Kenya National Highway Authority v Pandya (Suing as the legal administrator of the Estate of Latitchandra Durgashanker Pandya) ((Suing as the legal administrator of the Estate of Latitchandra Durgashanker Pandya)) (Civil Appeal E103 of 2021) [2025] KECA 287 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 287 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E103 OF 2021

JW LESSIT, GV ODUNGA & AK MURGOR, JJA

FEBRUARY 21, 2025

BETWEEN

KENYA NATIONAL HIGHWAY AUTHORITY ..... APPELLANT

AND

KAMLESH PANDYA ..... RESPONDENT

(SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF LATITCHANDRA DURGASHANKER PANDYA)

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa Constitutional and Human Rights Division (Ogola, J.) delivered on 4th February 2021 in H.C. Petition No. 13 of 2015)

JUDGMENT

1. This is a first appeal that has been filed by the appellant against the judgment and decree of the High Court of Kenya at Mombasa, Constitutional and Human Rights Division (Ogola, J.) dated 4th February 2021 in Constitutional Petition No. 13 of 2015.

2. Brief background of the matter is that the respondent, Kamlesh Pandya, suing as the legal administrator of the Estate of Lalitchandra Durgashankar Pandya, filed the Constitutional Petition against Kenya National Highway Authority (KENHA) (the appellant) via Petition dated 12th March 2015. The Petition was supported by his affidavit sworn on even date.

3. The respondent claimed that Lalitchandra Durgashanker Pandya the deceased herein was the owner of the property Subdivision Number 1667/V/ Mainland North Mombasa (hereinafter referred to as the suit property) that was registered on 13th April 2007; that the suit property had always remained in the possession of the deceased who enjoyed uninterrupted possession of the same until his demise, when

his estate continued in uninterrupted use and possession; and, that in the year 2015, the respondent received a notice from the appellant intimating that the suit property had encroached onto a road reserve and required them to demolish and make good the encroachment within 30 days.

4. The respondent contended that all the documentation in his possession pertaining to the suit property demonstrated that the suit property did not encroach onto any road reserve and that the improvements and developments carried out thereon were done within the boundary of the suit property; that he instructed a licensed surveyor to undertake a survey and prepare a report; that the surveyor's report confirmed that the suit property was within its boundaries and not on a road reserve; that the property was currently occupied by a third party tenant who had invested a substantial amount by establishing a multi-million structure and manufacturing production unit thereon; and, that the tenants business operations and the respondent's revenue would be interfered with by the appellant unless restricted by the court.

5. The respondent therefore sought for the following orders:

    a. A declaration that the respondent's fundamental rights to the protection of his property and from arbitrary deprivation thereof as well as the right to fair administration action, access to information and to a fair hearing have been or likely to be infringed;

    b. A declaration that the deceased is the lawful owner of CR. No. 42187 being subdivision no. 1667 within the meaning of Article 40 of the *Constitution*;

    c. A declaration that the forcible entry, seizure, possession and for proposed demolition of the development on the suit property namely CR. No. 42187 being subdivision No. 1667 by the appellant will amount to a violation of his rights to protection of property under Article 40 of the *Constitution*;

    d. Conservatory relief in the form of an injunction be issued restraining the appellant, its agent, servants, and/or nominees from entering into, seizure, confiscation, occupation, alienation, and demolition of the improvements and developments carried out on the suit property known as CR. No. 42187 being subdivision No. 1667 pursuant to the notice dated 16th February 2015 or any other such notices;

    e. A declaration that the appellant's notice dated 16th February 2015 is unlawful and illegal for contravention of the respondent's rights and freedoms under Article 27, 40, 47 and 50 of the *Constitution*;

    f. General damages for breach of the respondent's right and freedoms under Articles 27, 28, 40, 47 and 50 of the *Constitution*;

    g. Costs of the petition be borne by the appellant; and

    h. Any further relief or orders that the court shall deem just and fit to grant."

