



**Legal Advice Centre t/a Kituo Cha Sheria & another v Attorney General & 7 others;
Law Society of Kenya & another (Interested Parties); Kenya Legal and Ethical Issues
Network on HIV & Aids (KELIN) & another (Amicus Curiae) (Constitutional
Petition 007 of 2022) [2024] KEELC 1521 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
CONSTITUTIONAL PETITION 007 OF 2022**

L WAITHAKA, J

MARCH 20, 2024

BETWEEN

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA 1ST PETITIONER
REUBEN CHEPKONGA (SUING ON HIS BEHALF AND ON BEHALF OF
66 AFFECTED RESIDENTS OF BARTUM AND II NGA'ARWA LOCATIONS
BARINGO COUNTY) 2ND PETITIONER**

AND

**THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT
THE CS MINISTRY OF ENVIRONMENT AND FORESTRY 2ND RESPONDENT
THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT
THE CS MINISTRY OF TRANSPORT, INFRASTRUCTURE HOUSING,
URBAN DEVELOPMENT AND PUBLIC WORKS 4TH RESPONDENT
THE COUNTY GOVERNMENT OF BARINGO 5TH RESPONDENT
THE CS MINISTRY OF LANDS AND PHYSICAL
PLANNING 6TH RESPONDENT
THE NATIONAL LAND COMMISSION 7TH RESPONDENT
THE LAND SETTLEMENT FUND BOARD OF TRUSTEES .. 8TH RESPONDENT**

AND

**LAW SOCIETY OF KENYA INTERESTED PARTY
KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED PARTY**



AND

**KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV & AIDS
(KELIN) AMICUS CURIAE
INSTITUTE FOR STRATEGIC LITIGATION AFRICA AMICUS CURIAE**

RULING

1. On 26th May, 2023 the National Land Commission (NLC), the 7th Respondent herein, filed a Notice of Motion dated 24th May, 2023 seeking the following orders:-
 - i. That the 7th Respondent/Applicant be struck off these proceedings.
 - ii. That the 7th Respondent/Applicant herein has mandate to address this matter by dint of Section 6 and Section 15 of the [National Land Commission Act](#).
 - iii. That this Petition be referred to the 7th Respondent/Applicant.
 - iv. That the 7th Respondent/Applicant to file a report within a stipulated time period.
2. The Application was founded on the grounds adduced in the face of it and supported by the Affidavit of the 7th Respondent's Director, Legal Affairs and Dispute Resolution, Brian Ikol, sworn on 24th May, 2023. He deponed that the Petitioners have not exhausted all other available avenues to address their claims. He deponed that NLC as established under Article 67(1) of the [Constitution](#) of Kenya, 2010 has a mandate to address this matter by dint of Section 6 and Section 15 of the NLC Act. He asked the court to grant the 7th Respondent/Applicant an opportunity to address the claims in the Amended Petition and furnish the court with a report.
3. It is for this reason that the 7th Respondent sought to be struck off these proceedings and be allowed to act as an arbiter, urging that it was in the interests of justice and that the Petitioners would suffer no prejudice if the Application was allowed. He deponed that the 7th Respondent guaranteed a just and fair administrative process being keen on arriving at a just outcome as per Article 249(1) of the [Constitution](#) of Kenya. He pointed out that the Petitioners would have a right of appeal in the event the report made by the 7th Respondent is not satisfactory.
4. On 13th December, 2023 the Attorney General who is on record for the 1st, 2nd, 4th, 6th and 8th Respondents indicated that the AG would not take part in the Application. On the same day, the 3rd and 5th Respondent as well as the 1st and 2nd Amici Curiae also opted not to participate in the Application. The Petitioners however filed a response to the 7th Respondent's Application by way of a Notice of Preliminary Objection (P.O) dated 30th May, 2023. The Petitioners sought to have the said Application struck out on the following grounds:
 - a. The Application is frivolous, bad in law and an abuse of court process and should be struck out at first instance.
 - b. The Applicant lacks jurisdiction to determine the weighty constitutional issues raised by this petition.
 - c. That Sections 6 and 15 of the [National Land Commission Act](#) have been misconceived by the Applicant and are not applicable to the present petition.



- d. The Petitioners have pleaded specific grievances against the Applicant which it ought to address and as such there is no legal basis for striking out the Applicant from the present proceedings.
- e. The Constitution of the Republic of Kenya vests this court and not the Applicant with requisite jurisdiction to address violations of fundamental rights inter alia the right to a clean and healthy environment, right to dignity, right to the highest attainable standard of health which the Petitioner specifically pleaded.
- f. The Application does not lie and is misconceived.

