Limited 1973 EA 358** and **Mrao Vs First American Bank of Kenya Limited And Two Others, 2003 eKLR Civil Appeal Number 39 Of 2002**, Counsel examined the approach of the court, that favours the first title in time in cases of double allocation, as in the **Gitwany Investments Ltd Versus Tajmal Limited and Three Others 2006 eKLR** and further submitted at the plaintiffs have established a *prima facie* case with probability of success.

15. Regarding the claim that the plaintiffs have not demonstrated how they acquired the suit property, counsel pointed out, citing **Virenda Ramji Gudka & 3 Others Versus Attorney General 2014 eKLR**, that none of defendants has alleged any fraud or misrepresentation on the part of the plaintiffs. Counsel also pointed out that the National Land Commission had requested the Chief Land Registrar and the District Land Registrar to place a restriction on the suit plot with intent to stop any registration and/or dealings with regard to the said land, and that no title deed was supposed to have been issued owing to that directive; that this is persuasive that the 5th defendant's title over the suit property is irregular and therefore the court ought to issue the orders sought in the application and have the suit heard on its merits.

5th Defendant's Submissions

16. Counsel for the 5th defendant cited **Mukisa Biscuits Manufacturing Company Limited Versus West End Distributors Limited 1969 EA 696**, referred to the two gazette notices dated 17th July, 2017 and 8th February, 2019 by the National Land Commission and submitted that the Commission was exercising its Constitutional mandate under **Article 67** of the Constitution as well that is functions under Section 14 of the **National Land Commission Act No 6 of 2012**, and that its decisions made thereunder are subject to **Rule 30** of the National Land Commission Act (Review Of Grants And Dispositions Of Public Land) Regulations 2017 which provides as follows:

“Any person aggrieved by the decision of the Commission may within 14 days of the Commission’s decision appeal to the court.”

17. Therefore, it was not open to the plaintiffs to question the determination of the National Land Commission by approaching this court by way of an ordinary suit and their only recourse was to appeal the determination of the Commission to this court within **14** days of that determination. Citing **Macharia and Another Versus Kenya Commercial Bank Limited & 2 Others 2012 KESC 8 KLR**, counsel submitted that the jurisdiction of this court is clearly drawn and defined and it does not extend to taking up and hearing matters brought by original suits referencing a determination by the National Land Commission, urging the court to vacate the decision of the Commission; that such action is flawed and the suit is abuse of due process and an attempt to detour legal provisions circumscribing the jurisdiction of the court to hearing and determination of only appeals from NLC decisions. Counsel cited **Tom Dollar and Two Others Versus Chairman National Land Commission and Five Others 2020 eKLR** and **Malindi ELC 20 Of 2021 Mayungu Real Estates Limited Versus Dawagi Investment Limited and 4 others** where the court observed that the suit seeks to sidestep the decision of the National Land Commission which body is lawfully mandated to interrogate the validity of such titles.
18. Regarding Limitation, counsel submitted that **paragraph 9** of the plaint reveals that the plaintiff’s claim is based on alleged acquisition of

the property in **1980** while the **paragraph 15** states that in **1986** the government recalled their titles through the gazette notice; that going by the undisputed facts before Court the plaintiffs have never been in possession of the suit land; that they have come to this court 45 years after their purported acquisition and 39 years after the alleged recall of their title seeking vacant position and they thus offend **Section 7** of the Limitation Of Actions Act. Citing **Nicholas Kiptoo Korir Arap Salat Versus Independent Electoral & Boundaries Commission & Seven Ors 2014 eKLR & County Executive of Kisumu Versus County Government of Kisumu & Eight Others Civil Application Number 3 Of 2016 2017 KESC 16 KLR**, counsel submitted that the suit is time barred and is for striking out.