6. The appellant opposed the Petition by filing a Response to Petition dated 23rd April 2015, a further replying affidavit sworn on 20th April 2015 by Samuel Odoyo, and a further affidavit sworn by Engineer Jared Makori on 1st July 2015 and 18th December 2015. The appellant denied the respondent's allegations and contended:

    a. that the suit land being MN/V/1667 was a subdivision of two parcels namely MN/V/241 and MN/V/243;

b. that the two parcels were acquired by the Commissioner of Lands on behalf of the Government of Kenya vide Gazette Notice No. 3581 dated 14th November 1969 for the purposes of building the Digo-Changamwe Road pursuant to Section 6(2) of the Land Acquisition Act, 1968;

c. that the suit land were thus reserved for public purposes and could not be lawfully alienated in favour of the respondent or any other party;

d. that the title to the suit land was obtained unlawfully and therefore was not indefeasible; and,

e. that any subsequent amalgamation of the two parcels of land and sub-division is unlawful and cannot confer title upon the respondent, his predecessors in title or at all.

7. The appellant agreed that it issued a notice dated 16th February 2015 as alleged by the respondent and averred that the issuance was on the basis that the area in question was compulsorily acquired for the public purpose of constructing the Digo- Changamwe road.

8. Lastly, it was contended that the said two parcels of land having been compulsorily acquired by the Commissioner of Lands, the public interest of constructing the Digo- Changamwe road overrode the title issued to the respondent in respect of the suit land and that the Court ought to declare that the claim of title by the respondent could not defeat the public right of the appellant to construct the Digo-Changamwe road on the suit land.

9. Through viva voce evidence, the respondent told the court that the late Lalitchandra Durgashanker Pandya was his father. In cross-examination, he stated that the piece of land under dispute was not part of the suit land or a sub-division of what was initially known as 1666/V/MN. He indicated that 1667/V/MN was subdivided from MN/V/440 and it had been a consolidation from 3 plots Nos. 240, 241 and 243. He testified that there was an acquisition in 1969 in respect of plots Nos. 240, 243 and 241 meant for the government to acquire and consolidate the said plots to make it 1666/V/MN. That the consolidation done in 1992 resulted in 3 titles Nos. 1667, 1668 and 1669. He stated that his father bought the properties in 1970's which were transferred to them on 16th April 1980 and that he surrendered 1.7713 acres to the government which provided access road excluding tarmac. He told the court that the government had given him a notice of intention to acquire 0.0505 of his suit land. He stated that he attended National Land Commission meeting where he proved his rights to the properties.

10. Dennis Malembeka, the Land Surveyor testified in respect of his report dated 24th June 2019. He told the court that the suit land was not on a road reserve as per the Director of Surveys records hence there was no encroachment on the road reserve. In cross-examination, he confirmed that the road reserve according to the map was claimed to be between the green lines as claimed in 1969 by the appellant. In re- examination, he told court that the two black lines are the existing tarmac while the appellant claimed the land between the two green lines. According to him, the areas shaded brown MNV-1667 was not part of the road reserve but the respondent's land.

11. On their part, the appellant through one Samuel Odoyo Orwa, KENHA Surveyor told the court that there was a Gazette Notice informing the owners of the parcels of land that their lands would be acquired. The land was acquired and compensation was made. He testified that after the government acquired parcel Nos. 241 and 243 a total of 0.778 Ha. it built the road but did not cover the entire parcel of land hence a bigger chunk of road reserve was left.

12. He further said that the two plots were amalgamated and given Plot No.1666 of 0.429 Ha which was later divided into 3 plots 1667, 1668 and 1669 whereby 1668 was surrendered to government as a road reserve. He testified that the difference of 0.348 Ha was not surrendered but the government through

the appellant claimed the portion and sent notice to the respondent to vacate. He stated that the land between the green lines was what was acquired and that all owners vacated save for the respondent. He further stated that Plot No. 1667 was part of what was acquired in 1968 and was part of the road. In cross-examination, he told the court that the respondent was compensated for acquisition through his predecessors in title. He further stated that F/R 234/126 was the official record that confirmed the disputed part was not part of government land which he believed was as a result of misfiling of documents and lack of due diligence.

13. He further told the court that there was a difference between the road acquisition Map and Road Design Map. The Maps he attached did not have the coordinates but, there must have been a map with proper coordinates not before the court and so the court could not tell where the boundaries of what was acquired were. In re-examination, the witness told the court that the Gazette Notice for intention to acquire and Notice of Acquisition showed that the property was acquired in 1969. Lastly, he testified that the Director of Survey's map had coordinates.