Submissions:

7th Respondent/Applicant's Submissions;

5. The Application and the P.O. were disposed of by way of written submissions. The 7th Respondent filed its submissions dated 15th January, 2024. Counsel submitted that under Section 6 of the NLC Act, 2012 the 7th Respondent has a mandate to address this matter. That the 7th Respondent is not seeking to address the matter herein but rather to investigate and file a report highlighting the findings. Counsel submitted that the 7th Respondent is guided by Article 249(1) of the Constitution of Kenya, 2010. He reiterated that the 7th Respondent guarantees a just and fair administrative process being keen on arriving at a just outcome through adherence to the laid down law. He submitted that the Notice of Preliminary Objection is thus not merited.
6. As to whether the 7th Respondent was deserving of the orders sought in the Application, Counsel submitted that the 7th Respondent has a mandate to research on land use of natural resources and has in place a Natural Resources Department responsible for purposes of fulfilling its mandate under Section 6 of its parent Act. Counsel urged that the 7th Respondent is seeking to conduct a technical assessment, investigate and file a report highlighting the findings which will guide the court. Further, that the issue of settlement of any party is a prerogative responsibility of the 8th Respondent.
7. Counsel argued that Section 107(1) of the Land Act, 2012 sets out the procedure for reserving public land. In addition, that there are laid down procedures to be followed in acquiring public land and the 7th Respondent does not take this step of its own volition. The 7th Respondent submitted that the Petition does not disclose any cause of action against it and asked to be struck off these proceedings. For this reason, Counsel submitted that the 7th Respondent is deserving of the orders sought and prayed that the Notice of Motion dated 24th May, 2023 be allowed and the Notice of Preliminary Objection dated 30th May, 2023 be dismissed.

Petitioners/Respondents' Submissions;

8. The Petitioners' submissions in support of the PO and opposing the Application are dated 13th December, 2023. Counsel for the Petitioners submitted that the 7th Respondent pleaded the said Sections 6 and 15 without specificity. It did not show how the said Sections clothed it with jurisdiction to entertain and dispose of weighty constitutional issues of climate change and the right to a clean and healthy environment raised in this Petition. Counsel argued that the Sections in fact did not, and the 7th Respondent has misapprehended its mandate and arrogated to itself powers it does not possess.
9. Counsel relied on Robert Mutiso Lelli & Cabin Crew Investments Limited vs National Land Commission & 3 Others (2017) eKLR where it was observed that once there was a suit pending before a competent court, the NLC could not purport to hear and determine an inquiry touching on the same dispute. The court further held that the NLC had exceeded its jurisdiction in taking over proceedings



pending before a court of competent jurisdiction. Counsel submitted that the 7th Respondent has no jurisdiction or capacity to address the allegations raised in the Petition, and only seeks to oust the jurisdiction of the court unlawfully and that the court should not aid it in perpetrating an illegality. Counsel urged that the Application was among other things malicious, made in bad faith and an abuse of the court process.

10. In addition, Counsel argued that the 7th Respondent had not laid any basis for the court to strike it off from the proceedings. The Petitioners sought several reliefs against the 7th Respondent and thus it could not deflect its responsibility by removing itself from these proceedings. Counsel argued that the 7th Respondent's presence in these proceedings is necessary to enable the court effectively and completely adjudicate the legal issues arising in the Petition, and that without the 7th Respondent, the court cannot issue a decree on the contraventions alleged against it. Reliance was placed on *King'ori vs Chege & 3 Others* (2002) eKLR on the description of a necessary party, where it was held that there must be a right to some relief against it and that its presence should be necessary to enable the court effectively and completely adjudicate upon, and settle all questions in the suit. The court went on to state that it must be a party without whom no decree can be made effectively. Counsel urged that the 7th Respondent is a necessary party and urged for the dismissal of the Application.

The Amicis' Legal Opinion;

