



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. PETITION NO. 1 OF 2018**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 40, 60 AND 67**

**OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE KENYA GAZETTE NOTICE NUMBER 6 OF 22<sup>ND</sup> JANUARY 2016  
AND 97 OF 17<sup>TH</sup> JULY 2017**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**(SECTIONS 24, 25 AND 26)**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012 (SECTIONS  
5 AND 6)**

**IN THE MATTER OF TITLE NO. EMBU MUNICIPALITY/PARCEL/375**

**BETWEEN**

**THE DIOCESE OF EMBU TRUSTEES, REGISTERED.....PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF CHILD**

**WELFARE SOCIETY OF KENYA.....2<sup>ND</sup> RESPONDENT**

**HON. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. By a petition dated 16<sup>th</sup> March 2018 brought under **Articles 22(1), 40, 60 and 67 of the Constitution of Kenya 2010, Sections 24, 25 & 26 of the Land Registration Act, and Sections 5 & 6 of the National Land Commission Act No. 5 of 2012**, the Petitioner sought the following reliefs:

a. Orders of Judicial Review:

*Orders of Certiorari do issue to remove to this court to be quashed the order of the National Land Commission as referenced; as contained in and published in the Kenya Gazette of the 22<sup>nd</sup> January 2016 relating to the alienation of certificate of lease Embu Municipality/Parcel/375, the property of the Petitioner, Diocese of Embu Trustees Registered.*

b. Orders of Judicial Review:

*Order of certiorari do issue to remove to this court to be quashed the order of the National Land Commission as referenced; contained in and published in the Kenya Gazette of the 17<sup>th</sup> July 2017 relating to the revocation and alienation of the Certificate of Lease Embu Municipality/Parcel/375 the property of the Petitioner Diocese of Embu Trustees Registered.*

c. *An order of permanent injunction do issue restraining the 2<sup>nd</sup> Respondent, the Registered Trustees of Child Welfare Society of Kenya by itself, its servants and agents from interfering with or entering the Petitioner's property Embu Municipality/Parcel/375 or in any way interfering with, harassing or attacking the Petitioner's servants, or employees, or agents or in any way damaging, or taking possession of or alienating the property of the Petitioner erected or standing on parcel of land Embu Municipality/Parcel/375.*

d. *The Respondent to pay the Petitioner its costs of this petition.*

e. *Or such further or other orders.*

2. The grounds upon which the petition was based were set out in detail in the body of the petition. First, it was contended that the 1<sup>st</sup> Respondent (hereafter NLC) acted without jurisdiction and in excess of its powers under **Article 67 of the Constitution** in directing the Chief Land Registrar to revoke the Petitioner's title to *Embu Municipality/Parcel/375* (hereafter *the suit property*.) Second, it was contended that it acted without jurisdiction in directing the Chief Land Registrar to register the suit property in the name of **Child Welfare Society of Kenya**. Third, it was contended that NLC had usurped judicial and adjudicative powers it did not have under the Constitution and applicable law. Finally, it was contended that the 2<sup>nd</sup> Respondent was a vexatious litigant who was fond of forum shopping.

3. On 2<sup>nd</sup> October 2019 NLC filed an undated replying affidavit sworn by Brian Ikol in Response to the said petition. It was stated that the NLC had received a complaint from the 2<sup>nd</sup> Respondent to the effect that the Petitioner had been irregularly issued with title documents for the suit property despite the 2<sup>nd</sup> Respondent being the lawful allottee thereof. It was further contended that the said complaint was admitted under **Section 14 of the National Land Commission Act 2012**, (hereafter *NLC Act*) which granted NLC the mandate to review all grants and dispositions of public land with a view to ascertaining their legality and propriety.

4. The NLC contended that all concerned parties were notified of the complaint and invited to make representations thereon. It was contended that the Petitioner duly participated in the hearings conducted by the NLC and that it made both oral and written submissions on its acquisition of the suit property. It was further stated that upon hearing all the concerned parties it rendered a determination on 5<sup>th</sup> October 2015 directing the Chief Land Registrar to revoke the Petitioner's title since it was found that the certificate of title was irregularly and unlawfully issued to the Petitioner whereas it was not the allottee of the property. The NLC annexed copies of proceedings and determination on the matter to its replying affidavit.

5. The NLC contended that the Petitioner had voluntarily submitted to its jurisdiction and that at no time did it raise any objection to the matter being heard and determined at that forum. It was contended that the Petitioner did not at any time notify the NLC of any past or existing judicial proceedings concerning the suit property on all the occasions it appeared before it. The NLC further contended that the right to protection of private property under **Article 40(1) of the Constitution** was not absolute and that such protection did not extend to protection of property which had been unlawfully acquired as stipulated in **Article 40(6) of the Constitution**. The NLC considered the petition to be devoid of merit and an abuse of the court process hence it urged the court to dismiss it with costs.

6. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 18<sup>th</sup> October 2018 by one, Irene Mureithi as Chief Executive Officer. It was stated that prior to its establishment as a state corporation in 2014 vide Legal Notice No. 58 of 23<sup>rd</sup> May 2014 it operated as an approved and exempt society which operated under an irrevocable Deed of Trust of 1970. It was stated that it was a public agency involved in the care, protection, welfare and adoption of children and young persons including the vulnerable and marginalized children.

7. The 2<sup>nd</sup> Respondent contended that the suit property was initially allocated to its branch known as “Child Welfare Society of Kenya – Embu” vide a letter of allotment dated 28<sup>th</sup> June 1966 for a term of 33 years. The said term was later on extended by the Commissioner of Lands. It was stated that on or about 3<sup>rd</sup> January 2001 the Commissioner of Lands forwarded a lease in the name of “Child Welfare Society – Registered Trustees” to the District Land Registrar, Embu for registration. It was contended, however, that the registration process was hijacked by agents and servants of the Petitioner who irregularly and fraudulently caused the issuance of a certificate of lease in the name of the Petitioner.

8. The 2<sup>nd</sup> Respondent further stated that upon discovery of the alleged fraud, it reported the matter to the Directorate of Criminal Investigation (DCI) for investigation. It was contended that upon investigation, the DCI concluded that there was sufficient evidence to charge some of the Petitioner’s servants and agents including the Very Rev. Father Patrick Kariuki, Bishop Paul Kariuki, Sister Mary and the Very Rev. Father Patrick Njiru with the offence of *fraud* in connection with the registration of the suit property. The 2<sup>nd</sup> Respondent annexed a copy of a letter dated 27.08.2014 from the Divisional DCI Headquarters Embu to that effect.

9. The 2<sup>nd</sup> Respondent further stated that it also lodged a complaint with the NLC on the alienation of the suit property which was duly considered with the involvement of the Petitioner whereby it was found that the Petitioner had irregularly and illegally acquired the suit property. It was contended that all the concerned parties canvassed their respective cases before the NLC and that the Petitioner did not at any time object to the jurisdiction of the NLC to entertain and resolve the matter. It was further contended that the Petitioner did not lodge any appeal against the determination of the Respondent even though it had such right of appeal under the **Nation Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017**.

10. The 2<sup>nd</sup> Respondent also opposed the petition on the basis that the ownership dispute concerning the suit property could not be adjudicated and determined through a Constitutional petition since such a dispute would require *viva voce* evidence, discovery and cross examination of witnesses to enable the court arrive at a just decision. It was also contended that the instant petition was an attempt to invite the court to sit directly on appeal over the decision and determination of the NLC through the back door. The 2<sup>nd</sup> Respondent considered the petition to be frivolous and vexatious and consequently asked the court to dismiss it with costs.

11. The 3<sup>rd</sup> Respondent filed a replying affidavit sworn by Margaret W. Njoroge on 16<sup>th</sup> May 2019 in opposition to the petition. It was stated that on 22<sup>nd</sup> June 1966 the Commissioner of Lands offered for allocation the suit property to **Child Welfare Society of Kenya – Embu**. It was further stated on 11<sup>th</sup> December 2000 a lease was prepared in the name of the **Child Welfare Society of Kenya - Registered Trustees**.

12. The 3<sup>rd</sup> Respondent also reiterated the matters set out by the NLC regarding the lodging of a complaint by to the 2<sup>nd</sup> Respondent, the hearing thereof and the resultant decision and recommendations on revocation of the certificate of lease. The 3<sup>rd</sup> Respondent also reiterated the matters set out by the 2<sup>nd</sup> Respondent regarding the lodging of a criminal complaint with the DCI, its investigation and the resultant findings that there was sufficient evidence to charge the agents and servants of the Petitioner with *fraud* regarding the alienation of the suit property.

13. The 3<sup>rd</sup> Respondent further stated that the NLC had a constitutional and legal mandate to review grants and dispositions of public land and take the necessary remedial measures. The 3<sup>rd</sup> Respondent considered the petition to be devoid of merit and asked the court to dismiss it.

14. By a cross petition dated 20<sup>th</sup> May 2019 the 2<sup>nd</sup> Respondent sought the following reliefs as against the Petitioner:

*a) A declaration that the decisions made and subsequent acts done by the NLC in regard to L.R. Embu/Municipality/375 are lawful and in consonant with the Constitution of Kenya.*

*b) An order that the NLC, its employees, representatives and all its officers do vacate the suit land LR Embu/Municipality/375 effective immediately upon judgement failure to which a duly appointed court bailiff, with the assistance and under the supervision of the OCS Embu Police station be ordered to evict the NLC therefrom and the expenses of such eviction be borne solely by the NLC.*

*c) General damages for the blatant violation of the cross-petitioner's constitutional rights.*

*d) Any other or further order that the honourable court deems just and fit to grant.*

*e) Costs of the cross-petition.*

15. The said cross-petition was based upon the facts contained in the 2<sup>nd</sup> Respondent's replying affidavit sworn by Irene Mureithi on 18<sup>th</sup> October 2018 and all the annexures thereto. It was contended that the Petitioner had violated the 2<sup>nd</sup> Respondent's constitutional rights by irregularly causing the suit property to be registered in the former's name. It was further contended that the Petitioner had continued its unlawful occupation of the suit property in violation of the 2<sup>nd</sup> Respondent's right to property under **Article 40 of the Constitution.**

16. The 2<sup>nd</sup> Respondent stated that it was a state corporation fully funded by the Government of Kenya with a duty to take care of the welfare of young and vulnerable children. It contended further that it had established a children's home on the suit property where it provided food, shelter, health and education to needy and disadvantaged children. The 2<sup>nd</sup> Respondent contended that it was the rightful owner of the suit property hence entitled to immediate possession, control and use thereof to the exclusion of the Petitioner and any other unauthorized persons. It, therefore, fully supported the determination of the NLC in its review of the disposition of the suit property and urged the court to uphold its decisions.

17. The Petitioner filed a replying affidavit sworn by the Very Rev. Father Eliud Thuku Wanyoike on 24<sup>th</sup> June 2019 in opposition to the cross-petition. The deponent reiterated the contents of his affidavit of 16<sup>th</sup> March 2018 in support of the Petition. The Petitioner maintained that it was the legitimate owner of the suit property and it is the one which ran, maintained and developed the children's home on the suit property. The Petitioner contended that the **Child Welfare Society of Kenya** and the **Child Welfare Society – Embu branch** were separate and distinct entities and that the 2<sup>nd</sup> Respondent had nothing to do with the latter. In fact, the Petitioner contended that it was the one which established, ran and developed the **Child Welfare society of Kenya – Embu branch.**

18. The Petitioner further contended that the actions of the NLC were irregular and unsupportable as they were rendered in contravention of **Articles 47 and 50 of the Constitution.** The Petitioner contended that

it was denied a hearing or fair hearing and that it was not given written reasons for some of the adverse decisions taken by the NLC. The court has noted, however, that the allegations of being denied a hearing and breach of **Article 47** were never pleaded in the petition.

19. When the matter was listed for directions on 20<sup>th</sup> May 2019 the parties were given directions on the filing of affidavits and written submissions on both the petition and cross-petition within specified timelines and the matter fixed for further mention on 29<sup>th</sup> July 2019 to confirm compliance and fix a date for judgement. When the matter was mentioned on 29<sup>th</sup> July 2019 only one of the parties had complied hence the court granted an extension of time by a further 35 days. The record shows that the Petitioner filed its submissions on 5<sup>th</sup> August 2019, the 2<sup>nd</sup> Respondent filed its submissions on 13<sup>th</sup> November 2019 whereas the 3<sup>rd</sup> Respondent filed its submissions on 2<sup>nd</sup> July 2019. However, the NLC's submissions were not on record by the time of preparation of the judgement.

20. The court has considered the pleadings, affidavits, documents and submissions on record in this matter with respect to both the petition and cross-petition. The court is of the opinion that the following issues arise for determination:

- a) *Whether the NLC had jurisdiction to review the title issued to the Petitioner and to direct revocation of the Petitioner's certificate of title.*
- b) *Whether the NLC had jurisdiction to direct the Chief Land Registrar to have the suit property registered in the name of the 2<sup>nd</sup> Respondent.*
- c) *Whether the jurisdiction of the NLC to review the Petitioner's title was excluded in view of the pendency of a civil suit between the parties.*
- d) *Whether the 2<sup>nd</sup> Respondent's cross-petition raises any constitutional issues on violation of its right to property to warrant a constitutional petition.*
- e) *Whether the Petitioner is entitled to the reliefs sought in the petition.*
- f) *Whether the 2<sup>nd</sup> Respondent is entitled to the reliefs sought in the cross-petition.*
- g) *Who shall bear the costs of the petition and the cross-petition.*

21. The 1<sup>st</sup> issue is whether the NLC had jurisdiction to review the Petitioner's title to the suit property and to direct the Chief Land Registrar to revoke it. The 1<sup>st</sup> Respondent is a creature of **Article 67 of the Constitution**. It has diverse functions set out in **Article 67(2)** of the **Constitution** as follows:

**“(2) The functions of the National Land Commission are:**

- a. to manage public land on behalf of the national and county governments;**
- b. to recommend a national land policy to the national government;**
- c. to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**
- d. to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**
- e. to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**

- f. to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- g. to assess tax on land and premiums on immovable property in any area designated by law; and
- h. to monitor and have oversight responsibilities over land use planning throughout the country.”

22. The court has also paid attention to the provisions of **Section 67(3)** which stipulates as follows:

**“The National Land Commission may perform any other functions prescribed by national legislation.”**

23. Pursuant to **Article 68** of the **Constitution** parliament enacted the **National Land Commission Act 2012**, to give full effect to the provisions of **Articles 67 and 68 of the Constitution**. Parliament conferred additional functions upon the NLC including a mandate to review grants and dispositions to public land pursuant to the provisions of **Article 68(c) (v)**.

24. **Section 14(1) of the NLC Act** stipulates as follows:

**“Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint the national or County government, a community or an individual, review all grants and dispositions of public land to establish their propriety or legality.”**

25. The other relevant sub-sections of **Section 14** of the **NLC Act** are the following:

**“(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.”**

**“(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.”**

26. The gist of the Petitioner’s complaint is that the NLC acted without jurisdiction in purporting to review its title to the suit property and in directing the Chief Land Register to revoke its title. It was submitted that the NLC had no adjudicative power under both the Constitution and the statutory law. In the alternative, it was submitted that even if the NLC had power to review grants, it had no power to revoke or direct the revocation of titles.

27. The Petitioner relied on two decided cases. The first is the case of **Robert Mutiso Lelli Vs the National Land Commission & 3 Others NBI JR Nos. 298 and 363 of 2014** (hereafter *the Robert Mutiso case*). In that case, the court held, *inter alia*, that the NLC had violated the Constitution by entertaining a complaint under **Section 14 of the Act** whilst the relevant dispute was pending in court. It was further held that the NLC had no jurisdiction to revoke a title even if it was established upon review that the title was unlawfully obtained. It was held that the power of revocation rested with the Registrar. The second authority was the case of **Mwangi Stephen Muriithi Vs NLC & 3 Others Milimani Constitutional Petition No. 100 of 2017** (hereafter *the Mwangi Stephen Muriuki case*). In the latter case, the High Court held the NLC had no power to revoke an impugned title and that the Petitioner’s right to fair administrative action had been violated. The court further held that the NLC could only make a *recommendation* as opposed to a *determination* upon review of a grant.

28. The court has considered the Respondents’ responses and submissions on this issue. The court has also considered the applicable provisions of the Constitution and the **NLC Act** on the mandate, jurisdiction, and functions of the NLC. Whereas **Article 68(c) (v) of the Constitution** mandated Parliament to enact legislation to provide for a review of all grants and dispositions to public land with a

view to establishing their propriety and legality, Parliament enacted the **NLC Act** which vested such mandate upon the NLC in very clear terms.

29. The court is aware that neither the **Constitution** nor the **NLC Act** defines the term “review”. The **Interpretation and General Provisions Act (Cap. 2)** does not define the term either. The court will therefore resort to the dictionary meaning of the word. The **Concise Oxford English Dictionary** (12<sup>th</sup> Edition) defines review as follows:

**“a formal assessment of something with the intention of instituting change if necessary.”**

On the other hand, **Black’s Law Dictionary** (10<sup>th</sup> Edition) defines the term as follows:

**“consideration, inspection, or re-examination of a subject or thing.”**

30. The court is of the opinion that the first question for determination really boils down to a question of interpretation of both the constitutional as well as the statutory provisions involved. In the case the **Attorney General V Law Society of Kenya & 4 Others [2019] eKLR** the Court of Appeal re-stated the principles of interpretation which should be applied in construing a constitutional provision. The court referred to the various principles set out in **Article 259 of the Constitution** itself. Under **Article 259(1)** the **Constitution** should be interpreted in a manner that:

- a) **Promotes its purposes, values and principles;**
- b) **Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- c) **Permits the development of the law; and**
- d) **Contributes to good governance.**

31. It was further held by the Court of Appeal that:

**“We also emphasize the principle of holistic interpretation where the Constitution, which has different Chapters and Articles is read as one document, not disjointed sections where each provision is read as supporting the other and not destroying the other; where the provisions are ultimately in harmonious symphony. In the case of Tinyefuze V Attorney General of Uganda, Constitutional Petition No. 1 of 1997 [1997] 3 UGCC the Uganda Constitutional Court put it thus:**

**“The entire constitution had to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”**

32. The court is also aware that the constitution should be given a purposive interpretation. It should be construed as reflecting the values and aspirations of the people. The court is thus satisfied that the framers of the Constitution intended and actually did confer upon the **NLC** the mandate and power to **review** grants and dispositions of public land with a view to ascertaining their **propriety** and **legality**. This unique style of establishing the legality of titles was designed for the special and unique circumstances of the Kenyan situation where land grabbing was rampant. It was, therefore, thought necessary to introduce an additional constitutional mechanism for resolving such matters expeditiously. In this context, the mechanism was in addition to the conventional judicial mechanism. The court has noted that the High Court in both the **Robert Mutiso case and the Mwangi Stephen Muriithi case** recognized that the NLC had a mandate to review grants save that it could not revoke those which were found to have been unlawfully obtained. The court in both cases held that the power of revocation was vested in the Registrar.

33. The court has considered the provisions of **Section 14 of the NLC Act**. It is evident that Parliament empowered the NLC to direct the Registrar to revoke titles which upon review were found to have been unlawfully acquired. That appears to be the plain meaning of **Section 14(5) & (6)** of the said Act. The court is unable to ascribe any other meaning to the provisions of the said section.

34. The court is aware that sometimes challenges may arise as to what meaning to ascribe to particular words used in legislation. In the case of the **County Government of Kiambu & Another Vs The Senate and others [2017] eKLR** Mativo J. adopted the following approach to interpretation:

**“There are numerous rules of interpreting a statute but in my view and without demeaning the others, the most important rule is the rule dealing the statute’s plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete. The implication is that when the language is clear, then it is not necessary to belabor examining other rules of statutory interpretation.”**

35. The court is thus of the opinion that the Petitioner has no legitimate complaint with respect to the decision of the NLC to review its title and to direct the Chief Land Registrar to revoke it. The court is of the opinion that what the NLC did was in tandem with both the legislative intent and the plain language of the enabling statute. It would be futile for a constitutional organ to undertake a rigorous, expensive and time consuming review of grants only for it to be told that its findings or determinations were of no consequence. That cannot surely have been the intention of the people in Kenya in promulgating the Constitution and of the legislature in enacting the **NLC Act**.

36. The court has perused the decision of the NLC dated 5<sup>th</sup> October 2015 and the subsequent gazette notices communicating the decision to the general public. Whereas the NLC found that the Petitioner had unlawfully acquired title to the suit property and stated that the title had been revoked, the decision actually indicated that the determination would be forwarded to the Chief Land Registrar **for execution**. So, if the NLC had undertaken revocation of title by itself, what was the Chief Land Registrar to execute? The NLC’s Gazette Notice No. 6862 of 17<sup>th</sup> July 2017, however, clarified the issue of revocation as follows:

**“Consequently, the Commission has made determinations in respect of the following grants/Titles and orders for revocations, regularization, upholding of the titles, where applicable as indicated or give further orders. Where the order calls for revocation the Chief Land Registrar is thereby directed to revoke as per Section 14 (5) of the National Land Commission Act and attendant laws.” (emphasis added).**

The court is thus of the opinion that a holistic and objective consideration of all the actions of the NLC would lead to the conclusion that the revocation of title was not undertaken by itself. The NLC simply directed the Chief Land Registrar to do so in accordance with the law.

37. There is another reason why the court is unable to find merit in the Petitioner’s submission that the NLC had no jurisdiction to entertain the 2<sup>nd</sup> Respondent’s complaint and to review the grant in question. The material on record indicates that the Petitioner participated in the review proceedings before the NLC through its officials, agents and advocates. They made both oral and written submissions before NLC. However, they did not object to the jurisdiction of the NLC to undertake the review. All the Petitioner did was to support its acquisition of the certificate of title. It obviously wanted the NLC to affirm its ownership of the suit property.

38. It has been held that a party who takes the view that a tribunal has no jurisdiction to entertain a given matter ought to raise an objection before such tribunal at the earliest opportunity. Where the concerned party fails to challenge the jurisdiction of the adjudicating tribunal, he may be precluded from doing so at a later stage after a decision has been made by the concerned tribunal. **H.R.W. Wade** in his book **Administrative Law** (10<sup>th</sup> Ed) states as follows:

**“An applicant may lose his claim to relief because his own conduct has been unmeritorious or unreasonable. Examples of this have already been given in the context of natural justice. An applicant may also have raised the objection too late. If a party appearing before a tribunal knows that it is improperly constituted because one of the members has an interest in the case, but raises no objection at the time, he may be refused a remedy. He is treated, in effect, as having waived the objection by accepting the tribunal’s jurisdiction. It is a general rule that the court will not intervene in favour of an applicant who has allowed a court or authority to proceed to a decision without setting up an objection of which he was aware at the time except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant.”**

39. The 2<sup>nd</sup> issue is whether the NLC had jurisdiction to direct the Chief Land Registrar to issue a certificate of lease for the suit property to the 2<sup>nd</sup> Respondent. It was contended by the Petitioner that the NLC had no jurisdiction or power to direct the Chief Land Registrar to issue a certificate of lease to the 2<sup>nd</sup> Respondent. The material on record indicates that upon undertaking the review, the NLC found that the Petitioner had failed the test of propriety and legality. The NLC also found that both the letter of allotment and the lease were issued in the name of Child Welfare Society hence the certificate of lease ought not to have been issued to the Petitioner. The Petitioner appeared to suggest that the NLC ought to have left the matter hanging without directing that a certificate of lease be issued to the rightful allottee.

40. The court is of the opinion that the NLC was empowered to make *consequential orders* under **Section 14(6)** of the **NLC Act** upon finding that the Petitioner’s acquisition of title was irregular and unlawful. **Section 2** of the **NLC Act** defines “irregularity” as follows:

**“Irregularity means in a manner that does not conform to standards, procedures, or the criteria prescribed under this Act or any other written law.”**

41. There is no dispute that the NLC found that the Petitioner’s acquisition of title to the suit property was both irregular and unlawful. It is also on record that the NLC directed the Chief Land Registrar to revoke the Petitioner’s certificate of title. In those circumstances, can the NLC be faulted for directing the restoration of the suit property to the entity which it found to be the rightful allottee? The court is satisfied that the NLC was entitled to completely deal with the matter by making a consequential order under **Section 14(6) of the NLC Act**.

42. As indicated earlier, the Petitioner made an attempt to sneak in a new ground challenging the decision of the NLC through its replying affidavit to the cross-petition. It was contended that the NLC violated the rules of natural justice in that the Petitioner was not accorded a full hearing. The court is of the opinion that his matter cannot be legitimate issue for determination in the proceedings. It was never pleaded in the petition that the Petitioner was denied a hearing or adequate hearing. The Petitioner is simply trying to expand the scope of its petition irregularly through the back door. It would appear that the question of not being accorded an adequate hearing was raised merely as an afterthought in a bid to strengthen the Petitioner’s case.

43. Without prejudice to the contents of the immediately preceding paragraph, the court has carefully perused the record of proceedings and determination of the NLC. The proceedings indicate that the Petitioner’s officials, agents and advocates appeared before the NLC and made their representations defending its acquisition of the suit property. Although the Petitioner was denied further audience at some stage for failing to comply with certain directions by the NLC, the Petitioner had already presented its case and its representations were taken into account by the NLC in making its determination dated 5<sup>th</sup> October 2015. Indeed, the Petitioner has not presented any additional credible material before this court on its acquisition of the suit property. The state of evidence before and after the determination by the NLC remains the same. To date, the Petitioner does not have a letter of allotment or lease for the suit property. No wonder the Petitioner never raised the issue of not being heard or adequately heard in its petition. The court finds no merit whatsoever in the allegation that the Petitioner was never heard by the NLC during the review.

44. The 3<sup>rd</sup> issue is whether the jurisdiction of the NLC to review the grant was ousted in view of the pendency of a civil suit between the parties. It was contended by the Petitioner that the NLC had no jurisdiction to admit the 2<sup>nd</sup> Respondent's complaint and to undertake a review of grants and dispositions of public land where one of the concerned parties has taken the matter to court. The Petitioner relied on the **Robert Mutiso Case** in support of that proposition.

45. The court is aware that both the NLC and the Environment and Land Court derive their mandate from the **Constitution of Kenya, 2010**. The framers of the Constitution who provided for a review of grants in **Article 68** are the same ones who provided that Parliament shall enact legislation for the establishment of the Environment and Land Court to adjudicate upon disputes relating to land and the environment. When Parliament enacted the **NLC Act** it provided that the NLC shall undertake such review within a limited period of 5 years subject to extension of that period at the discretion of Parliament.

46. As indicated earlier, the constitution should be interpreted in a holistic manner. Every article and every clause must be given its due meaning and effect. The court should allow the intention of the framers of the constitution to prevail and give due effect to it. In the case of **Compar Investments Ltd V National Land Commission & 3 Others [2016] eKLR** Lenaola J (as he then was) made the following pronouncement in a matter challenging the jurisdiction of the NLC to review grants:

**“78. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy or procedure to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided for in the relevant statute. Such has been the gist of such cases like the Speaker of the National Assembly V Karume [2008] 1 KLR 426 ...”**

47. In the said case Lenaola J. further held as follows:

**“79. That is the law as I understand it and in the present case, the NLC has already determined the legality of the title of the Petitioner. This court can only exercise its review powers over NLC. Thus far, I have not found any wrong doing on its part in regard to its processes. That being so therefore I do not find a violation of the Petitioner's right to property.”**

48. With due respect to the High Court in the **Robert Mutiso Case**, this court does not agree that the constitutional mandate of the NLC to review grants is ousted the moment one of the affected parties files a suit before a court of law. The NLC's constitutional and statutory mandate is not dependent upon the unilateral action of any of the disputing parties with respect to a grant or disposition which is eligible for a review. Indeed, there is no such exception or exclusion of jurisdiction either under the constitution or the NLC Act. In the opinion of the court, such jurisdiction is not conditional upon the circumstances which may be created by the affected parties. However, that is not to say that the court cannot intervene in appropriate circumstances either during or after the conclusion of proceedings before the NLC. It was recognized in the **Compar Investments Ltd case** and the Court of Appeal authorities cited therein that, indeed, a court of law may intervene in exercise of its supervisory jurisdiction such as through judicial review proceedings. That is totally different from the proposition that the mandate of the NLC is automatically excluded upon a civil suit being filed by any of the affected parties.

49. The 4<sup>th</sup> issue is whether the 2<sup>nd</sup> Respondent's constitutional rights were violated by the Petitioner. This issue was raised by the 2<sup>nd</sup> Respondent in its cross-petition. It is not clear why it never filed a constitutional petition since 2012 when the Petitioner acquired a certificate of title for the suit property. There is also some evidence on record that the Petitioner has been running a children's facility on the suit property for a considerable period of time.

50. The court has further noted that the first relief sought by the 2<sup>nd</sup> Respondent is a declaration affirming the decision and actions of the NLC with respect to its review of the certificate of title held by the Petitioner. The court is of the opinion that such a declaration cannot be a legitimate constitutional remedy

in a case of this nature. The court is further of the opinion that the performance of constitutional functions by the NLC does not require a seal of approval from the court for every action taken in the course of its daily business. It is only a person who may be aggrieved by its actions and decisions who would be entitled to challenge such actions and decisions. The 2<sup>nd</sup> Respondent's prayer for validation of the actions and decisions of the NLC is therefore superfluous.

51. It is also evident from the cross petition as a whole that the 2<sup>nd</sup> Respondent is essentially aggrieved by the alleged violation of its right to property by the Petitioner in consequence whereof it has sought an order for the **eviction** of the Petitioner from the suit property and **general damages** for the alleged violation. The court is of the view that such grievances can be addressed through a normal civil action for eviction and damages. There is nothing special about the alleged violation to take it out of the realm of ordinary civil actions to warrant the filing of a constitutional petition.

52. The court is of the opinion that it is not every violation of the law which gives rise to a constitutional petition. In the case of **Kenya Bus Services Ltd & 2 Others V The Attorney General [2005] 1 KLR 787**, Nyamu J. (as he then was) made the following observations on the issue:

**“In addition, although there is no direct local authority on the point, the holding No. 3 in the Trinidad and Tobago Constitutional case of Re Application by Bahadur [1986] LRC (Const) 297 at page 298 represents our position as well:**

**“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution. See *Harrickson Vs Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied.*”**

53. The court is thus of the opinion that there are no genuine constitutional issues raised in the cross-petition. All the alleged violations of the 2<sup>nd</sup> Respondent's property rights are matters which can be canvassed and ventilated in an ordinary civil suit. An order of eviction and damages are civil remedies which can be granted in deserving cases in a normal suit.

54. The 5<sup>th</sup> issue is whether the Petitioner is entitled to the reliefs sought in the petition. The court has found and held that the NLC had jurisdiction to review the Petitioner's certificate of title with a view to ascertaining its propriety and legality. The court has also found and held that the NLC had jurisdiction upon review to direct the Chief Land Registrar to revoke or cancel the Petitioner's certificate of title. The court has further found that the NLC had statutory power to make a consequential order directing the Chief Land Registrar to restore the suit property to its rightful owner. In those circumstances, the Petitioner is not entitled to the reliefs sought in the Petition, or any one of them.

55. The 6<sup>th</sup> issue is whether the 2<sup>nd</sup> Respondent is entitled to the reliefs sought in the cross-petition. The court has found and held that the cross petition does not raise any constitutional issues which can exclusively be ventilated in a constitutional petition. The perceived violation of its property rights can at best constitute trespass to land for which there are adequate civil remedies. It would, therefore, follow that the 2<sup>nd</sup> Respondent is not entitled to the reliefs sought in the cross-petition, or any one of them.

56. The 7<sup>th</sup> issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of the action unless, for good reason, the court directs otherwise. See **Hussein Jahmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Since both the petition and cross petition have failed, the court is of the opinion that each party should bear its own costs.

57. The upshot of the foregoing is that the court finds no merit in both the petition and the 2<sup>nd</sup> Respondent's cross-petition. Accordingly, both the petition dated 16<sup>th</sup> March 2018 and the cross-petition

dated 20<sup>th</sup> May 2019 are hereby dismissed. Each party shall bear its own costs.

58. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **28<sup>TH</sup>** day of **NOVEMBER, 2019**.

In the presence of Mr. Morris Njage for the petitioner, Mr. Abubakar & Ms. Gasansule for the 2<sup>nd</sup> Respondent, Mr. Siro for the 3<sup>rd</sup> Respondent and in the absence of the 1<sup>st</sup> Respondent.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**28.11.19**