



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaita v Attorney General & another (Constitutional Petition  
E011 of 2023) [2024] KEELC 4502 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4502 (KLR)

**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION E011 OF 2023**

**LL NAIKUNI, J**

**MARCH 12, 2024**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS**

**OR FUNDAMENTAL FREEDOMS UNDER**

**THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE PETITIONER'S INHERENT RIGHT TO**

**DIGNITY AS ENSHRINED UNDER ARTICLE**

**28 OF THE CONSTITUTION OF KENYA,**

**2010.**

**AND**

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 20(1), 19(2), 21(1),**

**22(1), 23(1), 27(1) 28, 48 & 165(3) (B)(D)**

**OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS) PRACTICE**

**AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: LAND REGISTRATION ACT & NATIONAL**

**LAND COMMISSION ACT**

**RULING ELC. PET. E011 OF 2023 PAGE 1 OF 84 JUSTICE L.L. NAIKUNI**

**AND**



**IN THE MATTER OF: THE ETHICS AND ANTI-CORRUPTION  
ACT,2011, SECTION 11(1)(J)**

**AND**

**IN THE MATTER OF: ANTI-CORRUPTION AND ECONOMIC  
CRIMES ACT, 2003**

**BETWEEN**

**BETWEEN**

**SAMMY S. K. MWAITA ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. This ruling is in respect to the Notice of Motion application dated 8<sup>th</sup> May, 2023 instituted by Mr. Sammy S. K. Mwaita - the Petitioner/Applicant herein against the Respondents herein. It was brought under the provision of Articles 22, 23 and 70 of *the Constitution* of Kenya, 2010, Rules 13, 19 & 23 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
2. Upon service of the application to the Respondents, the 2<sup>nd</sup> Respondent opposed the application and the Petition through a Replying affidavit dated 23<sup>rd</sup> August, 2023 and grounds of opposition dated 21<sup>st</sup> July, 2023. At the same time, the 2<sup>nd</sup> Respondent also filed a Notice of Preliminary objection dated 28<sup>th</sup> July, 2023

**II. The Petitioner/Applicant's Case**

3. The Petitioner/Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of the Petition herein, the Honourable Court be pleased to issue conservatory stay orders barring and/or prohibiting the 2<sup>nd</sup> Respondent from proceeding to prosecute matters filed before the Environment and Land Court in which the Petitioner/Applicant is named as Defendant.
  - d. That costs hereby be provided for.
4. The application by the Petitioner/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 16<sup>th</sup> Paragraphed Supporting Affidavit of –SAMMY S.K MWAITA,



the Petitioner sworn and dated 8<sup>th</sup> May, 2023 with two (2) annexures marked as ‘SM – 1 to 2’. The Petitioner/Applicant averred that:

- a. At all material times to this Petition, the Petitioner/Applicant was the holder of the office of Commissioner of Lands between November 1999 and February 2003.
- b. The Petitioner/Applicant had also served the public in other capacities including as Senior Deputy Secretary in the Ministry of Local Government as well as the Member of Parliament for Baringo Central Constituency between the years 2008 to 2017 before venturing into private business in the real estate and farming sectors.
- c. Vide a Gazette Notice No. 4141 dated the 9<sup>th</sup> November 1965 and issued on the 16<sup>th</sup> November 1965, the then President of the Republic of Kenya, with effect from 12<sup>th</sup> December 1964, authorised the Commissioner of Lands to make grants or dispositions of any estates, interests or rights in or over Lands that are for the time being vested in the Government of Kenya, and it is noteworthy that the Notice had never been revoked.
- d. Acting pursuant to his lawful mandate as the Commissioner of Lands and pursuant to various duties conferred to the office under various statutes thus the Petitioner/Applicant made several grants and dispositions of the Land and estates vested in the Government in favour of third parties throughout the Republic of Kenya.
  - i. As Register General of Land under the provision of Section 5 of Registration of Title Act Cap 281 (now repealed).
  - ii. As Principal Registrar of Government Land under Cap. 280 (now repealed).
- e. The 2<sup>nd</sup> Respondent herein had since and continue to file several suits against the Petitioner/Applicant before the Land and Environment Court seeking to recover land and estates which were lawfully alienated by the Petitioner/Applicant as per his mandate as the Commissioner of Lands alleging that the aforesaid alienation is tainted with fraud and was as a result of abuse of office and made in breach of public trust.
- f. The civil suits instituted by the 2<sup>nd</sup> Respondent included but not limited to:
  - i. “ELC (Mombasa) No:180/2009 EACC - Versus - Ismail Kipkemboi, Laile Investment Limited, Stephen Kipkenda Kipkenda & Sammy S. K. Mwaita.
  - ii. “ELC (Mombasa) No:175/2009 EACC - Versus - Sarah Lobo, Bernard Atati & Sammy S.K. Mwaita.
  - iii. ELC (Mombasa) No:176/2009 EACC – Versus - Ezekiel Komen, Bernard Atati & Sammy S. K. Mwaita.
  - iv. ELC (Mombasa) No:170/2009 EACC – Versus - Romli Agencies Limited, Michael Chewikaw, Chepkeres Chebon & Sammy S.K.Mwaita.
  - v. ELC (Mombasa) No:177/2009 EACC – Versus - Zakayo Kipkemboi Cheruiyot, Omar Tahir Sheikh Said & Sammy S.K.Mwaita.
  - vi. ELC (Mombasa) No:247/2018 EACC – Versus - John Garachi & Sammy S.K.Mwaita.
  - vii. ELC (Mombasa) No:360/2017 EACC – Versus - Julius Keru Njoroge, Grace Wamiti Keru, Rayson Pharmaceuticals Limited & Sammy S.K.Mwaita.



- viii. ELC (Mombasa) No:97/2014 EACC -Versus - Lekyo Tours Co. Limited & Sammy S.K. Mwaita.
  - ix. Constitutional Petition:403/2012 Muungano wa vijiji & others - Versus – Sammy S. K Mwaita & others.
  - x. ELC (Mombasa) No: E024/2023 EACC -Versus - Ramadhan Ali & others.
  - xi. ELC (Mombasa) No:22/2022 EACC- Versus - Maxtowers Limited & Others.
  - xii. ELC (Mombasa) No:26/2023 EACC – Versus - Gikoma Enterprises & others.
  - xiii. ELC (Mombasa) No:21/2023 EACC - Versus - E. M. Mbasu & others.
  - xiv. ELC (Mombasa) No:28/2019 EACC – Versus – Banghra Limited & Sammy S.K.Mwaita.
- g. The suits above had diverse hearing dates. More so the following suits were coming up for hearing on 10<sup>th</sup> and 11<sup>th</sup> May 2023:
- i. ELC (Mombasa) No:177/2009 EACC – Versus - Zakayo Kipkemboi Cheruiyot, Omar Tahir Sheikh Said & Sammy S.K.Mwaita.
  - ii. ELC (Mombasa) No:178/2009 EACC -Versus - Cleophus Walubwengo & another.
  - iii. ELC (Mombasa) No:179/2009 EACC – Versus - Beth Nduta Ndungu & others.
  - iv. ELC (Mombasa) No:270/2009 EACC – Versus - David Gikonyo & others.
- h. The Petitioner/Applicant was doubtful and apprehensive but on founded fear and apprehension that the Judgments stood to permanently prejudice the Petitioner/Applicant if conservatory orders were not issued in the interim to enable the Petitioner/Applicant pursue the Petition herein.
- i. On 16<sup>th</sup> February 2023 the Court in its Judgment in “ELC (Mombasa) No:168 of 2009” pronounced Judgment against the Petitioner/Applicant and penalized the Petitioner/Applicant to pay General damages and mesne profits of a sum of Kenya Shillings Thirty Million(Kshs.30,000,000/=) only to be shared among the other two Defendants and further condemned him to personally pay Five Million Kenya Shillings (Kshs.5,000,000/=) only for liability, abuse of office and breach of fort while in office within the next 60days.
- j. From the pleadings filed in Court as aforesaid by the 2<sup>nd</sup> Respondent herein, the Petitioner/Applicant has been invariably depicted as a corrupt and untrustworthy person that was not fit to hold public office.
- k. Further to the above, the Petitioner/Applicant had almost been rendered destitute due to the fact that he had had to hire several advocates at colossal fees to defend his person in the said suits.
- l. In addition, the Petitioner/Applicant had suffered public odium and ridicule due to the perception created by the 2<sup>nd</sup> Respondent that he was a corrupt and dishonest person, and as a result, his dignity had been eroded and reputation tarnished.
- m. In the premises, the Petitioner/Applicant's right to human dignity as enshrined in Article 28 of *the Constitution* of Kenya, 2010 had been violated and infringed and thus came before this court for redress.



- n. The 1<sup>st</sup> Respondent herein, as the Principal Legal Advisor to the Government of Kenya ought to have made it known to the 2<sup>nd</sup> Respondent that suing the Petitioner/Applicant in person was erroneous as the law permitted him to make grants and dispositions of any estates, interests or rights in or over lands that were for the time being vested in the government of Kenya.
- o. The Petition herein was brought in good faith and in the interest of justice.
- p. It was therefore necessary that a conservatory order do issue in the meantime stopping the prosecution of the cases filed by the 2<sup>nd</sup> Respondent against the Petitioner/Applicant to avert a situation where the Petition herein would be rendered nugatory by the time final orders were granted by the court.

