



Speaker of the National Assembly v Mombasa Cement Limited & 4 others (Civil Appeal 100 of 2019 & E021 of 2020 (Consolidated)) [2023] KECA 33 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KECA 33 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 100 OF 2019 & E021 OF 2020 (CONSOLIDATED)
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 20, 2023**

BETWEEN

SPEAKER OF THE NATIONAL ASSEMBLY APPELLANT

AND

MOMBASA CEMENT LIMITED 1ST RESPONDENT

MINISTRY OF LANDS & PHYSICAL PLANNING 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

VIPINGO ESTATE LIMITED 5TH RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E021 OF 2020**

BETWEEN

SPEAKER OF THE NATIONAL ASSEMBLY APPELLANT

AND

MOMBASA CEMENT LIMITED 1ST RESPONDENT

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VIPINGO ESTATE LIMITED 5TH RESPONDENT



(An appeal from the Ruling of the High Court of Kenya at Mombasa (A. Omollo J.) delivered on 24th April 2019 in Mombasa ELC Petition No. 17 of 2018 and An appeal from the judgment of the Environment & Land Court of Kenya at Mombasa (Munyao Sila J.) delivered on 29th April 2020 in Mombasa ELC Petition No. 17 of 2018)

The National Assembly’s oversight role does not extend to overturning the decision of the National Land Commission.

The main issue before the court was whether the National Assembly could review the National Land Commission’s decision in exercise of its oversight powers. The Court of Appeal held that while the National Assembly could investigate complaints about the processes of decision making by the National Land Commission and make recommendations thereon, its oversight role did not extend to reviewing and altering quasi-judicial decisions made by the National Land Commission, which was a separate function of courts through an impartial and independent process, as a continuum of the system of checks and balances set out in the Constitution. The trial court did not err in finding that the National Assembly’s oversight role did not extend to overturning the decision of the National Land Commission.

Reported by John Ribia

Constitutional Law – independent commissions – alleged oversight by Parliament over independent commissions – National Assembly vis-à-vis the National Land Commission - whether the National Assembly was precluded from exercising its powers under article 95 of the Constitution with respect to land disputes determined by the National Land Commission - whether the functions of the National Land Commission to receive complaints on, and investigate historical land injustices and disputes were exclusive, and prevented the National Assembly from addressing a complaint raised by a Member of Parliament - whether the National Assembly could review the National Land Commission’s decision in exercise of its oversight powers - Constitution of Kenya, articles 1, 10, 25(c), 40, 42, 50(1), 67, 68, 69, 70, 95, 95(2), 95(5)(b); 118, 119, 124, 124(1), 125, 159, 159(2)(c), 162, 162(2)(b), 165(5), 165(6), 188, and 249; National Land Commission Act (Cap 281) section 14; National Land Commission (Review of Grants and Dispositions of Public Lands) Regulation, 2017 (cap 281) regulation 30.

Jurisdiction – jurisdiction of the Environment and Land Court – jurisdiction to determine constitutional petitions about matters incidental to land - whether the Environment and Land Court had jurisdiction to hear and determine a dispute on whether the National Assembly could exercise its oversight powers to review decisions by the National Land Commission – Constitution of Kenya, articles 162(2)(b), 165(5), and (6); Environment and Land Court Act (cap 8D) section 13.

Civil Practice and Procedure – joinder of parties – misjoinder/non joinder – effect of misjoinder in a constitutional petition - whether a constitutional petition could be defeated by the non-joinder or mis-joinder of a party - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Sub Leg) rule 5(b), and 7(2).

Words and Phrases – abuse of process - the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope - Black’s Law Dictionary, Tenth Edition.

Words and Phrases - constitutional question - a legal issue resolvable by the interpretation of a constitution, rather than by statute - Black’s Law Dictionary, Ninth Edition.

Brief facts

The two appeals that were central to the instant judgment, both initiated by the National Assembly (the appellant) and stemmed from a petition filed by Mombasa Cement Limited (the 1st respondent) at the Environment and Land Court (ELC) in Mombasa. The ELC made a decision that the National Assembly and its Committees, including the Departmental Committee on Lands, did not have power to review grants and dispositions of public land, that power being vested in the National Land Commission (subject to the



limitations in section 14 of the National Land Commission Act). The ELC also held that the National Assembly and its Committees, including the Departmental Committee on Lands, did not have power to hear disputes over title to land, or make decisions on who had good title or the right to occupy land.

Aggrieved the National Assembly filed the instant appeals. The first was an interlocutory appeal against an ELC ruling delivered on April 24, 2019, which denied the appellant's request to set aside conservatory orders or alternatively strike out the petition filed by the 1st respondent. The second appeal was an appeal against the final judgment by the ELC which was based on grounds that the ELC did not have the jurisdiction to determine the matter, that the ELC erred in law in finding that the National Assembly did not have powers to review decisions of the National Land Commission.

Issues

- i. Whether a constitutional petition could be defeated by the non-joinder or mis-joinder of a party.
- ii. Whether the Environment and Land Court had jurisdiction to hear and determine a dispute about whether the National Assembly could exercise its oversight powers to review decisions by the National Land Commission.
- iii. Whether the National Assembly was precluded from exercising its powers under article 95 of the Constitution with respect to land disputes determined by the National Land Commission.
- iv. Whether the functions of the National Land Commission to receive complaints on, and investigate historical land injustices and disputes were exclusive, and prevented the National Assembly from addressing a complaint raised by a Member of Parliament.
- v. Whether the National Assembly could review the National Land Commission's decision in exercise of its oversight powers.

Held

1. The role and duty of the first appellate court was one of reviewing the cases that were before the Environment and Land Court (ELC), and evaluating the ELC's decisions in light of the evidence that was adduced before it and the applicable law.
2. The 1st respondent's notice of cross appeal and grounds affirming the decision dated November 21, 2019. The 1st respondent's grounds for affirming the decision of showed that they were not strictly the grounds envisaged by rule 94 of the Court of Appeal Rules, as they did not raise any different or additional grounds other than those given by the ELC in its ruling of April 24, 2019. They were in effect the same grounds set out in the ruling being urged in opposition to the appeal. The court considered the grounds as part of the 1st respondent's response to the interlocutory appeal.
3. Many of the grounds from the 1st respondent's notice of cross-appeal did not challenge or seek to vary or reverse the ruling or part of the ruling of the ELC appealed against. In particular, the ground raised in the cross- appeal that there was no appeal against orders issued by consent on June 27, 2019 could not lie, as the orders were issued after the delivery of the ruling appealed against on April 24, 2019, and were not and could not be a ground in the interlocutory appeal. The ground that the appellant had failed to take essential steps as provided in rule 90 (1) of the Court of Appeal Rules of not serving the 1st respondent with the memorandum and record of appeal within 7 days was challenging the propriety of the appeal and was not competently raised, as the said rules required the 1st respondent to apply for the striking out of the said memorandum and record of appeal within thirty days of service, and it did not do so.
4. The only ground in the notice of cross-appeal which the court could determine was the one alleging that the appellant's interlocutory appeal was defective to the extent that it challenged the orders made on December 5, 2018 on the amendment of the 1st respondent's petition, when there was no notice of appeal filed against the said order. That was not an issue addressed by the ruling appealed against, it shall be deemed as part of the 1st respondent's response in opposition to the interlocutory appeal, which was a preliminary issue touching on the propriety of the interlocutory appeal.



