IN THE COURT OF APPEAL
AT NAKURU

[CORAM: WARSAME, MATIVO & GACHOKA

JJ.A] CIVIL APPEAL NO. NAK E052 OF 2025

BETWEEN

COUNTY GOVERNMENT OF NAROK.....APPELLANT

AND

LIVINGSTONE KUNINI NTUTU.....1ST RESPONDENT
OL KIOMBO LIMITED.....2ND RESPONDENT THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

*(Being an appeal from the judgment and decision of the Environment and Land Court of Kenya at Narok (**C. Mbogo, J.**) dated 6th March 2025*

in

ELC Case No. 21 of 2021)

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JUDGMENT OF MATIVO, JA

1. This protracted dispute involves the legality of title number **Cis-Mara/Talek/155** issued to the 1st respondent. The Supreme Court in its judgment dated 11th December 2018 rendered in ***Narok County Government vs. Ntutu & 2 others (Petition 3 of 2015) [2018] KESC 11 (KLR) (11 December 2018) (Judgment)*** set aside the judgment and orders of this Court *(R.N Nambuye, D.K. Musinga* & *J. Mohammed J.J.A)* dated 24th April 2015 issued in

Livingstone Kunini Ntutu vs.

***County Council of Narok & 2 Others* [2015] eKLR (Civil Appeal No. 109 of 2014** which upheld the 1st respondent's ownership of the said land and remitted the case back to the Environment and Land Court (ELC) for re-hearing. Central to the Supreme Court decision is the fact that the Apex Court was very clear on the issues to be determined by the trial court. It stated:

> ***"111. The remedies preferred by the court therefore have to be tailor made so as to be consistent with the objects in section 3 of the Act. It is paramount to restate that what is before this court is a matter involving Trust Land that is alleged to have been excised to a private individual. The dispute raised the issue of constitutionality and legality of the title to the Suit Land, which issue has not been heard and determined on merits by the superior courts. 112. Consequently, the appropriate remedy in this case is that we shall allow the determination of the status of the title to the Suit Land, in the public interest and so that such a determination is made to bring certainty in this matter.***
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> ***112. Consequently, the appropriate remedy in this case is that we shall allow the determination of the status of the title to the Suit Land, in the public interest and so that such a determination is made to bring certainty in this matter. Consequently, we find that referral of this matter back to the Environment and Land Court and not the High Court which no longer has jurisdiction on such a dispute to determine the constitutionality and legality of the title to the suit property in line with the Ruling of Nyamweya,***

J, will be the appropriate remedy to give."

2. When the Apex Court remits a case for a retrial or further hearing on specific issues, the trial court's primary duty is to strictly adhere to the terms of the remittal order. Therefore, a pivotal issue in this case is whether or not the ELC remained within the remit specified by the Supreme Court. However, before addressing this question, it is important we set out, albeit briefly, the factual background to this prolonged litigation. Luckily, this history is largely common ground or uncontroverted.

3. This prolonged dispute dates back to 1st July, 1984 when the appellant herein leased a 20-acre piece of land (L.R. No. 13325) to **Olkiombo Limited** (the 2nd respondent) for a term of 33 years ending on 1st July, 2017, while still collecting levy from the 2nd respondent and other hotels within the Masai Mara Game Reserve. On or about 28th October 1992, the Minister for Tourism and Wildlife following consultation with the appellant declared the cessation of the Talek area as part of the Maasai Mara National Reserve vide Legal Notice No. 412. This "*degazettement*" was intended to benefit members of the **Talek group** (or Koyiaki group ranch) by allowing for

individual land titles.

4. On 6th May 1997, the Land Adjudication Officer declared the Talek, a degazetted area as an adjudication section, a process aimed to ascertain and record land ownership rights within the specified area. The adjudication exercise proceeded, land parcels were ascertained, recorded and registered in the names of their respective owners. The adjudication officer certified the same as complete and gave a 60-day period for any objections thereto.

5. The 1st respondent maintained that he was ascertained, recorded and registered as the absolute proprietor of all that parcel of land measuring approximately 1610Ha (4000 acres) known as title no**. Cis-Mara/Talek/155** on 14th October, 1997 in accordance with the provisions of The Registered Land Act (RLA) (repealed), therefore, he holds and has at all material times held, the suit land together with all rights, privileges and appurtenances belonging thereto and free from all other interests and claims whatsoever.

6. The 1st respondent maintained that when the suit land was registered in his favour, all rights, interests and privileges that the appellant had hitherto enjoyed in relation to the

leased

portion, including, but not limited to the reversionary interest,

levying or collection of rent, tariffs, royalties, fees or other revenue, were and each of them was, *ipso facto* extinguished and the same were instead vested in him. However, despite the demands, the appellant unlawfully and without any colour of right or legal justification, continued to purport to exercise such rights or privileges by among others, demanding and collecting rent, tariffs, royalties, fees and other revenue for the use and occupation by the 2nd respondent of the leased portion.

7. Vide letter dated 16th September 1997, the Chief Land Registrar (F.R.S. Onyango) stated that the adjudication process created 154 parcels of land and that no errors were detected when checking the adjudication record, therefore the 1st respondent could not have been registered as the owner of the area number 155 on 14th October 1997 or at all. However, another identical letter was also written by the Chief Land Registrar (F.R.S. Onyango) purporting to include parcel number 155 as part of the adjudicated parcels.

8. Aggrieved the 1st respondent, filed a suit vide amended plaint dated 18th December 2000 seeking a declaration that

he is the absolute owner of a 1,610-hectare parcel of land known as **Cis-**

Mara/Talek/155. He claimed that the "*suit land*" resulted from a formal land adjudication process in the Talek area that was certified complete in June 1997. Consequently, he sought a permanent injunction to stop the appellant herein from collecting rent or royalties from the portion of the land leased to the 2nd respondent.

9. The appellant in its statement of defence and counter claim dated 7th October 2020 contested the 1st respondent's claim, arguing that the suit land was never properly adjudicated and that it was cancelled and/or modified vide the notice of establishment of an adjudication section dated 31st July 1997. Therefore, the 1st respondent's title was invalid, null and void.

10. The appellant contended that: (a) the suit land does not constitute part of Talek area described in the cessation order published vide Legal Notice No. 412 of 1992 dated 28th October 1992; (b) the provisions of the Land Adjudication Act (LAA) were not properly invoked; (c) there was no mandatory prior cessation and/de-gazettement of the land under Section 7 of the Wildlife Conservation and Management Act. Therefore, the suit land remained part of

the Maasai Mara National Reserve and had never been legally degazetted or surveyed for private

ownership; and (d) the registration was a "*fraudulent extension*" of the authorized Talek adjudication section. Consequently, the appellant prayed that the 1st respondent's suit be dismissed with costs and cancellation of the purported registration dated 14th October 1997 and a declaration that the 1st respondent's purported first registration as the proprietor of the suit premises, namely was invalid, null and void.

11. The 2nd respondent filed its amended statement of defence and counter claim dated 3rd August 2001 vehemently disputing the 1st respondent's claim. In its counter-claim, it prayed for a declaration that Title No. **Cis-mara/Talek/155** is void and an order that the said title be cancelled. It also prayed for costs of the suit. However, on 9th May 2023 vide the notice of withdrawal dated 26th April, 2023 filed in court on 27th April, 2023, the 2nd respondent withdrew its counter-claim against the 1st respondent with no orders as to costs.