### III. The Response by the 2<sup>nd</sup> Respondent

5. The 2<sup>nd</sup> Respondent responded to the application through filing of Grounds of Opposition dated 21<sup>st</sup> June, 2023 and a 31<sup>st</sup> Paragraphed Replying Affidavit sworn on 23<sup>rd</sup> August, 2023 by PHILLIP G. KAGUCIA who averred that:-
  - a. The Petition to him was an audacious attempt at sanitizing all irregular Grants and dispositions of public or government land since independence and to shield those responsible from accountability. The Petitioner was seeking to legitimize the phenomenon known as “land grabbing” that had afflicted this country for decades and which was the subject of the Commission of Inquiry into the illegal/Irregular Allocation of Public Land, 2003(also known as “The Ndungu Report”).
  - b. In addition, the Petition sought to determine all pending suits to recover public or government land as well as all pending appeals.
  - c. In the premises, it was the 2<sup>nd</sup> Respondent's contention that the Petition (and by extension the Application) was fatally defective and an utter abuse of the court process for the following reasons:-
    - i. It sought to usurp the functions and jurisdictional independence of trial Judges and determine pending suits based on abstract, academic, selective and speculative facts and issues.
    - ii. It sought to overturn binding precedent on personal liability of Commissioner of Lands issued by the Appellate, notably, in “CA No.183 of 2014; EACC – Versus - Judith Marilyn Okungu and another.
    - iii. It sought to overturn binding precedent on illegally obtained titles to land issued by the Supreme Court, notably, in the “Petition No. 37 of 2019; Pati Limited – Versus - Funzi Island Development Limited and 4 others and Petition No. 8 of 2021; Dina Management Limited – Versus - County Government of Mombasa and 5 others.
    - iv. This court could not through collateral challenge, usurp the functions of Judges properly seized of the matters.
    - v. The court was not seized of the matters, the subject matter of this collateral challenge.
    - vi. The court was being asked to entertain and issue binding and far reaching declarations in rem in respect of matters not before it; a jurisdiction which this court does not have.



- d. The 2<sup>nd</sup> Respondent had filed a total of 100 cases to recover public or government land illegally or fraudulently alienated by former Commissioner of lands and or the Petitioner herein and the same stood to be lost in the event that this Petition succeeded.
- e. He averred that the cases filed by the 2<sup>nd</sup> Respondent had unique facts issues and each of the cases should be determined on its own merit and not by way of a general, academic and speculative petition of this nature. It was a trite principle of law that courts should refrain from entertaining moot matters of general, academic, theoretical or speculative nature by way of this Petition and deal with concrete cases actually before them.
- f. The 2<sup>nd</sup> Respondent's investigations in the cases mentioned above revealed that the erstwhile Commissioners of Lands, in abuse of their offices, alienated land already alienated set aside for public or government purposes in contravention of the law particularly the provision of Section 3 of the Government Lands Act, Cap 280 (now repealed). It also established that the Commissioners of Lands exceeded their delegated authority under the aforesaid Section 3 and alienated land even when they had no such delegated authority. It was the 2<sup>nd</sup> Respondent's contention that in so doing, the then Commissioners of Lands acted beyond the protection afforded to them by law and became personally liable. In the premises, the court should allow EACC to demonstrate that the Commissioners of Lands, inclusive of the Petitioner, misconducted themselves as such in each of the suits filed rather than entertain a Petition seeking blanket orders based on unproven facts.
- g. Further, the 2<sup>nd</sup> Respondent established that in some instances, the Petitioner herein abused his powers to fraudulently alienate land to themselves, their relatives or cronies in breach of public trust. For instance, "ELC (Mombasa) No. 97 of 2014, EACC – Versus - Lekyo Tours & Ano", the Petitioner herein alienated land reserved for staff quarters belonging to Department of housing to his Company known as Lekyo Investments Limited mentioned at paragraph 16 (ix) of the Petition and Judgment was delivered against him in 20th February 2022. See annexure marked as "EACC - 1".
- h. He further averred that the Petitioner in another occasion alienated land in Nakuru reserved for Department of Surveys to his brother Hillary Mwaita. The 2<sup>nd</sup> Respondent also obtained Judgment against him. See annexure marked as "EACC - 2".
- i. It would be preposterous to contend that the Government, in such instances, was liable for fraudulent acts perpetrated by Commissioners of Lands in breach of trust and in pursuit of private interests.
- j. In response to the averments made out under Paragraphs a, b, c, and d and 4, 6, 7 & 8 of the application and the Supporting Affidavit and Paragraphs 11, 12, 13, 14 and 15 of the Petition, the 2<sup>nd</sup> Respondent admitted that the Petitioner/Applicant served as the as a public officer appointed as such as the Commissioner of Land between the years 1999 and 2003 but denied that Gazette Notice No. 4114 issued on 16<sup>th</sup> November 1965 purportedly issued by the then President of the Republic of Kenya authorized the Petitioner or any other Officer working in the Office of the Commissioner of Land to make any grants, dispositions of any estates, interest or rights in or over public or government land reserved or alienated for public or government purposes in the respective suits indicated in this Petition at all.
- k. In any event, the provision of Section 3 of the Government Lands Act was clear on the respective powers of the President and the Commissioner of Lands in alienating government



land which was available for alienation and the same could not be amended or repealed by executive fiat through a gazette notice.

- l. In response to the contents of Paragraphs (e, f and g) and 9,10 of the Application and Supporting Affidavit and Paragraphs 16, 17 of the Petition, the Deponent averred that the 2<sup>nd</sup> Respondent was an Independent body empowered by provisions of Articles 22, 79, 252, 258 of *the Constitution* and Section 11(1)(d) and (j) of the *Ethics and Anti-Corruption Commission Act* 2011 to conduct investigations on its own and thereafter institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption or the payment of compensation or other punitive and disciplinary measures on any matters of public interest.
- m. Further to the foregoing, the Deponent confirmed that the 2<sup>nd</sup> Respondent filed the respective suits enumerated in Paragraphs f (i-xv) and g (i-iv) of the Application and paragraphs 9(i-xv) of the Supporting Affidavit and Paragraphs 16 of the Petition, against the different parties jointly with the Petitioner after investigations established that the Petitioner had irregularly, fraudulently and corruptly issued grants, disposed and or allocated various public land/properties to private individuals while serving in the Office of the Commissioner Lands which actions occasioned the Government of Kenya to loose enormous public land reserved for various public utilities.
- n. Further to the foregoing, he averred that the 2<sup>nd</sup> Respondent was filed the said recovery suits on behalf of various institutions, Ministries and or Offices and the Government of Kenya in the Public. He was informed by Ms. Fatuma Abdulrahim S. Advocate, that the status of the suits were as follows:-
  - i. The eleven (11) suits mentioned in Paragraphs (f) i, ii, iii, iv, v, vi, and vii and paragraph (g) i-iv together with other four (4) which had been heard and determined were filed to recover public land set aside for use as public utility for Government Staff Quarters belonging to Kenya Civil Aviation Authority. The status of the cases were as follows:-
    - i. The ELC Case No.180 of 2009, EACC – Versus - Ismael Kikpemboi, Leila investment Limited, Stephen Kipkenda & Sammy Silas Komen Maita was scheduled for hearing on 26<sup>th</sup> September 2023.
    - ii. The ELC 175 of 2009, EACC – Versus - Sarah Maria Lobo & Bernard Atati & Sammy S.K. Mwaita, the matter was scheduled for hearing on 24<sup>th</sup> and 25<sup>th</sup> October 2023.
    - iii. The ELC No.176 of 2009 EACC vs. Ezekiel Komen, Benard Atati & Sammy Silas Komen Mwaita, the matter was at Pre - trial stage.
    - iv. The ELC No. 170 of 2009 EACC – Versus - Romli Agencies & Sammy Silas Komen Mwaita, which had been concluded by way of consent Judgment endorsed in court on 24<sup>th</sup> June 2022. See annexure marked “EACC 3”.
    - v. The ELC No. 168 of 2009, EACC – Versus - Bernsoft Limited, Equitronics Limited & Sammy Silas Komen Mwaita - it went through a full hearing before this Honourable Court and Judgment was delivered on 16<sup>th</sup> February 2013 which Judgment forms the basis of this Petition. See annexure marked as “EACC - 4”.



- vi. The ELC No.166 of 2009, EACC – Versus - Aerial Developers & Sammy Silas Komen – it went for full hearing and judgment 10<sup>th</sup> July 2019 before Honorable C.K.Yano. The said Judgment was later set aside following an application by the 1<sup>st</sup> Defendants and the matter came for hearing on 4<sup>th</sup> July, 2023 but the Defendant had initiated proposal to negotiate an out of court settlement. Matter would be mentioned on 5<sup>th</sup> October 2023 to record settlement. See annexure marked as “EACC - 5”.
- vii. The 2<sup>nd</sup> Respondent had also filed ELC No. 167 of 2009, EACC – Versus - Luka Kimutai & Sammy Mwaita. The same proceeded for full hearing before Honourable Matheka and Judgment was delivered on delivered on 9<sup>th</sup> May 2023. See annexure marked “EACC - 6”.
- viii. The ELC 177 of 2009; EACC – Versus - Zakayo Kipkemboi Cheruyot, Omar Sheikh Said & Sammy Silas Komen Mwaita - , the matter was pending negotiations in settlement of the suit. The 1<sup>st</sup> Defendant had agreed to surrender the title. The matter was scheduled for hearing on 7<sup>th</sup> March 2024.
- ix. The ELC No. 178 of 2009, EACC – Versus - Cleophas Welubengo & Ano”. It was scheduled for hearing on 7<sup>th</sup> November 2023.
- x. The ELC No.179 of 2009, EACC – Versus - Beth Nduta Ndungu & 2 Others. It was scheduled for hearing on 8<sup>th</sup> November 2023.
- xi. The ELC No.247 of 2018, EACC – Versus - John Garachi & Sammy Mwaita. It was scheduled for hearing on 25<sup>th</sup> September 2023.
- xii. The ELC No. 247 of 2018, EACC – Versus - John Garachi & Sammy Mwaita. It was scheduled for hearing on 25<sup>th</sup> September 2023.
- xiii. The “ELC 97 of 2014) EACC – Versus - Lekyo Tours & Sammy Silas Komen Mwaita was filed to recover public land that the Petitioner had allocated himself through a Company in which he was a Director. The said land had been set aside for Government Staff Quarters of National Department of Housing. The matter was heard and determined and a Judgment was delivered in favour of the 2<sup>nd</sup> Respondent on 20<sup>th</sup> February 2022.
- o. The “ELC Nos. E024/2023 EACC – Versus - Ramadhan Ali & Others, ELC No. E021of 2023 – Versus - E.M. Mbasu & others and ELC No. 22 of 2023 EACC – Versus - Maxtowers Limited others and ELC No,26/2023 EACC – Versus - Gikoma Enterprises & Others were cases filed by the 2<sup>nd</sup> Respondent for recovery of public properties reserved for government staff quarters of Kenya Revenue Authority in which the Petition allocated to private individuals during his tenure as a Commissioner of Lands and the same should be decided on its own merit. The said suits were at Pre - trial stage before the Environment and Land Court Mombasa.
- p. The case “ELC No. 28/2019 formerly ELC No. 203 of 2007 EACC – Versus - Bhangra Limited & Sammy S. K. Mwaita was a suit filed to recover a road reserve Tudor Road, formerly Tom Mboya Avenue and the same was scheduled for hearing on 4<sup>th</sup> October 2023. This suit had been filed along with other suits against the former Commissioner of Lands Wilson Gachanja to recover a road reserve along Tudor Road:-



- i. “ELC No. 9 of 2008, Kenya Anti-Corruption Commission – Versus - Bangra Limited & 4 others” which matter went through a full hearing and a Judgment was delivered on 5<sup>th</sup> May 2022. See annexure marked as “EACC - 7”
- ii. “ELC No. 301 of 2007, EACC – Versus - Harith Swaleh & Wilson Gachanja Another whereby a consent was endorsed by Hon. Nelly Matheka on 23<sup>rd</sup> May 2023. See annexure marked as “EACC - 8”.
- q. Consequently, he averred that the Petitioner’s issuance of grants, dispositions of any estates, interest or rights in or over the reserved public properties to private individuals in the respective suits properties herein above was irregular, illegal, fraudulent, and outside the confined powers and duties of the Office of the Commissioner of Lands and or an abuse his office and or breached the trust conferred upon the Office of the Commissioner of lands hence necessitating the suits herein.
- r. Further to the forgoing, he averred that the Petitioner’s insurance of grants, dispositions, allocation, leases in respect of the suit properties in all the cases were ultra vires of the Presidential authority and the powers of the Commissioner of Lands and therefore contravened the Provisions of Section 3 and 7 of the Government Lands Act and Financial Regulations and Procedures of Disposal of Government Act and other laws.
- s. The Petitioners actions of making grants, dispositions of any estates, interest or rights in or over the reserved public properties in the respective suits while serving as the Commissioner of Land exceeded the statutory power conferred upon the Office of Commissioner of Land in the Government Lands Acts (repealed), the Registration of Lands Act (repealed) and Registration of Titles Act thereby necessitating the claims against the Petitioner in all the respective suits before this Honourable Court.
- t. The issues raised in this Petition and the Application are subjects of determination in all the cases before this Honourable Court and it would be unfair and unjust to the other parties if the said the issues were generally determined by way of this Petition as each case varies in facts and requires oral evidence and the Petitioner herein shall be given an opportunity to Defend himself in all the matters.
- u. The 2<sup>nd</sup> Respondent was statutorily mandated to file the suits herein against or any other party including the Petitioner/Applicant when it was established that a cause of action arose as a result of their actions, omission either jointly and or severally in the respective suits and for purposes of recovering the Public Land of behalf of different institutions and reversion of the same to the original purpose for Government of Kenya.
- v. In response to the averments made out under Paragraph 19 of the Petition, the 2<sup>nd</sup> Respondent averred that it was statutorily empowered to file recovery suit without the advice of the 1<sup>st</sup> Respondent either as alleged or at all and the 1<sup>st</sup> Respondent never absconded any duties either as alleged or at all. The 2<sup>nd</sup> Respondent had never misapprehended any law in filing all the suit properties alleged therein.
- w. In response to the contents of Paragraphs (h), (i) of the Application and Paragraphs 10 and 11 of the Supporting Affidavit and the Petition, the 2<sup>nd</sup> Respondent averred that this was an abuse of the court process for the following reasons:-



- i. This Petition sought to adjudicate issues that this Honourable Court had earlier heard and determined in “ELC No. 168 of 2009”. The said issues were extensively dealt with in the Judgment of this Court at Paragraphs 29, 33, 38 - 41 and 44 - 55. Therefore, this Honorable Court was “functus officio” and lacked jurisdiction to hear and review its own Judgment over the same issues by way this Petition.
- ii. The Petitioner was seeking protection from infringement of fundamental rights and freedoms as envisaged in *the Constitution* in matters where he acted in conflict of interest and abused his office and/ or trust as a Commissioner of Lands by allocating public property to himself through his company in “ELC No. 97 of 2014 EACC – Versus - Leko Tours Company Limited & Another. The Petitioner was himself in violation of the provision of Article 40 (6).
- iii. The 2<sup>nd</sup> Respondent averred that the Application to stay the matters pending for determination before this Honourable Court for over 14years if granted would be an impunity of the highest order in the corridor of justice and would instill low confidence and public trust in the justice systems on the efforts to recover public properties. The same would encourage continuity of unethical conduct of public officers and abuse of office practice by public officers.
- iv. The 2<sup>nd</sup> Respondent had also filed civil case “ELC 167 of 2009, EACC – Versus - Luka Kimutai & Sammy Mwaita”. The same proceeded for full hearing before Honorable Matheka and Judgment was delivered on 9<sup>th</sup> May 2023.
- v. The Petition further sought to adjudicate issues that were similar to the issues raised on civil case “ELC. No. 170 of 2009 which had been concluded by way consent and where parties had agreed that each parties to bear their costs.
- x. The issues raised in this Petition had already been determined by Court this Honourable Court through a fair trial and consent Judgment which matters the Petitioner had participated and this Petitioner could not now seek remedy on fundamental rights to quench the fears, and or seek protection from the outcome of proceedings of concurrent jurisdiction which were pending determination based on determined cases.
- y. The Petitioner had filed this Petition and the Application at the eleventh hour and 14 years after the suits were set for hearing. The Petition had not provided any substantive reasons for the said delay. The 2<sup>nd</sup> Respondent averred that this Petition had brought to subvert and frustrate the 2<sup>nd</sup> Respondent’s effort in fighting against corruption.
- z. The issues raised in this Petition, had been raised in all the suits filed by the 2<sup>nd</sup> Respondent and the same be canvassed well in the Petitioner’s Defence during the hearing in the respective recovery cases.
- aa. The Petition and the Application herein if allowed would contravene the provision of Articles 40 (6), 47 (1), 50 (1), 62, 159 (b), 249 (2) (b), 232 (1) (e) 252 and 258 of *the Constitution* of Kenya 2010 and would be contrary to the principle of finality in litigation. The said Petition violated the rights of all the Defendants who had been in court awaiting determination of their disputes in their respective cases herein above for over 14 years without success. The Petition and the Application herein were speculative



and highlight on fears of matters that were pending for hearing and determination before this Honourable Court and it would be unreasonable and unjust for this Honourable Court to stay proceedings of the cases (involving persons who were not parties to this parties) that would be heard on their own merit.

- ab. The Petition herein never met the threshold set out in Rule 10 of the Constitutional of Kenya (Protection of Rights and Fundamental Rules and Procedures) Rules, 2023 and the Petitioner had not clearly demonstrated the nature constitutional rights and freedoms that the 2<sup>nd</sup> Respondent had violated and or infringed against the Petitioner to warrant the orders sought.

#### **IV. The Grounds of opposition**

- 6. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 21<sup>st</sup> June, 2023 opposing the notice of Motion application dated 8<sup>th</sup> May, 2023.

#### **V. The Notice of Preliminary objection by the 2<sup>nd</sup> Respondent**

- 7. The 2<sup>nd</sup> Respondent filed a Notice of Preliminary objection dated 28<sup>th</sup> July, 2023 on points of law. It stated that the Petition was fatally defective and an utter abuse of the Court process for the following reasons:-
  - a. It sought to usurp the functions and jurisdictional independence of trial Judges and determine pending suits based on abstract, academic, selective and speculative facts and issues.
  - b. This Court could not through collateral challenge, usurp the functions of Judges properly seized of the matters.
  - c. The Court was not seized of the matters, the subject matter of this collateral challenge.
  - d. The Court was being asked to entertain and issue binding and far reaching declarations in rem in respect of matters not before it; a jurisdiction which this Court never had.
- 8. The 2<sup>nd</sup> Respondent prayed for the Petition and application dated 8<sup>th</sup> May, 2023 be struck out with costs to the Respondents.

#### **VI. Submissions**

- 9. On 9<sup>th</sup> October, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 8<sup>th</sup> May, 2023 and the Notice of Preliminary objection dated 28<sup>th</sup> July, 2023 be disposed of by way of written submissions. Subsequently, all the parties obliged and on 16<sup>th</sup> January, 2024 a ruling date was reserved for 12<sup>th</sup> March, 2024 by Court accordingly.

#### **A. The Written Submissions of the Petitioner**

- 10. The Petitioner through the Law firm of Messrs. T.K. Rutto & Company filed their written submissions dated 24<sup>th</sup> October, 2023. Mr. T. K Ruto Advocate commenced the submissions by rehashing that the crux of the 2<sup>nd</sup> Respondent's Preliminary Objection dated 28<sup>th</sup> July, 2023 was that the Honourable Court never had the jurisdiction to determine the Petition herein since there were numerous other matters pending in courts of concurrent jurisdiction. In that regard, the 2<sup>nd</sup> Respondent, accused the Petitioner of attempting to usurp the functional and jurisdictional independence of trial judges to determine the various cases under reference before various courts. The Learned Counsel averred that the 2<sup>nd</sup> Respondent further contended that the various matters before various courts were not before



this Honourable Court and thus this Honourable Court was being called upon to give orders in rem regarding matters that it was not seized of.