5. The ELC did not err in finding that the matter was not *res judicata* and that determination of the petition would be an academic exercise. The orders of amendment of the 1st respondent's petition to disclose the previous suit were subsisting and had not been set aside, and the appellant's grounds of non-disclosure were overtaken by events. The appellant expressly pleaded and relied on the existence of a previous petition and a pending appeal on the same subject matter as the demonstration of abuse of process of court. The trial court could not be faulted for interrogating whether the previous petition dealt with the merits of the case. It was, on the contrary, necessary to do so as to determine if the suit before it was *res judicata* and an abuse of the process of court.
6. The fact that the pending appeal was subsequently withdrawn, and the effect therefore was that there was no pending appeal as at the time the trial court delivered the impugned ruling was a non-issue. The interlocutory appeal lacked merit.
7. Rule 5 (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provided that a petition should not be defeated by reason of misjoinder or non-joinder of parties and the court may deal with the matter regardless. Order 1 rule 9 of the Civil Procedure Rules had similar provisions that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as it regarded the rights and interests of the parties actually before it. The prejudice that was alleged to have been suffered by not being granted an opportunity to be heard, Bambani Kilio had the option of filing a suit in the appropriate court as regarded their claim, and the doors of justice were therefore not closed to it.
8. Disputes involving the environment and land were likely to arise in various forms of litigation, including by way of civil suits, constitutional petitions, judicial review applications, and by originating summons, and the ELC was in that respect granted broad jurisdiction to hear all disputes and any other dispute relating to the environment and land by article 162 (2) (b) of the Constitution.
9. The main determinant of whether a matter should be heard as a constitutional petition or by ordinary suit was whether there was a constitutional question raised by a dispute. Where that legal issue that required interpretation of the Constitution was one that related to environment and land, it followed that the ELC would have jurisdiction to entertain that constitutional question.
10. The actions and decisions whose constitutionality were in question in the subject suit before the ELC were the recommendations made by the National Assembly in the report on Ownership of Mombasa Cement Limited land in Kilifi County, and the decisions made by Cabinet Secretary of the 2nd respondent in implementing the said report. The subject of the said report and decisions were the suit properties, which were registered in the 1st respondent's name, and that the 3rd respondent had already made a finding to that effect, which was also the subject of inquiry by the appellant. The complaint before the National Assembly was by parties laying rival claims to the suit properties. It was difficult to fathom and appreciate the appellant's argument that that was not a dispute relating to title to land, and specifically the 1st respondent's title to land.
11. The appellant's position that the dispute solely involved an interpretation of the National Assembly's powers vis-a-vis the National Land Commission's powers was also not valid, as that was merely one of the grounds for challenging the impugned report and decisions, and which, irrespective of the manner of its resolution, would at the end of the day still affect the 1st respondent's title to the suit properties. The constitutionality or otherwise of the actions and processes undertaken by the National Assembly in that respect were material facts giving rise to the dispute, not in isolation, but ancillary to the decisions made as regarded the subject property.
12. The appellant did not demonstrate how any of its functions were interfered with by the ELC. All that the ELC did was to determine the constitutionality of its report and recommendations, which was the preserve and proper role of the of courts. The ELC did not err in assuming jurisdiction to hear the



- 1st respondent's amended petition, nor was its intervention inimical to the doctrine of separation of powers.
13. Article 67 of the Constitution, which established the National Land Commission, article 252(1) also granted general powers and functions to constitutional commissions to conduct investigations on their own initiative or upon complaints by members of the public, while section 14 of the National Land Commission Act granted powers to the Commission to, within five years of commencement of the Act and on its own motion or upon a complaint by the national or a county government, community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
 14. Article 68 of the Constitution also gave powers to Parliament to enact legislation on land. Article 95(2) expressly provided for the deliberative role of the National Assembly in exercising its representative function on behalf of the people of Kenya. In addition, public participation in the sittings and functions of the National Assembly and its committees was required by article 118, and article 119 provided that a person had a right to petition Parliament to consider any matter within its authority. The National Assembly was accordingly granted investigative powers as a consequence of that political responsibility and also for purposes of collecting information in order to judge the government's effectiveness of state organs and had powers to call for evidence under article 125 of the Constitution. The National Assembly Standing Orders 216(5)(j) provided that departmental committees could examine any question raised by its members on any matter relating to their mandate.
 15. Both the National Assembly and National Land Commission had a constitutional role and overlapping powers to receive and investigate complaints from the people of Kenya. There was no constitutional infraction committed by the National Assembly in receiving and considering the complaint from the Member of Parliament for Kilifi North Constituency, irrespective of the fact that the subject matter of the complaint was in relation to land, and had been addressed by the National Land Commission.
 16. Methods of resolution of land disputes were varied, including non-judicial methods and alternative dispute resolution methods such as mediation and arbitration, which also applied to land disputes and were expressly encouraged by the Constitution in article 159(2)(c). Disputes over boundaries of counties, which were to be determined by an independent commission and resolution by the National Assembly under article 188. Notwithstanding that under article 159(1) judicial authority vested in and was exercisable by the courts and tribunals established under the Constitution. The court did not prescribe to the position held by the ELC that it was only the National Land Commission and courts that had a monopoly over resolution of all types of land disputes. Courts must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance where there existed alternative methods of dispute resolution.
 17. The court was hesitant to uphold the finding by the learned trial court that the National Assembly and its Committees could not utilise their deliberative or oversight role to entertain disputes over land. That position needed to be qualified, so as not to unnecessarily fetter the powers of the National Assembly and administrative agencies that may have a role to play in dispute resolution in land matters, and further clarified in terms of the type and manner of interventions that could be made by the National Assembly in the specific circumstances of the appeal.
 18. The National Assembly was performing a political and deliberative role specifically provided for by the Constitution under article 95(2) of the Constitution when receiving and considering the complaint made by the Member of Parliament for Kilifi North Constituency, so as to provide representation and services to the electorate that they were directly accountable to. Therefore, its core function arose from its status as an elected assembly, and was to investigate, deliberate, inform and make recommendations on important political problems and public issues affecting the electorate, in the interests of democratic governance and accountability. The National Land Commission on its part was also performing its functions of investigating and scrutinizing the 1st respondent's title in the context of its constitutional



- powers, and also in light of the objectives of constitutional commissions set out in article 249 of the Constitution, namely protecting the sovereignty of the people, securing observance of democratic values and principles and promoting constitutionalism.
19. The design of the constitutional commissions in the Constitution was aimed at granting the said commissions a clear constitutional and independent mandate in a fairly technical and specialized area; to secure their sources of funding; and provide suitable and balanced appointment, tenure and support mechanisms, so as to ensure good ethical leadership. The objective in that regard was to enable the commissions independently monitor their area of expertise, and be watchdogs over other state agencies in a depoliticized, impartial and professional manner.
 20. The Constitution had granted the National Assembly and National Land Commission overlapping functional powers and roles when it came to investigation of complaints, including on land matters, but in so doing, article 1 of the Constitution required the two institutions to perform their functions in accordance with the Constitution, and to observe the national values and principles of governance under article 10. In resolving this functional overlap, it was necessary for each institution to delineate its core function that corresponded to its constitutional role and for which it was the primary actor; to respect powers and roles granted to other institutions in relation to the same function and any constitutional controls that may exist over its core function; and to avoid unnecessary or unwarranted intrusion into the roles and powers accorded to other, and especially more competent institutions in that respect.
 21. While it was perfectly within the political and deliberative role of the National Assembly to receive and consider the complaint made by a Member of Parliament regarding the 1st respondent's ownership of the suit properties, and to accept an invitation by the Member of Parliament to visit his constituency and interrogate the land matters therein; in so doing, it was required to acknowledge the limits of its role and competencies, in light of the nature of the complaint and dispute that was before it, and the role of other agencies in the resolution of the complaint. In this particular instance, the National Land Commission had already investigated a similar complaint and made a decision on the 1st respondent's ownership of the suit properties. The National Assembly ought to have recognized that the complaint before it involved a dispute as regards ownership of land and the propriety of the 1st respondent's title to the suit properties, and made appropriate recommendations that accord with and take into account the constitutional roles and functions accorded to the relevant state organs and agencies.
 22. The core function of resolving disputes regarding title to land, and the attendant adjudicative role was not one of the functions of the National Assembly under article 95 of the Constitution, and was a function and role primarily given to the courts and tribunals established under the Constitution by article 159. The main distinguishing factor between judicial resolution of disputes and other forms of dispute resolution was that it was only the courts that had the power to construe and apply the law to controversies and disputes, and make binding and final authoritative decisions on the controversies, and on the enforcement of the applicable law. That was essentially what the National Assembly purported to do in its impugned report and recommendations, and purported to bestow enforcement powers on the National Land Commission and the Cabinet Secretary in the Ministry of Lands and Housing in the process. The trial court did not err in his findings in that regard.
 23. Article 95(5)(b) of the Constitution which provided that one of the roles of the National Assembly was to exercise oversight of State organs, which state organs were defined under article 260 as a commission, office, agency or other body established under the Constitution. The framework of checks and balances therefore required commissions and independent offices to restrain the arms of Government and other State organs, and vice versa.
 24. The National Land Commission had already undertaken its functions of reviewing the 1st respondent's title at the time of the impugned actions and decisions by the appellant, and the question of interference with the commission's independence during this process was therefore moot. The