12. The 3rd respondent filed its defence and counter claim dated 30th October, 2001. Nevertheless, vide the orders issued on 18th October 2005 its defence and counter claim was marked as withdrawn.

13. During the pendency of the proceedings, the County Government of Narok, (the appellant's predecessor) passed a resolution compromising its position vide consent letter dated 13th May 2002 and as a result a consent judgment was entered in favour of the 1st respondent and by M/s Wambuu Wainana & Co. Advocates for Narok County Council and M/s Kilukumi & Co. Advocates for the 1st respondent on 15th May 2002, pursuant to which the appellant's statement of defence and counter-claim dated 7th October 2000 were struck out, a declaration was issued to the effect that with effect from 14th October1997, all rights and privileges hitherto enjoyed by the appellant in or over in relation to the leased portion including, reversionary interest levying or collection of rent, tariffs, royalties, fees or other revenue were and each of them was, *ipso facto* extinguished and the same were instead vested in the 1st respondent and a permanent injunction restraining the appellant whether by itself, its servants or agents or otherwise howsoever from purporting to exercise such rights, interests or privileges and in particular from demanding, levying or collecting from the 2nd respondent or

any other person rent, tariffs, royalties, fees or any other revenue whatsoever in

respect of the use, occupation or enjoyment of the leased portion or any part thereof.

14. The above consent generated several complaints and applications among them complaints from the 2nd respondent and the 3rd respondent who were not consulted. By a notice of motion dated 6th June 2002 and filed on 7th July 2002, the 2nd respondent prayed that the consent judgment entered between itself and the 1st respondent on 15th May 2002 pursuant to a consent letter dated 13th May 2002 and all the consequential orders be reviewed, set aside and the suit to proceeds to full hearing with liberty to the parties to apply.

15. The 2nd respondent's Judicial Review application was opposed by the appellant herein which defended its decision to settle the suit between itself and the 1st respondent. In a ruling dated 8th May 2009, *Khamoni, J.* dismissed the Judicial Review Application in its entirety and pointed out that it was well within the appellant's mandate to compromise its interest in any suit.

16. Evidently, during the pendency of Miscellaneous Application No. 1271 of 2002, an amicable settlement between the 1st

respondent and the 2nd respondent was reached and a second

consent was recorded between the two in High Court Civil Suit No. 1565 of 2000 vide a letter dated 16th November, 2005. The terms of this consent were that the appellant acknowledged that the 1st respondent was the registered owner of the suit land and the lease granted to it by the appellant was no longer binding nor subsisting. Accordingly, the suit between the appellant and the 1st respondent was marked as settled on condition that the appellant would grant a fresh lease to the 1st respondent for the leased portion for the unexpired lease period. A decree dated 24th November 2005 was issued as per the said consent.

17. However, after a change of heart, the appellant was evidently aggrieved by the decree dated 24th November 2005. Consequently, it filed a notice of motion dated 12th March 2009 challenging the said decree and seeking to stay its execution. It also prayed that the said consent Judgment be reviewed, varied, discharged or set aside on the ground that it was fraudulently entered into between the parties. The 1st and the 2nd respondents opposed the application. However, during the hearing, the 2nd respondent opted not take a position. The Hon. Attorney

General opposed the application urging that

during the pendency of the suit, the Government through the District Land Registry-Narok revoked the title to the suit property by Gazette Notice No. 2934 of 2010. Further, that upon the said cancellation the 1st respondent filed a Judicial Review Application in Nairobi seeking to quash the decision to cancel the title. It maintained that the subject matter in this suit was no longer in existence, therefore, any court proceedings were purely an academic exercise.

18. Vide ruling dated 19th March 2014, *Nyamweya, J.* (as she then was) set aside the consent judgment recorded on 15th May, 2002 as well as the decree issued on 24th November 2005 and ordered that High Court Civil Suit No.1565 of 2000 proceeds to full hearing. Aggrieved by the said decision, the 1st respondent appealed to this Court in ***Livingstone Kunini Ntutu vs. County Council of Narok & 2 Others [2015] eKLR (Civil Appeal No. 109 of 2014).*** The appeal was opposed by the appellant herein, the 2nd respondent and the Attorney General. In a Judgment, dated 24th April, 2015, this Court *(Nambuye, Musinga, & Mohammed JJA)* faulted *Nyamweya, J.* for setting aside the consent Judgment due to concerns raised

as to the constitutionality and legality of the registration of the

suit property. The learned justices of this Court held that the said grounds cannot be a basis for reviewing and setting aside a consent. Consequently, the Appellate Court allowed the appeal and set aside the ruling dated 19th March 2014 and upheld the decree dated 24th November 2005.

19. However, the dispute was far from over. Aggrieved by the Court of Appeal decision, the appellant (the successor to the Narok County Council) appealed to the Supreme Court under Article 163 (4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act and Rules 9 & 33 of the Supreme Court Rules, 2012, seeking orders that: (a) the Judgment and Order of the Court of Appeal dated 24thApril 2015 issued in Nairobi Civil Appeal No.109 of 2014 be set aside; (b) the ruling and orders of the High Court (*Nyamweya, J.)* delivered 19th March, 2014 in HCCC No 1565 of 2000 be reinstated; and, (c) in the alternative to prayer (b) above, an order for cancellation of the Title Number **Narok CIS-MARA/TALEK/155** be issued.

20. The Supreme Court, while allowing the said appeal, vide ruling delivered on 11th December 2018, asserted that

there was need to establish the constitutionality and legality of the title to the suit land. The Supreme Court was categorical that

determining the status of the disputed title required evaluation of the evidence to determine how the process leading to the issuance of the title was undertaken and a determination of the question whether the process complied with the law. Significantly, the Supreme Court emphasized that the said determination, though important, was yet to be made. Accordingly, the Supreme Court set aside the judgement and orders of this Court *(R.N Nambuye, D.K Musinga & J. Mohammed JJ.A)* dated 24th April 2015 issued in Nairobi Civil Appeal No.109 of 2014 and reinstated the ruling and orders of the High Court dated 19th March 2014 by *Nyamweya, J* issued in HCCC NO. 1565 of 2000 and *remitted the suit back to the Environment and Land Court for the determination of the constitutionality and legality of the title to the suit property in line with the ruling of Nyamweya, J.*

21. Pursuant to the Supreme Court Judgment, hearing before the ELC proceeded on 27th June 2023 through *viva voce* evidence before *Mbogo, J.* The 1st respondent's case was supported by his evidence (PW1) and Kennedy Kubasu, a Land Surveyor (PW2); Rakita Ole Muserian, the Chairman of

Talek Adjudication Section Committee in 1997, (PW3); and Saitoti

Kiok, (PW4). The appellant called the following witnesses: Joseph Nderitu, a Land Surveyor, (DW2); Cleophas Leshan Tokosh), the then Chief Officer for Land, Narok County, (DW3); John Ongalo Laku, a retired Deputy Director of Land Adjudication and Settlement, (DW4); Tom Manja Chepkwesi, a Land Registrar, (DW5); Maurice Robert Otieno, an Assistant Director, Land Adjudication and Settlement.,(DW6); Sammy Silas Komen Mwaita, a former Commissioner for Lands and Director of Land Adjudication and Settlement, (DW7); and Wilfred Muchae Kabue, an Assistant Director of Survey, (DW8).