11. In rebuttal to the objection, the Petitioner wished to restate that the 2<sup>nd</sup> Respondent had in the above rendition, made a deliberate attempt to mislead the Honourable Court by erroneously presenting the facts and the Petitioner's pleadings. To begin with, the Learned Counsel informed Court that the Petitioner had moved this Honourable Court under the provisions of Articles 22 and 23 of the Constitution of Kenya, 2010 regarding the enforcement of fundamental rights and freedoms enshrined under the constitution and to safeguard against the further infringement or threatened infringement. On the other hand, the 2<sup>nd</sup> Respondent had characterized the Petitioner's case as that moving the Honourable Court to exercise its supervisory jurisdiction under the provision of Articles 165 (5) (b) and 165 (6) of the Constitution of Kenya, 2010 a fact that was not only misguided but legally flawed. The Petitioner reiterated that the Petition herein was anchored under the provision of Articles 22 and 23 of the Constitution of Kenya, 2010 and not as alleged by the 2<sup>nd</sup> Respondent. In that light, the conceptualization of the preliminary objection was flawed and had no legal basis. Further, the 2<sup>nd</sup> Respondent's attempt to further characterize the Petitioner's case as an appeal against the decision of the Court in the civil case: "ELC (Mombasa) No. Case No.168 of 2009-KACC – Versus - Bernsoft Limited & 2 Others was incorrect.
12. The Petitioner herein had the option of instituting a constitutional reference with regard to all the suits that he was listed as a Defendant and to which the 2<sup>nd</sup> Respondent as the Plaintiff sought to attribute personal responsibility. However, doing so, would be an abuse of the process of this Honourable Court as there ran the risk of the various benches in the various constitutional reference arriving at different conclusions on similar subject matters and thus embarrassing the judicial process. In that regard, the Petitioner had elected an omnibus Constitutional Petition to address the common issues and substantial questions of law by the decision of an expanded bench under Article 165 (4) of the Constitution of Kenya, 2010 on the Petitioner's rights. The Petitioner thus wished to reiterate that the issues for determination before this Honourable Court related to the Petitioner's rights and has no bearing on the factual issues in dispute between the various parties in the various cases pending before courts which would eventually be determined on their merits.
13. In light of the above background and legal basis, the Learned Counsel framed the following issue for determination:-

Firstly, on whether the 2<sup>nd</sup> Respondent's Notice of Preliminary objection dated 28<sup>th</sup> July, 2023 was merited, the Learned Counsel submitted the Petitioner again reiterated that the present Petition was instituted pursuant to the provisions of Articles 22 and 23 of the Constitution of Kenya, 2010. This formed the basis on which the Petitioner was invoking the Jurisdiction of this Honourable Court. The above was in consonance with the decision of the Supreme Court of Kenya in the case of:- "Samuel Kamau Macharia & Another -Versus - Kenya Commercial Bank Limited & others (2012) eKLR" in which the Court held that:-

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...where the Constitution exhaustively



provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

14. In that regard, the Learned Counsel averred that this Honourable Court's Jurisdiction was circumscribed in *the constitution* in clear and unambiguous terms and the Court has been appropriately moved. To further contextualise the above, the Petitioner relied on the case of “Mohammed Said – Versus - County Council of Nandi [2013] eKLR” where the Court stated that the Environment and Land Court moved under the provisions of the Articles 22 and 23 of *the Constitution* of Kenya, 2010 had the jurisdiction to determine issues of infringement of fundamental rights and more particularly noted that:-

“[I]t can hear any constitutional petition under any provision of *the constitution* so long as the matter relates to the environment and the use and occupation of, and title to, land.”

15. According to the Learned Counsel, it was not in dispute herein that the subject herein related to the fundamental rights and freedoms of the Petitioner while acting as the Commissioner of Lands and therefore the issues in contention have a bearing on matters of occupation of and title to land. The Learned Counsel further contended that the 2<sup>nd</sup> Respondent's alleged Preliminary Objection never met the threshold as established in the case of:- “Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Limited (1969) EA 696”, where it was held that:-

“.....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

“.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

16. The Learned Counsel averred that the 2<sup>nd</sup> Respondent's Preliminary objection was not new in the corridors of justice as evinced by the case of “Gladys Omato – Versus - Independent Electoral and Boundaries Commission [2021]eKLR” where the Court was faced with a similar predicament. That is a preliminary objection whether a Constitutional Petition before it was incompetent and that it lacked jurisdiction on ground that the matter had been determined at the Political Parties Dispute Tribunal. The Court noted that the Preliminary Objection was misconceived since the Petition was on breach of fundamental rights and freedoms and not an appeal. The Court more particularly stated that:-

“The Petitioner has the right under Article 22 of *the Constitution* to approach this Court on claims of violation of her constitutionally guaranteed rights and fundamental freedoms. Likewise, this Court has jurisdiction under Article 165 of *the Constitution* to determine the



question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

17. In further support of this argument, the Learned Counsel relied on the doctrine of the ‘dominant cause of action’ established in the case of:- “Honey Creepers Investments Limited – Versus - Cab Investments Company Limited & 4 others [2020] eKLR” where the courts held that where land rights issues dominate a Cause, then the same should be filed before the Environment and Land Court and as such the Petition herein is properly before Court. That being the case, the 2<sup>nd</sup> Respondent’s Preliminary Objection that the Petition herein was bad in law for being either in “doctrine of Sub - Judice or Res Judicata” was not founded in law. This Court, albeit differently constituted had time and again made pronouncements on the grounds that must be satisfied before a party can succeed on a Preliminary Objection that a matter was either “Res Judicata or Sub – Judice” as envisaged in the case of:- “Timothy Maunda Mbiti – Versus - Regional Commissioner Nyanza & 10 others [2019] eKLR” where the court held in relation to a similar preliminary objection that:

“In order to enable the Court determine whether or not the matters in issue in this case were similar to those in Petition No. 447 of 2016, it will be necessary to delve into factual evidence.”

18. Having observed that the Court would first have to review the factual analysis of the cases filed in the matter alleged to be sub judice, the Court further quoted the authority of “Oraro – Versus - Mbaja [2005]1 KLR 141” where in relation to what qualified as a preliminary objection the court noted that an objection could only qualify as such if: -

“A ‘preliminary objection’, correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

19. Having noted that in order to determine the issue as a preliminary point, the Court had to go to the factual evidence, it accordingly disqualified the sale as a preliminary objection and held that:-

“I reject the Respondents assertion that the question about whether or not this case is sub-judice is sustainable as a Preliminary Objection.”

20. Similarly, in the case herein, for the court to determine whether the issues raised by the Petitioner was either Sub - Judice or Res - Judicata required for this Honourable Court to call for the various records under reference or if adduced by the parties as affidavit evidence, it had to comb through the factual evidence and on the authority of the above, automatically disqualified it as a preliminary objection and thus the 2<sup>nd</sup> Respondent’s preliminary objection must fail on that ground. Without prejudice to the foregoing, the Petitioner submitted that Courts have further held that for a party to rely on the doctrine of sub judice and res judicata, the Applicant (in this case the 2<sup>nd</sup> Respondent) must demonstrate that the issues were directly or were directly and substantially in issue as demonstrated by the Court in the case of:- “Julius Mutie Mutua & 2 others (suing as the officials of Aimi Ma Lukenya Society) – Versus - East Africa Portland Cement Co. Ltd & 3 others [2019] eKLR” quoting with approval the



case of “Edward R. Ouko – Versus - Speaker of the National Assembly & 4 others (2017) eKLR” and at paragraphs 14-16 of its Ruling held that:-

- “ 14. Although the suit property in this Petition is the same as the suit property in Machakos ELC. No. 74 of 2014, the issues raised are not directly and substantially the same. In Machakos ELC No. 74 of 2014, the Plaintiffs (Petitioners) herein alleged that the Defendant (1st Respondent) had trespassed on the entire parcel of land. However, in the Petition, the Petitioners have alleged that the 2<sup>nd</sup> Respondent is in the process of compulsorily acquiring a portion of the suit land measuring 900 acres with a view of allocating it to the 3<sup>rd</sup> Respondent. The Petitioners have therefore sought for an order stopping the exercise by the 2<sup>nd</sup> Respondent of compulsorily acquiring 900 acres of the suit land.
15. Other than the issues in the two suits being different, the parties in the Petition are different from the parties in Machakos ELC No.74 of 2014. As mentioned in the preceding paragraph, the Petition has included the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are not parties in Machakos ELC. No. 74 of 2014.
16. In view of the fact that some of the issues in the Petition are not directly and substantially similar to the issues raised in Machakos ELC No. 74 of 2014, and the parties in the two suits being different, I find that this suit is not sub-judice Machakos ELC No.74 of 2014. However, considering that the issue of ownership of the suit land is common in both suits, the most appropriate position is to have the two suits heard together to avoid a situation where the court is likely to write conflicting Judgments.
21. According to the Learned Counsel, in relation to the case herein, it was not in dispute that there were various cases in various courts relating to various parcel of land in which the Petitioner was at the center by virtue of being the Commissioner of Lands at the time the parcels were alienated in favour of various parties. Thus, in light of the above case that the Court held that despite the matters not being sub judice, it would “however, considering that the issue of ownership of the suit land is common in both suits, the most appropriate position is to have the two suits heard together to avoid a situation where the court is likely to write conflicting Judgments”. This was exactly what the Petitioner had done by virtue of this Petition. The fact that there were multifaceted and a plethora of case pending before various courts in which the 2<sup>nd</sup> Respondent was seeking that the Petitioner be held personally liable for the actions done in relation to the alienation of various parcels of lands, the possibility of conflicting Judgements was real and not merely hypothetical or imagined as claimed by the 2<sup>nd</sup> Respondent. To contextualise the above, the issue of awarding costs for personal liability and damages for fraud against the Petitioner was taking shape in various courts with the first batch of conflicting decisions envisaged in the case of “Kenya Anti-Corruption Commission – Versus - Vincent Kipkurui Tuwei & another [2020] eKLR” where the court declined to award damages for alleged fraud and personal liability against the Petitioner while in the case of “Mombasa ELC Case No. 168 of 2009- KACC v Bernsoft Limited & 2 Others” the court made award and castigated the Petitioner.
22. If this trend was allowed to continue, more conflicting decisions with regard to the issues raised by the Petitioner in the Petition herein. It would litter the jurisprudential fabric with the ugly effect of embarrassing the court process and bringing the judicial process to disrepute. Upon this background, the Petitioner had taken up the noble task to consolidate the issues vide the petition before Court to allow the empanelment of a bench of three Judges pursuant to the provisions of Section 165 (4) of *the*



Constitution of Kenya, 2010 as they constitute important questions of law and aimed at streamlining the administration of justice.

23. In conclusion, therefore, the Learned Counsel submitted that the Petition herein was neither sub-judice nor res-judicata. The same was aimed at aiding the administration of justice and to avoid bringing the court process into disrepute. On the prayers, the Learned Counsel argued that in light of the above the Petitioner prayed that:-
- a. That the 2<sup>nd</sup> Respondent's preliminary objection dated 28<sup>th</sup> July, 2023 be and is hereby dismissed with costs; and
  - b. That as submitted vide submissions dated 6<sup>th</sup> July 2023 the matter be referred to the Honourable chief Justice for the empanelment of an enlarged bench pursuant to the provisions of Article 164(5) of the Constitution of Kenya, 2010.

#### **B. The Written Submissions of the 2<sup>nd</sup> Respondent**

24. The 2<sup>nd</sup> Respondent through the Advocate Fatuma Abdulrahim S. Advocates on behalf of Ethics & Anti - Corruption Commission filed the written submissions dated 3<sup>rd</sup> October, 2023. M/s. Abdulrahim Advocate commenced their submissions by stating that the Petitioner filed this Petition together with the Notice of Motion dated 8<sup>th</sup> May, 2023 supported by the Affidavit of Sammy S.K. Mwaita sworn same date. The 2<sup>nd</sup> Respondent filed Grounds of Opposition dated 21<sup>st</sup> June 2023, Notice of Preliminary Objection dated 28<sup>th</sup> July 2023 and Replying Affidavit of Phillip G. Kagucia sworn 23<sup>rd</sup> August 2023 in opposition of the pleadings herein. The Petitioner's action was triggered by the Judgment delivered by this Honourable Court on 16<sup>th</sup> February 2023, in the case of:- "ELC (Mombasa) No. 168 of 2009 KACC - Versus - Bernsoft Limited & 2 others where the Court ordered the Petitioner and 2 other Defendants to jointly pay general damages and mesne profits for a sum of Kenya Shillings Thirty Million (Kshs. 30, 000, 000.00/=) to the Government for the loss of the user for the suit property covering all period of 22 years they had been in illegal possession and or occupation from the year 2002 to date with 60 days from the date of Judgment.
25. Further, the Court ordered the Petitioner as the then duly appointed Commissioner of Lands in the Ministry of Lands and Settlement, a public officer to personally pay a sum of Kenya Shillings Five Million (Kshs.5, 000, 000/=) for liability, abuse of office and breach of tort of Misfeasance in the Office. In the Petition, the Petitioner sought for the following main orders:-
- a. A declaration that your humble Petitioner's rights as enshrined in Articles 27 (1) and 28 of the Constitution of Kenya, 2010 have been violated and infringed by the Respondent.
  - b. A declaration that the actions of the Petitioner committed in the course of his then duties as the Commissioner of Lands were lawful and that the same binds all the arms of the Government.
  - c. A declaration that all third Parties who derived a benefit pursuant to the acts of the Petitioner in making grants and dispositions of Land and estates vested in the Government of Kenya acquired a good and unimpeachable title thereof.
  - d. A declaration that the 2<sup>nd</sup> Respondent herein had misapprehended the law and facts in bringing civil actions against the Petitioner in person to recover land and estates that were subject to grants and dispositions by the Petitioner while holding the public office of the Commissioner of Lands and discharging his duties.



- e. An order of permanent injunction to issue barring the 2<sup>nd</sup> Respondent from continuing to prosecute the suits filed against the Petitioner as a result of his actions when he was holding the office of Commissioner of Lands.
26. In addition, the Petitioner had filed an application seeking for the following main order at prayer 3:-
- That pending the hearing and determination of the Petition herein, the Honourable Court be pleased to issue conservatory stay orders barring and/or prohibiting the 2<sup>nd</sup> Respondent from proceeding to prosecute matters filed before the Environment and Land Court in which the Petitioner/Applicant is named as Defendant.
27. The Learned Counsel submitted that it was clear from the prayers sought from both the Petition and the Application was unprecedented, open ended, far reaching and indeterminate with respect to the number of suits affected. The Petitioner had also filed an application that a bench of uneven number of Judges in the Division be constituted to hear the Petition. Arising from the foregoing, it was the view of the 2<sup>nd</sup> Respondent that the following three (3) issues arise and call for determination:- Firstly, on whether the court has jurisdiction to hear and determine the Application for conservatory orders and the Petition. (See 2<sup>nd</sup> Respondent Notice of Preliminary Objection dated 28<sup>th</sup> July 2023). The Learned Counsel submitted that it had been said that jurisdiction was everything. Ideally, a court must decide the question in limine once raised. Being a jurisdictional question, the court must determine it preliminarily at the first opportunity.
28. On the question on jurisdiction, “the locus classicus’ on the subject is undoubtedly the case of “Owners of Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya)Ltd.1989 KLR”. Justice Nyarangi laid down the law in the following emphatic terms at page 9:-

“I think 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. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that that it is without jurisdiction.”

He went on to state at page 10;

“It is for this reason that a question of jurisdiction once raised by a party or by the court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

29. Further, the Learned Counsel referred Court to the case of: “Kenya *Hotel Properties Limited – Versus – Attorney General & 5 Others Supreme Court Petition No.16 of 2020*[2022] KESC 62(KLR)”, at paragraph 50 where it held that:-

“ on our part and this is trite law, jurisdiction is everything as denotes the authority or power to hear and determine judicial disputes. It was this court’s finding in R – Versus - Karisa



Chengo [2017]eKLR that jurisdiction is what grants a court authority to decide matters by holding:-

“By jurisdiction is meant authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may either as to the kind and nature of actions and matters which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristic....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decisions amounts to nothing. Jurisdiction must be acquired before judgment is given.”

30. She reiterated that the central questions for determination arising from the pleadings was whether or not a court has jurisdiction to determine matters pending in courts of concurrent jurisdiction. If the answer to the jurisdictional question raised is in the negative, then this court must down its tools as all the questions raised touch on matters pending in courts of concurrent jurisdiction.
31. The Learned Counsel averred that the Petitioner sought to usurp the functional and jurisdictional independence of the trial Judges. It aimed at causing the Court to determine over one hundred (100) cases that were pending trial and determination in competent courts of concurrent jurisdiction around the Country based on abstract, academic, selective and speculative facts and issues. Some of the cases involved were indicated in Paragraphs 16 of the 2<sup>nd</sup> Respondent Replying Affidavit. This Honourable Court was being asked to entertain and issue binding and far-reaching declarations in rem in respect of matters not before it, a jurisdiction which this Honourable Court never had.
32. The Learned Counsel contended that pursuant to the provision of Article 165 (6) and 165 (5) (b) and 162 of *the Constitution*, this Honourable Court lacked jurisdiction to hear this Petition. Article 165(6) and 165(5) (b) provides:-
  - (6) “The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial functions but not over a superior court”
  - (5) The High Court shall not have jurisdiction in respect of matters-(b) Falling within the jurisdictions of the courts contemplated in article 162(2)”
33. Additionally, the provision of Article 162 (1) defines ‘Superior courts are Supreme Court, Court of Appeal, High Court and the Courts mentioned in clause (2) which provides:
  - (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.”
34. To buttress on this point, the Learned Counsel referred Court to the case of “Kenya Hotel Properties Limited – Versus - Attorney General & 5 Others (supra)”, where the Supreme Court held that:-

“Superior courts could not grant orders to re-open or review decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves.



A court's jurisdiction flowed from either *the Constitution* or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by *the constitution* or other written law.”

35. It was the Learned Counsel's submission that this Honourable Court was “functus officio” and lacked jurisdiction to hear and review its own Judgment and that of other courts of concurrent jurisdiction over the same issue by way of this Petition. In so doing, it would be exercising supervisory powers over other courts of concurrent jurisdiction and would be in contravention of the provision of Article 165 (6) of *the Constitution* of Kenya, 2010. On this point, the Learned Counsel relied on the “Civil Appeal No. 239 of 2017 Bellevue Development Company Limited – Versus - Francis Gikonyo & 7 Others(Nairobi)” where the court opined that:-

“it was an abuse of the court process for a litigant to seek to obtain through a constitutional Petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceeding over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-litigate the matter through a Constitutional Petition or other originating proceedings. The Court further held that “High Court's Constitutional Division, indeed any other Division, cannot supervise any other superior courts of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of *the Constitution*”.

36. She affirmed that Courts respect the doctrine of ‘sub judice’ and ought not comment, much less, decide cases pending in courts of concurrent jurisdiction. For these reasons, she urged this court to decline the invitation which was made without jurisdiction and in violation of the very same constitution that the Petitioner was invoking.

37. Secondly, on whether the matter should be referred to the Chief Justice to Constitute a bench. The Learned Counsel contended that that the Petitioner herein had not met the threshold for this matter to be referred to the Chief Justice under the provision of Article 165(4) for consideration of appointment/ empanelment of a three (3) bench Judge for the following reasons:-

- a. The power to refer a suit to the Chief Justice for empaneling of uneven number of Judges under the provision of Article 165 (4) of *the Constitution* must be the exception and not a routine, usual and ordinary course of making judicial pronouncements. The reference of matters to the Chief justice for empanelment of uneven number of Judges to hear and determined this case imperiled the prudent and efficient use of judicial resources and violates the provision of Article 159 (2) (6) of *the Constitution*.
- b. The issues and facts raised in this Petition were not so complex or difficult to the extent that they could be said to raise a “substantial question of law” worthy of reference for settling up of a three (3) Judge bench.
- c. A High Court Judge had the authority under the provision of Article 165 of *the Constitution* to determine any matter within the jurisdiction of the High Court and for this matter. To support her argument, the Learned Counsel relied on the cases of:- “Wycliffe Ambetsa Oparanya & 2 others – Versus - Director of Public Prosecution & another [2016] eKLR” and “Peter Nganga



Muiruri – Versus - Credit Bank Limited & Another, Civil Appeal No. 203 of 2006”,where the court held:-

“that any single Judge of high court in this country has jurisdiction and power to handle a constitutional question. Therefore, the decision whether or not to certify the matter as rising a substantial question of law is an exercise of judicial discretion as opposed to a right. However, like all discretion, the power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes”.

38. According to the Counsel, the issues raised in the Petition herein were not substantial, novel or complex in nature as the same had been settled by the highest Courts. The Learned Counsel submitted that on “Petition No. 280 of 2017 Council of County Governors – Versus - Lake Basin Development Authority & 6 Others [2019] eKLR”, At paragraph 30 where the court held:-

“that if the question has been has been well settled by the highest court or the general principles to be applied in determining question before court has been well settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law”.

39. There are already ample judicial precedents and decision by both the Court of Appeal and the Supreme decided by three bench or more Judges on similar issues raised in this Petition. There was rich precedents in Kenya decided by different courts as enumerated herein above over issues raised in this Petition. It was Learned Counsel’s contention that empaneling this Petition to a bench of three judges to decide issues which could be dealt with by single Judge would burden judicial resources to the extent that the value of obtaining justice without delay under the provision of Articles 159(2) (b) would be imperiled. The Learned Counsel relied on principles set out in “Petition No. 74 of 2011 J. Harrison Kinyanjui – Versus - the Attorney General & Another [2012] eKLR”, and invited this Honorable Court to adopt the same and dismiss the Application for this Petition to be placed to the Chief Justice for appointment of a three bench judge to hear it.

40. Further, the Learned Counsel argued that it appeared that the Petitioner was under the impression that a bench consisting of more judges would have the capacity to overturn decisions of Judges of concurrent jurisdiction or disregard binding precedent by higher courts. No matter the number of Judges to hear the matter, their decision remained that of the Land and Environmental Court and it was bound by precedent from the Court of Appeal and Supreme Court.

41. Thirdly, on the issue of whether the orders in the application and Petition should be granted. The Learned Counsel posited that the Petition and application should not be allowed for the following reasons:-

- a. This Petition was seeking to overturn the binding precedent on personal liability of Commissioner of Lands issued by the Appellate Court in “Civil Appeal No. 183 of 2014 and EACC – Versus - Judith Marilyn Okungu & Another.
- b. The Petition further sought to overturn the binding precedents on illegality obtained titles to land issued by the “Supreme Court in Petition No. 37 of 2019, Pati Limited – Versus - Funzi Island Development Limited and 4 others and Petition No. 8 of 2021”,Where the Court held:-

“that statutory procedural safeguards which are imposed for the benefit of the persons affected by the exercise of administrative powers by a statutory body are normally regarded mandatory and the non-compliance with the mandatory



procedural requirements together with the breaches of law by the Commissioner of Lands renders the allocation ultra vires and the subsequent grant a nullity. The Courts held further that a registered proprietor acquires absolute and indefeasible title if and only if allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality and give it seal of approval to an illegal or irregularly obtained title.

42. The Petition herein sought to overrule the binding precedent set out in the case of “Dina Management Limited – Versus - County Government of Mombasa & 5 others”. In that case, the Court opined that:-

“ Court should nullify titles by land grabbers who stare at your face and wave to you a title of land grabbed and loudly plead the principle of indefeasibility of Title deeds.....the Constitution is the supreme law and a party cannot plea the principle of indefeasibility which is a statutory concept. Under.

Paragraph 108, the Court when further to opine that:-

“ We cannot on the basis of indefensibility of title sanction irregularities and illegalities in allocation of public land. The title is an end product to a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such title cannot be held as indefeasible and no valid legal interest could pass”.

43. It was the Learned Counsel’s submission that this Honourable Court could not through collateral challenge by way of this Petition, usurp the functions of Judges properly seized of the pending matters before different Land and Environment Courts within the Country.

44. Fourthly, on the question of personal liability of the Commissioner of Lands. The Learned Counsel cited the case by the Court of Appeal in “Civil Appeal No. 183 of 2014 Ethics and Anti-Corruption Commission – Versus - Judith Marilyn Okungu & Anoth”. Where it held:-

“ that where 1<sup>st</sup> Respondent is alleged to have exceeded here authority, acted in violation of the law and engaged in fraudulent acts in breach of her fiduciary, such illegalities are not only null and void, they can only attach personally to the 1<sup>st</sup> Respondent and she may be sued therefore.....There is ample authority to the effect that a person against whom fraud or illegality is alleged cannot escape personal liability (should the fraud or illegality be proved) on the basis that he was acting as an agent or servant of another. Indeed, government functionaries of whatever seniority are not immune from personal liability for unlawful acts such as deceit, fraud or contempt of court. See Standard Chartered – Versus - PNSC (supra) and MVs. Home Office & Ano. (Supra). The latter case locates personal liability at the heart of the rule of law and quotes Prof. Dicey in the following terms:

“When we speak of the rule of law as a characteristic of our country, [we mean] not only that with us no man is above the law, but [what is a different thing] that here every man , whatever be his rank or condition, is subject to ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us, every official, from prime minister down to a constable or a collector of taxes, is under the same responsibility for every act-done without legal justification as any other citizen. The report abound with cases in which officials have been brought



before courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out their commands of their official superiors, are responsible for any acts, which the law does not authorize, as is any private and unofficial person. See introduction to the study of the law of *the Constitution* (10th Edn, 1965 pp 193-194).

45. Additionally, in the case of:- “Civil Appeal No. 8 of 2014 at Nyeri, Henry Muthee Kathurima – Versus - Commissioner of Lands & Another [2015] eLKR” the Court of Appeal concurred with the decision of the trial Judge and held that the Commissioner of Lands had no power to alienate public land and any action taken without authorization is a nullity. The court went ahead and cited the case of “Said Bin Seif – Versus - Sharrif Mohamed Shatry (1940)(1)KLR9”, and reiterated that an action taken by the Commissioner of Lands without legal authority was a nullity; such action however technically correct, was a mere nullity and not only voidable, but void with no effect, either as legitimate expectation estoppel or otherwise.
46. The Learned Counsel further invited this Honourable Court to the decision by the three bench Judges in “Civil Appeal No. 185 & 186 of 2009 Kenya Anti-Corruption Commission – Versus - Bangra Limited & Sammy Silas Komen Mwaita [2009] eKLR”, where the court opined that:

“the President had no power to grant interest in unalienated Government Land and the delegated powers to Commissioner of Land are limited and that the enjoinder of the Commissioner of Land in the matter was necessary in the suit..... in the absence the suit will be a non-starter”.
47. The issues raised in this Petition and particularly the issue of breach of trust the Commissioner of Lands had fiduciary duty to protect public land but defied the trust was well settled in the case of:- “ELC Case no. 113 of 2008 at Kisii, Ethics and Anti-Corruption Commission – Versus - Joseph Oroko Ongera & Another [2021] eKLR”, “ELC Case no.156 of 2015 at Kitale, Ethics & Anti-Corruption Commission – Versus - Kapsoen Estates Limited & Another [2020] eKLR” and “ELC 168 of 2009, KACC – Versus - Bernsoft & 2 others”, “Civil Appeal No 183 of 2014 EACC – Versus - Judith Marilyn Okungu & Another [2017] eKLR” and “Mombasa ELC No.215 of 2009; KACC – Versus - Frann Investment and 6 others” where the issues of Commissioner of Lands being held personally liable for the breach of trust and abuse of the office in disposition of public government land were extensively discussed and decided.
48. The Learned Counsel further invited this Honourable Court the decision by the three bench judges in “Civil Appeal No.185 & 186 of 2009 Kenya Anti-Corruption Commission -Versus - Bangra Limited & Sammy Silas Komen Mwaita [2009] eKLR”, where the court opined that the President had no power to grant interest in unalienated Government Land and the delegated powers to Commissioner of Land are limited and that the enjoinder of the Commissioner of Land in the matter was necessary in the suit..... in the absence the suit will be a non-starter”.
49. Further to the foregoing it was the Learned Counsel’s argument that Petition herein was impropriety and grossly misconstrued as it attempted to re - open and re - litigate decided issues in original form through the subterfuge of clothing them in constitutional garb. The issue raised in this Petition had been extensively expounded and determined through a full trial in the Judgment of “ELC (Mombasa) No. Case No. 168 of 2009 KACC – Versus - Bernsoft and 2 Others” at Paragraphs No. 7, 29, 30, 31, 32, 33, 38, 39, 40, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 55, “ELC 97 of 2014, EACC – Versus



- Lekyo Tours & Company Limited & Sammy Silas Komen Mwaita”, and “Nakuru HCCC No. 43 of 2008 Kenya Anti-Corruption Commission – Versus - Sammy Silas Komen Mwaita” and “Mombasa ELC No. 170 of 2009, KACC – Versus - Romli Agencies Limited & Ano” just to mention but a few.

50. It was the Learned Counsel’s submission that the Gazette Notice No.4114 issued by the President of the Republic of Kenya on the 16<sup>th</sup> November 1965 never authorized the Petitioner and or any Commissioner of Lands or any Public Officer working in the Commissioner of Lands Office to issue grants, dispositions of any estates, interest or rights in or over public or government land that had been reserved for public utilities in the respective suit properties which were pending determination before the Honourable Court. Put differently, the Gazettenotice never conferred power on Commissioners of Lands which the President himself never had. The Learned Counsel also invited this Honourable Court to adopt the Principal set out in the case of “Petition 94 of 2005, Chemey Investment Limited – Versus - The Attorney General & 2 Others(Nairobi)” where the court at Paragraphs 64 and 64,66 held that:-

“*The Constitution* protects a higher value, that of integrity and rule of law.

64. These values cannot be side stepped by imposing legal binders based on indefeasibility.....
66. Under the *Anti-Corruption and Economic Crimes Act*, 2003 ( Act No. 2 of 2003) the Commissioner is empowered under section 7(h) “to investigate the extent of liability for the loss of or damage to any public property and (i) to institute civil proceedings against any person for the recovery of such property or for compensation. The exercise of this mandate by the Commission falls under section 75(60 of *the Constitution* and is consistent with what is reasonably justifiable in a democratic society.
68. These are matters that will be subjected to due process to verify the facts. In my opinion, it would be improper at this stage to grant the declaration sought even if I were so minded. To do so would be to grant a seal of approval on the acts of the applicant and other parties and removal of them from the purview of a lawful investigation by competent legal authorities’. *The Constitution* cannot be used to promote impunity. To grant the declarations in the originating summons would be to undermine *the constitution* itself.

51. In response to the invitation to prohibit the 2<sup>nd</sup> Respondent from bringing proceedings against the Petitioner, it was her averment that the 2<sup>nd</sup> Respondent is Constitutionally and statutorily empowered by provisions of the provision of Articles 22, 79, 252, 258 of *the Constitution* of Kenya and Section 11 (1) (d) (j) of the *Ethics and Anti-Corruption Commission Act* 2011, to conduct investigations and institute and conduct proceedings in court for purposes of the recovery and protection of public property. To bar the 2<sup>nd</sup> Respondent from exercising its right to access to justice in vindication of public interest would be to restrict its rights (and by extension, that of the public) to constitutionally guaranteed access to justice. Article 50 of *the Constitution* of Kenya provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate , another independent and impartial tribunal or body” ..... (e) “to have a trial that begin and conclude without unreasonable delay”.



52. In seeking to stop prosecution of cases involving persons who were not parties to this Petition, it would infringe on the constitutional right to expeditious determination of disputes. Article 159(2) (a)(b) provides:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principle:

- (a) Justice shall be done to all, irrespective of the status;
- (b) justice shall not be delayed;

53. The Learned Counsel further submitted that the Orders sought in the Petition violated the provisions of Article 249 (2) (a) & (b) and Article 252(1) (a) of the Constitution of Kenya. Article 249(2)(b) provides that the Commissions and independent offices:-

- (a) Are subject only to this constitution and the law; and
- (b) Are independent and not subject to direction and control by any person or authority.

Article 252 of *the constitution* of Kenya provides that:

SUBPARA (1)

Each Commission and each independent office...(a) May conduct investigations on its own initiatives or on a complaint made by a member of public.

54. The Learned Counsel opined that other than seeking to prohibit the 2<sup>nd</sup> Respondent from prosecuting the cases already filed involving the Petitioner, he had not addressed the following question:-

- a. Whether a court could prohibit a litigant from prosecuting cases pending in other courts.
- b. Once cases were instituted, did the court have any say in how the case proceeded or was determined? In other words, was merely issuing an order of prohibition against the 2<sup>nd</sup> Respondent sufficient to determine the pending cases?
- c. What happened to the cases pending all over the Republic once the prohibition orders issue? Could they be dismissed for want of prosecution if the Respondent never proceeded with the hearing in obedience to the orders of the court herein (assuming the court granted the orders)?
- d. What orders would issue in the specific cases pending in various courts in the Republic involving the Petitioner? Were they going to be marked as withdrawn, dismissed, settled, abandoned?
- e. What orders with respect to costs would be made in those cases where the 2<sup>nd</sup> Respondent had prohibited from prosecuting them?
- f. Assuming that an order of costs was made against the 2<sup>nd</sup> Respondent in those cases, would this not amount to being condemned without being heard?

55. The Learned Counsel asserted that in view of the above, the orders sought therein violated the above provision of *the Constitution* of Kenya and if allowed would implant a culture of impunity from liability whether civil or criminal and bring an end to efforts to recover public and Government land corruptly acquired. The said orders if allowed would undermine national values and principles of governance particularly the rule of law, good governance, integrity, transparency and accountability as envisaged in Articles of 10(2) (a) (c).



56. In conclusion, the Learned Counsel for the 2<sup>nd</sup> Respondent prayed that the Petition herein to be dismissed with costs to the 2<sup>nd</sup> Respondent. The Petitioner was at liberty to raise the issues he was raising in this Petition in the specific suits filed and if successful, he would be compensated by the award of costs. To prohibit the 2<sup>nd</sup> Respondent from exercising its asset recovery mandate in perpetuity as against the Petitioner would be to elevate unproven private interest above public interest. It was a recipe for impunity. It would result in permanent loss of corruptly acquired public and Government land.

## VII. Analysis & Determination.

57. I have carefully read and considered the pleadings herein by the Petitioner/Applicant and the Respondent, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

58. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has crystalized the subject matter into the following three (3) salient three two (2) framed issues for its determination. These are:-

- a. Whether the Notice of Preliminary objection dated 28<sup>th</sup> July, 2023 raised by the 2<sup>nd</sup> Respondent was merited based on Law and precedents?
- b. Depending on (a) above, whether the objection and the Notice of Motion dated 8<sup>th</sup> May, 2023 are merited;
- c. Who will bear the Costs for the application.

### **Issue No. a). Whether the Notice of Preliminary objection dated 28<sup>th</sup> July, 2023 raised by the 2<sup>nd</sup> Respondent was merited based on Law and precedents?**

59. Under this Sub – title, the Honourable Court as it is trite law grants Preliminary objects precedence over any other issue and in particular if its on issues of law – on the Jurisdiction of the Court. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.

60. According to the Black Law Dictionary, Preliminary Objection is defined as:-

“.....an objection that, if upheld, would render further proceedings before the tribunal (Court) impossible or unnecessary. An objection to the Jurisdiction of Court is an example of a preliminary Objection”.

Thus, in law, a preliminary objection may take various forms but it has to be determined on a case to case basis. As to its meaning, I am guided by the seminal case of “Mukhisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Limited (1969) EA 696”, where Sir Charles Newbold defined it as follows:-

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded



by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

61. Likewise, the Court in the case “Oraro – Versus - Mbaja [2005] eKLR 141”, on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

62. Additionally, the Supreme Court weighed in on the issue in “Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Ltd & 3 Others [2015] eKLR” and stated thus: -

“.... Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

63. Further, in the case of:- “John Musakali – Versus - Speaker County of Bungoma & 4 others (2015) eKLR” the validity of a preliminary objection was considered in the following manner: -

“..... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....”

64. Finally, in the case of:- “Omondi – Versus - National Bank of Kenya Limited & Others {2001} KLR 579; [2001] 1 EA 177”, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

“..... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....”

65. From the instant case, the objection has three limbs. It is vehemently contended that the Court lacks jurisdiction on the basis of the principles of Sub - Judice and Res – Judicata” and that the Petition is an abuse of the Court process. In the event of any of the limbs succeeding, the entire proceedings will stand terminated. Therefore, in view of the manner in which the objection is tailored, it comes out that



the objection rests purely on points of law and does not call for any evidence in its determination. It is this Court's finding that the Preliminary Objection passes the propriety test and the objection is for consideration.

66. On the propriety of the Petition, due to the unique nature of Constitutional petitions, courts since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of Petition.

10. An application under rule 4 shall be made by way of a Petition as set out in
    - (1) Form A in the Schedule with such alterations as may be necessary.
    - (2) The Petition shall disclose the following—
      - (a) the Petitioner's name and address;
      - (b) the facts relied upon;
      - (c) the constitutional provision violated;
      - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the Petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
      - (e) details regarding any civil or criminal case, involving the Petitioner or any of the Petitioners, which is related to the matters in issue in the Petition;
      - (f) the Petition shall be signed by the Petitioner or the advocate of the Petitioner; and
      - (g) the relief sought by the Petitioner.
67. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of Petitions. They provide as follows: -
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
  - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
68. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively. The Supreme Court in "Communications Commission of Kenya & 5 Others – Versus - Royal Media Services Limited & 5 Others [2014] eKLR" had the following on Constitutional Petitions:-

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru – Versus - Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been



contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

69. A perusal of the Petition shows that the Petitioner seeks for conservatory stay orders barring and/or prohibiting the 2<sup>nd</sup> Respondent from proceeding to prosecute matters filed before the Environment and Land Court in which the Petitioner/Applicant is named as Defendant. In the Petition, the Petitioner avers that he held the office of Commissioner of Lands (as he then was) between November 1999 and February 2003. Acting pursuant to his lawful mandate as the Commissioner of Lands and pursuant to various duties conferred to the office under various statutes thus the Petitioner/Applicant made several grants and dispositions of the Land and estates vested in the Government in favour of third parties throughout the Republic of Kenya. The 2<sup>nd</sup> Respondent herein has since and continue to file several suits against the Petitioner/Applicant before the Land and Environment Court seeking to recover land and estates which were lawfully alienated by the Petitioner/Applicant as per his mandate as the Commissioner of Lands alleging that the aforesaid alienation is tainted with fraud and was as a result of abuse of office and made in breach of public trust.
70. According to the 2<sup>nd</sup> Respondent, and rightfully so, the Petitioner's action was triggered by the Judgment delivered by this Honourable Court on 16<sup>th</sup> February 2023, in the Civil suit was “ELC (Mombasa) No. 168 of 2009 KACC – Versus - Bernsoft Limited & 2 others where the Court ordered the Petitioner and 2 other Defendants to jointly pay general damages and mesne profits for a sum of Kenya Shillings Thirty Million (Kshs. 30, 000, 000.00/=) to the Government for the loss of the user for the suit property covering all period of 22 years they had been in illegal possession and or occupation from the year 2002 to date with 60 days from the date of Judgment. The Court further ordered the Petitioner as the then duly appointed Commissioner of Lands in the Ministry of Lands and Settlement, a public officer to personally pay a sum of Kenya Shillings Five Million (Kshs.5, 000, 000.00/=) for liability, abuse of office and breach of Tort of Misfeasance in the Office. In the Petition, the Petitioner seeks the main orders as set out herein above. In addition, the Petitioner has filed an application seeking the following main order at prayer 3;

That pending the hearing and determination of the Petition herein, the Honourable Court be pleased to issue conservatory stay orders barring and/or prohibiting the 2<sup>nd</sup> Respondent from proceeding to prosecute matters filed before the Environment and Land Court in which the Petitioner/Applicant is named as Defendant.

71. The central questions for determination arising from the pleadings is whether or not a court has jurisdiction to determine matters pending in courts of concurrent jurisdiction. If the answer to the jurisdictional question raised is in the negative, then this court must down its tools as all the questions raised touch on matters pending in courts of concurrent jurisdiction.
72. A number of Courts hold that jurisdiction is everything and without it, the court must down its tools. In the case of the “Owners of Motor Vessel “Lilian S” (Supra) the court held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



73. I make reliance to the case of “Kenya *Hotel Properties Limited – Versus - Attorney General & 5 Others Supreme Court Petition No.16 of 2020*[2022] KESC 62(KLR)”, at paragraph 50 held that:

“on our part and this is trite law, jurisdiction is everything as denotes the authority or power to hear and determine judicial disputes. It was this court’s finding in R – Versus - Karisa Chengo [2017] eKLR that jurisdiction is what grants a court authority to decide matters by holding:-

“By jurisdiction is meant authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may either as to the kind and nature of actions and matters which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristic....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decisions amounts to nothing. Jurisdiction must be acquired before judgment is given.”

74. I totally concur with the Learned Counsel for the 2<sup>nd</sup> Respondent, the Petitioner seeks to usurp the functional and jurisdictional independence of the trial judges and determine over one hundred (100) cases that are pending trial and determination in competent courts of concurrent jurisdiction around the Country based on abstract, academic, selective and speculative facts and issues. Some of the cases involved are indicated in Paragraphs 16 of the 2<sup>nd</sup> Respondent Replying Affidavit. Additionally, this Honourable Court is being asked to entertain and issue binding and far-reaching declarations in rem in respect of matters not before it, a jurisdiction which this Honourable Court does not have. Therefore, to comment on, discuss and or hear and determine on them as proposed herein, would amount to engaging in sub judice.

75. The concept of Sub – Judice, as set out under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21, is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be offending the Doctrine of Res Judicata under Section 7 of the Civil Procedure, Cap. 21. The provision of Section 6 of the *Civil Procedure Act*, Cap. 21 bars any court from engaging in matters sub judice before them. It provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



76. Further, I fully agree with the Learned Counsel for the 2<sup>nd</sup> Respondent pursuant to the provision of Article 165(6), 165(5)(b) and 162 of *the Constitution*, this Honourable Court lacks jurisdiction to hear this Petition. The provision of Articles 165(6) and 165(5) (b) provides:-
- (6) “The High Court has supervisory jurisdiction over the sub - ordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial functions but not over a superior court”
77. Article 162 (1) defines ‘Superior courts are Supreme Court, Court of Appeal, High Court and the Courts mentioned in clause (2) which provides:-
- (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.”
78. In a recent decision, my brother Justice Mativo intensively discussed the concept sub judice. This was in “Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR” where he stated as follows:-
- “...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”
79. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in “Kenya National Commission on Human Rights -Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)”, stated therein as follows: -
- “(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
80. In this instant case, I have critically observed and noted that the parties in all the 100 civil cases instituted by the 2<sup>nd</sup> Respondent herein are all the same. This Petition is seeking to overturn the binding precedent



on personal liability of Commissioner of Lands issued by the Appellate Court, “Civil Appeal No. 183 of 2014, and EACC – Versus - Judith Marilyn Okungu & Another”.

81. It is obvious from the above that the sub – judice rule only applies where another “suit or proceeding is pending” in another Court involving the same parties or their privies over the same subject. What is clear however is that all the suits referred to by the 2<sup>nd</sup> Respondent to sustain a plea of sub – judice are still on going. They are still pending. The bar of sub – judice has therefore been properly invoked.

82. On the issue of the Doctrine of Res – Judicata”,as provided under the provision of: Section 7 of the Civil Procedure Act, Cap. 21 are as follows: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

83. Before a plea of res – judicata can properly be invoked to terminate a suit, the following must be established: -

- 1: The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits.
- 2: The former suit must have been between the same parties or parties under whom they claim.
- 3: The parties must have litigated under the same title.
- 4: The Court which decided the former suit must have been competent and; lastly,
- 5: The former suit must have been heard and finally decided by the Court in the former suit.

84. There have been divergent views as to whether or not the dismissal of a suit for want of prosecution can amount to res – judicata. In “Salem Ahmed Zaidi – Versus - Faud Humeidan 1960 E.A 92”, the Plaintiff’s case had been dismissed for non – attendance and a fresh suit was filed. The then East African Court of Appeal held that the latter suit was res – judicata because an order dismissing a suit has the same effect as a dismissal upon evidence and accordingly, the first suit must be deemed to have been heard and determined and therefore, the dismissal of the earlier suit operated as res – judicata.

85. The Court of Appeal took the same view in “Thomas K. Sambu – Versus - Paul K. Chepkwony (2018) eKLR” where it affirmed the reasoning in the case of “Salem Ahmed Zaidi (supra)” and said that the dismissal of a suit for non – attendance is in the nature of a final Judgment.

86. Undoubtedly, taking that what triggered this Petition was the proceedings, Judgment and Decree in the Civil Suit “ELC (Mombasa) No. 168 of 2009 KACC - Versus - Bernsoft Limited & 2 others” there will be need to critically assess the said case in order to inform the eventual decision herein. This Honourable Court adjudicated on it and hence delivered the Judgment therefore granting the Court full knowledge on its facts and all aspects of it. Thus the contention by the 2<sup>nd</sup> Respondent that this matter has already been determined by a competent court (itself) of the same jurisdiction vide Mombasa ELC 168 of 2009 is extremely factual and correct.

87. If the Petitioner was dissatisfied with the outcome of this Civil case - ELC No. 168 of 2009 whereby this Court ordered the Petitioner and 2 other Defendants to jointly pay general damages and mesne profits for a sum of Kenya Shillings Thirty Million (Kshs. 30,000, 000.00/=) to the Government for the loss of the user for the suit property covering all period of 22 years they had been in illegal possession



and or occupation from the year 2002 to date with 60 days from the date of judgment, then it should have preferred an appeal and not file another suit.

88. From the proceedings and the decree, clearly, this is a case that falls on all fours within “The Doctrine of Res – Judicata”. I cannot think of any other aspect fitting into the ingredients of “Res – Judicata” as in the instant Petition. I seek refuge from the case of “Henderson – Versus - Henderson (1843) 67 ER 313” where res-judicata was described as follows:-

“.....where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.

89. Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.

90. Be that as it may, I strongly hold that the petitioner has failed to meet the threshold to oblige to his prayers for causing it to refer it to the Chief Justice for empanelment of a three Judge bench to deliberate on the Petition under the provision of Article 165(4) of *the Constitution* of Kenya, 2010. In saying so, I hold that:-

- a. The Petition is not an exceptional case. It is not so complex or difficult to the extent that they could be said to raise a “substantial question of law” worthy of reference for settling up of a three (3) Judge bench.
- b. On the contrary, the Petition and other 100 related court cases instituted by the 2<sup>nd</sup> Respondent herein raises routine, usual and ordinary course of making judicial pronouncements.
- c. There will be need to save on judicial resources. Such a decision will imperil the prudent and efficient use of judicial resources and violate the provision of Article 159 (2) (6) of *the Constitution*.

91. Juxtapose, on the other hand, I observe that through this Petition, the Petitioner seems to be seeking to usurp the functional and jurisdictional independence of the trial Judges. It aims at causing the Court to determine over one hundred (100) cases that were pending trial and determination in competent courts of concurrent jurisdiction around the Country based on abstract, academic, selective and speculative facts and issues. Some of the cases involved were indicated in Paragraphs 16 of the 2<sup>nd</sup> Respondent Replying Affidavit. This Honourable Court was being asked to entertain and issue binding and far-reaching declarations in rem in respect of matters not before it, a jurisdiction which this Honourable Court never had.

92. Hence, I find that this suit is res judicata and an abuse of the court process. This Honourable Court was “functus officio” and lacked jurisdiction to hear and review its own Judgment and that of other courts



of concurrent jurisdiction over the same issue by way of this Petition. In so doing, it would be exercising supervisory powers over other courts of concurrent jurisdiction and would be in contravention of the provision of Article 165 (6) of *the Constitution* of Kenya, 2010. For these reasons, I discern that the preliminary objection has merit and hence upheld. Petitioner's case must be dismissed with costs.

**Issue No. b). Depending on (a) above, whether the objection and the Notice of Motion dated 8<sup>th</sup> May, 2023 are merited.**

93. Under this sub title we will examine whether this Honourable Court should examine the Notice of Motion application dated 8<sup>th</sup> May, 2023. Upon perusal of the pleadings and submissions filed in respect of the instant application, I find that the sole issue for my determination would be whether the Applicant has met the threshold for grant of conservatory orders. This threshold was established by the Supreme Court in the case of "Gatirau Peter Munya – Versus - Dickson Mwenda Kithinji & 2 others [2014] eKLR" as follows:

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

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

- (iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*."

94. But due to the fact that I have already determined above that the application and Petition dated 8<sup>th</sup> May, 2023 is sub judice and res judicata, I will not indulge in the merits of the same. As it is that Notice of Motion dated 8<sup>th</sup> May, 2023 is dismissed for want of jurisdiction.



**Issue No. c). Who bears the costs of the Notice of Preliminary Objection dated 28<sup>th</sup> July, 2023, the Notice of Motion dated 8<sup>th</sup> May, 2023 and the Petition dated 8<sup>th</sup> May, 2023.**

95. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
96. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion of awarding the 2<sup>nd</sup> Respondents with the costs of the Notice of Preliminary objection dated 28<sup>th</sup> July, 2023, the Notice of Motion dated 8<sup>th</sup> May, 2023 and the Petition dated 8<sup>th</sup> May, 2023 to be paid by the Petitioner.

**VIII. Conclusion & Disposition**

97. Ultimately, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience and in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at and makes the following orders:-
- a. That the Notice of Preliminary objection dated 28<sup>th</sup> July, 2023 has merit and hence be and is hereby upheld.
  - b. That the Notice of Motion application dated 8<sup>th</sup> May, 2023 be and is hereby dismissed in its entirety.
  - c. That the Petition dated 8<sup>th</sup> May, 2023 be and is hereby dismissed for offending the Doctrine of Sub - Judice, Res - Judicata” contrary to the provision of Sections 6 and 7 of the *Civil Procedure Act*, Cap. 21 and for the lack of jurisdiction by the Honourable court as founded under the provisions of Article 162 (2) (b) & 159 (1) & (2) of *the Constitution* of Kenya, 2010; Sections 3 & 13 of the Environment & Land Court Act, No. 19 of 2011; Sections 101 of the *Land Registration Act* No. 3 of 2012 and Section 150 of *Land Act*, No. 6 of 2012 respectively.
  - d. That the 2<sup>nd</sup> Respondents shall have the costs of the Notice of Preliminary objection dated 28<sup>th</sup> July, 2023, the Notice of Motion dated 8<sup>th</sup> May, 2023 and the Petition dated 8<sup>th</sup> May, 2023 to be paid by the Petitioner.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 12<sup>TH</sup> DAY OF MARCH 2024.**

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**HON. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Ruling delivered in the presence of:**



- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. T. K Ruto Advocate for the Petitioner/Applicant.
- c. M/s. Abdulrahim Advocate for the 2<sup>nd</sup> Respondent