14. By the judgment of the trial court dated 4th February 2021 Ogola, J. found that apart from the Gazette Notices in which the government expressed the desire to acquire part of the suit land being LR No. 241/V and LR No. 243/V, there was no further evidence whether or not the process of acquisition was concluded; that a letter produced from the Department of Lands where the department purported to have compulsorily acquired a certain piece of land was barely readable and did not show the title of land to which it related nor any money exchanges if at all; that the court had directed a joint survey of the suit land to determine whether it encroaches on the road reserve, but the parties were not able to agree on a joint methodology; that it was therefore not possible for the court to ascertain the position as to whether or not the suit land encroaches on the road, which in any event was a determination outside the jurisdiction of the High Court; and that the issue ought to be determined in a court which has the competence and skill and time and the jurisdiction to find an answer.

15. The learned judge however found that the notice issued by the appellant and the intended consequent actions of threatened demolitions were not only unlawful but illegal right from the outset, as the respondent had demonstrated that the deceased and his estate held a good, absolute and indefeasible title to the property in question namely Plot No.1667/V/MN issued by the Government, which had neither been cancelled nor revoked, and therefore entered judgment for the respondent in terms of the prayers in the Petition save for the prayer for general damages which was not granted.

16. Aggrieved and dissatisfied with the said judgment, the appellant filed the instant appeal before this Court. In its memorandum of appeal dated 4th November 2021 the appellant faults the learned judge on grounds that he erred inter alia:

    a. by proceeding to hear and determine the matter when he was aware that he had no jurisdiction;

    b. in declaring the respondent the rightful owner of the suit property whereas he had no jurisdiction to make any determination as to the contested rightful ownership of the suit property, which is the preserve of the ELC;

    c. in finding that the respondent's purported title had a traceable root and in the absence of any lawful challenge, the title remained indefeasible and absolute;

    d. in issuing a permanent injunction against the appellant yet the authenticity of the respondent's title was challenged and the court could not ascertain its veracity due to lack of jurisdiction;

    e. in declaring the appellant's notice dated 1th February 2015 unlawful and illegal for contravention of the respondent's right and freedoms under Articles 27, 40, 47, and 50 of

the *Constitution* of Kenya yet such a declaration can only be made in an instance where the ownership of the suit property is properly ascertained;

f. in failing to consider the evidence supplied by the appellant in his impugned determination of the ownership of the subject land herein;

g. in making a conclusive finding on the legality and/or otherwise of the respondent's title to the subject land without considering the dispute on its merit and allowing the proper court to make that determination;

h. in prematurely determining the ownership of the property without considering the appellant's evidence and the public interest nature of the issues before the court;

i. by awarding costs to the respondent without taking into account the public interest nature of the issue before the court, and the fact that the appellant is performing a statutory public interest function; and,

j. in making and issuing all orders contained in the judgment as the same could not be made without a finding of the legitimacy of the respondent's title and ownership of the suit property.

17. The appellant therefore prays that this appeal be allowed and judgment of the Ogola, J. dated and delivered on 4th February 2021 quashed, vacated and or set aside for having been made without jurisdiction; the respondent's Petition dated 12th March 2015 and filed in the superior court be dismissed for having been filed in a court which lacked the jurisdiction to take cognizance of and determine the issue in dispute; and the respondent bears the costs of the proceedings before the superior court and the proceedings before this Court.

18. At the virtual hearing of the appeal on 2nd July 2024 learned counsel Mr. Agwara appeared for the appellant while learned counsel Mr. Sanjeev Khagram appeared for the respondent. Both counsel intimated to the Court that they would make brief highlight of their written submissions. The appellant's written submissions are dated 11th March 2024 while the respondents written submissions and supplementary submissions are dated 11th March 2024 and 12th June 2024 respectively.

19. Mr. Agwara collapsed the grounds of appeal by the appellant into one major ground and that was whether the superior court had the jurisdiction to entertain the matter. He argued that the main contention of the respondent's case was with regards to the ownership of the subject parcel of land and the rest of the prayers related to the occupation and use of it. He further submitted that although the trial judge confirmed that the issue related to the ownership of land and that the court had no jurisdiction to determine the same, he however proceeded to render judgment contrary to Article 165(5) of the *Constitution* of Kenya which reserved determination of both disputes to the Environment and Land Court (ELC).

