



**Iimbani Dispensary Project Group v Two Estate Owners and Residents Association
(Represented By Hassan Ahmedunur Baricha, Abdiwali Mohamed, Abdulahi Maktal,
Hassan Ali Ham, Mohamed Ali Sime, Badour Ahmed Mohamed & Ibrahim Warfa) & 5
others (Civil Appeal E525 of 2022) [2025] KECA 1455 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1455 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E525 OF 2022
SG KAIRU, P NYAMWEYA & LA ACHODE, JJA
JULY 31, 2025**

BETWEEN

IIMBANI DISPENSARY PROJECT GROUP APPELLANT

AND

**TWO ESTATE OWNERS AND RESIDENTS ASSOCIATION (REPRESENTED
BY HASSAN AHMEDUNUR BARICHA, ABDIWALI MOHAMED, ABDULAH
MAKTAL, HASSAN ALI HAM, MOHAMED ALI SIME, BADOUR AHMED
MOHAMED & IBRAHIM WARFA) 1ST RESPONDENT**

CHIEF LAND REGISTRAR 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

FRANKLIN MUTHOKA MUMU 4TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

*(An appeal against the entire Judgment of the Environment and Land
Court at Nairobi (Oguttu Mboya J.) dated and delivered on 2nd
June 2022 in Nairobi ELC Constitutional Petition No. E003 of 2020)*

JUDGMENT

1. Green Two Estate Owners and Residents Association, the 1st respondent herein, filed a petition dated 20th July 2020 in the Environment and Land Court at Nairobi in ELC Constitutional Petition No. E003 of 2020, in which they claimed to have acquired through purchase and transfer, parcels of private land in Green Two Estate, South C, Nairobi before the promulgation of the 2010 Constitution.



- Further, that the said properties were transferred and registered in their favour and certificates of title issued to them under the Registration of Titles Act (since repealed) with Land reference numbers from 209/16885 to 209/16935, and they had in their possession Land Survey Plans showing that the said parcels of land were subdivisions of LR No. 209/16432 and LR 209/16433.
2. Additionally, after purchasing the said parcels and being in uninterrupted possession for a number of years, Green Two Estate Owners and Residents Association (hereinafter “Green Two Estate Association”) received notices and summons issued by Iimbani Dispensary Project Group, the appellant herein; Franklin Muthoka Mumu, the 4th respondent herein; and the Director of Criminal Investigations, the 5th respondent herein. Iimbani Dispensary Project Group (hereinafter “Iimbani”) alleged to be the owner of “L.R. No. 209/10778 (Now L.R. No. 209/16432 and 209/16433) Nairobi Area – South C” and issued a “Notice to Vacate Land” to Green Two Estate Association under regulations 63(1), 64(1) and 65 of the Land Regulations 2017 in Form LA. 57 under those Regulations. The notice alleged that the residents of Green Two Estate Association were in unlawful occupation thereof and should vacate the premises within three (3) months from the date of this notice. According to Green Two Estate Association, there was no provision in the *Land Act* 2012 under which a private person may issue a Notice to Vacate Land on account of “unlawful occupation” pursuant to which this form of notice was purported to be issued. They asserted that their land is private land under Article 64 of *the Constitution*, the *Land Act*, 2012 and *Land Registration Act*, 2012; and their land rights were guaranteed and secured under Article 60(1)(b) of *the Constitution* and section 26 of the *Land Registration Act*, 2012.
 3. Franklin Muthoka Mumu (hereinafter “Franklin”) on his part claimed to be the registered proprietor of L.R. No. 209/10772 situate in South C Mugoya Phase Four, Nairobi, and he issued a notice of intention to sue Green Two Estate Association, in which he relied on a Gazette Notice No. 11714 of 2018 published by the National Land Commission, the 3rd respondent herein. He stated in the notice that the National Land Commission initiated an inquiry in 2018 on its own motion and established that the grants issued to a Mr. Abdi (deceased) in respect of the subject property are illegal, and directed that due to the fact that the land was developed with residential units which are occupied by tenants, Mr Abdi (deceased) should compensate him for loss of the land and loss of income. Green Two Estate Association claimed that it did not know Mr Abdi (deceased) to whom the notice was addressed, nor was it the owner of the cited property. In addition, that an inquiry or investigation suo moto by the National Land Commission can only be validly conducted concerning a matter involving public land and not private land, and the decision in Gazette Notice No. 11714 of 2018 was therefore inconsistent with the *National Land Commission Act*, 2012, the *Land Act*, 2012 and *the Constitution*.
 4. The Director of Criminal Investigations on his part summoned Green Two Estate Association’s Security Committee and their Chairman concerning investigations into alleged fraud in respect of “L.R. No. 209/10772 (Now LR No. 209/16432 and LR No. 209/16433)”, and required them to present the history of their properties. Green Two Estate Association claimed that the summons was an inquiry into historical land injustices in a manner inconsistent with the constitutional mandate given to the National Land Commission under Article 68(c)(v) of *the Constitution* and sections 14 and 15 of the *National Land Commission Act*, 2012.
 5. Various declarations were accordingly sought in the petition by Green Two Estate Association, namely that the National Land Commission did not have jurisdiction to investigate their private properties situated at Green Two Estate, South C, Nairobi; the National Land Commission’s decision published in Gazette Notice No. 11714 of 2018 on 9th November 2018 touching on land parcels LR No. 209/16432 and LR. No. 209/16433 is null and of no effect for being inconsistent with Article 47 of *the Constitution* of Kenya, 2010, the *Fair Administrative Action Act*, 2015 and the time limitations under