11. The Amici sought and obtained leave to file its opinion in its quest to assist the court. The opinion is dated 26th January, 2024 and was filed by Nyokabi Njogu, Advocate on behalf of the 1st and 2nd Amici Curiae. Counsel relied on Petition No. 13A of 2013, Judges and Magistrates Vetting Board & 2 Others vs Centre for Human Rights and Democracy & 11 Others, (2014) eKLR to explain why ouster clauses exist. Counsel advised that the Supreme Court in the above case cautioned against the use of ouster clauses to exclude a court's jurisdiction in a matter of enforcement of the bill of rights unless the statutory language introducing the ouster clause, though not absolute, is absolutely clear. This is because ouster clauses have the ability to prevent people from vindicating their rights before the courts and have the potential to undermine the rule of law needed to protect the enforcement of human rights.
12. Counsel further advised on the right to access courts and justice as enshrined at Article 22 as read with Article 48 of the Constitution of Kenya, and further broadened by Article 258 thereof. Further, that Article 159 provides for the minimum principles that should guide access to justice. Counsel pointed out the need for citizens to be able to approach courts to have their rights determined by a competent court. Article 23(1) empowers the High Court to hear and determine applications for redress in respect of denial, violation, infringement or threat against a right or fundamental freedom in the bill of rights in accordance with Article 165. Counsel further pointed out that Kenyan Superior Courts have held that the ELC has jurisdiction to interpret and enforce the Constitution in regard to matters falling within its jurisdiction, and she cited *United States International University vs A-G* (2012) eKLR and *Daniel N. Mugendi vs Kenyatta University & 3 Others* (2013) eKLR.
13. Counsel opined that a statutory ouster clause ought to be interpreted in a purposive manner that safeguards the fundamental rights and freedoms enshrined in Chapter 4 of the Constitution. Counsel cited Civil Appeal No. 255 of 1998, *Tononoka Steels Limited vs Eastern & Southern Africa Trade Development Bank* where it was held that the right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya. That it is important for the court to determine claims for enforcement of the Constitution, and limit ouster clauses that completely oust the jurisdiction of the court (*Apollo Mboya vs Attorney General & 2 Others* (2018) eKLR).
14. Counsel also pointed to the supervisory jurisdiction of the Court with regards to the validity of judicial acts done in the exercise of quasi-judicial functions by administrative bodies or other authorities and



persons obliged to perform them (Rex vs Electricity Commissioners (1947) 2 All ER 257 and Minerva Mills Ltd vs Union of India (1924) 1 KB 171 at p.205). That the *Constitution* itself has conferred fundamental rights to administrative justice and the doctrine of Constitutional Supremacy prevents legislation from infringing on those rights (Pharmaceutical Manufacturers Association of South Africa & Another; ex parte President of the Republic of South Africa & Others (CCT) 31/99) (2000) ZACC 1; 2000 (2) ZA 674).

15. Further, that the functions of the NLC as spelt out at Article 67(2) of the *Constitution* and Section 6 and 15 of its parent Act are limited to investigations and recommending appropriate actions. The 7th Respondent cannot purport to make a determination and any such purported determination would be without jurisdiction and be tainted with illegality. Counsel pointed out that the court needed to consider the extent, essence and nature of any limitation placed on the right to access justice. In addition, that Article 48 guarantees the right to access justice, yet the ouster clause had not provided any justification on the limitation of the said right hence it is not in conformity with *the constitution*.
16. Counsel for the Amici also observed that one of the elements of the right to access is the right to an effective remedy. Article 23 (3) is inclusive and not exhaustive and does not limit the court to the reliefs listed therein, thus Courts have wide powers in terms of the remedies they can offer as opposed to quasi-judicial tribunals. Unlike quasi-judicial bodies, Courts are also provided with mechanisms to enforce its orders. Counsel ventured that it is not clear what remedies the quasi-judicial body envisaged by the Act can provide for claims of violations of the *Constitution* and state obligation. States are mandated under international Human Rights Law to ensure that persons whose rights or freedoms have been violated have an accessible and effective remedy in order to vindicate the violations of their rights under domestic law (The UNHRC General Comment 31[80], Minister of Health & Others vs Treatment Action Campaign & Others (2002)5 LRC 216).
17. Counsel advised that Kenya has ratified various international conventions and treaties that provide for equality and non-discrimination before the law such as CEDAW. This right is crystallised at Article 27 of the *Constitution* and courts are required to adhere to the right to equality and equal protection of the law. There is however, no similar legal standard provided for under the Act requiring adherence by the 7th Respondent when performing its functions under Section 6 and 15. It was Counsel's assertions that while alternative dispute resolution processes may be more accessible to women, they may lead to further violation of their rights and impunity for perpetrators as they often operate on patriarchal values. Counsel underlined the need for women to have access to court for resolution of disputes relating to the impact of climate change and its effects on women's socio-economic rights, and stressed on the need to ensure women have access to courts as well as other justice mechanisms.
18. Counsel also did a comparative analysis on ouster clauses in other jurisdictions. Under South African law, once it is established that a person has a protected right, that person has a right to have disputes in respect of that right resolved by a court of law. The Person is entitled to obtain an appropriate remedy and enforcement thereof (Chief Lesapo vs North West Agricultural Bank & Another (2000)1 SA 409 (CC) 1999, (12 BCLR 1420 (CC) at para 5-16). In England, ouster clauses do not apply where a public body has overstepped its jurisdiction and any determination issued thereunder is null and void. In cases of conflict between an ouster clause and the rule of law, a binding effect cannot be given to such a clause (Anisminic Ltd vs Foreign Compensation (1969)2 AC 147 and R (Privacy International) vs Investigatory Powers Tribunal (2019) UKSC 22).
19. Counsel considered the situation in Pakistan, where the superior courts have held that the ouster of the general jurisdiction of the courts should not be acknowledged automatically, but such clauses should be determined consciously by courts. In Fazlul Quader Chaudhary vs Muhammad Abdul Haq PLD 1963 SC 486, it was held inter alia that the jurisdiction of superior courts cannot be taken away by an