- relevant question was whether the decision arising from the due performance of the National Land Commission's functions could be reviewed by the National Assembly in the exercise of its oversight powers.
25. The nature of oversight envisaged by article 95(5) of the Constitution was the review by the National Assembly of the activities of state organs, so as to ensure that they were achieving expected results; representing good value for money; and were in compliance with applicable policies, laws, regulations, and ethical standards. Specifically, for constitutional commissions, article 254 of the Constitution provided that the Commissions shall submit a report of their activities to the President and Parliament at the end of every financial year, or on any issue as requested, which reports were tabled before the relevant departmental committee of the National Assembly for consideration under Standing Order 216(5)(i).
 26. The decision made by the National Land Commission that was the subject of the National Assembly's investigation and oversight was a quasi-judicial decision and not a routine administrative decision, and to which elaborate procedures applied under section 14 of the National Land Commission Act. In addition, the processes of reviewing and overturning administrative, quasi-judicial and statutory decisions were laid down either by the applicable parent statute, the Fair Administrative Action Act and the Constitution, by way of review or appeal mechanisms. No such role was granted to the National Assembly under the National Land Commission Act, Fair Administrative Action Act or the Constitution. Various statutes reserved the role of review at the first instance to the Cabinet Secretary or other administrative officer in the parent Ministry and Tribunals, and article 165(6) the Constitution and section 7 of the Fair Administrative Action Act reserved the supervisory role and jurisdiction over all persons and bodies exercising administrative and quasi-judicial functions to the courts.
 27. While the National Assembly could investigate complaints about the processes of the decision making by the National Land Commission and make recommendations thereon, its oversight role did not extend to reviewing and altering quasi-judicial decisions made by the National Land Commission's, which was a separate function of courts through an impartial and independent process, as a continuum of the system of checks and balances set out in the Constitution. The trial court did not err in finding that the National Assembly's oversight role did not extend to overturning the decision of the National Land Commission.

Appeal partly allowed.

Orders

- i. *The appellant's interlocutory appeal in Mombasa Civil Appeal 100 of 2019 was dismissed in its entirety with costs to the 1st respondent.*
- ii. *The appellant's substantive appeal being Mombasa Civil Appeal E021 of 2020, was found to be partially merited, only to the extent of the following orders:*
 1. *Order (iii) of the judgment that was delivered on April 29, 2020 by the Environment and Land Court in Mombasa ELC Petition No 17 of 2018 that the National Assembly and its Committees, including the Departmental Committee on Lands, did not have power to review grants and dispositions of public land, that power being vested in the National Land Commission (subject to the limitations in section 14 of the National Land Commission Act) and to the courts was set aside, and substitute therefore the following order:*
 - i. *That the exercise of the powers under articles 95(2), and 95 (5)(b) of the Constitution by the National Assembly and its Committees, including the Departmental Committee on Lands, with respect to disputes over grants and dispositions of public land were subject to, and did not include the constitutional powers and functions vested in the National Land Commission and the courts pursuant to articles 67, 159(1), 162(2)(b) and 165(6) of the Constitution.*



2. *Order (iv) of the judgment delivered on April 29, 2020 by the Environment and Land Court in Mombasa ELC Petition No 17 of 2018 that the National Assembly and its Committees, including the Departmental Committee on Lands, did not have power to hear disputes over title to land, or make decisions on who had good title or the right to occupy land was set aside, and substitute therefore the following order:*
 - i. *That the exercise of the powers under articles 95(2), and 95 (5)(b) of the Constitution by the National Assembly and its Committees, including the Departmental Committee on Lands, with respect to disputes over title to, use and occupation of land were subject to, and did not include the constitutional powers and functions vested in the courts pursuant to articles 159(1), 162(2)(b) and 165(6) of the Constitution.*
- iii. *All the other declarations and orders by the Environment and Land Court in orders (i), (ii), (v), (vi), (vii), (viii), (ix), (x) and (xi) of the judgment delivered on April 29, 2020 in Mombasa ELC Petition No 17 of 2018 were affirmed and upheld, save to the extent that they may have been modified or qualified by the findings made in the instant judgment.*

Citations

Cases

1. Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (Civil Appeal 161 of 1999; [2013] KECA 208 (KLR); [2013] eKLR) — Followed
2. Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (Petition 3 of 2016; [2019] eKLR) — Followed
3. Attorney General & 2 others v Okiya Omtata & 14 others (Civil Appeal 621 of 2019; [2020] KECA 30 (KLR); [2020] eKLR) — Mentioned
4. Aviation & Airport Workers Union(K) v Kenya Airports Authority & another ([2014] eKLR) — Mentioned
5. Christopher Ngusu Mulwa & 28 others v County Government of Kitui, Julius Malombe & National Land Commission (Environment & Land Case 63 of 2017; [2017] KEELC 2271 (KLR); [2017] eKLR) — Mentioned
6. Daniel Maingi Muchiri v Jubilee Insurance Company Ltd (Civil Appeal Appeal138 of 2016; [2017] KECA 114 (KLR)) — Followed
7. Daniel N Mugendi v Kenyatta University, Benson I Wairegi, Eliud Mathiu & Olive M Mugenda (Civil Appeal 6 of 2012; [2013] KECA 41 (KLR); [2013] eKLR) — Followed
8. In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011; [2011] eKLR) — Followed
9. In the Matter of the Speaker of the National Assembly ([2013] eKLR) — Mentioned
10. In the Matter of the Speaker of the Senate & Senate of the Republic of Kenya (Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR) — Followed
11. Isacko Pius Malicha, Mary Luka Lemerelle & Peter Letiyon Leituro v National Land Commission, Chief Land Registrar & Marsabit Pastors Fellowship (Environment & Land Case 27 of 2017; [2019] KEELC 2988 (KLR); [2019] eKLR) — Mentioned
12. JMK v MWM & MFS (Civil Appeal 15 of 2015; [2015] KECA 524 (KLR); [2015] eKLR) — Mentioned
13. Judicial Service Commission v Speaker of the National Assembly and 8 others (Petition 518 of 2013; [2014] eKLR) — Mentioned
14. Katiba Institute v Attorney General & 9 others (Petition 17 (E017) of 2020; [2021] KESC 25 (KLR); [2020] eKLR) — Mentioned
15. Kipsiwo Community Self Help Group v Attorney General And 6 Others (Environment & Land Case 9 of 2013; [2013] KEELC 63 (KLR); [2013] eKLR) — Mentioned



16. Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (Civil Appeal 287 of 2016; [2017] KECA 231 (KLR); [2017] eKLR) — Followed
17. Leiyagu, Richard Ncharpi v Independent Electoral Boundaries Commission, Ismael Hashimi, Mathew Kipeme Lempurkel (Election Petition 18 of 2013; [2013] KECA 282 (KLR); [2013] eKLR) — Mentioned
18. Mombasa Cement Limited v Speaker, National Assembly & Attorney General (Petition 177 of 2015; [2018] KEHC 5197 (KLR); [2018] eKLR) — Mentioned
19. National Gender & Equality Commission (NGEC) v Independent Electoral and Boundaries Commissions (IEBC) & 3 others (Petition 409 of 2017; [2018] eKLR) — Mentioned
20. Nderitu, James Kanyiita & Hellen Njeri Nderitu v Marios Philotas Ghikas & Mohammed Swaleh Athman (Civil Appeal 6 of 2015; [2016] KECA 470 (KLR); [2016] eKLR) — Mentioned
21. Nguruman Limited v Shompole Group Ranch & Ol Kiramatian Group Ranch (Civil Application 90 of 2013; [2014] KECA 358 (KLR); [2014] eKLR) — Followed
22. Okiya Omtatah Okoiti v National Executive of the Republic of Kenya, Public Service Commission, Attorney General, Chief Justice of Kenya, National Assembly & Margaret Nyangate Nyakangó; Katiba Institute (KI), Consumers Federation of Kenya (COFEK), Law Society of Kenya & Controller of Budget (Interested Parties) (Petition 235 of 2019; [2020] KEELRC 749 (KLR); [2020] eKLR) — Mentioned
23. Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) (Civil Appeal 50 of 1989; (1989) 1 KLR; [1989] eKLR) — Mentioned
24. Pankaj Transport PVT Limited v SDV Transami Kenya Limited (Civil Case Case 162 of 2014; [2018] KEHC 7744 (KLR); [2018] eKLR) — Mentioned
25. Patrick Musimba v National Land Commission, Kenya Railways Corporation, National Environment Management Authority, Attorney General & China Road Bridge and Construction Company (? 126 of 2014; [2014] KEHC 1157 (KLR); [2015] eKLR) — Mentioned
26. Republic v District Land Adjudication And Settlement Officer, Igembe District Ex-Parte M'aciita M' mingaine & Regina Kailu (Miscellaneous Civil Application 32 of 2011; [2016] KEHC 5056 (KLR); [2016] eKLR) — Mentioned
27. Republic v Land Registrar, Mombasa & 2 others Ex parte Bhangra Limited (Miscellaneous Civil Application 132 of 2010; [2012] KEHC 1223 (KLR); [2012] eKLR) — Followed
28. Republic v National Land Commission Ex-parte Holborn Properties Limited (Judicial Review 5 of 2015; [2016] KEELC 941 (KLR); [2016] eKLR) — Mentioned
29. Republic v Speaker of the National Assembly & 4 Others ex parte Edward R.O. Ouko (Miscellaneous Application 108 of 2017; [2017] eKLR) — Followed
30. Sagwe, Graham Rioba & 2 others v Fina Back Limited & 5 others (Petition 82 of 2016; [2017] eKLR) — Mentioned
31. Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] eKLR) — Mentioned
32. Union of Insurance Company of Kenya v Ramzan Abdul Dhanji (C. A. Application No 179 of 1996) — Mentioned
33. United States International University (USIU) v. The Attorney General & others (Petition 170 of 2012; [2012] eKLR) — Followed
34. York Worldwide Holdings Limited v Kenya Forest Service, Attorney General; Friends of Karura Community Forest Association (Interested Party) (? 48 of 2017; [2019] KEELC 2625 (KLR); [2019] eKLR) — Mentioned
35. Selle and another v Associated Motor Boat Co Ltd ([1968] E.A.123) — Followed
36. Howard Gosset ((1845) 10 QB 359 at 379) — Followed

Statutes



1. Civil Procedure Act (cap 21) — section 7 — Interpreted
2. Civil Procedure Rules (cap 21 Sub Leg) — rule 10(2) Order 1; order 1 rule 9 — Interpreted
3. Constitution of Kenya — article 1; 10; 25(c); 40, 42, 50(1); 67; 68; 69, 70, 95; 95(2); 95(5)(b); 118; 119; 124, 124(1); 125; 159; 159(2)(c); 162; 162(2)(b); 165(5); 165(6); 188; 249 — Interpreted
4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Sub Leg) — rule 5(b); 7(2) — Interpreted
5. Court of Appeal Rules, 2010 (cap 9 Sub Leg) — rule 75, 90(1); 93(1); 94; 94(1) — Interpreted
6. Employment And Labour Relations Court Act (cap 8E) — section 12 — Interpreted
7. Environment And Land Court Act (cap 8D) — section 13 — Interpreted
8. Fair Administrative Action Act (cap 7L) — section 7 — Interpreted
9. National Assembly’s Standing Order — order 216; 215(5)(i); 216(5)(j) — Cited
10. National Land Commission Act (cap 281) — section 14 — Interpreted
11. National Land Commission (Review of Grants and Dispositions of Public Lands) Regulation, 2017 (cap 281) — regulation 30 — Interpreted
12. Supreme Court Act (cap 9B) — Cited

Texts

1. Garner, BA., Black, HC., (Ed) (2014), Black’s Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)
2. Garner, BA., (Ed) (2009), Black’s Law Dictionary (St Paul Minnesota: West Group 9th Edn)
3. Paul Mason (1953), Mason’s Manual of Legislative Procedure for Legislative and Other Governmental Bodies (McGraw - Hill Book Company, Inc. New York Toronto London)

Advocates

Mr. Mbarak Awadh for for the appellants

Mr. Onyony for for the 1st respondent

Ms. Waswa for for the 2nd and 4th respondents

Mr. Mbutia for for the 3rd respondent

JUDGMENT

1. The two appeals that are the subject of this judgment were both lodged by the National Assembly (“the appellants”) and both arise from a petition dated August 30, 2018 filed by Mombasa Cement Limited (“the 1st respondent”) at the Environment and Land Court (ELC) at Mombasa in Mombasa ELC Petition No 17 of 2018, which was later amended on October 24, 2018. The first appeal is Mombasa Civil Appeal 100 of 2019, which is an interlocutory appeal against a ruling by the ELC (A Omollo J) delivered on April 24, 2019 dismissing the appellants’ application dated October 11, 2018, which sought to set aside or discharge conservatory orders granted to the 1st respondent, and alternatively strike out its petition. The 1st respondent in response, filed a notice of cross appeal and grounds affirming the decision dated November 21, 2019. The second appeal, Mombasa Civil Appeal E021 of 2020, is the substantive appeal against the final judgment by the ELC delivered on April 29, 2020 granting various orders sought by the 1st respondent in its amended Petition.
2. When we heard the two appeals and cross appeal on February 7, 2022, Mr Mbarak Awadh, learned counsel for the appellants was present, and informed us that there were issues in the interlocutory appeal that needed to be canvassed and which were not covered by the substantive appeal. This view was not shared by Mr Onyony, Ms Waswa, and Mr Mbutia, the learned counsel for the 1st respondent, the 2nd and 4th respondents (the Ministry of Lands and Physical Planning and the Attorney General) and for the 3rd respondent (the National Land Commission) respectively, who insisted that the interlocutory



appeal had been overtaken by events, and any outstanding issue was adequately covered by the substantive appeal. The said counsel opposed the application by Mr Mbarak to consolidate the two appeals for this reason. We consequently ordered that the two appeals be heard back to back, and one judgment be rendered on both appeals.

3. The appellant's counsel in this regard filed written submissions dated December 31, 2019 on the interlocutory appeal, while the 1st respondent's counsel filed written submissions dated January 9, 2020 on the said appeal and on its cross appeal. As regards the substantive appeal, the appellant's counsel filed written submissions dated September 27, 2021, and the 1st respondent's counsel's submissions were dated October 12, 2021. The 2nd and 4th respondents' and 3rd respondent's counsel did not file any submissions, Ms Waswa and Mr Mbuthia both relied on their submissions filed in the ELC. It is notable in this regard that while the 1st and 4th respondents had opposed the amended petition in their submissions filed in ELC, the said respondents left it to the court to determine the constitutionality of the appellant's decisions. The 3rd respondent supported the 1st respondent's case and Mr Mbuthia also made oral arguments in opposition to the appeal during the hearing. There was no appearance by the counsel for the 5th respondent at the hearing, despite having been served with the hearing notice.
4. We need to state at the outset that the two appeals before us are first appeals, and we are therefore cognizant of our role and duty as the first appellate court, which is essentially one of reviewing the cases that were before the ELC, and evaluating the ELC's decisions in light of the evidence that was adduced before it and the applicable law. See in this regard the decisions in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR and *Selle and another v Associated Motor Boat Co Ltd* [1968] EA 123.

The Interlocutory Appeal

5. We shall therefore commence with a consideration of the interlocutory appeal, before proceeding with the substantive appeal. A short background leading to the interlocutory appeal is as follows. Contemporaneously with its petition filed in the ELC, the 1st respondent filed a notice of motion application dated August 30, 2018 seeking conservatory orders restraining the 2nd respondent from dealing with two properties that were the subject matter of the said petition, namely LR No MN/III/291/2 and MN/III/4391 (hereinafter "the suit properties"). The said orders were granted by the ELC on August 30, 2018 and were subsequently extended on September 12, 2018 pending the inter partes hearing of the application. The appellant thereupon filed an application by a notice of motion dated October 11, 2018, seeking to stay, discharge and set aside the orders granted on August 30, 2018 and that the petition dated August 30, 2018 be struck out and the entire proceedings be dismissed.
6. The main ground for the appellant's application was that the 1st respondent had failed to disclose that it had filed a similar petition and application for conservatory orders in the High Court at Nairobi, being Nairobi HC Petition No 177 of 2015 - *Mombasa Cement Ltd v The Speaker National Assembly and others*, which petition was dismissed by Mativo J (as he then was) on July 1, 2018 after establishing that the 1st respondent had not paid the requisite court filing fees. That the 1st Respondent thereupon lodged a notice of appeal on August 14, 2018, and instead of prosecuting the said appeal, proceeded to file Mombasa ELC Petition No 17 of 2018 in the ELC at Mombasa in an exercise of forum shopping and in abuse of the process of court, and that after obtaining the ex parte conservatory orders therein, sought to withdraw the notice of appeal on September 4, 2018.
7. The appellant's application dated October 11, 2018 was dismissed by the ELC in the impugned ruling delivered on April 24, 2019, and the appellant being aggrieved, filed a memorandum of appeal dated



July 30, 2019 in which it raised six grounds of appeal. The appellant faulted the learned trial judge for allowing the 1st respondent's application for amendment of the petition dated October 24, 2018 and thereby allowing it to introduce facts which it had deliberately concealed in obtaining the conservatory orders on August 30, 2018; for failing to determine properly the issue whether the 1st respondent obtained the conservatory orders made on August 30, 2018 through material non-disclosure and abuse of court process; for determining the appellant's application on the basis of *res judicata* which was not an issue before her; for holding that the appellant had not provided a copy of the ruling made by Mativo J (as he then was) on July 31, 2018 yet a copy of the ruling was provided; and for refusing to follow binding precedents of this court. The appellant therefore prayed that the entire ruling and orders of the learned trial Judge dated April 24, 2019 be substituted with orders that the appellant's notice of motion of October 11, 2018 be allowed with costs, the conservatory orders made by ELC at Mombasa on August 30, 2018 be set aside; the 1st respondent's petition dated August 30, 2018, and amended on October 24, 2018 be hereby struck out and the entire proceedings in the ELC be dismissed and costs of the appeal and of the proceedings in the ELC at Mombasa be awarded to the appellant.

8. The 1st respondent in its grounds for affirming the decision supported the ruling on the grounds that the learned trial Judge did not err in dismissing the appellant's notice of motion dated October 11, 2018 as the same was premised on *res judicata*; in issuing the 1st respondent's conservatory orders in the application dated August 30, 2017 as the orders are underpinned on the principles of fairness, equity, equality, reasonableness, lawfulness, good conscience, and morality without which the matter would be rendered nugatory; and by putting into consideration the provision of section 7 of the [Civil Procedure Act](#) in holding that for a suit to be declared *res judicata* issues raised must have been heard and determine on merits. Further, that the striking out of [Nairobi Petition No 177 of 2015](#) did not bar the 1st respondent's amended petition, as the said petition no longer existed, the power of the court to order for an amendment is discretionary, and the order of amendment was not appealed in the appellant's notice of appeal.
9. The grounds raised in the 1st respondent's notice of cross-appeal were that the appellant's notice of appeal was fatally defective and against the mandatory provisions of rule 75 of the [Court of Appeal Rules of 2010](#) as it did not stipulate the part of the ruling being appealed against, and sought the hearing of the matters not appealed against as there was no notice of appeal against the orders made on December 5, 2018 on the amendment of the 1st respondent's petition. In addition, that the orders issued by consent on June 27, 2019 relating to the hearing and determination of the amended petition and the issue of conservatory orders bound the appellant, and could not be varied or discharged unless the order was obtained by fraud or collusion. Further, that the appellant had failed to take essential steps as is provided in rule 90(1) of the [Court of Appeal Rules of 2010](#), of not serving the 1st respondent with the memorandum and record of appeal within 7 days after lodging it, having been served on August 13, 2019. The 1st respondent therefore prayed that the appellant's appeal be dismissed for lack of merit with costs, and the cross appeal and the grounds of affirming the decision be allowed and admitted by this court.
10. Before we commence our determination, we need to make some preliminary observations about the 1st respondent's notice of cross appeal and grounds affirming the decision dated November 21, 2019. Rule 94(1) of the [Court of Appeal Rules of 2010](#) in this regard provided as follows as regards the objective and contents of a notice of grounds for affirming decision:

“(1) A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those



relied upon by that court shall give notice to that effect, specifying the grounds of his contention.”

A perusal of the 1st respondent's grounds for affirming the decision of shows that they are not strictly the grounds envisaged by rule 94, as they do not raise any different or additional grounds other than those given by the ELC in its ruling of April 24, 2019. They are in effect the same grounds set out in the ruling being urged in opposition to the appeal. We shall therefore deem the said grounds as part of the 1st respondent's response to the interlocutory appeal.

11. Likewise, rule 93(1) of the [Court of Appeal Rules of 2010](#) provided as follows as regards the objective and contents of a notice of cross-appeal:

“(1) A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the court to make, or to make in that event, as the case may be.”

It is notable from the 1st respondent's notice of cross-appeal that many of the grounds therein do not challenge or seek to vary or reverse the ruling or part of the ruling of the ELC appealed against, which was delivered on April 24, 2019. In particular, the ground raised in the cross-appeal that there was no appeal against orders issued by consent on June 27, 2019 cannot lie, as this was orders were issued after the delivery of the ruling appealed against on April 24, 2019, and were not and could not be a ground in the interlocutory appeal. Likewise, the ground that the appellant had failed to take essential steps as provided in rule 90(1) of the [Court of Appeal Rules of 2010](#), of not serving the 1st respondent with the memorandum and record of appeal within 7 days is challenging the propriety of the appeal and is not competently raised, as the said rules required the 1st respondent to apply for the striking out of the said memorandum and record of appeal within thirty days of service, and it did not do so.

12. The only ground in the notice of cross-appeal which we shall therefore consider is the one alleging that the appellant's interlocutory appeal is defective to the extent that it challenged the orders made on December 5, 2018 on the amendment of the 1st respondent's petition, when there was no notice of appeal filed against the said order. In addition, since this was not an issue addressed by the ruling appealed against, it shall be deemed as part of the 1st respondent's response in opposition to the interlocutory appeal, which we now proceed to address at the outset, as a preliminary issue touching on the propriety of the interlocutory appeal.
13. In this regard, the appellant, in its interlocutory appeal referred to an application dated October 24, 2018 filed by the 1st respondent in the ELC, seeking amendment of the petition, and faulted the trial court for allowing the application. The orders of amendment were granted by the ELC on September 5, 2018, and allowed the said amendment to the 1st respondent's petition, which sought to disclose the existence of the previous petition. The appellant did not exhibit any notice of appeal against the said orders of amendment and cannot therefore purport to challenge them in this appeal, as held by this court in [Nguruman Ltd v Shompole Group Ranch & another](#) [2014] eKLR. We shall therefore in our determination, confine ourselves to the issues raised in the interlocutory appeal as against the ELC ruling delivered on April 24, 2019 which is the one appealed against.
14. In this respect we were curious, and did ask Mr Awadh during the hearing, as to whether the interlocutory appeal was still relevant, and he confirmed that it still was, despite the submissions by the respondents' counsel that it had been overtaken by events. It is in this regard evident that some



of the grounds of appeal raised by the appellant in its interlocutory appeal as regards the propriety or otherwise of the conservatory orders have indeed since been overtaken by events, following the delivery of the final judgment which addressed and granted the said orders on merit, and can therefore be addressed by the substantive appeal. Mr Awadh in his submissions consequently confined himself to the findings by the ELC on the prayer for the striking out of the petition, which is the main issue that we shall address in the interlocutory appeal.

15. The gist of Mr Awadh's submissions in this regard is that there was material non-disclosure by the 1st respondent of the pending appeal arising from the striking out of the 1st respondent's earlier petition, and that it was therefore an abuse of the process of the court to lodge the second petition. According to Mr Awadh, the issue of the previous petition being *res judicata* was not in issue and therefore erroneously raised as the basis of the impugned ruling. He cited various decisions in support of his submissions on non-disclosure and abuse of the process of court including the *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya)* (1989) 1 KLR, *Graham Rioba Sagwe & 2 others v Fina Back Limited & 5 others* [2017] eKLR and *Aviation & Airport Workers Union(K) v Kenya Airports Authority & another* [2014] eKLR.
16. Mr Onyony in reply submitted that deviations and lapses in form and procedure which do not go to the jurisdiction of the court, or to the root of the dispute, or which do not at all occasion prejudice or miscarriage of justice to the opposite party, ought not to be elevated to the disadvantage of the parties to the dispute. Further, that the court should do justice by sparing the parties the draconian approach of striking out pleadings, and hearing the dispute on merit. Various judicial authorities were cited in this respect, including *James Kanyita Nderitu & another v Marios Philotas Gbikas & another* [2016] eKLR, *Richard Ncharpi Leiyagu v IEBC & 2 others* [2013] eKLR and *Pankaj Transport PVT Limited v SDV Transmi Kenya Limited* [2018] eKLR.
17. We note that the trial Judge had raised two questions to be answered in the impugned ruling, namely whether the suit before the ELC was *res judicata* and an abuse of the process of court, and if not, whether the striking out of the previous petition barred interlocutory orders in subsequent suits. The trial judge held that the former suit not having been determined on merit, the subsequent suit cannot be *res judicata* or an abuse of the court process, and that the only remedy the appellant had was to claim costs in the suit that was struck out. In addition, that the grounds for setting aside the *ex parte* orders lacked merit, as the petition having been amended to disclose existence of the former suit made the grounds overtaken by events, and since the appellant pleaded that they were in the process of implementing the report by the National Assembly Committee on land dated March 2, 2017 which formed the subject matter of the petition, the determination of the petition would be rendered an academic exercise if the said orders were set aside.
18. We are of the view that the trial Judge did not err for various reasons. Firstly, as noted earlier, the orders of amendment of the 1st respondent's petition to disclose the previous suit were subsisting and had not been set aside, and the appellant's grounds of non-disclosure were largely overtaken by events. Secondly, as regards the abuse of process of court in the circumstances, it is notable that the appellant expressly pleaded and relied on the existence of a previous petition and a pending appeal on the same subject matter as the demonstration of abuse of process of court. The trial cannot be faulted for interrogating whether the previous petition dealt with the merits of the case. It was, on the contrary, necessary to do so as to determine if the suit before it was *res judicata* and an abuse of the process of court.
19. Thirdly, the fact that the pending appeal was subsequently withdrawn on September 4, 2018 is pleaded by the appellant, and the effect therefore was that there was no pending appeal as at the time the trial court delivered the impugned ruling on April 24, 2019, and this was therefore a non-issue.



20. Lastly, abuse of process is defined in *Black's Law Dictionary*, Tenth Edition at page 12 as

“the improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope”.

The suits filed by the 1st respondent, could only be an abuse of process of court if they were for an unlawful object, for example if the 1st respondent was expressly barred from instituting the suits, or if they were intended to pervert the course of justice and were thereby frivolous and vexatious. The 1st respondent had in this respect filed only one previous suit which was struck out on a technicality, and not on merits. The 1st respondent’s counsel pointed out in his submissions that the suit property was located within the jurisdiction of the ELC in Mombasa. In addition, as noted by the trial court, there were pending proceedings by the appellant on the issue at hand which would have been rendered nugatory if the *ex parte* orders did not subsist. In our view these factors did not render the subsequent suit an abuse of the process of court, and the trial judge exercised her discretion judiciously in the circumstances.

21. We therefore find no merit in the appellant’s interlocutory appeal for these reasons.

The Substantive Appeal

22. The appellant’s substantive appeal challenges the judgment delivered by the ELC after hearing the 1st respondent’s amended petition dated October 24, 2018. The 1st respondent’s claim in the amended petition was that it was the registered proprietor of the suit properties, after it purchased the properties from Vipingo Estates Ltd (the 5th respondent) and executed a transfer of lease and a transfer of sale respectively for the two properties both dated March 1, 2005, which transfers was registered on March 9, 2005. That on December 16, 2013, the National Land Commission (the 3rd respondent herein) informed the 1st respondent that a complaint had been made to it about the suit properties, and after investigations, the National Land Commission, in letters dated September 22, 2014 and January 8, 2015, informed the 1st respondent and Kilifi County Government respectively that the suit properties were owned by the 1st respondent.
23. However, that the 1st respondent thereafter received letters dated March 11, 2015 and March 30, 2015 from the appellant, inviting it to appear before the National Assembly’s Departmental Committee of Lands in follow-up investigation on the suit properties. On July 28, 2017 the Cabinet Secretary, Ministry of Lands and Physical Planning (the 2nd respondent) also wrote to the 1st respondent informing him of the parliamentary report dated November 24, 2015 and its recommendations, and directing it to give vacant possession and title of the suit properties. The 1st respondent’s claim was that the appellant had no constitutional or legal mandate to take over or undertake the exclusive powers of the National Land Commission, and could not review or sit on appeal over a matter that had been conclusively determined by the said Commission, which is an independent constitutional commission and not subject to the appellant’s control. In addition, that the Cabinet Secretary of the 2nd respondent had no powers to repossess land or cancel any title deed, and could only seek judicial intervention, irrespective of any parliamentary recommendations.
24. The 1st respondent therefore claimed violation of its rights to property, title, and fair administrative action, and breach of its legitimate expectations. The 1st respondent sought various relief in this regard namely, various declarations, orders prohibiting the Cabinet Secretary of the 2nd respondent from interfering with the 1st respondent’s title; and orders to quash the proceedings of the appellant’s departmental committee on Lands as well as its report dated November 24, 2015, as well as the