section 14 and 15 of the [National Land Commission Act](#), 2012; Green Two Estate Association are the registered proprietors of their properties in Green Two Estate South C, City County of Nairobi; the said properties are private land under Article 64 of [the Constitution](#) of Kenya, 2010 and are not public land under Article 62; as proprietors of their private land at Green Two Estate, South C, Green Two Estate Association lawfully acquired the properties as innocent purchaser without notice of any irregularity or corruption; and Green Two Estate Association acquired their properties after the year 2006 and any complaint or challenge to their titles or to the subdivision of LR. No. 209/16432 and LR. No. 209/16433 was not admissible before the National Land Commission as a complaint or challenge based on historical land injustice for the purposes of Article 67 (3) or Section 15 (3) of the [National Land Commission Act](#), 2012, or through the Courts for being time barred under section 7 of the [Limitation of Actions Act](#).

6. In addition, that the Form LA 57 used as the “Notice to Vacate Land” issued by Iimbani and expressed to be under Regulation 63 (1), 64 (1) and 65 of the Land Regulations 2017 is inconsistent with the [Land Act](#) 2012 and [Land Registration Act](#) 2012 and section 28 of the [Interpretation and General Provisions Act](#); Regulation 65 of the Land Regulations 2017 is inconsistent with the [Land Act](#), 2012, the [Land Registration Act](#), 2012 and section 31 (b) of the [Interpretation and General Provisions Act](#), as there is no provision in the [Land Act](#) 2012 under which it was validly made which provides for a notice to vacate private land; the procedures for eviction from private land introduced through the Land Laws (Amendment) Act, 2016 and especially sections 152E and 152F of the [Land Act](#), 2012 and through the Land Regulations, 2017 and Regulation 65 are inconsistent with [the Constitution](#) of Kenya, 2010 to the extent that they threaten the land security rights of proprietors of private land guaranteed under Articles 60 (1) (b), 64, 40 (1) and (2), leading to arbitrary deprivation of fundamental rights which is inconsistent with Article 21 thereof; and that section 26 of the [Land Registration Act](#) is the avenue for any challenge to any proprietor of private land and the title to the private land in case of any allegations that the title was acquired unlawfully, irregularly, illegally or by corrupt means.
7. A number of injunctions were also sought in the petition to restrain Iimbani from entering upon or interfering with the possession by Green Two Estate Association of the suit properties at Green Two Estate, South C, Nairobi and from in any way enforcing the Notice to Vacate Land bearing the date “May 2020” purporting to be issued under regulations 63 (1), 64 (1) and 65 of the Land Regulations 2017; and to restrain Franklin from in any way enforcing the Notice dated 16th March 2020 affecting the property known as LR. No 209/10772 said to be situate in South C Mugoya Phase 4 Nairobi.
8. Lastly, Green Two Estate Association sought judicial review orders of prohibition to prohibit the Director of Criminal Investigations from pursuing them following the summons Reference No. DCI/LFIU/SEC/2/16/VOL.XIII/221 dated 20th November 2019 concerning the history of the parcels of land described as LR. No. 209/10772 (Now LR No. 209/16432 and LR No. 16433), for being inconsistent with [the Constitution](#) of Kenya, 2010, the [National Land Commission Act](#), 2012, the [Land Act](#), 2012 and the [Land Registration Act](#), 2012; and an order of mandamus to require the Chief Land Registrar to protect the titles and record of their registered private land parcels at Green Two Estate South C, Nairobi.
9. In response, Iimbani stated that it is a local organization registered under the [Societies Act](#) of Kenya, who's function includes empowering its members through various means such as property ownership and provision of social amenities to the group and the general public. It claimed to be the rightful owner/ proprietor of LR. NO. 209/10772 (now L.R. NO. 209/16432 and 209/16433) Nairobi Area - South C), having acquired the same by way of allotment, and has all the rights enshrined under Article 40 (2) of [the Constitution](#) to have it protected. In addition, these rights are echoed under section 152 E of the [Land Act](#), 2012 which allows persons to serve notices to vacate private land upon illegal/unlawful



occupants. Therefore, that it acted rightfully, legally and in accordance with *the Constitution* of Kenya 2010 by invoking section 152 E of the *Land Act*, 2012 and the Land Regulations, 2017 and serving Green Two Estate Association with the notices to vacate the land.

10. The history of its acquisition of the said land was detailed by Iimbani, including writing to the Commissioner of Lands by a letter dated 13th July 1984 seeking to have the property transferred to it by way of allotment; its acceptance of the allotment of LR. NO. 209/10772 (now L.R. NO. 209/16432 and 209/16433) Nairobi Area - South C by a letter dated 18th July, 1984; payment of Kenya Shillings One Million One Hundred and Thirty-Six Thousand Three Hundred and Sixty-Seven (Kshs 1,136,367/=) as the allotment fees and the issue of a receipt dated 1st July 1988; the issue of the allotment letter dated 14th April 1988; and issue of a title deed for LR. NO. 209/10772 (now L.R. NO. 209/16432 and 209/16433). The Group claimed that the title deed issued to it remains the only genuine title to the suit property, as confirmed and verified by a letter dated 7th May, 2020 by the Ministry of Interior and Co-ordination of National Government. Iimbani also relied on the investigations conducted by the National Land Commission, which it stated conclusively declared that Iimbani was the true and rightful proprietor of parcel of land L.R. NO. 209/10772 (now L.R. No. 209/16432 And 209/16433) Nairobi Area in South C. Further, that Gazette Notice No. 11714 of 2018 resulted from the investigation, which was properly conducted by the National Land Commission in performing its duties as conferred to it under the *National Land Commission Act*, No. 5 of 2012, to review the grants and dispositions of public land.
11. Iimbani accordingly filed a cross-petition in the ELC dated 22nd September 2020 claiming that that as the registered owner of the suit property its title was absolute and indefeasible under section 23 (1) of Registration of Titles Act (since repealed) and that the same was protected under Article 40 of *the Constitution*. It sought a declaration that it was the rightful owner and proprietor of the parcel of land known L.R. No. 209/10772 (now LR No. 209/16432 and 209/16433) Nairobi Area - South C including the encroached area and that the actions by Green Two Estate Association thereon are illegal and constitute trespass; and it be granted leave and permission to evict the them from the said parcel of land
12. On his part, Franklin filed a Notice of Preliminary Objection dated 21st September 2020 on the ground that the petition by Green Two Estate Owners and Residents Association was res judicata since the issues therein had been decided in Nairobi High Court Civil Case No. 36 of 2007 and that the Association could not sue in its own name. In his substantive response, Franklin also alleged to be the registered owner of the property known as Land Reference Number. 209/10772 situate in South C Mugoya Phase Four within Nairobi County and that he was the proprietor of Iimbani Dispensary. He also detailed the history of the allocation of the said property, that was similar to the account given by Iimbani, starting with an application for allocation, and resulting in the issue on 23rd December 1991 with Grant Number IR44982 in the name of Iimbani Dispensary for a term of 99 years from 1st July 1988 subject to payment of a revisable annual rent of Kenya Shillings Two Hundred and Sixty Five thousand (Kshs.265,000/=) which he duly paid, even though the grant had a typographical error and instead read IR 44992.
13. However, that on 18th January 2005, one Abdirahman Abdi in the company of the then area Chief one Njoka and his administration police officers, stormed into his residence at Madaraka Estate and forcefully and illegally took away the original certificate of title of Land Reference Number 209/10772 (Grant Number IR.4498 2/1) and other supporting documents; procured a fake title to Land Reference Number 209/10772 in the name of Daniel Toroitich Arap Moi, Noah Katana Ngala and Julius Sunkuli as the trustees of Kenya African Union (KANU); purported that the said KANU transferred to him the said Land Reference Number 209/10772 vide dated 5th January, 2005; caused



the fraudulent and illegal subdivision of Land Reference Number 209/10772 into LR Nos 209/16432 and 209/16433; and erected illegal structures thereon. Franklin placed reliance on the proceedings in Nairobi High Court Civil Case No. 36 of 2007, in which he claimed the then executive director of KANU denied owning the suit property nor transferring to Mr Abdirahman and that the issue of ownership of the suit property was ventilated in the said suit. He also made reference to several criminal cases and prosecutions against him which he alleged were instigated by the said Abdirahman Abdi in relation to LR. No. 209/10772.

14. Lastly, Franklin claimed that he then began the process of regularising his title, and made an application to the Ministry of Lands on 22nd December 2014 for the issue of a provisional certificate. The Land Registrar consequently advertised the reconstruction of the lost or destroyed grant over the suit property in the Kenya Gazette Volume CXVII-No.22 of 6th March 2015 entry No. 1510. Subsequently, in January 2016, he saw an advert caused by the National Land Commission listing the suit property as one of the properties whose grant it had called for submissions from its owners/ interested parties to enable them conduct a review, and he tendered his submissions. That upon hearing all parties the National Land Commission established, vide its findings on 18th April 2018, that the grant issued to Abdirahman in respect of the suit property was illegal and in the Kenya Gazette of 9th November 2018 directed that the title to Iimbani Dispensary group be regularised; compensation be paid to it by Abdirahman Abdi for the loss of the land and loss of income; and upon payment, the title held by Abdirahman M. Abdi would be regularised. According to Franklin, the National Land Commission established by a valuation report dated 16th October 2019 that the market value of the suit property was Kshs 2,592,250,000/- and the loss of income was Kshs 562,000,000/- all totalling to Kshs 3,154,250,000/-.
15. At this juncture it is notable that Iimbani and Franklin disputed each other's titles, in addition to disputing the title held by Green Two Estate Owners and Residents Association. Iimbani averred that it's proper name was Iimbani Dispensary Project Group and it had been misdescribed in the petition; the only documentation that shows an application for the suit parcel was produced by it, and it is logical to conclude that the allotment letter produced by Franklin was a forgery and a sham as it was dated 1st July 1988, almost 3 months after the Iimbani Dispensary Project Group was issued with the original and genuine allotment letter dated 14th April 1988; the title produced by Franklin dated 23rd December 1991 purported to confer rights for a period of 99 years from 1st July 1986 and bore his own name; and he produced the same receipt that had been produced by the Iimbani Dispensary Project Group for the payment of Kshs 1,136,367/= as allotment fees. Franklin on his part stated that Iimbani Dispensary Project Group did not exist in the government records, either as a limited liability company, partnership or as a registered business, and was an attempt to mimic Iimbani Dispensary which was duly registered.
16. Although the Chief Land Registrar, Director of Criminal Investigations and Attorney General filed a joint response, the ELC upheld an objection by the counsel for Green Two Estate Association that the subject replying affidavit would substantially prejudice the proceedings and the parties, in so far as it was filed after the other the parties had filed and served their submissions, and consequently ordered and directed that the impugned replying affidavit be struck out and expunged from the record of the Court. It was therefore not considered by the ELC in its determination.
17. On 7th June 2021, the ELC (K. Bor J.), delivered a ruling dismissing the preliminary objection raised by Franklin. In its final determination delivered on 2nd June 2022, the ELC (Oguttu Mboya J.) framed seven issues for determination as follows:



- a. Who is the lawful and legitimate owner of L.R No. 209/10772 (Now L.R No. 209/16432 and L.R No. 209/16433)
 - b. Whether the Eviction Notices issued by and/or on behalf of the 3rd Respondent were Valid and Lawful.
 - c. Whether the 3rd Respondent is entitled to Compensation as sought or at all.
 - d. Whether the Provisions of Section 152E and 152F of The Land Act, 2012 (2016) are Unconstitutional
 - e. Whether the Petitioners have laid a basis to warrant a Declaration that the 5th Respondent cannot carry out and/or undertake any investigations pertaining to illegality and/or irregularity in the acquisition of Land.
 - f. What Reliefs ought to be granted.
18. We have restrained ourselves from commenting or setting out the findings made on the said issues for reasons that will become evident later on in this determination. The trial Judge, after analysing the issues and making findings thereon, in the end made the following orders:
- a. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi and the properties are private land under Articles 64 of the Constitution of Kenya 2010 and are not public land under Articles 62.
 - b. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi, acquired the properties as innocent purchasers without notice of any irregularity, if there was any and the properties were lawfully acquired by them and without any corruption in which any of them was involved.
 - c. An Order Of Injunction do issue to restrain the 3rd Respondent Limbani Dispensary Project Group, its servants and workmen from entering upon the Petitioner's properties Green Two Estate, South C, City County of Nairobi, interfering with the Petitioners' quiet enjoyment of their properties ,and from pulling down or suffering to be pulled down the dwellings and commercial premises constructed on those properties owned and occupied by the Petitioners or leased out or licensed to the Petitioners' tenants or licensees, which properties are mentioned in the Petition, being the properties numbered and commonly known as Green Two Estate, South C, City County of Nairobi numbered and commonly known as Green Two Estate 1A-50A and Green Two Estate 1B-50B and RAF University Plot, and from removing any buildings and other improvements erected by the Petitioners and from selling or otherwise disposing of the materials whereof the said properties are comprised.
 - d. An Order of Temorary Injunction (sic) do issue pending the hearing and determination of these proceedings, restraining the 3rd Respondent, Limbani Dispensary Project Group, from in any way enforcing the Notice to Vacate Land bearing the date May 2020 and delivered to security gate at the Petitioners premises purporting to be issued under regulations 63(1), 64(1) and 65(1) and 65 of the Land Regulations, 2017 and addressed to the "Members of Green Estate Residents Association" and to "Hassan Baricha the to the (sic) Chairman of the Association, notwithstanding that the 3rd Respondent's Notice to Vacate Land does not relate to the Petitioners' properties but to L.R No.209/10778/10778 (Now L.R No. 209/16432 and 209/16433 Nairobi Area-South -C)".



- e. An Order of Judicial review in the nature of mandamus be and is hereby issued directing the 1st Respondent to protect the title and records of the Petitioners registered private land parcels at Green Two Estate, South C City County of Nairobi and to observe the Law and *the Constitution* of Kenya 2010 in dealing with the property and the title thereto.
 - f. The Cross- Petition by and/or on behalf of the 3rd Respondent be and is hereby Dismissed.
 - g. The rest of the Reliefs/Declarations which have not been expressly granted are deemed as declined.
 - h. Costs of the Petition and Cross- Petition are awarded to the Petitioners jointly and/or severally.
19. Being dissatisfied with the trial Court's decision, Iimbani Dispensary Project, filed a Notice of Appeal dated 7th June 2022 and lodged on 10th June 2022 and the Memorandum of Appeal dated 1st August 2022 where they raised ten (10) grounds of appeal. These grounds were collapsed into four issues in their submissions dated 17th November 2023, namely:
1. Whether the trial Judge took into account extraneous matters in determining the petition.
 2. Whether the Trial Judge erred in law and fact by holding that the determination of National Land Commission dated 18th April 2018 lawfully negated the Appellant's title over 209/10772 (now L.R. NO. 209/16432 and 209/16433) in Nairobi Area-South C.
 3. Whether the trial Judge erred in law and fact by declaring that Green Two Estate Association are the registered and bona fide purchasers of the suit property for value without notice of fraud.
 4. Whether the trial Court erred in law and fact by holding that the Iimbani's eviction notices dated 30th May 2020 and served upon Green Two Estate Association were unlawful.
20. Iimbani proposes that its appeal be allowed, the judgment in Nairobi ELC Constitutional Petition No. E003 of 2020 be set aside, this Court issues a declaration that it is the rightful owner/ proprietor of all the parcel of land known as LR. No 209/10772 Nairobi Area- South C, and it be granted leave and permission of this to evict Green Two Estate Association from all the parcel of land known as LR. No 209/10772 Nairobi Area- South C
21. Franklin was also dissatisfied with the decision of the trial Court, and filed a Notice of Appeal dated 14th June 2022 and a Notice of Cross Appeal dated 24th August 2022, where he raised 11 grounds of appeal. These grounds were addressed under five headings in its submissions dated 29th May 2023, namely, that there was no evidence to support the holding that the resultant sub-divisions of LR No. 209/16432 and LR. No. 209/16433 were duly transferred and are currently registered in the names of Green Two Estate Association; there was no evidence to support the finding that Green Two Estate Association were bona fide purchasers of the same; the failure to take into account the evidence by Franklin that established his lawful or legitimate rights over and in respect of the suit property; the reference to a ruling allegedly delivered on 7th October, 2021 in Milimani ELC Misc. Application No.195 of 2018 which was not part of the evidence before the Court.; and failure to consider the issue of the jurisdiction of the National Land Commission to review title and grants over private land. Franklin accordingly seeks orders that the decision of the ELC delivered on the 2nd June 2022 be varied and/or set aside, the ELC Constitutional Petition No. 3 of 2020 be dismissed with costs, and he be declared the bona fide registered owner and/or proprietor of Land Reference No. 209/10772, the subject property herein
22. Green Two Estate Association similarly filed a Notice of Cross Appeal dated 8th November 2022 where they raised 8 grounds, and 2 grounds for affirming the decision. They however abandoned the said



grounds in their submissions dated 17th April 2023, save for one ground in their cross appeal. The retained ground was that the learned trial Judge "erred in law and fact when he framed the first issue as 'Who is the lawful and legitimate owner of LR No. 209/10771 (Now LR No. 209/16432 and LR. No. 209/16433)' when no certified copy of any such title had been presented and proceeded to discuss the issue and in the process, to endorse the decision of 18th April 2018 by the National Land Commission when neither the National Land Commission nor the Chief Land Registrar had offered any evidence in the matter and the decision of the National Land Commission did not relate to LR No. 209/10772 (Now LR No. 209/16432 and LR. No. 209/16433)". Green Two Estate Association sought orders that their cross appeal is allowed and the decision of the Environment and Land Court is varied, and they be granted additional declarations that the National Land Commission's decision published in Gazette Notice No. 11714 of 2018 on 9th November 2018 touching on Land Parcel LR. No. 209/16432 and LR, No. 209/16433 is null and of no effect, and that they acquired their properties at Green Two Estate South C, City County of Nairobi after the year 2006 and any complaint or challenge to their titles or to the subdivision of LR. No 209/16432 and LR, No. 209/16433 that resulted in 2006 was not admissible before it as a complaint or challenge based on historical land injustices and was time barred.

23. These grounds and issues were highlighted during the hearing of the appeal on this Court's virtual platform on 7th October 2024, by learned counsel Mr. S. Mwenesi who appeared for Green Two Estate Association; learned counsel Mr. Waigwa together with Mr. M. Mbakaya appearing for Iimbani Dispensary Project Group; and learned counsel Mr. C. Midenga who appeared for Franklin Muthoka Mumu. Learned counsel Ms Nyawira appeared for the Chief Land Registrar, Director of Criminal Prosecution and Attorney General, and did not file any submissions.
24. In commencing our determination of the appeal and cross appeals, we are mindful of the duty of this Court as a first appellate Court as set out in the decision of *Selle and another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123. This is to reconsider the evidence, evaluate it, and draw conclusions of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in *Jabane vs Olenja* (1986) KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & another vs Shah* (1968) EA 93.
25. We have in this respect gone to great lengths to outline the claims made by the different parties in the ELC and decisions made thereon by the learned Judge to contextualise the issues arising in this appeal for our determination. We have condensed the issues set out by the parties to two related issues, namely, whether the findings by the learned trial Judge were supported by the pleadings and evidence, and secondly whether the trial Judge took into account extraneous matters in determining the petition.
26. In this regard it is notable that the claim as pleaded by Green Two Estate Association before the ELC was precipitated by the actions by Iimbani, Franklin and the Director of Criminal Investigations, that were consequential to a decision made by the National Land Commission after reviewing the allocations made of the suit property and specific findings on the regularity or otherwise of the various allocations published in Gazette Notice No. 11714 of 2018 on 9th November 2018 touching on land parcels LR No. 209/16432 and LR. No. 209/16433. In addition, Green Two Estate Association specifically pleaded and prayed for an order that that the National Land Commission had no jurisdiction to undertake the said review, and that its decision published in Gazette Notice No. 11714 of 2018 on 9th November 2018 be declared illegal and null and void. Iimbani and Franklin on the other hand relied on the said decision to lay claim to the suit properties.



27. We therefore find that the ELC failed to determine a key determinant and pertinent issue that was specifically pleaded and raised by the parties, namely the legality and constitutionality of the proceedings and decision made by the National Land Commission published in Gazette Notice No. 11714 of 2018 on 9th November 2018, which would have had significant ramifications on the issues it framed of ownership of the suit properties, compensation and the legality of the subject eviction notices. As evidenced from the pleadings, the issues raised by the parties were predicated on, affected by, or consequential to a finding one way or another of the legality and constitutionality of the subject proceedings and decision by the National Land Commission.
28. We shall reproduce the findings by the trial Judge as regards the decision by the National Land Commission, which we do in extenso, solely for purposes of illustrating our concern:

“ 149. It is worthy to recall that faced with a dispute over and in respect of ownership in respect of the suit title, the 3rd Respondent herein (Iimbani Dispensary Project Group) filed and/or lodged a Complaint before the 2nd Respondent, to interrogate the Title which was allegedly held by one Abdi Rahiman Muhamud Abdi and the one held by the 3rd Respondent and to authenticate, which of the Titles was valid.

150. Pursuant to the lodgment of the Complaint, the 2nd Respondent herein, namely, National Land Commission, carried out and undertook investigations pertaining to and/or concerning the title in respect of the suit property and after extensive review, the 2nd Respondent rendered a determination vide letter dated 18th April 2018. For coherence, the 2nd Respondent rendered herself;

“The commission found that Mr. Abdi obtained L.R No. 209/107772 illegally acquired and letter subdivided it into L.R No. 209/16432 and L.R No. 209/16433. The land was legally allocated Iimbani Dispensary Project and they have never relinquish their rights to it.

The commission ordered that Mr. Abdi compensates Iimbani Dispensary Project Group for the land and loss of income after a valuation by our office.

The chief land registrar is requested to place restrictions on titles L.R No. 209/16432 and L.R No. 209/16433 until Mr. Adbi Rahiman Muhamud Abdi compensates Iimbani Dispensary Project Group.”

151. My understanding of the decision and/or verdict of the 2nd Respondent herein vide the letter dated 18th April 2018, which verdict was thereafter gazetted vide Gazette notice number 11714 of 9th November 2018, is that even though the suit property was found to have been lawfully allocated to the 3rd Respondent, the 2nd respondent ordered that same be compensated after a valuation was done by the commission.
152. In my considered view, by ordering and/or directing that the 3rd Respondent herein be compensated, the Commission thus negated the 3rd Respondent’s



ownership and in this regard the 3rd Respondent's Stake in respect of the suit property was thereafter premised on the compensation and not otherwise.

153. In any event, it is worthy to note that upon the delivery and/or rendition of the decision of the 2nd Respondent, which I have reproduced herein before, the 3rd Respondent herein was contented with the said Decision and thus no challenge and/or review was mounted (Emphasis ours)."

29. The learned trial Judge then proceeded to find as follows as regards the status of the decision by the National Land Commission:

"154. On the other hand, it is also imperative to note that subsequent to the delivery of the decision and/or verdict by the 2nd Respondent herein, the 3rd Respondent herein filed Civil Proceedings vide Milimani ELC Misc. Application No. 195 of 2019 between Iimbani Dispensary Project v Abdul Rahaman Muhamed Abdi, whereby same sought enforcement of the decision and/or award of the National Land Commission vide letter dated 18th April 2018.

155. Suffice it to observe, that the said proceedings were thereafter prosecuted and this Honorable court, namely, Hon Justice Oguttu Mboya, Judge, proceeded to and rendered a decision vide ruling dated the 7th October 2021, in respect of which the court adopted the award and decreed compensation in favor of the 3rd Respondent herein.

156. Pursuant to the ruling of the court vide Milimani ELC Misc. Application No. 195 of 2019, the 3rd Respondent herein now holds a valid and lawful decree as against Abdul Rahaman Muhamed Abdi, which decree is premised on Compensation for the loss or better still, forfeiture of the suit property.

157. Based on the fact that the 3rd Respondent herein has a valid decree for compensation in lieu of ownership of the said property, it is my considered view that the 3rd Respondent herein, cannot similarly now revert to court and seek to stake a claim on ownership of the suit property, at the same time."

30. It is notable that the learned Judge relied on the holding in Milimani ELC Misc. Application No. 195 of 2019, which was introduced for the first time in the impugned judgment, to effectively seal the fate of the decision of the National Land Commission. It was not indicated in the judgment who the parties in that application were, and whether the ruling dealt with the issues pleaded by Green Two Estate Association as regards the legality and constitutionality of the decision made by the National Land Commission. Further, the fact of the existence of the decision and its effect was introduced by the learned trial Judge in the judgment, with parties not being given any opportunity to address the legal import and effect of that decision with respect to their claims, particularly on the issue of ownership of the subject properties and on the issue of compensation. We also note that there was no prayer for compensation sought in the petition or cross petition on record. In essence, the trial Judge made significant findings on issues which were not pleaded.

31. Lastly, the learned trial Judge also found that by the time the National Land Commission rendered its decision by the letter dated 18th April 2018, touching on the legality or otherwise of the acquisition of title to and in respect of L.R No.209/10772 (now L.R No. 209/16432 and L.R No 209/16433), the said parcels of lands had long ceased to exist and by the said date, Green Two Estate Association had



long acquired their titles and hence the imputation of illegality on Abdi Rahaman Mohamed Abdi by the National Land Commission could not retrospectively invalidate Green Two Estate Association's titles. We reiterate in this respect that what was in issue and the relief that was specifically sought by Green Two Estate Association was with respect to the legality and constitutionality of the proceedings and decision made by the National Land Commission as published in Gazette Notice No. 11714 of 2018 on 9th November 2018, and the trial Court evidently did not address the case before it in this respect.

32. Our concern in this regard arises from the legal principles that each party is bound by its pleadings and the trial court is also bound by the pleadings of the parties, and has a duty to adjudicate upon the specific matters in dispute which the parties themselves have raised in the pleadings. There is therefore an abdication of a trial Court's duty, and no substantive justice is meted if the parties' cases as pleaded are not resolved one way or the other. In addition, the risk and injustice caused by a trial Court introducing an issue that is not pleaded or raised by or against a party is that it then enters upon the realm of speculation and into the arena of conflict, and the parties will not have an opportunity to be heard on the issues introduced by Court. See in this regards the decision by the Supreme Court of Kenya in its ruling in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR, and by this Court in *Galaxy Paints Co. Limited v Falcon Guards Limited* [2000] 2 EA 385, *North Kisii Central Farmers Limited vs Jeremiah Mayaka Ombui & 4 Others* [2014] eKLR and *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR.
33. On the issue of whether the findings were supported by the evidence, our observation is that it was evident that the petition and cross petition in the ELC concerned disputed titles, and conflicting and contested affidavit evidence with respect to ownership of the same parcels of land. The issue of ownership of the said parcels of land could therefore only be determined by testing the veracity of the evidence presented by the parties. It is notable that the petition by Green Two Estate Association in the ELC was brought pursuant to among other provisions Articles 22 of *the Constitution*, which grants locus to every person to institute court proceedings for enforcement of their constitutional rights and fundamental freedoms. While disputed issues and evidence on ownership of land ought to be preferably tried by way of a normal civil suit, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules published in *Legal Notice 117 of 2013* also provide an avenue in Rule 20 thereof as follows:
 34. The hearing of the petition shall, unless the Court otherwise directs, be by way of—
 - a. affidavits;
 - b. written submissions; or
 - c. oral evidence.
 2. The Court may limit the time for oral submissions by the parties.
 3. The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.
 4. The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.
 5. A person summoned as a witness by the court may be cross examined by the parties to the petition.



35. There is therefore an option for examination of witnesses on any evidence that is produced by parties in constitutional petitions, and which ought to have been employed by the trial Court when it became evident that there were various titles and conflicting evidence presented by the parties with respect to the same parcel of land. It has now been confirmed by the Supreme Court of Kenya that it is not prudent and judicious where a claim on ownership of land is of a highly contentious nature, to determine this matter by affidavit evidence only. The Supreme Court in this respect held as follows in *Fanikiwa Limited & 3 others vs Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR):

“77. This matter entails disputed ownership of land. In other words, there are competing claims as to the ownership of the suit parcels. Therefore, it behoves a court to make a just determination on the same, procedurally. In doing so, it has to, on the basis of the law and evidence before it, decide who the owner is and thoroughly interrogate how such ownership was conferred. In the present scenario, a trial process involving examination, cross-examination and re-examination of the witnesses is the only way of resolving the competing allegations and counter allegations. We recognize that the superior courts below relied on rule 20(1)(a) of the Mutunga Rules to hear the matter by way of affidavit evidence. However, we are of the view that a court is required to make a special endeavour to unravel all the competing claims and in particular, by calling for viva voce evidence from witnesses, especially those who have sworn depositions, and cross-examination done. This is particularly important because its decision will have a far-reaching impact especially upon the party(ies) whose ownership may end up being nullified. In taking this view, we are fortified by rules 20(3), (4), and (5) of the Mutunga Rules which allow a court to admit oral evidence, examine and cross-examine parties.”

36. In conclusion, we have abstained from addressing the merits of the findings made by the learned trial Judge, or the arguments made thereon by the parties in the appeal and cross appeals therefrom, for the reason that we are of the view that the appropriate course of action and relief in this appeal is to send this matter back to the ELC for a new trial, in order to facilitate an effective and just resolution of all the issues raised by the various parties, and for the trial Court to summon and have relevant witnesses examined and cross examined on the conflicting affidavit evidence produced by the parties. This Court is in this regard granted powers under Rule 33 of the Court of Appeal Rules of 2022 to take the following actions and decisions after hearing an appeal:

- a. to confirm, reverse or vary the decision of the superior court;
- b. to remit the proceedings to the superior court with such directions as may be appropriate; or
- c. to order a new trial, and
- d. to make any necessary incidental or consequential orders, including orders as to costs.

37. Our determination is accordingly as follows. The appeal and cross appeals filed herein partially succeed only to the extent that we set aside the entire proceedings and judgment delivered by the Environment and Land Court at Nairobi (Oguttu Mboya J.) on 2nd June 2022 in ELC Constitutional Petition No. E003 of 2020. We hereby order that ELC Constitutional Petition No. E003 of 2020 be remitted back to the Environment and Land Court at Nairobi for a new trial to be held on a priority basis by a Judge other than Oguttu Mboya J. Considering the circumstances giving rise to our decision, we order that



each party shall bear their own costs of the appeal and of the proceedings in the Environment and Land Court.

38. The petition in ELC Constitutional Petition No. E003 of 2020 shall be mentioned before the Presiding Judge of the ELC at Nairobi within 60 days from the date of delivery of this judgment for purposes of giving directions regarding its hearing and disposal in line with the observations and directions made in this judgment. The Deputy Registrar of this Court is accordingly directed to immediately transmit this judgment to the Presiding Judge of the ELC at Nairobi.

39. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2025

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