20. Placing reliance on the case of Republic vs. Karisa Chengo & 2 Others [2017] eKLR; Kenya Tea Growers Association *& 2 Others vs. The National Social Fund Board of Trustees & 13 Others (Petition No. E004 & E002 of 2023*) [2023] eKLR; and Abidha Nicholus vs. Attorney General & 7 Others; National Environment Complaints Committee & 5 Others (Interested Parties) Petition No. E007 of 2023 [2023] KESC 113 (KLR) Mr. Agwara emphasized that the trial judge had no jurisdiction to determine those issues and urged this Court to set aside the impugned judgment and refer the matter to the ELC for consideration and a proper determination made based on the facts and the dispute between the parties.

21. Mr. Khagram opposed the appeal. He submitted that the issue of jurisdiction was never raised in the superior court and that this was the first time that it was being challenged in court. He refuted that

the issue of ownership of the subject parcel was the main ground or relief sought and submitted that the predominant purpose of the Petition was the enforcement of a right to protection of property from arbitrary deprivation under Article 40 of the *Constitution* and that the rest of the prayers were subsequent and supplementary to that prayer.

22. Counsel argued that the learned judge noted that the appellant was engaging in the arena of questioning the title and getting the title quashed on a constitutional petition, which jurisdiction the court did not have and therefore held that he could not quash the respondent's title where there was no evidence that the title was defective or illegal. He further held that if that impeachment was sought, then ELC was the avenue.

23. Mr. Khagram emphasized that in light of evidence given before the trial court, the predominant purpose and issue in the petition were clear. It was neither a boundary issue nor a dispute relating to the occupation or use of the land or an environmental dispute to be brought with the jurisdiction of the ELC court but, an attempt to arbitrary deprive his client of his property the evidence of which showed that his title was valid according to the official government records.

24. Counsel urged that the respondent's petition was premised on an intended demolition of the building erected on the suit land, which demolition threatens and/or violates the constitutional rights of the respondent. He urged that the petition sought to speak to the infringement of the constitutional rights of the respondent i.e. the right to property and right to equality before the law as premised under Article 47 and 27(1) respectively.

25. Mr. Khagram submitted that the issues raised in the petition fell under the purview of Article 23 of the *Constitution* and that the High Court has mandate to hear and determine such matters. He urged that for the superior court to determine application for redress of a denial, violation or infringement of or threat to a right under the *Constitution*, it had to first satisfy itself that these rights emanate and/or accrue from the constitutional right to property, through proof of proprietorship. He urged that rightly so, the trial court considered the evidence adduced and submissions filed in court and determined that the questions of proprietorship, inter alia, that "it was the court's finding that the evidence brought by the parties is prima face evidence that the person named in the title is the absolute and indefeasible owner and the title of that person shall not be subject of challenge..."

26. To buttress his argument further, counsel relied on the case of Serah Mweru Muhu vs. Commissioner of Lands & 2 Others [2014] eKLR where it was held:

> " In order to protect the rights to property, a party must establish a proprietary right or interest in land as a constitution does not itself create these rights or interests."

27. Further, quoting the case of Nairobi Permanent Market Society & 11 Others vs. Salima Enterprises & 2 Others Civil Appeal No. 185 of 1997 (unreported) counsel stated that in order to protect the right to property, a party must establish a proprietary right or interest in land as the *Constitution* does not itself create these rights or interests. He therefore submitted that it was first important upon them to establish that the proprietary right of the respondent to the suit land, which was exactly what was before the High Court.

28. In conclusion therefore, Mr. Khagram urged this Court to dismiss the appeal on the basis that the trial court had the jurisdiction and it was incumbent upon the appellant to go before the ELC court if it so wished to impeach a title that was otherwise validly held.

29. In response to the question raised by the Court of whether the cause of action would be a land issue or purely an Article 40 issue when a government agency gives notice to demolish one's property, Mr.

Agwara responded that the issue would be purely on use and occupation of land falling under the ELC and that there would be no issue of right.

30. On the second issue as to whether the declaration issued that the deceased was the lawful owner of CR No. 42187, being subdivision no. 1667, within the meaning of Article 40 of the *Constitution* amounted to a determination of ownership, Mr. Khagram's reply was in the negative saying that the declaration in the absence of anything else, was an establishment of the proprietary right and that is why Article 40 was invoked.