- decisions of the Cabinet Secretary of the 2nd respondent as contained in the letters dated July 28, 2017 and February 15, 2018.
25. The 3rd and 5th respondents supported the 1st respondent's position that the appellant had no lawful mandate to review the decisions of the National Land Commission.
 26. The appellant opposed the amended petition and averred that its Clerk received a complaint dated September 21, 2014 from the Member of Parliament for Kilifi North Constituency, which had been made by the Bambani Kilio Community Based Organisation (hereinafter "Bambani Kilio"), stating that the suit properties had been allocated to the said community by the Ministry of Lands but was occupied by the 1st respondent, and that the community members had been forcefully evicted therefrom. Further, that the complaint was referred to the appellant's Departmental Committee on Land which is established under the National Assembly's Standing Order 216 made pursuant to article 124 of the Constitution, and which was carrying out its functions within the appellant's role as stipulated in the Constitution, of deliberating and resolving issues of concern to people, and oversight over all state organs including the 2nd, 3rd and 4th respondents.
 27. The appellant detailed the processes of the inquiry undertaken by the Departmental Committee of Land into the complaint, including invitations sent to the 1st respondent and 3rd respondents to appear before it, and that after completion of the inquiry, it prepared its report titled report on the ownership of Mombasa Cement Limited Land in Kilifi County which was tabled and adopted by the appellant, and which recommended that the 2nd respondent takes possession of the suit properties, being public land that was in use by the 1st respondent, and that the properties be administered by the 3rd respondent, which was to immediately reserve the suit properties for settlement by the affected community in the area. In addition, that an Implementation Committee commenced implementation of the findings. The appellant denied that it violated any of the 1st respondent's rights or controlled or sat on appeal over the 3rd respondent, and averred that there is no provision for the 3rd respondent to conduct its functions to the exclusion of the appellant exercising its powers of oversight under the Constitution. The appellant also challenged the jurisdiction of the ELC to hear the dispute while it was still seized with the National Assembly, on account of the application of the principles of sub judice and separation of powers.
 28. The 2nd and 4th respondents filed grounds of opposition to the amended petition, stating that the ownership of the suit properties was not disputed, and what was in dispute were the constitutionality of the documents presented by the appellant on the amalgamation and sub-division of the suit properties and the letters dated July 28, 2017 and February 15, 2018 by the Cabinet Secretary of the 2nd respondent.
 29. Munyao Sila J, after hearing the parties, delivered a judgment on April 29, 2020, and held that the ELC had jurisdiction to hear the 1st respondent's petition for reasons that the orders sought in the amended petition related to the right to title to land and the right to occupy and use land; that article 125 of the Constitution did not impact on the jurisdiction of the court and the provisions therein only give power to Parliament to call for evidence and summon witnesses; and that the question of whether or not the National Assembly and its Departmental Committee on Land acted within the confines of the Constitution is a subject that the court has a duty to interrogate. On the issue whether the National Assembly had power to make decisions on disputes over ownership of land, the ELC elaborated on the applicable law in relation to land disputes and held that the Constitution and statutes do not give the National Assembly the power to handle a dispute over land, to cancel title, or direct the Ministry or the National Land Commission to cancel a title, and that for purposes of resolving land disputes, the Constitution has established the National Land Commission and the courts. Therefore, that the



National Assembly and its Committees cannot purport to utilise their deliberative or oversight role to hear disputes over land.

30. On whether the National Assembly can sit on appeal against a decision of the National Land Commission, the ELC found that the deliberative or oversight role of Parliament cannot extend to overturning a decision of the National Land Commission or directing the National Land Commission to make a decision in a certain way, and that if a person is aggrieved by a decision of the National Land Commission, that person needs to move the court to quash that finding. In conclusion, the ELC held that the result of the deliberations and recommendations of the National Assembly, and the subsequent action taken by the Cabinet Secretary of the Ministry of Lands, directly and adversely affected the right of the 1st respondent to property enshrined by article 40 of the Constitution, and their report and directives were illegal and unconstitutional.
31. The ELC accordingly granted the following orders:
- i) That it is hereby declared that the National Land Commission when conducting its functions under the Constitution is not subject to control or direction by the National Assembly or any of neither (sic) its Committees nor the control or direction of the Cabinet Secretary of Lands and Physical Planning.
 - ii) That it is hereby declared that a decision of the National Land Commission following its functions under the Constitution is not subject to appeal or review by the National Assembly or any of its Committees.
 - iii) That the National Assembly and its Committees, including the Departmental Committee on Lands, do not have power to review grants and dispositions of public land, this power being vested in the National Land Commission (subject to the limitations in section 14 of the National Land Commission Act) and to the courts.
 - iv) That the National Assembly and its Committees, including the Departmental Committee on Lands, do not have power to hear disputes over title to land, or make decisions on who has good title or the right to occupy land.
 - v) That the National Assembly does not have power to cancel title to land, and does not have jurisdiction to issue directives to the Ministry of Lands and Physical Planning to cancel title to land, or issue orders and directives on the occupation of such land.
 - vi) That it is hereby declared that the act of the National Assembly in proceeding to investigate the title of the petitioner when the National Land Commission had already done so was unconstitutional and thus *ultra vires*.
 - vii) That the report of the National Assembly, Departmental Committee on Lands, titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County” is unconstitutional and null and void.
 - viii) That an order of certiorari is hereby issued quashing the report of the National Assembly, Departmental Committee on Lands titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County” and all subsequent actions and directives made pursuant to the said report are hereby declared null and void.
 - ix) That an order of *certiorari* is hereby issued quashing the decision of the Cabinet Secretary contained in the letters dated July 28, 2017 and February 15, 2018 addressed to the petitioner.



- x) That an order of prohibition is hereby issued, prohibiting the Cabinet Secretary, Ministry of Lands and Physical Planning from implementing the report of the National Assembly, Departmental Committee on Lands titled “Report on Ownership of Mombasa Cement Limited Land in Kilifi County”.
- xi) That the 2nd respondent will shoulder the petitioner’s costs.
32. The appellant has raised fifteen (15) grounds of appeal in its memorandum of appeal dated November 12, 2020 challenging the said judgment. The said grounds fault the findings of the ELC along three broad fronts and issues, namely, the jurisdiction of the ELC to hear the 1st respondent’s petition, the propriety of the 1st respondent’s petition, and the National Assembly’s representative and oversight role and powers in relation to disputes over land and the National Land Commission.
33. We shall first address the issue raised on the propriety of the 1st respondent’s petition. The submissions made by the appellant’s counsel on the propriety of the petition were that the 1st respondent was guilty of abuse of process, material non-disclosure and bad faith for the reason that they instituted the proceedings before the ELC after the dismissal of the first petition and did not disclose the existence of the first petition at the ex parte stage. These are essentially the same arguments raised in its interlocutory appeal, which we have already dispensed with and found that the amended petition was not filed in abuse of the process of court.
34. It is notable that the appellant raised another ground on the propriety of the petition in its memorandum of appeal, namely that the ELC erred in holding that it was not necessary to enjoin Bambani Kilio which was the complainant before the National Assembly and in whose favour the decision of the National Assembly was made and would adversely be affected by the final judgment of the court. Mr Awadh submitted that the impugned decision adversely affecting the rights of the complainant to a fair hearing which are protected under article 25 (c) and 50(2) of the Constitution, and relied on the cases of National Gender & Equality Commission (NGEC) v Independent Electoral and Boundaries Commissions (IEBC) & 3 others [2018] eKLR and JMK v MWM & another [2015].
35. Mr Onyony’s response was that Bambani Kilio was not a necessary party within the meaning of rule 10(2) of order 1 of the Civil Procedure Rules, as the amended petition challenged the decision of the appellant and the subsequent actions which were taken by the Cabinet Secretary of the 2nd Respondent, as such the actions of Bambani Kilio of requisitioning parliament was not an issue before the court. Further, the appellant did not at any point seek leave or make an application for the joinder of Bambani Kilio, and lastly, that rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provided that a petition should not be defeated by reason of mis-joinder or non-joinder of parties and the court may deal with the matter regardless.
36. We are of the view that since it was not disputed that Bambani Kilio made a complaint on the suit properties, that was the basis of the National Assembly actions and decisions that were the subject of the 1st respondent’s amended petition, it was a party which was likely to be affected by the outcome of the petition, and the failure by the 1st respondent or the ELC to join it as interested parties was in error. It is notable in this respect that under rule 7(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the ELC has the discretion and power, irrespective of whether there is an application for joinder or not, to join an interested party on its own motion to proceedings before it. An interested party is defined under the rules as “ a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a