ordinary statute. Courts in Singapore have held ouster clauses as incompatible with the rule of law and a violation of Articles 12(1) and 93 of their Constitution for taking away the judicial power of the court where its supervisory jurisdiction is concerned. In *Marplan Pte Ltd vs AG* (2013) 3 SLR 201 (HC) at paras 24-28, while upholding Constitutional supremacy, it was held that Constitutional norms trump a statutory ouster clause thereby rendering them automatically invalid.

20. Counsel opined that in Australia, it was held that an ouster clause was invalid for attempting to oust the Court's jurisdiction. Counsel referred this court to *Plaintiff S157 of 2002 vs the Commonwealth of Australia* (2003) HCA 2, which further held that parliament cannot abrogate or curtail the Court's constitutional jurisdiction of protecting the subjects against any violation of the *Constitution* or of any law made under *the constitution*. Acknowledging that ouster clauses posed a possibility of conflict, the Chief Justice in that case further held that ouster clauses must be construed on the basis that the legislature does not intend to deprive citizens of the right to access the courts.
21. In conclusion, the Amici opined that the Court needs to determine whether Sections 6 and 15 of the NLC Act that are purported to oust the jurisdiction of this court, are constitutional. To do that, counsel noted that the court needs to determine the reasons for the exclusion of the court and whether it is permissible in light of Articles 22, 23, 27, 48, 165, 258 and 259 of *the constitution*. The court further needs to determine whether the Petitioners have access to suitable, effective and sufficient remedy in the NLC Act, capable of vindicating their rights as would have been dispensed by the courts. If that is not the case, Counsel opined that the jurisdiction of the court cannot be ousted.

Analysis and Determination

22. After perusal of the Application, the affidavit in support, the Notice of Preliminary Objection filed in response, the submissions of the Parties and the Amici Curiae's legal opinion filed in respect of this Application, in this court's considered view, the issues for determination are:-
 - i. Whether Section 6 and 15 of the *National Land Commission Act* can oust the jurisdiction of the Environment and Land Court;
 - ii. Whether the Petition offends the doctrine of exhaustion;
 - iii. Whether the 7th Respondent should be struck off the proceedings; and
 - iv. Who should bear the costs of this Application?
23. A brief background of this matter as can be gleaned from the facts of the Amended Petition is that; the Petitioners filed the instant Petition describing themselves as marginalised and minority groups and that their ranks include extremely vulnerable groups such as children, women, youth, persons with disabilities as well as the elderly. They are seeking redress against alleged violations and threatened violations of various rights and freedoms enshrined in *the constitution*. These violations mainly arise from the impacts of climate change which are exacerbated by failure by the Respondents to make relevant policies and take action as mandated by the *Constitution* and statutes to ensure that the Petitioners and other affected people enjoy their rights and freedoms given by the *Constitution* itself.
24. The 7th Respondent then filed the current application claiming that it is mandated under Sections 6 and 15 of the NLC Act to address the matters raised in the Petition. While the other Respondents opted not to take part in this Application, the Petitioners responded and filed a Notice of Preliminary Objection objecting to the same, thus necessitating this ruling.



Whether Section 6 and 15 of the National Land Commission Act can oust the jurisdiction of the Environment and Land Court;

25. In dealing with this issue, the most important question the court seeks to answer is whether or not the Petition as amended ought to be referred to the 7th Respondent to look into the claims raised therein. This court is required to determine whether or not Sections 6 and 15 of the National Land Commission Act can unseat the jurisdiction of this Court as conferred by the Constitution of Kenya, 2010 and the Environment and Land Court Act. The issue of jurisdiction has been held to be a threshold matter which goes to the competence of a court to hear and determine a suit. In *Re the Matter of the Interim Independent Electoral Commission (2012) eKLR* the Supreme Court stated that:-

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by Statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. [30] The *Lillian ‘S’* case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

26. The Environment and Land Court was established under Article 162 of the Constitution which provides that:-

“ 162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in the 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).
- (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

27. Pursuant to this, Parliament enacted the Environment and Land Court Act, which at Section 13 gives the jurisdiction of this court and provides that:-

“ 13. Jurisdiction of the Court



- (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.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.”



28. It goes without saying that under Article 162(2)(b) as read with Section 13(3) of the ELC Act, the ELC has jurisdiction to hear constitutional petitions. In addition, Article 165(6) grants the High Court supervisory jurisdiction over subordinate courts and ‘over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court’. Being of the same status as the High Court, the ELC equally exercises supervisory jurisdiction over subordinate courts or persons and/or bodies exercising judicial or quasi-judicial jurisdiction over matters relating to the environment and land. As a result, the Petition herein falls squarely under the jurisdiction of this court.
29. The 7th Respondent however claims to have a mandate under Sections 6 and 15 of the [National Land Commission Act](#) to hear and make determinations over the matters in dispute in the instant suit. For this reason, the 7th Respondent seeks to have the matter referred to it for investigation and undertakes to file a report of its findings in court. Although the 7th Respondent does not deny the court’s jurisdiction to hear and determine the suit herein, effectively it seeks to use Sections 6 and 15 of the NLC Act as ouster clauses to preclude and/or oust the jurisdiction of this court to hear and determine the matter.
30. As explained by the Amici in its legal opinion, an ouster clause is a clause in a statute which seeks to deny or divest the court of its jurisdiction to hear and determine a matter or its jurisdiction over the exercise of public power. Given the constitutional importance of the court’s jurisdiction, courts assume that Parliament does not intend to exclude its jurisdiction unless the statutory language introducing an ouster clause is absolutely clear. A citizen’s right to seek recourse in courts for the determination of his rights is not to be excluded except by clear words. The Court thus needs to determine whether the said provisions of the NLC Act can oust the jurisdiction of this Court.
31. The text Administrative Law by H.W.R. Wade and C.F. Forsyth 9th Edition at pg 709-710 observes that courts are reluctant to hold that statutory remedies which are in the hands of administrative bodies can exclude ordinary remedies, which in this instance are the courts. The authors cite the English case of *Pyx Granite Estates Ltd vs Ministry of Housing and Local Government (1960) AC 260 & 286*, where Lord Simmonds stated that:-
- “It is principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s Courts for the determination of his rights is not to be excluded except by clear words. That is...a ‘fundamental rule’ from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such a recourse? The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old, as we like to call it, the inalienable remedy of Her Majesty’s subjects to seek redress in her courts is taken away.”
32. The passage quoted above, confirms that alternative remedies contained in ouster clauses cannot prevent the court from intervening in matters falling under the ambit of the administrative bodies. The position adopted by English Courts was further outlined in what is now a leading authority of the House of Lords in the case of *The Anisminic Ltd vs The Foreign Compensation Commission and Another (1969) 2 A.C 147, (1969) 2 W.L.R. 163, 113 S.J. 55; (1969) 1 ALL E.R. 208 (House of Lords)*, where Lord Reid had this to say:-
- “It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that if such a provision is reasonably



capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”

33. The purported ouster clauses relevant to the Petition herein are to be found in the *National Land Commission Act*. The National Land Commission is established under Article 67(1) and its functions are set out at Article 67(2) as well as Section 5 of its parent Act as follows:

- “(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.”

34. Section 6 sets out the powers of the commission as:

“6. Powers of the Commission

- (1) The Commission, shall have all the powers necessary for the execution of its functions under *the Constitution*, this Act and any other written law.
- (2) Without prejudice to the generality of subsection (1), the Commission shall have powers to—
 - (a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;
 - (b) hold inquiries for the purposes of performing its functions under this Act;
 - (c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of *the Constitution*.



- (3) In the exercise of its powers and the discharge of its functions, the Commission—
- (a) may inform itself in such manner as it may consider necessary;
 - (b) may receive written or oral statements; and
 - (c) is not bound by the strict rules of evidence.”

35. Nothing in Section 6 can be said to be so clear as to indicate that the law makers intended that the 7th Respondent’s powers as provided thereunder were meant to operate to oust the jurisdiction of the court. As has been made clear in the above cited authorities, the jurisdiction of the court can only be ousted where the ouster clause is framed in very clear words. Back home in Kenya, the position with regards to ouster clauses can be found in *Republic vs Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrati* (2008) eKLR, where it was held that:

“Finally by way of a restatement I find and hold that our Constitution, gives access to the courts and such access cannot be denied or restricted save where expressly provided for in *the Constitution*. Indeed the right of hearing has no limitation at all - see section 77. In the case before me the restriction on the right of hearing is by a provision in an Act of Parliament and the provisions relied on are not free from ambiguity. Even where a restriction is permissible by statute such ouster clauses or restriction would only be effective if clear statutory words are used which is not the case here. It is wrong for the executive to literally allocate themselves administrative finality in matters that are at the core business of the courts - namely the judicial function of adjudication. Operational independence, of the Courts is part of the wider principle of the independence of the courts. They should be stopped in their tracks as I have here.”

36. As earlier noted, the 7th Respondent does not deny the court’s jurisdiction to handle the Amended Petition herein. It however calls on its purported mandate under Sections 6 and 15 of its parent statute and claims that it is mandated to look at the allegations and grievances raised in the Amended Petition. This court on its part acknowledges the 7th Respondent’s mandate only as far as that mandate concerns investigating and information gathering and is limited to its primary function of administering public land and addressing historical land injustices. Section 6 empowers the 7th Respondent to hold inquiries, receive written or oral statements and take any measures it deems necessary to ensure compliance with principles of land policy at Article 60(1). Section 6 does not indicate any remedies that the 7th Respondent might issue to the affected parties, yet the most important aspect of seeking intervention from judicial or quasi-judicial forums is to obtain an adequate and effective remedy as correctly pointed out by the Amici. Therefore, where the ouster clause leaves an aggrieved party with no effective remedy at all, it ought to be struck down as being unreasonable.

37. Even read together, Sections 6 and 15 cannot be mistaken for a clear ouster of court’s jurisdiction. Section 15 of the National Land Commission provides that pursuant to Article 67(3) the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress. Section 15 then goes ahead to give the parameters for identifying a historical land injustice. It further outlines how a historical land injustice claim can be registered and gives the procedure through which the claim will be processed and eventually the remedies that the NLC can recommend. To be clear, the provision is clear that after investigating any case of historical land injustices, the NLC can only recommend the remedies listed under Section 15(9) (a)-(k), thereafter it is up to any authority



mandated to act under the redress recommended to do so within 3 years. The Act provides no means within which to enforce its recommendations or ensure compliance thereto by whatever government agency mandated to operationalise its recommendations.

38. It must be noted also, that the parameters given for identifying historical land injustices at Section 15(2)(c) limit historical land injustice to grievances that “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”. From the contents of the Amended Petition, the Petitioners complain of events related to climate change and failure to make policy to alleviate the effects of climate change, which acts have happened not only in recent years, but are still ongoing. For this reason, the dispute does not qualify as one that the 7th Respondent can claim jurisdiction over by virtue of the said Section 15.
39. As correctly pointed out by the Amici, allowing Sections 6 and 15 of the NLC Act to oust the jurisdiction of this court will essentially limit the Petitioners right to access the court and obtain adequate and effective remedies to the violations and infringement of their rights raised in the Amended Petition herein. Further, Article 258 expressly provides that any person “has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention” as is the case in the instant Petition. In *Jeanne W. Gacheche & 6 others v The Judges And Magistrate’s Vetting Board & 2 others* [2012] eKLR, the court held that:-

“We found the case of *Austin v Attorney General* Case No. 1982 of 2003 representative of the position in Barbados with regard to the subject under review. In that case, High Court Judge William Chandler summarized the position of Constitutional ouster clauses as follows:

‘In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali C.J. in his reasoning recognised that an ouster clause may be usurped if there are ‘strong and compelling reasons’. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy the test of ‘strong and compelling reasons’ and that where such breaches are alleged an ouster may be ignored. There is sufficient authority to support this.’”

40. In any event, the functions of the 7th Respondent’s powers and functions as set out above as well as the duty to administer public land under Article 62(2) of the Constitution show that the 7th Respondent’s jurisdiction is only limited to matters relating to public land. In contrast, this court’s jurisdiction encompasses not only public land, but includes private and community land, as well as matters relating to the environment. From a reading of the Petition as amended, the concerns raised by the Petitioners herein cover not only land but also the environment as well as other constitutional rights and freedoms.
41. For instance, the Petitioners have alleged a violation or threatened infringement of the following Article 27 on equality and freedom from discrimination; Article 28 on human dignity and the right to have it respected and protected; Article 42 being the right to a clean and healthy environment; Article 43 relating to economic and social rights and Article 56 dealing with the rights of minorities and marginalised communities. Unlike the court which has jurisdiction to deal with all the facets of the dispute herein, the 7th Respondent can only claim jurisdiction over matters relating public land. Accordingly, the 7th Respondent cannot claim to be the appropriate forum to handle this matter. For that reason, referring this suit to the 7th Respondent will mean denying the Petitioners not only the right to access courts and the right to have their dispute handled by a forum with the requisite jurisdiction, but also their non-derogable right to a fair hearing/trial.