31. On the issue that the matter of jurisdiction was raised in this Court for the first time, Mr. Agwara submitted that the issue was live before the superior court and that the learned judge noted that the court had no jurisdiction to determine the ownership of the land. He argued that the problem was that despite the learned judge noting the lack of jurisdiction to determine the issue he still went ahead and determined that the respondent was the rightful owner. Further, he urged, the respondent could not determine his own case whether he had a valid title and that was why he went to court for that determination. That at trial the validity of title was a central issue, and that the questions asked by the appellant challenging validity of title inevitably called upon the trial court to consider the evidence before it, weigh it and determine whether the property had been compulsorily acquired or not. Counsel urged that however, the trial court proceeded to determine that the respondent was the actual owner of the suit land based on evidence.

32. In rejoinder Mr. Agwara submitted that there was no principal prayer and that all the prayers were numbered from A to F and that therefore to argue that there was a principal prayer before the trial court would be misleading. Counsel emphasised that based on the pleadings, the facts, and even submissions by his senior colleague, it confirmed to this Court that the High court had no residual jurisdiction over the matter, that the jurisdiction lay with the ELC. In conclusion therefore, Mr. Agwara prayed that the appeal be allowed with costs to the appellant.

33. We have considered this appeal, the submissions of counsel and the cases and the law cited, as well as the evidence that was adduced before the trial court. We are of the view that the main issue that calls for our determination is whether the trial court had jurisdiction to entertain and determine the Petition. A lot has been said by counsel before us, with the appellant arguing that the issue of jurisdiction was raised from the onset of the Petition and that it ran throughout the trial. In Mr. Agwara's view the main contention of the respondent's case was with regards to the ownership of the subject parcel of land and the rest of the prayers related to the occupation and use of it, thus the entire Petition was a matter for determination by the Land Court.

34. Mr. Khagram submitted that the predominant purpose of the Petition was the enforcement of a right to protection of property from arbitrary deprivation under Article 40 of the *Constitution* and that the rest of the prayers were subsequent and supplementary to that prayer; that it was neither a boundary issue nor a dispute relating to the occupation or use of the land or an environmental dispute to be brought within the jurisdiction of the ELC court but, an attempt to arbitrary deprive his client of his property the evidence of which showed that his title was valid according to the official government records. Counsel urged that issues raised in the petition fell under the purview of Article 23 of the *Constitution* and that the High Court has mandate to hear and determine such matters.

35. The respondent has argued that jurisdiction was not an issue before the trial court, and that it was raised at the appeal stage for the first time. The Supreme Court dealing with the issue of jurisdiction in Dina Management Limited vs. County Government of Mombasa & Others, Petition No. 8 (E010) of 2021 held:

60. We note that this question neither arose nor was it determined by the trial court. It is only at the Court of Appeal vide the Attorney General's Cross Appeal that the court's jurisdiction to hear and determine the matter was first questioned on this ground. Whether the dispute is intergovernmental in nature is a jurisdictional issue. Indeed, jurisdiction is a pertinent question for determination. A court is bound to always satisfy itself whether or not it has jurisdiction to hear and determine a matter before it. In Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR we held that jurisdiction is a legal question and it can be raised at any time and by any party. The Nigerian Supreme Court in the case of Alhaji Bello Nasir v. Kano State Civil Service Commission & 2 others, SC. 144/2003 per Ogbuagu, JSC in his concurring judgement held as follows:

> "It is now firmly settled that issues of jurisdiction or competence of a court to entertain or deal with a matter before it, is very fundamental. It is a point of law and therefore, a rule of court, cannot dictate when and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this Court.'"

36. From the above decision of the Supreme Court, it is trite that the issue of jurisdiction is fundamental being a point of law and therefore can be raised at any stage of the case and by any party. That means it will still be a valid issue for determination even if it was raised at the appeal stage for the very first time.

37. Since jurisdiction is such a pertinent issue, a court is bound to always satisfy itself whether or not it has jurisdiction to hear and/or determine a matter before it. The cardinal rule being that even where the word 'jurisdiction' may not feature in the pleadings, the court should nevertheless consider whether the subject matter of the case falls within its jurisdictional power.