22. After considering the written submissions and the issues raised by both the appellant and the 1st respondent, *Mbogo, J.* isolated the following issues for determination: (a) whether the title held by the 1st respondent is a valid and legal title; (b) whether the 1st respondent is entitled to the orders sought in the amended plaint, and (c) whether the appellant is entitled to the orders sought in its counter-claim. Significantly, the learned judge did not frame and or address a specific issue interrogating the constitutionality of the process leading to the

acquisition of the 1st respondent's title in line with the Supreme Court judgment. We shall revert to this issue later.

23. Regarding the legality of the 1st respondent's title, the *Mbogo,*

J. had this to say:

> ***"181. To answer all the above issues, it is not disputed that the plaintiff is the registered proprietor of the suit land, having acquired the title as a first registration under the repealed Registered Land Act. However, and in contention is the validity and legality of the title which has been challenged in various courts for more than twenty years. The plaintiff contended that vide the notice dated 6th May, 1997, Talek was declared as an adjudication section, and the adjudication exercise was carried out. That by a notice dated 15th June, 1997, the adjudication officer certified the register as complete, and that 155 parcels of land came out of the exercise which was ascertained, recorded and registered in the names of individuals. The plaintiff contended that his interest in the suit land was ascertained, recorded, registered and a title deed issued on 14th October, 1997. Forming part of the suit land was 20 acres lease by the 1st defendant to the 2nd defendant for a term of 33 years which he maintained vested in him as opposed to the 1st defendant.***
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> ***182. On the other hand, the 1st defendant contended that the declaration notice dated 6th May, 1997 was never implemented as it***

was cancelled by the declaration notice of 31st July, 1997, and that no demarcation or adjudication

process was carried out in respect of the suit land. The 1st defendant maintained that the suit land does not form part of Talek area described in the cessation order published in legal notice no. 412 of 1992, and that no proper application of the fundamental provisions of the Land Adjudication Act would have been carried out without prior mandatory cessation or degazettement under Section 7 of the Wildlife (Conservation and Management) Act.

183. From the evidence tendered, the principal land adjudication officer issued a notice of establishment of an adjudication section-Talek, dated 6th May 1997, and declared Talek adjudication section, Koiyaki location, Ololulunga division to be an adjudication section. The notice gave the boundaries as described therein. Preceding this notice, and as alluded to by the parties, Talek formed part of the Maasai Mara National Reserve which had been excised for use by the community.

184. Based on the declaration notice published on 6th May, 1997, the applicable law in the administration of land is the Land Adjudication Act. According to the plaintiff, and the evidence of PW3, there was a committee that was responsible in ensuring that the interest in land was ascertained. PW3 testified that as the chairman of Talek adjudication section, there were 155 parcels which resulted from the adjudication process, and as far has he could recall, no one disputed the adjudication process. Indeed, the contest has been whether or not the suit

land existed during the adjudication process, and in support thereof, the plaintiff produced a

copy of the survey computation certified as a true copy on 17th November, 2000. On 5th June, 1997, a notice was published inviting members to inspect the register, and by a certificate of finality dated 29th August, 1997, the land adjudication officer was informed that all objections had been determined and the register consisting of the demarcation map and adjudication record was certified as final. In between this period, a subsequent declaration notice was issued dated 31st July, 1997 seeking to correct the declaration notice dated 6th May, 1997. As I understand it, the certificate of finality meant that the interest in land had been recorded, and was awaiting registration of the individual proprietors.

185. From the above, it is clear that the interest of the suit land stemmed from an adjudication process, and any issue arising therefrom would only be dealt with under Section 25 of the Land Adjudication Act. The 1st defendant was aware of the ongoing adjudication process owing to its acquisition of parcel nos. 152 and 153. Having such knowledge, the 1st defendant would have taken the necessary action to file an objection against the plaintiff's land. From the look of things, the 1st defendant woke up from slumber as it engaged the services of Gatome and Associates to carry out survey works way after individuals had acquired interest in their respective parcels of land. In my view, the 1st defendant having failed to invoke the necessary mechanism to resolve any issue arising out of the adjudication process, it would be safe to state that the 1st defendant forfeited its right to file any objection/ claim.

…

187. From the above, it is my view that the principal land adjudication and settlement officer did not have the power to order a correction of the notice. In any case, there is no record of the purported implementation of the correction on the ground.

188. It is also my view that having not pleaded Article 40 (6) of the Constitution, 2010 in its defence and counter-claim dated 7th October, 2000 or even sought leave to amend the said claim and counterclaim, the 1st defendant cannot be heard to invoke the above mentioned Article in its submissions. In a nutshell, the 1st defendant is bound by its pleadings and it cannot seek to apply the provisions of the Constitution of Kenya, 2010 retrospectively. In other words, the 1st defendant did not challenge the history of the Plaintiff's title in the manner that it ought to have done."

24. In summary, the learned judge found that the 1st respondent's amended plaint dated 18th December 2000 was merited and had been proved on a balance of probabilities and that the appellant failed to present its grievances to the relevant body mandated to hear disputes arising from the adjudication process as at the time when it was due. The learned judge went on to hold that since the interest of the suit land stemmed from an adjudication

process, any issue arising therefrom could only be dealt with under Section 25 of the Land Adjudication

Act. The appellant being aware of the ongoing adjudication process owing to its acquisition of parcel nos. 152 and 153 and having such knowledge, it ought to have taken the necessary action to file an objection against the 1st respondent's land. It was the trial judge's finding that the appellant woke up from slumber as it engaged the services of Gatome and Associates to carry out survey works long after individuals had acquired interest in their respective parcels of land. Therefore, the appellant having failed to invoke the necessary mechanism to resolve any issue arising out of the adjudication process, it forfeited its right to file any objection/claim.

25. The learned judge also found that the appellant had no business remaining in the 1st respondent's land and more so there was no justification for it to collect monies that ought to have been collected by the 1st respondent in respect of the suit land. The learned judge held that the appellant is duty bound to render an accurate account of monies received by it and to pay the same to the 1st respondent. Consequently, the learned judge issued the following orders in favour of the 1st respondent:

a) A declaration that with effect from 14th October, 1997, all rights interests and

privileges hitherto enjoyed or had by the 1st defendant in or over or in relation to the leased portion, including but not limited to, reversionary interest, levying or collection of rent, tariffs, royalties, fees or other revenue were, and each of them, was extinguished and the same were vested in the plaintiff instead.

b) A permanent injunction restraining the 1st defendant whether by itself, its servants or agents or otherwise howsoever from purporting to exercise such purported rights, interests or privileges and in particular from demanding, levying or collecting from the 2nd defendant or any other person rent, tariffs, royalties, fees or any other revenue whatsoever in respect of the use, occupation or enjoyment of the leased portion or any part thereof.

c) An account of all the rent, tariffs, royalties, fees and other revenue collected or received by the 1st defendant from the 2nd defendant and any other person since 14th October, 1997 for the use, occupation or enjoyment of the leased portion or any part thereof within the next thirty (30) days from the date of this judgment.

d) An order for the payment by the 1st defendant to the plaintiff of all the moneys received or found due to the plaintiff on the taking of such accounts.

e) Interest on the amount found due to the plaintiff at such rate and for such period as this honourable court shall think fit.

f) The costs of this suit.