Whether the Petition offends the doctrine of exhaustion;

42. One of the grounds on the face of the motion and the 7th Respondent's supporting affidavit is that the Petitioners did not exhaust all the remedies. The 7th Respondent is in effect alleging that the Petition offends the doctrine of exhaustion, also referred to as the doctrine of constitutional avoidance, for failure to exhaust all other available avenues to address their claims. Its argument seems to be that in bypassing the 7th Respondent and moving directly to this court, the Petitioners did not adhere by the doctrine of exhaustion. The Black's Law Dictionary 9th Edition at page 654 says this about the doctrine of exhaustion as:

“Exhaustion of remedies: the doctrine that if an administrative remedy is provided by a statute a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the court and administrative agencies to ensure that courts will not be burdened by cases in which judicial relief is unnecessary.”

43. Under the doctrine, courts will not normally consider a constitutional question unless the existence of a remedy depends upon it. This means that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of constitutional rights. In this regard, the Supreme Court in *Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR observed thus: -

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

‘I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed’.”

44. This position is reiterated in various authorities such as *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where the Court of Appeal held that: -

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

45. In the case of *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd*, [2011] eKLR, again the Court of Appeal observed that: -

“Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of



the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it”

46. Another case is that of *Martin Kabubii Mwangi v County Government of Laikipia* [2019] eKLR where it was held that:-

“The exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Another vs Hulbhai Gedi Abdille* (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*. The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.”

47. Over time however, a number of exceptions to the doctrine of exhaustion have developed through case law. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) & 6 Others* (2017) eKLR, after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

48. More exceptions are to be found in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR making reference to the *R. vs Independent Electoral and Boundaries Commission* (supra) set out elaborately the exceptions to the doctrine of exhaustion. The Court stated as follows: -

“60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a



suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”
49. The Court may therefore, in exceptional circumstances consider whether in applying the exhaustion doctrine the dispute would be properly resolved in line with the constitutional values and/or law, and if not the court will allow the suit to proceed before it. The Court also considers the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
50. The 7th Respondent cannot claim to have jurisdiction to address all the aspects of the Petitioners' grievances. As outlined earlier in this decision, the Amended Petition raises concerns covering a range of rights and not only relating to public land, which is the preserve of the 7th Respondent. Going by the facts set out in this Petition and the amount of public interest involved in the Petition, it goes without saying that the 7th Respondent may not be in a position to handle the matters herein adequately and effectively. This court is convinced that the Petition herein is the very definition of the term Polycentric, for which the case of *R. vs Independent Electoral and Boundaries Commission* (supra) relies on the definition to be found in Mark Stephan, Graham Marshall, and Michael McGinnis in their Article, *An Introduction to Polycentricity and Governance* at Page 22 to be “...the idea of multiple centres of decision-making, or multiple authorities, no one of which has ultimate authority for making all collective decisions”.
51. Further, although the 7th Respondent has submitted that it guarantees a just and fair administrative process keen on arriving at a just outcome through adherence to the laid down law, there is no assurance that it has the ability to balance the interests of the parties herein. It becomes clear that this is one of the exceptional circumstances where this court must find that the doctrine of exhaustion would not serve the values enshrined in the Constitution or law. In addition, this is also one of those rare instances where parties seek to assert their economic and social rights, and thus it can be argued that an important constitutional value is at stake. For these reasons, the doctrine of exhaustion cannot apply in this instance.
52. From the foregoing, it is clear that in considering the issues raised before us, we should make an interpretation guided by the principles of giving effect to the rights and freedoms under the Bill of Rights and restricting the application of the ouster clause in favour of the rights. In addition, we note that some of the matters sought to be challenged hinge upon breach of fundamental rights and freedoms of the Petitioners. It is not in dispute that this court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights.
53. The William Odhiambo Ramogi Case (Supra) points out that some of the considerations a court takes when deciding whether or not to do away with the doctrine of exhaustion in a particular case is: “the suitability of the appeal mechanism available in the context of the particular case and



determine whether it is suitable to determine the issues raised”. We observe that under Article 25 of *the Constitution*, the right to a fair trial encompasses the right to an appeal process which the mechanism under the NLC Act does not provide for. The allegation by the 7th Respondent in that the Petitioners will have the opportunity to appeal the report to be filed if it is not satisfactory is thus false. For these and other reasons explained in this ruling, we must find that the said Sections 6 and 15 are incapable of eliminating this court’s jurisdiction over the Petition herein, which seeks to address alleged breaches of fundamental rights and freedoms.

Whether the 7th Respondent should be struck off these proceedings;

54. The 7th Respondent has also invited this court to strike it off these proceedings and that it be allowed to act as an arbiter. With regard to the striking out of parties, Order 1 Rule 10 (2) of the Civil Procedure Rules provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

55. From the passage above, it is clear that the court may on its own motion or on application of any party to the proceedings order the striking out of a party, who the court finds was improperly joined. The power to strike out a party from a suit is a discretionary one and thus should be approached with caution. The question that falls for determination therefore is whether the 7th Respondent is a proper party to this Petition and whether any cause of action is disclosed against it. A proper party, is one who is necessary or relevant for the determination of the real matters in dispute, or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. In the case of *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others* (1988) eKLR it was held that:-

“For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

56. Also answering the question of who a necessary party in a suit is, Justice M. Mbaru in *Kizito M. Lubano v KEMRI Board of Management & 8 Others* [2015] eKLR, held that:

“53. The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. See *Benjamin Kipketer Tai versus Kenya Commercial Bank, HCCC No.87 of 2003 (Kisumu)* [2003] LLR 8071. In this regard therefore I wish to refer to *Amon –vs- Raphael Tuck and Sons Ltd* [1956] 1 ALL E.R. AT Page 273 it was held inter alia that;



‘... A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter’.”

57. In the present Petition, the Petitioners fault the 7th Respondent for failing to reserve public land for settling the Petitioners after loss of their ancestral lands. In the words of the Petitioners, the alleged violation raised by the Petitioners against the 7th Respondent set out at paragraph 77 is that:-

“The 7th Respondent...denied, violated, infringed and threatened to continue denying, violating, infringing the Petitioners fundamental rights and freedoms safeguarded under Articles 20(1), 20(2), 21(1), 21(3), 21(4), 27, 28, 40, 42, 43(1)(a), 43(1)(b), 43(1)(d), 56(e) and 70 of the Constitution of Kenya, by failing to reserve public land for establishment of approved settlement programmes for the benefit of the Petitioners.”

58. The Petitioners have also sought various remedies against the 7th Respondent jointly with the other Respondents. At prayers (b), (c) and (e) of the Amended Petition, the Petitioners seek declaratory orders against the 1st to 8th Respondents. At Prayer (f), (g) and (h) the Petitioners seek compensation from the Respondents, including the 7th Respondents, for their acts of omission and commission. At Prayer (i), the Petitioners seek a writ of mandamus as against the 5th to 8th Respondents directing them to carry out their statutory duties geared towards providing land to the Petitioners displaced by natural causes as a result of swelling of Lake Baringo.

59. Should the court direct that the Petitioners are entitled to be allocated public land, it is the 7th Respondent who can deal with the issue of identification, reservation and allocation of public land to them. There is no doubt therefore that the 7th Respondent’s presence in these proceedings is necessary to enable this court effectually and completely adjudicate upon and settle all the questions involved in this Petition. Since there is a possibility the court may issue orders directed at the 7th Respondent, it would not be possible to pass any effective orders or a decree in the absence of the 7th Respondent. The 7th Respondent is therefore a necessary party to these proceedings and thus it is imperative that it remain a party to the proceedings herein.

60. In any event, since the Court has already found that the 7th Respondent has no jurisdiction to entertain this matter, and the 7th Respondent will not act as arbiter as had been sought, no other sufficient reason has been given or remains as to why the 7th Respondent should be struck off these proceedings. This prayer must also fail. None of the parties who participated in this Application asked for costs and therefore none shall be awarded.

61. Consequently, the 7th respondent’s Application dated 26th May, 2023 is not merited and must thus fail. On the other hand, the Petitioners’ Notice of Preliminary Objection is hereby upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ITEN ON THIS 20TH DAY OF MARCH, 2024.

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HON. L. N. WAITHAKA

JUDGE OF THE ENVIRONMENT & LAND COURT

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E. O. OBAGA



JUDGE OF THE ENVIRONMENT & LAND COURT

.....

J. M. ONYANGO

JUDGE OF THE ENVIRONMENT & LAND COURT