19. Regarding whether the prayers in the application should be granted, the counsel examined the principles for grant of injunctive relief and submitted that the court in exercising its jurisdiction to grant equitable relief should not countenance the plaintiff's lack of adherence to the law with regard to filing appeals against the decision of the National Land Commission. It was also urged by counsel that there is no evidence to show that the deceased acquired the suit property sometime in **1980**, and that fact accounts for why the deceased never took possession thereof; that without *prima facie* demonstration of the manner in which the deceased acquired the property the plaintiff's case lacks substance and so he has not demonstrated a *prima facie* case with likelihood of

success; that on the other hand the 5th defendant has provided documentation in support of its case by showing documents indicating the manner in which it acquired the suit property through lawful purchase. Citing **Hubart L Martin & Two Others Versus Margaret J Kamar & Five Others 2016 eKLR**, counsel submitted that the National Land Commission's inquiry into the dispute was concluded in favor of the 5th defendant and prayed that the suit be struck out with costs to the 5th defendant.

ANALYSIS AND DETERMINATION

20. That this is a highly contentious matter is borne out by the fact that so much material that is fit for the substantive hearing of the main suit has been placed before this court at an interlocutory stage, and that in fact this court must navigate carefully in deciding the present application and preliminary objection in order not to prejudice the hearing of the main suit, that is, if the suit survives the two main limbs of the Preliminary Objection raised by the 5th defendant.
21. This court must above all remind itself that the main issue in the application dated **28th May, 2025** is whether a temporary order of injunction ought to issue restraining the defendants from interfering with the suit land pending the hearing and determination of the suit. However, the court must deal with the Preliminary Objection first.
22. The issues arising for determination from both the Preliminary Objection and the application are as follows:

- a. **Whether this court lacks original jurisdiction to hear and determine a suit canvassing and challenging a decision of the National Land Commission made pursuant to Article 67 of the Constitution of Kenya;**
- b. **Whether the claim is time barred;**
- c. **Whether the orders sought in the application can issue.**

23. Regarding **issue (a)** it is noteworthy that this court draws its jurisdiction from Article 165(2) (b) of the Constitution and Section 13(1) of the Environment and Land Court Act. Section 13 of the Act is enacted pursuant to Article 165(2) (b).

24. It is the case that there are two conflicting gazette notices regarding the suit land. One appears to name the deceased as the proprietors of the suit and while the other which is the subsequent one, appears to name the 5th defendant as the owner. Had there been only one gazette notice, this court would have found need to delve deeper into the issue of jurisdiction. As things stand the matter before this court is not merely about whether or not the Commission made a decision in favour of any of the parties but as to which of the gazette notices is valid. The claim of non-involvement of the plaintiffs in the proceedings precipitating the issuance of the second gazette notice renders the allegations of violation of infringement of Constitutional rights to a hearing and to a fair hearing under **Articles 47** and **50** of the Constitution as well as under **Section 4** of the Fair Administrative Action Act to be triable issues in the suit. Besides, the point relied on by the 5th defendant appears to be a double edged sword when considered in the light of the fact that the first gazette notice appearing to recognize the deceased's title was issued prior to the

one appearing to recognize the 5th defendant's title, and that he had not appealed against the first decision by the National Land Commission, technically placing the 5th defendant in the same boat as the plaintiffs. In this court's view, the presence of both gazette notices which are beyond the timelines prescribed by **Rule 30** for the lodging of appeals, leaves an undesirable situation of uncertainty regarding ownership which warrants this court to arise when called upon by the plaintiffs through this suit and establish some kind of order by way of an original hearing on the merits of the dispute between the parties. In the circumstances, I am not persuaded that the jurisdiction of this court regarding the two conflicting decisions regarding title to land is limited to determining an appeal as the Constitutionality of the presence of two conflicting decisions by the same Constitutional Commission *per se* raises serious controversy as to the Constitutionality of either, which controversy this court is mandated to resolve under the provisions of **Article 162** of the Constitution and **Section 13** of the Environment and Land Court Act. there is need to determine if there was any capricious or whimsical conduct on the part of the NLC officials in issuing two gazette notices on the same land which put two citizens in conflict with each other. In the case of Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] KECA 341 (KLR) The Court of Appeal in held as follows:

“22. For this proposition the appellant called in aid this Court's finding in the case of Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 where the Court expressed itself in relevant part as follows: -

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

23.... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

25. Not much hope of a final resolution of the ownership dispute could be placed on any appeal to this court from any of the two decisions of the National Land Commission; it is clear that by giving two decisions the Commission does not seem to know what it wants to be recognized as the truth. This court must therefore step in and exercise its original jurisdiction in accordance with Article 165(2)(b) of the Constitution. The exercise of this court’s mandate within the context of the exigency created by the two decisions can not be therefore restricted by the provisions of Section 14 of the National Land Commission Act No 6 of 2012 and Rule 30 of the National Land Commission Act (Review of Grants and Dispositions of Public Land) Regulations 2017 to a merely perfunctory

determination of an appeal that would not write *finis* to the dispute between the plaintiffs and the 5th defendant. That the manifestation of confusion within the Commission as to the correct position on proprietorship can be ignored by this court would be anathematic to the very purpose for which this court was established, and to the dictates of Article 159((2)(d) of the Constitution that promotes substantive justice over technicalities of procedure. There are therefore present in the present case exceptional circumstances that allow for this court to have and to exercise jurisdiction over this dispute and I therefore hold that this court thus has jurisdiction to hear and determine the present suit on its merits.

26. As to whether the claim is time barred, it is hard to ignore the fact that this court was faced with a similar set of facts in an earlier case **Malindi ELC Number E069 of 2024 Sudhaben Amritlal Shah & Another Vs Sandy Beach Limited & Others** and it dismissed a similar Preliminary Objection in that case and ordered the suit to proceed to full hearing on its merits. In this case too, it is the correct position that though some of the actions occurred many years ago as pointed out by the 5th defendant, there are more recent happenings that have become the proximate cause for the lodging of the present proceedings. Having regard to the weighty constitutional approach adopted herein above with regard to the conflicting gazette notices of the Commission, I find that the issues in the

present suit would be more safely canvassed within the hearing of the main suit in order not to prejudice any of the parties.

27. The last issue is whether the orders sought in the application are deserved. I have considered the sworn affidavit of Mohamed Billow, Land Registrar Kilifi, from which, even at this interlocutory stage, appears to show clearly that the suit land was at one point registered in the names of the deceased; that the deceased never surrendered their title; that the title was used as security for credit facilities issued by Jimba Credit Corporation. There appears to be a mistaken belief that all the matters raised by Mr Billow are in support of the 5th defendant's case. I do not agree. They - and particularly the nullification of the Circular and Gazette Notice No 2005 of June, 1986 by the court and the directive by the NLC to the relevant lands offices to have the suit title restricted, which matters preceded issuance of title in the 5th defendant's name - indeed portray a situation where the validity of the process employed in issuance of title to the 5th defendant is liable to be questioned, and the answers as to its propriety can only be answered in a substantive hearing of the main suit by way of evidence and cross examination of witnesses and scrutiny of documents. I thus find that the plaintiffs have established a *prima facie* case in this matter and further, that irreparable loss may be occasioned to them in the event that the orders sought are not granted as the property may be put out of their reach in the event of disposal or other dealing by the defendants before the conclusion of the suit.

28. The upshot of the foregoing is that the application dated 20/5/2025 has merit and I hereby grant the same in terms of **Prayer No 4**. The costs of the application shall be in the cause. This matter shall be mentioned on **26/2/26** for pretrials. Parties shall comply with the CPR by filing all their lists, witness statements, and trial bundles before then.

Dated, signed and delivered at Malindi on this 20th day of January, 2026.

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE,
JUDGE, ELC MALINDI.**