26. Aggrieved by the above findings, the appellant filed the

present appeal. In its memorandum of appeal dated 27th March 2025, the appellant faults the trial judge for: (a) misinterpreting the

LAA, particularly regarding the finality of the adjudication process and the scope for correcting error; (b) finding that the registration of land title No. **CIS-MARA/TALEK/155** in the name of the 1st respondent was lawfully and procedurally obtained yet the appellant had proved that the suit land was obtained fraudulently; (c) erroneously deeming the adjudication process *"final"* under Sections 25-27 of the LAA and thereby barring post-hoc corrections; (d) holding that the 1st respondent's title was legal, valid and lawful by accepting it as conclusive evidence; (e) improperly shifting the burden of proof to the appellant to disprove the validity of the 1st respondent's title contrary to binding Court of Appeal and Supreme Court precedents to the contrary; (f) misapplying the principle of first registration under the Registered Land Act (RLA) (Repealed) and failing to consider exceptions for fraud;

(g) failing to properly analyze the appellant's written submissions on the fact that the Talek Adjudication Section only gave birth to 154 parcels that were adjudicated upon and same forwarded by the Land Adjudication officer; (h) failing to consider the appellant's evidence on forgery of the letter dated 16th September 1997 which the 1st

respondent relied on to

support that 155 parcels were forwarded for issuance of title deeds; (i) dismissing the appellant's counterclaim without adequately addressing evidence of fraud, forgery, collusion or corrupt scheme in the adjudication and registration process.

(j) the fact that fraud, forgery, collusion or corrupt scheme was not pleaded or particularized by the appellant was not in law a bar to the courts to consider the evidence on fraud adduced during the trial; (k) failing to hold that Article 40(6) of the Constitution (prohibiting protection of unlawfully acquired property) applies to the 1st respondent's title; (l) ordering the appellant to account for and reimburse levies collected for 26 without legal and evidentiary basis; (m) ordering an account of the rent, tariffs, royalties, fees and other revenue collected by the appellant since 14th October, 1997 to be rendered and paid to the 1st respondent without taking into account various legal and financial constraints on the appellant, (a public entity which deals with public funds and the ability to retrieve data or records during the pre-devolution period between 1997 to 2013; (n) awarding costs to the 1st respondent without considering the appellant's defence and counterclaim raised matters of

great constitutional and public nature imperatives;

and (o) the decision/judgment of the trial court goes against the weight of evidence.

27. The parties canvassed the appeal by way of written submissions which they briefly highlighted orally during the hearing of the appeal on 27th January 2026.

28. In his written submissions dated 25th July 2025 in support of the appeal, Mr. Muite Senior Counsel addressed five issues, namely: (a) whether the trial court misinterpreted the LAA, particularly regarding the finality of the land adjudication process, scope for corrections, and the pivotal role of the adjudication officer; (b) whether fraud, forgery, collusion and corrupt practices vitiates the 1st respondent's title; (c) whether the title constitutes a valid first registration under the RLA (repealed), rendering it indefeasible; (d) whether the order for accounts and reimbursement of revenues is lawful and enforceable; and (e) whether costs should be awarded given the public interest imperatives.

29. Faulting the trial court for misinterpreting the LAA, particularly regarding the finality of the process, scope for corrections and the pivotal role of the adjudication officer,

Mr.

Muite, Senior Counsel maintained that although the learned

judge correctly observed at paragraph 184 of his judgment that the applicable law in the administration of the land is the LAA, he misinterpreted the import of Sections 25 and 26 of the Act by holding that the appellant ought to have filed objections and having failed to do so, it forfeited its right to file any claim. Further, the trial court proceeded to find that the Principal Adjudication Officer could not correct the declaration after the completion of the register save for objections. Counsel urged that to uphold the superior court's finding on the issue at hand is tantamount to condoning a wrong without a remedy effectively driving litigants out the seat of justice.

30. Mr. Muite, Senior Counsel also submitted that the Principal Adjudication Officer had residual powers under Section 5 of the Act to issue a correction declaration as he did on 31st July 1997 to ensure that the adjudication section and register are correct. Therefore, the trial court failed to consider the evidence that parcel number 155 was added to the adjudication register post-adjudication since the initial register had only 154 parcels. In addition, Mr. Muite Senior Counsel stressed that the trial court overlooked

evidence that the initial declaration notice of 6th May 1997 was erroneous as

it had encroached into Maasai Mara National Reserve thereby necessitating the correction vide Notice of 31st July 1997.

31. On whether fraud, forgery, collusion and corrupt practices vitiates the 1st respondent's title, Mr. Muite Senior Counsel submitted that there were only 154 parcels of land and that the 155th parcel yielding the suit property was fraudulently entered into the adjudication register and that the letter dated 16th September 1997 from Chief Land Registrar which forwarded 155 parcels to Land Registrar Narok was a forgery which was disowned by its author, one F.R.S. Onyango and indeed the 1st respondent was complicit in all acts of forgery and collusion with officials in the department of lands and that is why he was charged, in ***Nairobi Chief Magistrates Criminal Case No. 2157 of 2003, Republic vs. Livingstone Kunini Ntutu*** with forgery relating to adjudication of the Suit Property.

32. It is also the appellant's case that the acquittal in the above case does not insulate the title from civil scrutiny. Indeed, The High Court in its ruling dated 19th March 2014 correctly observed that the acquittal did not conclusively address the

issue of the alleged unconstitutionality and/or illegality of the

registration of the suit land, as the Magistrate's Court had no jurisdiction in that respect. Citing ***County Government of Narok vs. Livingstone Kunini Ntutu & Others (Supreme Court Petition No. 3 of 2018)***, counsel maintained that the legality of the title remains a live issue.

33. The appellant further contended that even though fraud was not particularized in the appellant's pleadings, having led evidence on the same and made it an issue before the Court, the burden of prove in the circumstances shifted to the 1st respondent under Section 112 of the Evidence Act in matters within the special knowledge of the 1st respondent to prove lawfulness of his acquisition of the suit property including his membership of Talek Adjudication Section community, Koiyaki Group Ranch and the tallying of Registry Index Map with the suit property, therefore, the trial court ought to have considered the totality of the evidence and parties' submissions on the same.

34. To buttress his submission, Mr. Muite Senior Counsel cited the case of ***Pacific Frontier Seas Ltd vs. Kyengo & Ano. [2022] KECA 396 (KLR)*** where this Court held that where the parties adduce evidence and address

unpleaded issues and

from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the Court, the Court can validly determine the unpleaded issues.

35. On whether the title constitutes a valid first registration under the RLA rendering it indefeasible, Mr. Muite Senior Counsel contended that the Grant No. IR. 4453, L.R No. 1332526 in favour of Olkiombo Limited, (the 2nd respondent) for 33 years from 1st July 1984 predates the title to the suit land, therefore the 1st respondent's title is not a first registration and since the grant to the 2nd respondent was registered under the Registration of Titles Act (RTA) (repealed) but would later be subsumed by the registration of the suit land, it is the appellant's case that the latter's registration could not therefore be valid, clean and legal. It presents a legal absurdity where the same property is registered under two different legal regimes in the name of two different people.

36. Mr. Muite Senior Counsel further urged that there was no surrender under Section 44 of the RTA in favour of the 1st respondent since the 2nd respondent's title was still in

existence. To buttress his position, Mr. Muite Senior Counsel cited the Supreme Court decision in ***Fanikiwa Limited & 3***

Others vs. Sirikwa Squatters & Others where the Apex Court weighed in on the issue of surrender of lease under Section 44 of RTA.