38. We note that the respondent in his Petition was seeking certain declaratory orders, including the following:

    b. A declaration that the deceased is the lawful owner of CR. No. 42187 being subdivision no. 1667 within the meaning of Article 40 of the *Constitution*:

    c. .....

    d. Conservatory relief in the form of an injunction be issued restraining the appellant, its agent, servants, and/or nominees from entering into, seizure, confiscation, occupation, alienation, and demolition of the improvements and developments carried out on the suit property known as CR. No. 42187 being subdivision No. 1667 pursuant to the notice dated 16th February 2015 or any other such notices. [Emphasis added]

39. After the trial was concluded, the filed submissions of the parties suggested the issues for determination. The respondent suggested, inter alia, the issue:

    a. whether or not the respondent held a good title to the suit land;

    b. whether or not the appellant was justified in law to issue a notice dated 16th February 2015 on the part of the whole or part of the suit land being acquired by the Commissioner of Lands on behalf of the Government of Kenya.

40. The appellant posited that the issue for determination was whether the suit land was the subject of compulsory acquisition in the 1970's. In the final submissions the appellant summarized its case thus:

a. the Commissioner of Lands compulsorily acquired land parcel No. MN/V/241 and MN/V/242 for the public purpose of constructing the Digo-Changamwe Road;

b. ...

c. ...

d. The respondent's title is therefore defeasible.

[Emphasis added].

41. The declaration sought by the respondent and the issue for determination they proposed was clearly a determination on the validity of title, the rightful ownership, use and occupation of land; and surprisingly, they also posed a question whether the appellant's claim that the suit land was acquired in the 70' was justified. The appellant on the other hand was clear and consistent that the respondent's title was null and void as it was acquired by the Commissioner of Lands on behalf of the government for construction of a public road and that the title was therefore defeasible.

42. Article 165(5) of the *Constitution* is clear that the High Court:

5. The High Court shall not have jurisdiction in respect of matters-

a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. falling within the jurisdiction of the courts contemplated in Article 162(2).

43. Article 162 of the *Constitution* makes clear which courts are contemplated under this Article as the following:

> " 162. System of courts
>
> 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
>
> 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
>
> a. employment and labour relations; and
>
> b. the environment and the use and occupation of, and title to, land.
>
> 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

44. Parliament did enact legislation to effect Article 162(3) setting the jurisdiction and functions of the two courts. In the case of the environment and the use and occupation and title to land, it enacted the Environment and Land Court. Under Section 13 of the Act the jurisdiction of the Environment and Land Court was determined as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes-

a. relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land." (Emphasis added)

45. It is clear that the respondent's Petition was concerned, first and foremost title to land and land acquisition. The declarations sought by the petitioner clearly asked the court to declare who the rightful owner was, and to declare whether the appellant was justified to claim that the suit land had been acquired by or for the government. The court empowered by the *Constitution* and the law to entertain and determine each of these issues was the Environment and Land Court.

46. The respondent's contention that the Petition was meant for the enforcement of a right to protection of property from arbitrary deprivation under Article 40 of the *Constitution* is not tenable, and we are not convinced that the intention was solely to enforce property rights.

47. We have carefully considered the appeal, submissions by counsel and the evidence adduced before the superior court.

We find that the appellant's appeal has merit. We are satisfied that the superior court had no jurisdiction to hear and determine the matter and should have found that he had no jurisdiction to declare who the rightful owner of the suit land was, or to make and issue orders contained in the judgment as the same could not be made without a finding of the legitimacy of the respondent's title and ownership of the suit property, as that is the preserve of the ELC.

48. We find that the appropriate orders to make are as follows:

1. The appellant's appeal has merit and is hereby allowed;

2. The judgment of the Superior Court (E. Ogola, J.) dated 4th February 2021 be and is hereby set aside together with all the consequential orders;

3. The Petition filed by the respondent in the High Court, being Mombasa High Court Petition No.

   13 of 2015 be and is hereby remitted to the Environment and Land Court for hearing and determination to its logical conclusion;

4. We note that there were in place orders issued on 8th March 2018 maintaining status quo which we do not interfere with unless set aside by the Environment and Land Court when re- hearing the matter;

5. The Deputy Registrar of this Court will send the file to the Mombasa Environment and Land Court within 21 days from the date hereof and inform the parties accordingly; and

6. The respondent shall meet the costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR