



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC PETITION NO. 5 OF 2018

IN THE MATTER OF: ARTICLES 22, 23, 24, 40, 47(1), 50(1), 258 AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 24(1), 27(1), 40(2), (3) AND 50 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

STANLEY & SON LIMITED PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF MAKUENI.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF MAKUENI..... 4TH RESPONDENT

WILLIAM NDUSE MATHEKA SUED IN HIS CAPACITY AS CHAIRMAN OF

KIU-KALANZONI AND MUKAA (KIAMUKA) SOCIETY 5TH RESPONDENT

RULING

1. What is before court for ruling is the Petitioner's Notice of Motion dated 08th November, 2018 and filed in court on even date for orders: -

1) Spent.

2) Spent.

3) Spent.

4) Spent.

5) A conservatory Order do issue restraining the 2nd Respondent either by itself, agents, employees, servants or whomsoever from commencing, continuing or otherwise completing the process of hearing, investigating or considering claim No.NLC/HLI/541/2018 or any other claim relating to historical land injustice complaints in relation to the Petitioner's property being L.R. no.1748, Kiima Kiu/Kalonzoni and Mukaa Ward, Makueni county as under the provisions of Section 15(3) of the National Land Commission Act pending the hearing and determination of the Petition filed herewith.

6) A Conservatory Order do issue staying the 2nd Respondent's decision, through the 4th Respondent or otherwise, to carry out a survey of the Petitioner's property being L.R. No.1748, Kiima Kiu/Kalonzoni and Mukaa Ward, Makueni County contained in the 2nd Respondent's letter dated 30th October, 2018 pending the hearing and determination of the Petition filed herewith.

7) The costs of this Application be awarded to the Petitioner.

2. The application is premised on the grounds on its face and is supported by the supporting, supplementary and further supplementary affidavits of Robin Alan Stanley, its Managing Director, sworn at Nairobi on the 08th November, 2019, 2nd April, 2019 and 19th June, 2019 respectively.

3. The 5th Respondent has opposed the application through its grounds of opposition dated 22nd February, 2019 and replying affidavit of William Nduse Matheka, sworn at Nairobi on 22nd February 2019 and both filed in court on 25th February, 2019.

4. The 1st Respondent has also opposed the application through his undated grounds of opposition filed in court on 30th April, 2019.

5. The 3rd and 4th Respondents have opposed the application through the replying affidavit of Shadrack Mulanga, the Director of legal services of the 4th Respondent, sworn at Nairobi on the 06th May, 2019 and filed in court on 09th May, 2019.

6. The 2nd Respondent has also opposed the application through its grounds of opposition dated 29th April, 2019 and filed in court on 27th May, 2019.

7. Pursuant to the directions to dispose off the application by way of written submissions issued on the 25th February, 2019, the Petitioner filed its submissions, replying submissions and further submissions on the 09th May 2019, 26th September, 2019 and 08th October 2019, the same being dated 08th May 2019, 23rd September, 2019 and 07th October, 2019 respectively.

8. On the 09th May, 2019 the 3rd and 4th Respondents filed their submissions dated 06th May, 2019. On the other hand, the 5th Respondent filed his submissions on 30th September, 2019 the same being dated 21st June, 2019.

9. The Petitioner's Counsel framed three (3) issues for determination namely:-

(a) Whether the Petitioner has demonstrated that it has a meritorious case and that it will suffer prejudice if the conservatory orders are not issued?

(b) Whether the grant of the conservatory orders enhance constitutional values?

(c) Whether it is in public interest to grant the conservatory orders?

10. The Counsel for the 3rd & 4th Respondents framed three (3) issues for determination, namely: -

(i) Whether the 2nd Respondents have jurisdiction to hear and to investigate a claim of historical injustice?

(ii) Costs of the suit;

(iii) What reliefs the court should issue?

11. The Counsel for the 5th Respondent framed four (4) issues for determination. The issues are: -

(a) Whether the Petitioner/Applicant has made out a case to warrant the grant of conservatory orders?

(b) Whether the Applicant has made out a prima facie case?

(c) Whether there is real danger that the Petitioner will suffer prejudice as a result of violation or threatened violation of the constitution, and

(d) Whether the grant of the conservatory order will fulfill the public interest threshold?

12. On whether or not the Petitioner has demonstrated that it has a meritorious case and that it will suffer prejudice if the conservatory orders are not issued, the Petitioner's Counsel cited the case of **Kevin K. Mwiti & others vs. Kenya School of Law & Others [2015] eKLR** which set out the principles that should be considered to determine whether a party has established a prima facie or meritorious case as follows: -

“A prima facie case ... is not a case which must succeed at the hearing of the main case, but must be a case that is not frivolous. The Petitioner has to show that he has a case which discloses arguable issues and in this case, arguable constitutional issues, but the court should not at this stage make definitive findings either of fact or law as that is the province of the court that will intimately hear the petition.”

The Counsel pointed out Section 15(3) of the National Land Commission Act which the 2nd Respondents purports to act upon was suspended by the court in the case of **Malindi ELC Petition No.19 of 2016 Malindi Law Society vs. the Hon Attorney General and the National Assembly**. The Counsel added the institution and continuation of proceedings based on a suspended section of the law would be inconsequential.

13. It was further submitted on behalf of the Petitioner that it (Petitioner) has established a meritorious case in that Section 15(3) of the NLC Act seeks to arbitrarily deprive the Petitioner's right to property contrary to Article 40(2) of the Constitution by allowing the 2nd Respondent to admit, register and process a historical claim irrespective of whether the historical land claim contradicts a law in force at the time when an alleged injustice began or where the claim is debarred under Section 7 of the Limitation of Actions Act, Cap.22 or any other law.

14. The Counsel went on to submit that if Section 15(3) of the NLC Act were to be applied, the Petitioner would not be able to rely on Section 23(1) of the Registration of Titles Act (repealed) which provided that the Petitioner's title to the suit property is conclusive evidence that the Petitioner is the absolute and indefeasible owner of the suit property. The Counsel added that the Petitioner cannot also rely on Section 23(3) of the Interpretation and General Provisions Act which provides that upon the repeal of the Registration of Titles Act, the Petitioner's rights and interests in the suit property cannot be affected. That the Petitioner further cannot also rely on the 1963 Constitution of Kenya which provided that all rights in or over land which the Governor created or recognized before 1st June 1963 were confirmed as validly granted.

15. The Counsel further submitted that Section 15(3) of the NLC Act also infringes on the Petitioner's rights to an administrative process which is fair and reasonable under Article 47 of the Constitution. That by not placing conditions on the filing of stale claims, the Counsel pointed out, the 5th Respondent presumably would be able to file a claim with the 2nd Respondent almost 120 years after the alleged displacement without justifying the delay in filing the claim and the likely prejudice that a party may face. He submitted that on the other hand, the Petitioner is compelled to trace witnesses and documentary evidence on matters that predated its acquisition of the suit property which is unreasonable and unfair upon the Petitioner.

16. The Counsel went on to submit that the consequent effect of the inordinate delay in filing the claim is that the Petitioner's right to fair hearing under Article 50 during the investigations will be severely prejudiced in that the Petitioner cannot trace suitable witnesses or documentary evidence to challenge the allegations by the 5th Respondent. In support of this position, the Counsel relied on the case of **Wellington Nzioka Kioko v Attorney General [2018] eKLR** in which the Court of Appeal considered the issue of time limitations and held that a Court will not consider state constitutional claims where there has been an inordinate delay, no plausible explanation which may deny a party to suitable defence when it stated;

“The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned judge found that no justification for the delay of over 3 decades had been given in this matter. Can the judge be faulted for that? We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time to end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in position to defend himself. There is of course a rebuttable presumption that if you don't seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.”

17. The Counsel further submitted that the Petitioner has a prima case that the historical land injustice investigations under Section 15(2) of the NLC Act sought to be commenced by the 2nd Respondent threaten to infringe on the Petitioner's right to property under Article 40, right to equal protection and equal benefit of the law under Article 27, the right to administrative process which is reasonable and fair under Article 47 and the right to a fair hearing under Article 50 by denying it the defence to limitation of time and sanctity of titles.

18. The Counsel submitted that the assertions that the 2nd Respondent's commissioners have left office and the investigations have been deferred until new commissioners are appointed cannot be a defence to the claim by the Petitioner. He submitted that nothing prevents the 2nd Respondent, once properly constituted, from continuing with its intended unconstitutional action against the Petitioner. The Counsel added that it is necessary that the conservatory orders sought in the application be granted so that the Petitioner may have protection against any adverse action by the 2nd and 4th Respondent during the pendency of the constitutional petition.

19. On the issue of whether the grant of the conservatory orders enhance constitutional values, the Counsel stated that the 2nd Respondent has a constitutional mandate under Article 67(2) to conduct historical injustice investigation, which mandate is effectuated through Section 15(2) of the NLC Act.

20. The Counsel went on to submit that in view of the fact Section 15(3) is unconstitutional and threatens to infringe the Petitioner's right to property under Article 40, right to equal protection and equal benefit of the law under Article 27, right to administrative process which is reasonable and fair under Article 47 and right to a fair hearing under Article 50, the issuance of the conservatory orders against the 2nd Respondent's actions would enhance constitutional values.

21. The Counsel added that the institution and continuation of the historical land injustice investigations have no force in law following the suspension of Section 15 of the National Land Commission Act by the Court in **Malindi ELC Petition No.19 of 2016 Malindi Law Society vs. The Hon. Attorney General and the National Assembly**. The Counsel was of the view that by granting the conservatory orders, this Court will be enhancing constitutional values by retraining the 2nd Respondent from continuing with unlawful investigations that are not anchored in law.

22. On the issue of whether it is in public interest to grant the conservatory orders, the Counsel submitted that the 2nd Respondent has the power to conduct historical land injustice investigations under Article 67 of the Constitution. That however, the statutory framework in which the 2nd Respondent is to carry this mandate is unconstitutional and runs contrary to public interest in that it allows a party to bring a late claim after inordinate delay and without requiring such a party to explain or justify the delay. He stated that in the present case, the historical injustice claim has been brought almost 120 years after the alleged displacement.

23. The Counsel further submitted that Section 15(3) of the NLC act also does not set clear thresholds of evidence which a party should produce to prove that it has a verifiable historical injustice claim. That the allegations by the 5th Respondent that its members' parents and grandparents had utilized the suit property as ancestral land, communal grazing land and traditional shrines are not substantiated before the 2nd Respondent or this court.

24. The Counsel went on to submit that there are no clear guidelines and procedures on how the public participation hearings and historical land injustice hearings should be conducted or how the documents in the hearings should be exchanged by the parties. As an example, the Counsel submitted that in this case, the Petitioner was not invited to the public participation hearing of 29th October, 2018 which is annexed as RS-12 in the Application.

25. The Counsel further submitted that Parliament has recognized that a framework must be enacted to bring life into Article 67(2) of the Constitution. To the extent that the present statutory framework is under challenge, the Counsel submitted that it would therefore be contrary to the public interest for the historical land injustice investigations to continue pending the determination of the Petition.

26. On the other hand, the Counsel for the 3rd and 4th Respondent stated that there being claims of historical land injustices, the Petitioner feels that the National Land Commission should be barred from investigating the ownership of the suit property being LR No.1748, Kiima Kiu/Kalonzoni and Mukaa ward Makueni County as provided for under Section 15(3) of the National Land Commission Act terming it as unconstitutional.

27. The Counsel further submitted that it is the 3rd and 4th Respondents contention that the 2nd Respondent being a constitutional body should be allowed to carry its constitutional mandate with no fear or favour.

28. The Counsel went on to submit that it is important to note that the National Land Commission after receiving a complaint as stipulated under Section 15(2)(3)(4) has to make sure that the complaint meets the qualification of a historical land injustice claim which is the cause in the current suit.

29. The Counsel relied on **Constitutional Petition No.530 of 2016 of 2016: Joseph Mungai Gichuru & another vs Mathaara Mwangi & 4 Others** where the court found out that the Petitioners had not demonstrated any reasonable apprehension of bias or imminent breach of their rights if the investigations were illegal and thus dismissed the Petition with costs to the Respondents.

30. The Counsel stated that conditions for a complaint to qualify as a historical land injustice claim include;

- a) *Was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;*
- b) *Resulted in displacement from their habitual place of residence;*
- c) *Occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated;*
- d) *Has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and*
- e) *Meets the criteria set out under subsection 3 of this section.*

The Counsel submitted that the investigations to be conducted arose from a valid claim that's why the National Land Commission wrote to the Petitioner, themselves and the other Respondents herein in order to enable them find the correct position of the land in question.

31. The Counsel went on to submit that a historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria:

- (a) *It is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;*
- (b) *The claim has not or is not capable of being addressed through the ordinary Court system on the basis that –*
 - (i) *The claim contradicts a law that was in force at the time when the injustice began; or*
 - (ii) *The claim is debarred under section 7 of the Limitation of Actions Act or any other law;*
- (c) *The claimant was either a proprietor or occupant of the land upon which the claim is based;*

(d) *No action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question.*

32. In opposing the Notice of Motion the Counsel for the 5th Respondent submitted that the prayers sought by the Petitioner in the said Application have been overtaken by events in that; Prayers 1, 2 and 4 of the Application having been spent, Prayer 3 shall be spent if extended to inter-parties hearing date. It was 5th Respondent's contention that issuing prayers No.5 and 6 of the Application shall be in vain for the following reasons that:

a) *The two prayers seek an injunctive conservatory Order to restrain the National Land Commission, the 2nd Respondent from continuing to hear claim No.NLC/HLI/541/2018 or any other relating to historical Land Injustice complaints in relation to the suit property being L.R No.1748, Kiima Kiu/Kalonzoni and Mukaa Ward.*

b) *The National Land Commission, 2nd Respondents Commissioners through which the commission function have since left office their term having expired on 19th February 2019.*

c) *No new commissioners have been appointed and the process for recruitment has not commenced and therefore the commission cannot in any way proceed with any hearing of a dispute without commissioners.*

d) *In any event, claim No.NLC/HLI/541/2018 or relating to historical Land Injustice complaints in relation to the suit property being L.R. No.1748, Kiima Kiu/Kalonzoni and Mukaa Ward was on 13th November 2018 deferred to the next commission which is yet to be constituted.*

e) *Further execution of the 2nd Respondent decision to survey equally got stayed and/or deferred to the new commission to be constituted and therefore any orders sought on similar ground is in vain.*

f) *The Petition can be heard and disposed off before constitution of any new commission.*

33. The Counsel in further response to the said application further asserted that despite the Petitioner setting out the 5th Respondent's members claim thereof correctly, the Petitioner has not approached this Court with clean hands and that the Petitioner's contention of breach of fundamental rights and the conservatory prayer sought for is premised on a misapplication and wrongful interpretation of the law on the following grounds;

a) *The National Land Commission has jurisdiction pursuant to Article 67(1)(e) to initiate investigations, on its own initiate or on a complaint, into present or historical land injustices and recommend appropriate redress.*

b) *The jurisdiction of the commission is donated by the constitution and not by statute and therefore the contentions by the Petitioners on lack of jurisdiction of the commission on the basis of an interim stay order from another Court impugning Section 15 of the NLC Act cannot oust the constitutional provision conferring mandate and/or jurisdiction of NLC.*

c) *The Petitioner's Argument that it is a private company holding private land protected by Article 40 of the constitution and therefore that its grant is not subject to review by the National Land commission for lack of Jurisdiction is spurious.*

d) *That pursuant to Article 67(3) of the constitution, parliament conferred to the National Land Commission under Section 14 of the National Land Commission Act the power to review public land that was illegally or irregularly allocated.*

e) *Courts have pursuant to similar arguments by the Petitioner that its Land is private made findings that section 14(1) of the NLC Act gives the 2nd Respondent the power to review all grants or disposition of public land and that it follows that such review can only entail Land that has been converted from public Land to private land.*

f) *In any event the Petitioner has not met the saving reserved pursuant to Section 14(7) of the NLC Act since it has not been pleaded as to how it acquired the suit property for the obvious reason that the same shall fall squarely within the 5th Respondent's historical injustice claim.*

g) *That the NLC jurisdiction exist despite this Honourable Court's jurisdiction to determine their claim pursuant to Article 162(2) & (3) of the Constitution as read with S.13 of the Environment and Land Act No.19 of 2011, and the provisions of Section 101 of the Land Registration Act No.3 of 2012 section 4 and 26.*

h) *Section 23 of the Registration of Titles Act (RTA), IS SUBJECT TO Article 40(6) of the Constitution, section 23 of the Registration of Titles Act (RTA), or section 26 of the Land Registration Act, cannot qualify the provisions Article 40(6) of the Constitution which implies that any title that has been acquired unlawfully should be cancelled by the Court, regardless of the circumstance.*

i) *Accordingly the 5th Respondents asserts that the Petitioner's contention of infringement of its fundamental rights pursuant to Articles 40 of the constitution falls far below the legal threshold and therefore does not make a legal foundation for the Orders prayed for.*

34. The 5th Respondent's Counsel disputed the Petitioners claim that its rights under Article 47 and 50 of the Constitution had been violated, and averred that:

- a) *No doubt that in the execution of its constitutional mandate the NLC is duty bound to observe and follow the due process.*
- b) *Further that the right to fair administration action is not absolute.*
- c) *In the circumstances of this case, this plea is premature in that the NLC was yet to hear the petition before it.*
- d) *It is on record from the Petitioner's evidence that NLC had notified the Petitioner to attend and the Petitioner was aware of the hearing date by notice. Consequently the Petitioner had an opportunity to hear and make representations.*
- e) *The plea on Articles 47 and 50 of the constitution in the circumstances of the facts pertaining is self-defeating.*
- f) *The 5th Respondent prays and urges the court to make a finding that the Petitioner has not satisfied the court and there is/was any transgression on the part of the NLC in so far as the Petitioner's right to fair administrative action and right to fair hearing was concerned.*
- g) *The 5th Respondent avers that in light of the foregoing dispositions, the Petitioner claim that its rights pursuant to Article 27 have violated cannot stand as in any event the Article applies equally to the 5th Respondents members who are pursuing their fundamental rights.*
- h) *The 5th Respondent denies the Petitioner's that its members threatened to invade the suit property. The same is said to be fabricated and not supported by evidence. The Respondent asserts that in any event the contentions are side shows intended to divert the real issues for determination.*

35. He submitted that the 5th Respondent contended that the Petitioner has not met the threshold for grant of the prayers sought in that;

- a) *It has not established a prima-facie case by establishing that a legal wrong or a legal injury has been caused.*
- b) *It has not demonstrated that unless the conservatory order is granted there is real danger which may be prejudicial to it.*
- c) *More importantly it has not demonstrated that grant of the orders would be in public interest.*
- d) *Conservatory orders are not ordinary civil remedies but are remedies provided for under the Constitution, the Supreme law of the Land. That therefore they are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of particular state of affairs as opposed to injunctive orders which may only attach to a particular person.*
- e) *Conservatory orders are not, unlike interlocutory injunctions, linked to such private party issues as "prospects of irreparable harm" occurring during the pendency of a case;*
- f) *Consequently conservatory orders can only be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and the priority levels attributable to the relevant causes.*

36. Regarding the 3rd and 4th Respondent's Opposition to the Notice of Motion, the Counsel for the 5th Respondent submitted that the 3rd and 4th Respondents admitted the facts that the Petitioner is the duly registered proprietor of the suit property and that a motion by the County Government over claims of historical injustice concerning the suit property was passed, after which they moved the National Land Commission to investigate the matter.

37. The Counsel further submitted that the 3rd and 4th Respondents have averred that the National Land Commission took up the matter and invited both the 3rd and 5th Respondents as well as the Petitioner herein for hearing the claim under historical injustices.

38. The Counsel went on to submit that the 3rd and 4th Respondents have asserted that they rightly took the claim to the National Land Commission which has the power under Article 67 (2) (e) of the Constitution of Kenya as read with Sections 14 and 15 of the NLC Act 2012 to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

39. The Counsel further submitted that the 3rd and 4th Respondents have reiterated the Petitioner's admission that the 5th Respondent's members' parents and grandparents who were natives of the suit property had been displaced but opposes the Petitioner's defence that the same was not carried out by the Petitioner and hence the essence of Article 67 (2) of the Constitution as read with Section 15(2) of the NLC Act.

40. The Counsel went on to submit that the Respondents deplore the Petitioner's claim that its title is being challenged and yet neither the Chief Land Registrar nor the Commissioner of Lands are not parties to the Petition.

41. The Counsel stated that 3rd and 4th Respondents contended that the petition was premature as the National Land Commission was yet to hear the matter and urged the Court to dismiss the Application.

42. The Counsel for the 5th Respondent submitted that the Applicant had not made out a case to warrant the grant of conservatory orders as the principles for the grant of conservatory orders are well established and settled through judicial pronouncements.

43. The Counsel further submitted that the guiding principles in regard to the grant of conservatory orders were well outlined by the Court in the case of **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another, Petition No.167 of 2016** where it was held that:

“[68] what then are the circumstances under which the Court grants conservatory orders; it has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the Applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, the Court is not required-indeed it is forbidden-from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the Applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No. 16/2011, Muslims for Human Rights (MUHURI) & 2 others. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011 and V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.”

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[71] Back home, Musinga, J (as he then was) in Petition No.16 of 2011 Nairobi – Centre for Rights Education and Awareness (CREAW) & 7 Others stated that: “...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

[72] In The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No.11 of 2012, it was held by a majority as follows: “In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

[73] Similarly, in Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR this court expressed itself as follows in regard to Conservatory orders: “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

[74] This position was adopted by the Supreme Court in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No.5 of 2014, the Court held as follows at paragraph 86 and 87: Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant cause. The principles to be considered before a Court of law may grant stay of execution have been crystallized throughout a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
 - (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
- These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added namely:
- (iii) That it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.”

44. The Counsel went on to submit that in **Latema Sacco & 33 others vs. National Transport & Safety Authority & 7 others; Uber Chap Chap & 2 Others (Interested Parties) 2019 eKLR**, the honourable Justice E. Mwita restated the principles with approval while citing other decisions expounding on the principles as follows;

“[22] At this stage, an Applicant must show that he has a prima facie case with a likelihood of success, and that if the conservatory order is not granted, he will continue to suffer prejudice in so far as his rights and fundamental freedom are concerned. In other words the Applicant must demonstrate a clear case of violation or threat to violate or infringe rights and fundamental freedoms, and that failure to grant conservatory orders would perpetuate the violation or infringement.

[23.] In the case of *Centre for Rights, Education and Awareness (CREQ) & 7 Others v Attorney General [2011] eKLR*, the court stated;

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory order is granted, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

[24.] in the case of *Centre for Human Rights and Democracy & 2 Others v Judges and Magistrates Vetting Board & 2 Others (Petition No.11 of 2012)* it was again observed that in deciding whether or not to grant conservatory orders, the court should consider the credential of the Petitioner, prima facie correctness or nature of information available to the court, whether the grievances expressed in applying for conservatory orders are genuine, legitimate, deserving or appropriate; whether the Applicant has demonstrated the gravity or seriousness of the dispute, or whether the Applicant is engaged in wild, vague, indefinite or reckless allegations.

[25.] Further, in *Martin Nyaga Wambora v. Speaker of the County Assembly of Embu & 3 others (supra)* the court was clear on the importance of demonstrating the real and imminent danger stating that; “The danger must be imminent and evidence, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”

And in the case of *Gitarau Peter Munya v Dickson Mwaure Githinji & 2 Others [2014] eKLR*, the Supreme Court Stated that;

i. “Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within Public agencies, as well as to uphold adjudicatory authority of the court in the Public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues on the prospects of irreparable harm occurring during the pendency of a case or high probability of success” in the Applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

45. The Counsel submitted that the Court is required to evaluate the pleadings and determine whether the Applicant has established a prima facie case with a likelihood of success.

46. The Counsel further submitted that a prima facie case is not a case which must succeed at the hearing of the main case. The Counsel added that it is not a case which is frivolous. The Counsel pointed out that an Applicant has to show that he or she has a case which discloses arguable issues and in a case alleging violation of rights, arguable constitutional issues.

47. The Counsel submitted that the Petitioner has not demonstrated prima facie that his right to a fair administrative action and hearing pursuant to Articles 47 and 50 of the Constitution has been and/or will be violated by the National Land Commission scheduling a hearing date of the historical injustices.

48. The Counsel further submitted that the evidence placed before Court demonstrates that the 2nd Respondent has not violated but rather upheld the right to a fair administrative action and fair hearing. That this is apparent from the admission made by the Petitioner at paragraph 20 of its Affidavit of Support which reads;

“(20) I am aware that the Petitioner has since received a formal invitation from the 2nd Respondent by its letter dated 5th November, 2018 in which it refers to historical Land Injustice claim No.NLC/HLI/541/2018 presented to it by the Kiamuka Society and inviting the Petitioner, amongst other,s to a session on 13th November, 2018. The invitation further annexed the claim dated 25th September, 2018 lodged with the 2nd Respondent by the Kiamuka Society. A copy of the 2nd Respondent’s letter together with the claim enclosed are annexed hereto marked as RS-13”

49. The Counsel went on to submit that the 2nd Respondent adhered to the provisions of Article 47 on fair Administrative action as well as Article 50 on fair hearing.

50. The Counsel further submitted that the Petitioner had not pleaded and/or given an iota of evidence on violation and/or likely violation of the alleged rights.

51. The Counsel relied on the Authority from both the High Court of Appeal to the effect that the National Land Commission has constitutional powers to carry out investigations on historical injustices. The High Court in **Republic vs. National Commission & another (2018) eKLR** held inter-alia as follows: -

“The Court has considered the relevant provisions of law. Indeed Article 40 of the Constitution provides for the protection of right to property. Therefore every person has a right to protection of his/her property by the State. The Constitution of Kenya 2010 has also categorized various holding of land such as Public land, Community land and Private land.

However, in Article 66(1), the State is given mandate to regulate the use of any land or any interest in or right over any land in the interest of Defence, Public Safety, Public Order, Public Morality, etc...”

It is for the above reasons that the Constitution further established the National Land Commission and its functions have been enumerated in Article 67(2). Among the many functions of National Land Commission is “to initiate investigations, on its own initiative or complaint into present or historical land injustices, and recommend appropriate action.”

Further, the National Land Commission Act No.5 of 2012 spells out the functions and powers of the National Land Commission in Section 5(1) and these functions are the ones spelt out in the Article 67(2) of the Constitution and among the said functions are to:-

“initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress.”

The Court has also considered Section 6(1) of National Land Commission Act and it provides that the Commission shall have all the powers necessary for the execution of its function under the Constitution, the Act and any other written law.

Further Section 6(2)(b) provides that the Commission shall have power to:-

“hold inquiries for the purpose of performing its functions under this Act.”

From the above provisions of law, the Court finds that the National Land Commission has powers to investigate any alleged historical land injustice and make any appropriate recommendation. In doing So, the National Land Commission can hold inquiries for purposes of carrying out the above stated investigations. It does not mean that by carrying an investigation and inquiry, the National Land Commission has already concluded that the land in issue was acquired irregularly or there is any historical injustice. It may just be an alleged historical injustice and after the investigation and inquiry, the said Commission may come up with appropriate recommendation that might assist in unlocking the dispute herein.”

52. The Counsel also relied on **Kipsiwo Community Self Help Group vs. Attorney General and 6 others (2013) eKLR** where Justice S. Munyao while determining the issue as to whether the court could hear a matter touching on historical land injustices or whether the same falls exclusively with the National Land Commission stated thus:-

“24. The second point, raises a different question on jurisdiction. It is the argument of the 7th Respondent that that this court has no jurisdiction to hear this petition because it is a petition anchored on a claim of historical injustice, which can only be entertained by the National Land Commission. I think this point needs a different level of interrogation.

25. The National Land Commission is established by Article 67 of the Constitution which provides as follows: -

Constitution Article 67. (1) There is established the National Land Commission.

(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.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

26. The functions of the NLC as set out in Article 67(e) are repeated in Section 5 of the National Land Commission Act, Act No.5 of 2012. (NLC, Act) which also clarifies some aspects of jurisdiction. The said section provides as follows: -

5.(1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be –

(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.

(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution-

(a) on behalf of, and with the consent of the national and county governments, alienate public land;

(b) monitor the registration of all rights and interests in land;

(c) ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;

(d) develop and maintain an effective land information management system at national and county levels;

(e) manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and

(f) develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.

(3) Despite the provisions of this section, the Commission shall ensure that all unregistered land is registered within ten years from the commencement of this Act.

(4) Parliament may, after taking into consideration the progress of registration, extend the period set by the Commission under subsection (3).

27. The issue in this suit relates to the function of the NLC set out in Article 67 (2) (e) and S. 5(e) of the NLC Act. There is no question that one of the functions of the NLC is to “initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.” Any person has a right to complain to the NLC on a perceived historical injustice. Indeed, the NLC may commence an investigation on historical or present land injustices on its own.

28.....

29. Thus, in as much as I agree that the NLC has a mandate to look into historical injustices, I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices.

30. That I think resolves the 2nd issue.”

53. The Counsel went on to submit that it was clear from the foregoing and many decisions that the court may be aware of that National Land Commission is a Constitutional Commission and has its mandate donated by the Constitution. That to allege therefore that the Petitioner’s right to fair hearing may be violated due to lack of jurisdiction would fly on the face of Article 67(2) of the Constitution.

54. On the issue of the Petitioner’s reliance on a pending interim order elsewhere allegedly suspending the operation of Section 15(3) of the National Land Commission, the Counsel submitted that although the same does not bind this Court nor does it take away the Constitutional power granted by Article 67(2) of the Constitution, he was not persuaded by the arguments advanced as the basis thereof.

55. The Counsel went on to submit that Limitation of Actions Act will not be a bar to constitutional claims lodged on infringement of rights. He relied on the case of; **Chief Land Registrar & 4 others vs. Nathan Koech & 4 others (2018) eKLR** where the Court of Appeal restated the position that there is no time limit within which a party can file a claim for violation of constitutional rights;

“60. We are alive to the decision of this Court in *Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No.79 of 2012*, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in *Kamlesh Mansuklal Damji Pattni & another vs. Republic [2013] eKLR* where it was noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights

should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. (See *Metal Box Co. Ltd vs. Curry's Ltd.* (1988) 1 All ER 341. We appreciate that in *Kariuki Kiboi vs. Attorney General* [2017] eKLR, Nairobi Civil Appeal No.90 of 2015, this Court heard and determined a claim which arose in the mid- 1980s and was lodged by a petition dated 26th August 2010. This Court observed:

“Kariuki Kiboi (the appellant) was among six other persons who filed Constitutional petitions against the Attorney General (the Respondent), who was sued on behalf of the government of Kenya at the Constitutional and Human Rights Division of the High Court at Milimani Law Courts in Nairobi. The petitions were based on events that took place in this country in the mid-1980s and 90s, a period which some historians like to refer to as the dark days of the Moi era.

The appellants were claiming in the main that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary.”

*61. Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of rights. (See **Dominic Arony Amolo vs. Attorney general Nairobi HC Misc. Civil Case No.1184 of 2003 (O.S.) [2010] eKLR; Otieno Mak’Onyango vs. Attorney General & Another Nairobi HCCC No.845 of 2003**).*

56. The Counsel said that the Petitioner’s contentions on infringement of Article 47 and 50 of the Constitution are frivolous, baseless and consequently no prima facie case is disclosed.

57. The Counsel went on to submit that Article 40 protects rights to property and in particular from arbitrary deprivation, the same Article 40 clause 6 however excludes property unlawfully acquired.

58. The Counsel further submitted that the Petitioner had neither pleaded nor demonstrated that it acquired the suit property lawfully.

59. The Counsel submitted that the 2nd Respondent had only scheduled a hearing of a complaint of deprivation of property by the 5th Respondents members. That it had not made any determination and could only make a recommendation since the final arbiter of land disputes is this Court.

60. The Counsel went on to submit that in any event, survey exercise is part of investigations and therefore within the mandate of National Land Commission. That it is important that ultimately survey of the suit property be carried out to establish as to whether there is additional land fenced by the Petitioner that belongs to community land. That if the same is found to exist, then National Land Commission would make appropriate recommendation in which case the 4th Respondent who is the caretaker of community land would move this Court for appropriate action.

61. The Counsel further submitted that no prejudice would be suffered whether now or in the future if survey was carried out as the same is only intended in establishing the exact acreage of the suit property and may help in determining the pending disputes.

62. With respect to Article 27, the Counsel submitted that the same was spurious and no basis had been laid that can be arguable at the main hearing. That equality applies to both the Petitioner and the 5th Respondents members who have claims that ought to be heard taking into account that both parties were scheduled to be heard by the NLC.

63. The Counsel further submitted that had the Petitioner established a prima facie case, the court would then decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right of freedom in the Bill of Rights. The Counsel submitted that if they were wrong on the issue of prima facie case and the court were to consider this aspect, their view shall be that a grant of the relief sought will not enhance constitutional values and objects of the specific rights as the same has to be balanced against the rights of the 5th Respondent’s members as demonstrated elsewhere in their written submissions.

64. On whether there is real danger that the Petitioner will suffer prejudice as a result of the violation or threatened violation of the constitution, the Counsel submitted that the question that arises is whether in the circumstances of this case, the Petitioner has discharged the burden. The Counsel added that there is absolutely no evidence of any imminent danger. That to begin with, the term of National Land Commission commissioners lapsed and the process of recruitment of new commissioners has not even commenced. That consequently, no hearing can take place in the absence of the commissioners and by extensions the supposed survey of the suit property that in any event is not injurious by extension awaits the reconstitution of the commission or other order from a Court of Law.

65. The Counsel went on to submit that the Applicant has failed to prove that they face imminent, evident, true and actual danger that they will suffer prejudice as a result of the violation or threatened violation of the Constitution. That the Applicants have failed the test for the grant of Conservatory order. That in the absence of that proof, to grant the conservatory orders in the circumstances of this case would be disproportionate to the mischief that is sought to be cured by such orders.

66. On whether grant of the conservatory order will fulfil the public interest dogma threshold, the Counsel cited the case of **Gatirau Peter Munya** (supra) where the Supreme court made it clear that conservatory orders bear a more decided public law connotation; for these are

orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in public interest. The Court added that conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.

67. The Counsel further submitted that orders sought by the Petitioner are intended to stop a Constitutional Commission from carrying out its Constitutional mandate. That the complaint placed before the National Land Commission concerns infringement of rights of a community that claims to have lost their ancestral Land arbitrarily and without compensation. That they are not only a large community but involve members of the public in their hundreds. That the outcome would affect the lives of thousands of Kenyans. In his view, the Counsel stated that a stay injunction the National Land Commission from hearing a historical injustices claim will not be in public interest.

68. The Counsel further submitted that the Respondent's position that public interest outweighs private interests and as such, it will be greatly prejudicial to the public at large if this court halts the actions of the Respondent of hearing the historical injustices claims as and when the NLC Commissioners are appointed.

69. In his replying submissions while responding to the 3rd and 4th Respondent's contention that the petition is premature, the Petitioner's Counsel submitted that the investigations which have been carried out so far by the 2nd Respondent constitutes unfair administrative action contrary to Article 47(1) of the Constitution for reasons that;

a) While the 5th Respondent lodged the complaint with the 2nd Respondent on 25th September 2018, the Petitioner was only made aware of it about 8 days before the hearing by the 2nd Respondent.

b) Despite being the owner of the suit property, the Petitioner was purposely excluded from the public participation meeting on 29th October, 2018 in which the 2nd – 5th Respondents made a decision to determine the acreage of the suit property.

c) It is only after the Petitioner lodged its claim with the 2nd Respondent and made inquiries regarding the decision to determine the acreage of the suit property that it was invited to a meeting.

70. The Petitioner's Counsel cited the case of **Mwangi Stephen Muriithi vs. National Land Commission & 3 others [2018] eKLR** where the Court held that the National Land Commission (which is the 2nd Respondent herein) had infringed on the Petitioner's right to be heard and right to fair administrative action by failing to give him adequate notice when it held that:

“My finding is that the right to be heard transcends mere notice and extends to the person being given sufficient information to enable them prepare and/or present their case. Such a person is entitled to be furnished, in good time, with information, including reports and documents in the body's possession that may be prejudicial to his/her case and which would guide that body relied in arriving at its decision... in the absence of adequate notice, and access to the complaint as outlined herein, I am inclined to find that the Petitioner was not granted a fair hearing.”

71. It was the Petitioner's Counsel's submissions that even if the above arguments were not to be considered, the conservatory orders suspending the implementation of section 15 of the NLC Act in the case of **Malindi ELC Petition No.19 of 2016 Malindi Law Society vs. The Hon. Attorney General and The National Assembly** restricted the 2nd Respondent from carrying out the impugned inquiries.

72. The Counsel further submitted that conservatory orders apply in rem and the 2nd Respondent cannot therefore purport to carry out the investigations under Section 15 up and until the orders of the Court are vacated. In support of this position, the Petitioner relies on the case of **Judicial Service Commission vs. Speaker of the National Assembly & another [2013] eKLR** to the extent that the court set out the effect of conservatory orders in constitutional petitions when it held that:

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

73. The Counsel went on to submit that the authorities which the 3rd and 4th Respondents are relying on, **Constitutional Petition No.530 of 2016: Joseph Mungai Gichuru & Another vs. Maathara Mwangi & 4 Others, Farmers Company Limited vs. the National Land Commission & Twiga Estate Squatters Society** and **Judicial Review No.10 of 2017, ELC Case No.539 of 2016 Mahesh Shah vs. Chief Land Registrar & 5 others** are inapplicable to this matter.

74. The Counsel further submitted that the authorities address the concerns raised by the Respondent in relation to the constitutionality of Section 15 of the NLC Act, the fair administrative action breached by the 2nd Respondent and the effect of suspension of the implementation of Section 15 by the court in the case of **Malindi ELC Petition No.19 of 2016 Malindi Law Society vs. the Hon. Attorney General and the National**.

75. In response to the 5th Respondent's submissions, the Petitioner's Counsel reiterated the arguments made in the Petitioner's: -

a) Notice of Motion application dated 8th November 2019 (the “Application”) supported by the affidavit of Robin Alan Stanley dated 8th November 2018 (the “Supporting Affidavit”).

- b) *Supplementary Affidavit sworn by Robin Stanley dated 5th April 2019 (the “Supplementary Affidavit”);*
- c) *Petitioner’s Submissions dated 8th May 2019; and*
- d) *Petitioner’s Replying Submissions dated 23rd September, 2019.*

76. In Response to the submissions that the 2nd Respondent has not appointed commissioners, the Petitioner’s Counsel submitted that it relies on its averments at paragraph 6 to 8 of its Supplementary Affidavit and adds that there is no demonstrable evidence from the 5th Respondent to support its allegations that the impugned hearing or the illegal survey was supposedly deferred to the new commissioners.

77. The Counsel for the Petitioner submitted that it is in fact the 5th Respondent who is guilty of unclean hands having filed a frivolous claim in Court in Makueni ELC Case No.82 of 2018 which it disowned upon the Petitioner filing an application challenging it. That the orders marking the matter withdrawn and correspondence exchanged with law enforcement agencies on the matter are annexed as RS-17 in the Supplementary Affidavit.

78. The Counsel further responded to the 5th Respondent’s submissions that the 2nd Respondent has unfettered power to investigate historical claims under Article 67 of the constitution by submitting that the Petitioner relies on the averments at paragraphs 11 and 16 of the Supplementary Affidavit and added that the 2nd Respondent has its mandate effectuated through Section 15(2) of the NLC Act which is subject to the provisions of the Constitution.

79. It was the Counsel’s submissions that the authorities which the 5th Respondent has relied on in support of its arguments **Republic vs. National Commission & another [2018] eKLR, Kipsiwo Community Self Help Group vs Attorney General & others [2013] eKLR and Chief Land Registrar & 4 Others vs. Nathan Koech & 4 Others [2018] eKLR** are distinguishable in that neither of the authorities considered:-

- a) *The constitutionality of Section 15(2) of the NLC Act in that it deprives a person their right to property, right to benefit and protection of the law, right to a fair hearing and the right to fair administrative action;*
- b) *Whether the 2nd Respondent may purport to act on Section 15 of the NLC Act which is currently suspended; and*
- c) *Whether the 2nd Respondent had infringed on the rights of the Petitioners by failing to provide adequate notices and excluding Petitioners in public participation meetings.*

80. In response to the arguments that the 2nd Respondent has not infringed upon Articles 47 and 50 of the Constitution, the Petitioner’s Counsel submitted that the invitation to the investigations hearing by the 2nd Respondent was a mere afterthought and wholly disingenuous in that:-

- a) *The 2nd Respondent had denied the Petitioner its right to fair hearing when the 2nd Respondent purposely exclude the Petitioner from the public participation hearing of 29th October 2018 in which it made a decision to determine the acreage of the suit property.*
- b) *It was only after conducting internal inquiries relating to the public participation hearing of 29th October, 2018 that the 2nd Respondent issued the Petitioner with the invitation to the investigations hearing and supplied it with 5th Respondent’s complaint.*
- c) *The notice to attend the investigations hearing was issued 8 days before the hearing although the 5th Respondent had lodged its complaint on 25th September, 2018.*

81. The Counsel submitted that by denying the Petitioner the opportunity to make representations at the public participation hearing and by failing to give the Petitioner adequate notice to the investigations hearing of a complaint which is allegedly more than 120 years, the intended hearing is a violation of the constitutional rights to fair hearing and fair administrative action. He relied on the case of **Mwangi Stephen Muriithi vs. National Land Commission & 3 others [2018] eKLR**, in which the Court held that failure to issue an adequate notice by the 2nd Respondent violated a Petitioner’s right to fair hearing.

82. The Counsel further submitted that the Petitioner has demonstrated that it has a prima facie case which discloses serious constitutional issues and that the conservatory orders are necessary.

83. The Counsel went on to submit that it is within public interest that the court issues the conservatory orders to restrain the 2nd Respondent from conducting historical land injustices investigations under Sections 14 and 15 of the NLC Act when it is fully aware that these provisions have been suspended. That equally, there are no guidelines and procedures on how public participation and historical land injustice hearings are to be conducted and how documents should be exchanged by parties. That the 2nd Respondent cannot continue to conduct such hearings arbitrarily in flagrant violation of the Petitioner’s Constitutional rights.

84. From the submissions filed by the Petitioner and the Respondents herein, my finding is that the only issue for determination is whether or not the Petitioner has made out a case for the grant of conservatory orders pending the hearing and determination of this petition. It is worth noting that the 2nd Respondent did not file its submissions. It is not in dispute that the Petitioner is the registered owner of all that parcel of land known as LR No.1748 Kiima Kiu/Kalonzoni and Mukaa Ward in Makueni County measuring 5.048 acres. There is a dispute

as to how the Petitioner acquired the said parcel of land but of importance to note is that the Petitioner's title to the said suit property is absolute and can only be impeached by following the due process of the law. It is not in dispute that section 15 of the National Land Commission Act was suspended by the court in **Malindi Petition No.19 of 2016 – Malindi Law Society vs. The Hon. Attorney General and The National Assembly** even though the Counsel for the 5th Respondent contends that the said decision does not bind the court nor takes away the 2nd Respondent's constitutional power granted by Article 67(2) of the Constitution. However, my finding is that public interest would be better served by upholding the sanctity of the Petitioner's title despite the Respondents contention that they are not out to challenge the Petitioner's title but only to measure the acreage of the land that it owns. Even though the 2nd Respondent has indicated in ground 4 of its grounds of opposition that in the exercise of its mandate under Article 67(1) of the Constitution, it operates as a quasi-judicial body within the full meaning of Article 169(1) of the Constitution and the procedure for carrying out this mandate is clearly set out under Section 15 of the National Land Commission Act, the reality is that the said section 15 that the 2nd Respondent seeks to rely on was suspended in Malindi Petition No.19 of 2016. The 2nd Respondent cannot purport to carry out its investigations in respect of the suit property under a suspended procedure and this would also explain the reason why the 2nd Respondent has stated in ground 9 of its grounds of opposition that in the interest of justice and good sequence, the proceedings herein be stayed pending the hearing and determination of the aforesaid Malindi petition No.19 of 2016. I am satisfied that the Petitioner's application has met the threshold for the grant of conservatory orders. In the circumstance, I hereby proceed to grant prayers 5, 6 and 7 of the application.

Signed, Dated and Delivered at Makeni this 28th day of November, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kuyo for the Petitioner/Applicant

Ms. Mwangeli holding for Mr. Nyandieka for the 5th Respondent

Mr. Ombati holding brief for Ms. Karanja for the 3rd & 4th Respondents

Mr. Kwemboi – Court Assistant

MBOGO C. G., JUDGE,

28/11/2019.