37. It was Mr. Muite Senior Counsel's submission that the trial court misdirected itself by holding that the 2nd respondent's title was extinguished by the 1st respondent's title, yet its root of the title was not clean. Thus, the trial court erred by finding that the 1st respondent' title was lawfully registered under the RLA; therefore, it was protected as a first registration. Mr. Muite Senior Counsel cited the Supreme Court decision in ***Dina Management Limited vs. County Government of Mombasa,*** and the finding in ***Torino Enterprises Limited vs. Attorney General*** ***(Petition 5 (E006) of 2022) [2023] KESC 79*** which underscored the need for the root of title to be established.

38. Lastly, concerning the legality and enforceability of the order for accounts and reimbursement of revenue, Mr. Muite Senior Counsel maintained that such an order requires *prima facie* evidence of revenue and cannot be granted speculatively and more so where public funds are

involved. In addition, an order for accounts spanning over a period of 26 years is

unconscionable, against public policy and it ignores realities such as availability of records, therefore, the order potentially exposes public funds to unfeasible demands and violates principles of fiscal accountability.

39. Senior counsel also argued that by ordering the respondent to render accounts to the 1st respondent since 1997, the trial court effectively shifted the burden of proof to the appellant to assist the 1st respondent's case, yet the 1st respondent did not render evidence on the revenue, tariffs, levies and charges collectable from the suit land. Furthermore, no evidence was led to demonstrate that the appellant collected such monies from the suit land.
40. Regarding costs, Mr. Muite Senior Counsel maintained that this case is special because it involves adjudication of community land and a public body, therefore, it attracts considerable public interest transcending private law litigation. Considering the already no mean award to render accounts for the last 26 years, the trial court ought to have exercised its discretion to order that each party bears its costs guided by the principles laid down by the supreme court in

Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2013] eKLR.

41. The 1st respondent vehemently opposed the appeal. The 1st respondent's counsel Mr. Kilukumi Senior Counsel maintained that the ELC correctly held that the applicable law is the LAA, a position agreed upon by both parties. He asserted that the chronology of events clearly show that the LAA was adhered to, and that the Principal Land Adjudication Officer had powers to correct the register. He cited the ELC decision in ***Manangoi & 5 Others (Suing on their own behalf and on behalf of all the members of the Ildamat Clan) vs. Attorney General & 10 Others; Kilusu & 8 Others (Interested Parties) [2024] KEELC 4261 (KLR). Para. 159*** in support of the proposition that the Land Adjudication Officer has no powers to stop an adjudication process once it begins. Further, counsel maintained that by 31st July 1997, when the Principal Land Adjudication Officer was issuing a notice correcting the initial declaration in terms of the land available for adjudication, the initial declaration notice had been fully implemented, and the process was complete.

Therefore, he did not have the power as contemplated under

Section 11B of the LAA to issue such correction after the register was declared complete. More significantly the purported correction on paper was never acted upon on the ground.

42. Mr. Kilukumi, Senior Counsel also submitted that the appellant did not raise an objection during the adjudication process yet it was not only a participant but also a beneficiary of the adjudication process in that two parcels of land were registered in her name being **Cis-Mara/Talek/152** and **Cis- Mara/Talek/15316.** Therefore, the appellant forfeited its right to raise an objection during the adjudication process as was held by this court in ***John Kariri Mucheke vs. M'itabari M'arunga 18 [2008] KECA 228 (KLR)*** at page 3.

43. Regarding the allegations of fraud, forgery, collusion and corrupt practices, Mr. Kilukumi Senior Counsel maintained that the appellant did not plead and particularize these allegations before the ELC. Under Order 2 Rule 10 of the Civil Procedure Rules, 2010, read together with Section 19 (2) of the Environment and Land Court Act, fraud must be specifically pleaded. The appellant ought to have given

notice over these serious allegations, since it borders on crime to enable the 1st

respondent to defend himself. Therefore, un-pleaded issues of forgery and fraud cannot be canvassed at the appellate stage. As the recorded proceedings and the judgment of the trial court confirm, the course adopted at the trial was to confine parties to the pleaded issues and no un-pleaded issues were left to the decision of the trial court. In support of this submissions, Mr. Kilukumi Senior Counsel cited this Court in ***Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] KECA 223 (KLR)*** where it held that fraudulent conduct must be distinctly alleged and specifically proved, and it is not allowable to leave fraud to be inferred from the facts.

44. Answering the appellant's submission that the burden of proof was shifted to the respondent under Section 112 of the Evidence Act, Mr. Kilukumi Senior Counsel maintained that the process of excising part of the Maasai Mara Game Reserve, the declaration of the adjudication area, the adjudication process, the registration process and the issuance of title to the suit land were publicly undertaken by public officers and there was no special knowledge attributable personally to the 1st respondent and in any

event, the respondent during the

trial proved to the required standard that he legally and lawfully acquired the suit land.

45. Regarding the question whether the total number of plots was 154 or 155 parcels, Mr. Kilukumi Senior Counsel contended that DW4, DW5 & DW6's testimonies confirmed that the confusion as to whether there were 154 or 155 parcels of land arose from a double entry in the Survey Computation Form 24, which had duplicated No. 154 to two different parcels of land with different acreages. All the witnesses agreed that, if number 154 was duplicated, it logically followed that there were 155 parcels of land from the adjudication exercise, therefore, the Chief Land Registrar followed this basic logic in his correspondence referring to 155 parcels of land, which was confirmed by PW3's evidence. Hence, it is baffling for the appellant to assert that parcel 155 was added post adjudication.

46. It is also the 1st respondent's case that F.R.S. Onyango, the then Chief Land Registrar in his letter dated 16th September 1997 which was found to be genuine and not a forgery referred to 155 parcels of land and the letter dated 12th June, 2023 from the Director, Directorate of Land

Adjudication and

Settlement confirmed the existence of 155 parcels of land. Therefore, the error in the Survey Computation Form 32 are attributable to public officers and not the 1st respondent.

47. The 1st respondent's counsel maintained that the appellant did not produce evidence of forgery, fraud or collusion on the part of the 1st respondent. Therefore, the 1st respondent could not be an accomplice to a none existent crime and, in any case, the 1st respondent was acquitted by the Magistrates' Court (Mrs. R.A. Mutoka) on 30th May 2006 of the offences of making false documents, forgery and uttering false documents. He was never charged as an accomplice.

48. Regarding the allegations that the 1st respondent was not a member of Koyiaki Group Ranch and he was therefore not eligible to lay a customary claim to land in Talek Area Scheme, (TAS), Mr. Kilukumi Senior Counsel maintained that TAS was distinct and different from Koyiaki Group Ranch as confirmed by Joseph Macharia Nderitu (DW2) and Rakita Ole Muserian (PW3) who was the chairman of the TAS and the Treasurer of the Koyiak Group Ranch. One did not require to be a member of Koyiaki Group Ranch to lay a

customary claim to land in the TAS.

49. Answering the appellant's contention that the Registry Index Map (RIM) did not tally with the actual situation of the suit land on the ground, counsel dismissed this contention as baseless and not supported by the evidence on record, Further, it was not demonstrated the circumstances under which the burden of proof of fraud shifts to the 1st respondent as per the Supreme Court guidelines in ***Munya vs. The Independent Electoral and Boundaries Commission & 2 Others*** ***[2014] KESC 38 (KLR). Para. 189*** under Section 112 of the Evidence Act.

50. Regarding the appellant's argument that the suit land was not a first registration, Mr. Kilukumi Senior Counsel maintained that the testimony of Tom Mainja Chepkwesi (DW5) confirmed that the registration in question was a first registration within the meaning of section 14 (d) of the RLA. This fact, according to Mr. Kilukumi Senior Counsel was supported by the official documents showing that the land was registered on 14th October, 1997.

51. Mr. Kilukumi Senior Counsel also submitted that upon registration of the suit land under the RLA, the land ceased to be trust land in accordance with Section 116 of the

repealed

Constitution. Therefore, there would be no need for consensual surrender under Section 44 of the RTA since the grant was extinguished by operation of Section 116 of the repealed Constitution. Accordingly, the lease granted to Olkiombo Limited by the appellant on 19th January 1990 for 33 years with effect from 1st July, 1984 was extinguished by operation of a constitutional provision and no provision in the RTA or any other statutory provisions could override a constitutional provision and in any event, Section 44 of RTA envisages a situation where a grant can be deemed surrendered or extinguished by operation of law without the formalities of executing instruments of surrender.

52. It is also the 1st respondent's case that the 2nd respondent did not participate in the proceedings before the ELC and since it has obtained a new lease from the 1st respondent, its extinguished and expired lease is no longer an issue, live for litigation.

53. Regarding the order for rendering accounts of all the rent, tariffs, royalties and other revenue, Mr. Kilukumi Senior Counsel urged that the appellant in its pleadings did not mention the legality of the order for accounts or the

hardship

it faces in rendering such accounts, nor did it adduce evidence citing difficulties in complying with such an order, therefore, the issue is now being raised before this Court for the first time. Counsel maintained that the order for accounts is provided under the law and its procedure specifically outlined in Order 20 of the Civil Procedure Rules, 2010, therefore, the 1st respondent's prayers were predicated in law.

54. Mr. Kilukumi Senior Counsel also submitted that the 1st respondent is entitled to *mesne profits* for trespass. The information on the amount of monies collected by the appellant during the time of the trespass is within the appellant's special knowledge and custody. It is therefore only reasonable and in accordance with Section 112 of the Evidence Act that it renders accounts as ordered by the trial court.

55. On costs, it is the 1st respondent's case that the appellant's conduct disentitles her the Court's discretion to order each party to bear its costs. She deliberately failed to comply with an order to render accounts; she trespassed onto the 1st respondent's land in violation of a court order and

reneged on a consent order which had exempted her from paying costs. In

the circumstance the 1st respondent ought to be awarded costs for this appeal and the proceedings before the ELC.

56. I have considered the entire record and the parties' submissions in line with this Court's defined mandate under **Rule 31 (1) (a)** of the Court of Appeal Rules, 2022. I am alive to the fact that an appellate court starts with the presumption that the trial court's factual findings are correct because that court was steeped in the trial and it had the advantage of observing witness demeanor and personality firsthand. An appellate court will overturn factual findings in the following circumstances: (a) if there is demonstrable and material misdirection, that is, if the trial judge overlooked material factors, relied on facts not in evidence, or ignored undisputed evidence; (b) if the decision is plainly wrong, that is, when the recorded evidence shows the trial court's conclusion is "*clearly wrong*" or "*manifestly mistaken*"*;* (c) if the finding is inconsistent with the record, that is, if the impression based on a witness's demeanor is contradicted by the general weight of the evidence; (d) if there is a total failure of justice resulting from a gross departure from established

rules of procedure; (c) when the trial court's own findings are internally inconsistent

or based on speculation, surmises, or conjectures. (See ***Mwangi vs. Wambugu [1984] KLR*** page 453).

57. Importantly, it is not enough for an appellate court to simply disagree or feel it might have reached a different conclusion if it had heard the case. The appellant must convince this Court on adequate grounds that the trial court's evaluation of oral testimony cannot be supported by the record. If the appellate court is merely left in doubt as to whether the trial court was right, it is duty-bound to uphold the decision.

58. A pivotal starting point in this determination is to underscore that as mentioned earlier, on 11th December 2018, the Supreme Court in ***Narok County Government vs. Livingstone Kunini Ntutu & 2 Others (Petition 3 of 2015)*** allowed the appellant's appeal and set aside the judgment and orders of this Court dated 24th April 2015 issued in Nairobi Civil Appeal No. 109 of 2014 *(Nambuye, Musinga & J. Mohammed, JJ.A)* and remitted case back to the ELC for hearing. It is important we reproduce verbatim what the Apex Court said. It stated:

“106. On that issue and without in any way departing from our earlier finding on our

jurisdiction to interpret the substance of the consent order, we agree with the High Court decision that there was need to establish the constitutionality and legality of the title to the Suit Land. To establish the status of the title to the Suit Land, the learned judge had to set aside the consent and ordered for the hearing of the substantive matter. To determine the status of the title calls for evaluation of evidence to determine how the process was undertaken and if it infringed any law. This determination has yet to be made even as important as the matter is.

…

111. The remedies preferred by the court therefore have to be tailor made so as to be consistent with the objects in section 3 of the Act. It is paramount to restate that what is before this court is a matter involving Trust Land that is alleged to have been excised to a private individual. The dispute raised the issue of constitutionality and legality of the title to the Suit Land, which issue has not been heard and determined on merits by the superior courts.

112. Consequently, the appropriate remedy in this case is that we shall allow the determination of the status of the title to the Suit Land, in the public interest and so that such a determination is made to bring certainty in this matter. Consequently, we and that referral of this matter back to the Environment and Land Court and not the High Court which no longer has jurisdiction on such a dispute to determine the constitutionality

and legality of the title to the suit property in line with the Ruling of Nyamweya

J. will be appropriate remedy to give. J, will be the appropriate remedy to give."

59. In very clear terms, the Supreme Court directed that the ELC determines the constitutionality and legality of the 1st respondent's title in line with the ruling by *Nyamweya, J.* At paragraph 17 of the decision, the Apex Court pointed out that *Nyamweya, J.* summarized particulars of unconstitutionality and illegality of the 1st respondent's acquisition of the suit land. It stated:

> ***"17. The High Court (Nyamweya J), in her Ruling dated March 19, 2014 inter alia summarized the particulars of unconstitutionality and illegality of the 1st respondent's acquisition of the Suit Land as pleaded in the Application in the following words:***
>
> ***a) That the Suit Land was the subject of a Constitutional Trust held by the 1st defendant pursuant to the provisions of Section 115 of the previous Constitution, and had never prior to its registration in the plaintiff's name been adjudicated under the provisions of the Land Adjudication Act, as was stipulated under Section 116 of the previous Constitution.***
>
> ***b) That the area purportedly represented in the Suit Land had never, pursuant to the provisions of Section 7 subsection (1) of the Wildlife (Conservation and***

Management) Act, been excised from the Trust Land of the Maasai Mara National Reserve, and that the

registration was not preceded by any resolution of the National Assembly approving the excision thereof as required under Section 7 subsection (2) of the Wildlife (Conservation and Management) Act.

c) ***That the area of the Suit Land did not form part of Gazette Notice No 145 of 1984 under which the Minister of Tourism and Wildlife expressed his intention to declare the Talek excision area or cessation area to cease to be part of the Trust Land of the Maasai Mara National Reserve.***

d) ***That the area of the suit property did not form part of the Minister's Cessation Order published vide Legal Notice 412 of 1992 made under section8 of the Wildlife (Conservation and Management) Act, and that area had therefore not been excised from Trust Land of the Maasai Mara National Reserve and therefore was still held in trust by the 1st defendant in terms of section 115 (2) of the previous Constitution.***

e) ***That the Councillors of the 1st defendant in office at the time the Consent Judgment was entered acted in an unconstitutional, reckless and negligent manner, without due diligence and in total breach and disregard of their mandate and/or duty as trustees in purporting to yield and cede the proprietorship of the area of the Suit Land to the 1st respondent herein without adjudication or setting apart."***

60. Earlier in its judgment, the Supreme Court making reference to the decision by *Nyamweya, J* stated:

> ***"22. Furthermore, the Court determined that the 1st respondent's acquittal of the offence of forgery in Nairobi Chief Magistrate Criminal Case No 2157 of 2003 did not conclusively address the issue of the alleged unconstitutionality and/or the illegality of the registration of the Suit Land as the Magistrate' Court had no jurisdiction in that respect.***
>
> ***23. The learned judge went on to evaluate the issue of unconstitutionality and illegality of the Suit Land under the heading "Other sufficient reasons" set out in Section 80 of the Civil Procedure Act as well as order 45 of the Civil Procedure Rules as a ground for setting aside a consent order and stated that it was argued in great details by the present appellant that the Consent Judgment was vitiated by its unconstitutionality and illegality and was void ab initio which averment was supported by the grounds as set out in the Application. She noted that the ground of sufficient reason in the context of consent judgments had been the subject of many judicial decisions including Brooke Bond Liebig Ltd –vs-Mally (1975) E.A266 where it was settled that a court could review a consent judgment on the same grounds that would justify the varying and rescinding of a contract between parties. The learned Nyamweya J. then stated thus:***
>
> *"Allegations of unconstitutionality and illegality of a*

consent judgment are a serious policy issue that this

court must have regard to, and in addition an established principle under contract law that an illegal contract is not enforceable on grounds of public policy. In the instant Application it has not been disputed that the law applicable at the time of recording the Consent Judgment was section 116 of the repealed Constitution ..."

24. She further held: "Section 116 of the repealed Constitution made it clear that such registration was to be subject to such conditions as were provided in applicable Act of Parliament. In the present case, since the land being registered was a game reserve, the applicable law was then the Wildlife (Conservation and Management) Act (Cap 376)..."

25. The Judge then concluded thus:

"This court cannot overlook the concerns raised as to the constitutionality and legality of the registration of the suit land from all the relevant offices that were concerned in the process of excision, adjudication and registration of the suit property."

26. The court furthermore opined that it would be in the public interest and interest of justice that the issue of the constitutionality and legality of the 1st respondent's title be determined conclusively and that it would be against public policy in the circumstances to compromise the suit and/or allow the Consent Judgment to stand.

27. Consequently, the learned judge set aside the Consent Judgment recorded on May 15, 2002 as well as the Decree issued on

November 24, 2005 and ordered that High Court Civil Suit No.1565 of 2000 proceeds to full hearing."

61. As the above excerpts from the Supreme Court decision show, the trial court was required to determine the constitutionality and legality of the 1st respondent's title. When a case is remitted back to a trial court by an appellate court for a retrial or further hearing on specific issues, the trial court's primary duty is to strictly adhere to the terms of the remittal order. I will therefore examine the trials court's decision to satisfy myself whether the trial court determined the issues the Apex Court required it to determine. As is evident from the earlier cited excerpt from the impugned judgement, the learned judge addressed his mind to the legality of the adjudication process and or conformity with the Land Adjudication Act. Regarding the constitutionality or otherwise of the title, the learned judge had this to say:

> ***"188. It is also my view that having not pleaded Article 40 (6) of the Constitution, 2010 in its defence and counter-claim dated 7th October, 2000 or even sought leave to amend the said claim and counterclaim, the 1st defendant cannot be heard to invoke the above mentioned Article in its submissions. In a nutshell, the 1st defendant is bound by its pleadings and it cannot seek to apply the provisions of the Constitution of Kenya, 2010 retrospectively. In other words, the 1st***

defendant did not challenge the history of the Plaintiff's title in the manner that it ought to have done."

62. The reason offered by the trial judge for refusing to address the constitutional issues is that the appellant did not plead the constitutional issues in its pleadings, therefore, it was precluded from urging the same in their submissions. It is settled law that the general legal position is that parties are bound by their pleadings, and evidence led on un pleaded issues cannot be considered by the court to support a claim or defence. This is because pleadings serve to inform the other party and the court the specific case they are required to answer. However, a crucial exception exists; a court may base its decision on unpleaded issues if evidence is led, and from the course followed at the trial, it appears that the issue has been treated by both parties as part of the case and left to the Court for decision.

63. The above position has been settled in numerous decisions by our superior courts. In ***Odd Jobs vs. Mubia* [1970] EA 476**, the *locus classicus* on this point, this Court held that a court could determine an unpleaded issue if it appears from the "*course followed at trial*" that the parties left the issue to the court for decision. In ***Pacific Frontier Seas Ltd vs. Kyengo & Ano.* [2022] eKLR,** this Court reaffirmed that

while

pleadings guide litigation, unpleaded issues may be validly determined if parties led evidence and addressed them during the trial. In ***Albert Chaurembo Mumba & 7 Others vs. Maurice Munyao & 148 Others [2019] eKLR***, the Supreme Court confirmed that the place of unpleaded issues is a "*long settled*" matter in law, acknowledging that courts can intervene when such issues are substantially addressed by parties. Lastly, in ***Olive Mwihaki Mugenda & Ano. vs.Okiya Omtata Okoiti & 4 Others [2016] eKLR***, this Court reaffirmed the Odd Jobs principle, noting that if an unpleaded issue is necessary for resolving a dispute and parties have addressed it, the court is entitled to make a determination.

64. Before the ELC, the 1st respondent framed 4 issues among them whether there was compliance with the Constitution, the law and procedure set out in the LAA and the RLA on the adjudication and registration of the 1st respondent as proprietor of **LR No. CIS-Mara/Talek/155.** The 1st respondent maintained that the suit land was legally registered in its name.

65. The appellant before the trial court maintained that the 1st

respondent’s title was issued contrary to Sections 115, 116

and 117 of the former Constitution, and Sections 7 and 8 of the Wildlife Conservation and Management Act because the suit property was not adjudicated under Section 14 of the Land Adjudication Act, and in the absence of a valid notice of demarcation of the suit land under Section 5 of the said Act. The appellant submitted that the suit land was the subject of a constitutional trust held by the Narok County Council pursuant to the provisions of Section 115 of the former Constitution and had never prior to its registration in the 1st respondent's name been adjudicated under the provisions of the LAA as stipulated by Section 116 of the former Constitution. It was the appellant's case that the title deed in respect of the suit land is not indefeasible because the land lies in the Maasai Mara Game Reserve, and that it cannot come under the ambit of indefeasibility as the same was illegally acquired and should be cancelled as it is a nullity.

66. By now, it is clear that the constitutionality or otherwise of the process surrounding the issuance of the title in question was a live issue. The Supreme Court directed the trial court to determine the case in line with the ruling rendered by

Nyamweya, J. Earlier in this decision, we reproduced the

constitutional issues raised by *Nyamweya, J.* It will add no value for us to rehash them here. It will suffice for us to mention that the issues remain undetermined.

67. For example, the question whether the land was originally trust land remains unresolved. Under the repealed Constitution, specifically Sections 115–118, and the Trust Land Act (Cap 288), "Trust Land" was vested in County Councils to be held for the benefit of residents. The alienation (transfer to private or government use) of this land required a strict process of described as "*Setting Apart.*" The above position was clearly stated by the Supreme Court in ***Petition No. 37 of 2019, Pati Ltd vs. Funzi Island Development Ltd.*** It was necessary for the trial court to determine whether the land in question was trust land and if it was, establish clear compliance with the above provisions and also the provisions of the Trust Land Act.

68. The question whether or not the land formed part of the Masai Mara Game Reserve, and if it did, whether there was clear compliance with the provisions of the World life (Management and Conservation) Act is still a live question.

69. The question whether the land was subject to a constitutional trust prior to its registration in the 1st respondent's name and whether it had never been adjudicated under the provisions of the LAA, as was stipulated under Section 116 of the previous Constitution remains a live question. *Nyamweya, J.* had also raised the question whether the area purportedly represented in the suit land pursuant to the provisions of Section 7 subsection (1) of the Wildlife (Conservation and Management) Act, had been excised from the Trust Land of the Maasai Mara National Reserve, and whether the registration was preceded by a resolution of the National Assembly approving the excision thereof as required under Section 7 subsection (2) of the Wildlife (Conservation and Management) Act.

70. Other critical questions raised in the decision rendered by *Nyamweya, J* are: (a) the suit land did not form part of Gazette Notice No 145 of 1984 under which the Minister of Tourism and Wildlife expressed his intention to declare the Talek excision area or cessation area to cease to be part of the Trust Land of the Maasai Mara National Reserve; (b) the

suit property did not form part of the Minister's Cessation Order published vide Legal Notice 412 of 1992 made under section 8

of the Wildlife (Conservation and Management) Act, and that area had therefore not been excised from Trust Land of the Maasai Mara National Reserve and therefore was still held in trust by the appellant in terms of section 115 (2) of the previous Constitution; (c) whether the appellant's councilors in office at the material time by entering into a consent judgment, acted in an unconstitutional, reckless and negligent manner.

71. Both parties' case before the trial court was very thin in addressing these constitutional questions despite the clear directions by the Supreme Court. Possibly that explains why the learned judge took a narrow view of the constitutional questions. By concentrating on the validity or otherwise of the adjudication process, the trial court narrowed its remit far below the clear directions issued by the Apex Court. As a consequence, critical issues as highlighted above touching on the validity, constitutionality and legality of the title were left undetermined. A judgment that fails to determine material issues or "*grave issues*" raised in the pleadings, or by the parties, or as directed or by a Superior Court is considered a failure of justice and is a primary

ground for an appellate

court to set the decision aside. A court must determine the "real controversy" between the parties as defined in their pleadings or by the parties or as directed by a higher court. In this case, the directions by the Supreme Court were clear. The trial court was required to determine the constitutional issues in line with the ruling by *Nyamweya, J.* This was not done. Accordingly, by failing to adhere to the remit set out by the Apex Court, the trial court fell into a grave error and as a consequence, it left out material issues undetermined.

72. I find it necessary to point out that this is an intriguing case as the respondents kept on changing positions. However, at the heart of the dispute is the issue of the constitutionality and legality of the title held by the 1st respondent. The trial judge failed to address it and bypassed it casually. This places this Court in a difficult position, as it is difficult for this Court to address this question at the appeal stage. This is the position that the Supreme Court found itself in, and it gave very clear directions that were ignored by the trial Judge.

73. The Supreme Court of India in ***Sital Das vs. Sant Ram***

(AIR 1954 SC 606) reaffirmed that an appellate court should generally set aside a judgment if the trial court has failed to

record findings on material issues that were essential for the proper disposal of the suit. A judgment that ignores unchallenged evidence or fails to frame and decide critical issues is "*vitiated*" in the eyes of the law. Accordingly, the judgment rendered by *Mbogo, J.* on 6th March 2025 is for setting aside. Regrettably, this dispute has been in court for over three decades, but the real controversy as delineated by the Supreme Court remains undetermined. However, the justice of the case demands that the issues highlighted by the Supreme Court to be determined conclusively.

74. Notably, this dispute has been before various courts for the last 30 years. Sadly, the glaring questions in this dispute, namely, whether the land in question is public land held in trust by the appellant or whether it is private property held by the respondent, and more important, the constitutional questioned alluded to by the Supreme Court remain unresolved. It is therefore with a heavy heart that I have to remit it back to the Environment and Land Court in Narok for determination of these critical questions in line with the Supreme Court decision by any other Judge other than Justice Mbogo.

75. Consequently, I find that the orders that commend themselves to be issued in this case are:

    a) ***The judgment rendered by Mbogo, J. on 6th March 2025 in Ntutu vs County Council of Narok & 2 others (Environment & Land Case 21 of 2021) [2025] KEELC 1064 (KLR) (6 March 2025) (Judgment) all is hereby set aside in its interest together with all the consequential orders arising from the said judgment.***

    b) ***Civil Suit No ELC 21 of 2021, Livingstone Kunini Ntutu vs County Council of Narok and 2 others is hereby remitted to the ELC for hearing and determination by any other judge other than Mbogo, J. in line with the Supreme Court Decision in Narok County Government vs Ntutu & 2 Others (Petition No. 3 of 2015) [2018] KESC 11 (KLR) (11 December 2018) (Judgment). We direct that the case shall be heard on priority basis.***

    c) ***For avoidance of doubt, the stay of execution orders issued by this Court on 16th July 2025 is hereby vacated in its entirety and the parties are returned to status quo prior to the impugned judgement. Effective from the date of this judgment, the control of the land in dispute shall revert to the appellant until the hearing and determination of the suit. Further, the 1st respondent should account and refund all the monies that it has collected during the pendency of the stay order.***

    d) ***Each party shall bear its own costs.***

76. This judgment is delivered pursuant to Rule 34 (4) of the Court of Appeal Rules, 2022 since *Warsame, JA* (who had concurred with this opinion) was elevated to the Supreme

Court before the delivery of this judgment and has therefore ceased to be a

member of this Court. Nonetheless, because *Gachoka, JA* also agrees with this opinion, this shall be the judgment of the Court.

Dated and delivered at Nakuru this 8th day of May, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.
Signed.

DEPUTY REGISTRAR.

IN THE COURT OF APPEAL
AT NAKURU

[CORAM: WARSAME, MATIVO & GACHOKA

JJ.A.] CIVIL APPEAL NO. NAK E052 OF 2025

BETWEEN

COUNTY GOVERNMENT OF NAROK.....APPELLANT

AND

LIVINGSTONE KUNINI NTUTU.....1ST RESPONDENT
OL KIOMBO LIMITED.....2ND RESPONDENT THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

*(Being an appeal from the judgment and decision of the Environment and Land Court of Kenya at Narok (**C. Mbogo, J.**) dated 6th March 2025*

in
ELC Case No. 21 of 2021)
****

CONCURRING JUDGMENT OF GACHOKA, JA

I have had the privilege of reading the erudite judgment authored by my learned brother, *Mativo, JA*. I am in complete agreement with the reasoning and the ultimate outcome of this appeal. I have nothing useful to add.

Dated and delivered at Nakuru this 8th day of May 2026.

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.
Signed.

DEPUTY REGISTRAR.