party to the proceedings or may not be directly involved in the litigation”. Bambani Kilio was one such interested party by virtue of its complaint.

37. The question which we need to decide is whether the non-joinder of Bambani Kilio was fatal to the ELC proceedings. The answer is in rule 5(b) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) which provide that a petition should not be defeated by reason of mis-joinder or non-joinder of parties and the court may deal with the matter regardless. Order 1 rule 9 of the [Civil Procedure Rules](#) has similar provisions that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. On the prejudice that is alleged to have been suffered by not being granted an opportunity to be heard, it is notable that Bambani Kilio has the option of filing a suit in the appropriate court as regards their claim, and the doors of justice are therefore not closed to it.
38. The two main outstanding issues in the substantive appeal are firstly, whether the ELC had jurisdiction to hear and determine the 1st respondent’s amended petition; and secondly, whether the National Assembly is precluded from exercising its powers under article 95(2) of the [Constitution](#) with respect to land disputes determined by the National Land Commission, and if not precluded, the constitutional principles and processes if any, that govern its review of decisions made by the National Land Commission.
39. On the first issue, Mr Awadh submitted that the jurisdiction of the ELC jurisdiction was limited in disputes involving constitutional interpretation, as held in the case of [Attorney General & 2 others v Okiya Omtata & 14 others](#) [2020] eKLR, and that the issue before the ELC in this regard was the interpretation of article 95(2) and 119 of the [Constitution](#) on the National Assembly’s mandate to investigate the disputed properties and not the validity of the 1st respondent’s title. That the proper forum in the first instance of investigating the complaint by Bambani Kilio was the Departmental Committee on Lands and the National Assembly, and that the ELC’s jurisdiction was limited to reviewing the proceedings of the Committee and the National Assembly to determine whether there was compliance with the law and Constitution, and not to venture into the arena of the National Assembly’s mandate without justifiable or constitutional compulsion. Reliance was placed in this regard on the decisions in [Okiya Omtatah Okoiti v The National Executive of the Republic of Kenya & 5 others; the Katiba Institute & 2 others \(interested parties\)](#) [2020] eKLR and [Katiba Institute v The Attorney General & 9 others](#) [2020] eKLR.
40. Mr Onyony on the other hand submitted that the ELC had the jurisdiction to hear and determine the constitutional questions raised in the amended petition pursuant to the provisions of section 13 of the [Environment and Land Court Act](#) and article 162(2)(b) of the [Constitution](#). Further, that the question in issue was in relation to ownership and occupation of the suit property, and the counsel placed reliance on the decisions in the cases of [Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others](#) [2017] eKLR, [Patrick Musimba v National Land Commission & 4 others](#) [2015] eKLR, [Kipsiwo Community Self Help Group v Attorney General & 6 others, Eldoret ELC Petition No 9 of 2013](#) [2013] eKLR and [Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR for this proposition. On whether the petition was an affront to the doctrine of separation of powers, counsel, while citing the decision of the Supreme Court in [In the Matter of the Speaker of the National Assembly](#) [2013] eKLR submitted that it was within the authority of the court to determine the constitutionality or otherwise of the conduct of Parliament, and that the same does not amount to an affront to the doctrine of separation of powers.
41. Various decisions including that of the Court of Appeal in [Owners of the Motor Vessel “Lilian S” v Caltex Oil \(Kenya\) Limited](#) [1989] KLR 1 and of the Supreme Court of Kenya in [Samuel Kamau](#)



Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR have pronounced themselves on the issue of the jurisdiction of a court. The Supreme Court in the *Samuel Kamau Macharia case* held as follows:

“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 *onstitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel 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. This court dealt with the question of jurisdiction extensively in, In *the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. 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.”

42. Article 162(2)(b) of the *Constitution* in this regard provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Parliament consequently enacted the *Environment and Land Court Act*, which in section 13 details the jurisdiction of the ELC as follows
- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the *Constitution* and with the provisions of this *Act* or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
 - (3) Nothing in this *Act* shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*.
 - (4) In addition to the matters referred to in sub sections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.



- (5) Deleted by Act No 12 of 2012, sch
- (6) Deleted by Act No 12 of 2012, sch
- (7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.
43. It is our view that disputes involving the environment and land are likely to arise in various forms of litigation, including by way of civil suits, constitutional petitions, judicial review applications, and by originating summons, and the ELC is in this respect granted broad jurisdiction to hear “all disputes” and “any other dispute relating to the environment and land”. This court (Nambuye, Mwera & Kiage, JJA) also opined as follows in *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR, on the jurisdiction of the ELC in to hear claims on violations of the [Constitution](#):
- “In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamentals rights associated with two subjects.”
44. This court (Musinga, Gatembu & M’inoti, JJA) held in [Attorney General & 2 Others v Okiya Omtata & 14 others](#) [*supra*] that the Employment and Labour Relations Court (ELRC) did not have any jurisdiction to entertain the petitions from which the appeal arose, for reasons that the appointment and removal from office of the commissioners of independent commissions was not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a *sui generis* devise to address challenging governance needs and gaps, and that the appointment of the chairperson and members of the National Land Commission did not raise any of the employment and labour relations issues contemplated by section 12 of the [ELRC Act](#). The court then proceeded to hold as follows:
- “We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the [Constitution](#) as held by the High Court in [United States International University \(USIU\) v. The Attorney General & others](#) [2012] eKLR and this court in [Daniel N Mugendi v Kenyatta University & 3 others](#) [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the [Constitution](#) is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters. In [Daniel Maingi](#)



Muchiri Jubilee Insurance Co Ltd, CA No 138 of 2016, this court expressed the position as follows:

“The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction.” (Emphasis added).

45. This decision, which was relied on by the appellant, confirmed that the ELC and ELRC have jurisdiction to interpret the *Constitution* in appropriate cases. In this respect, the main determinant of whether a matter should be heard as a constitutional petition or by ordinary suit is whether there is a constitutional question raised by a dispute. A constitutional question is defined by *Black’s Law Dictionary*, Ninth Edition as

“a legal issue resolvable by the interpretation of a constitution, rather than by statute”.

Where that legal issue that requires interpretation of the *Constitution* is one that relates to environment and land, it follows that the ELC will have jurisdiction to entertain that constitutional question. The question that we therefore need to answer, is whether the dispute before the ELC as presented by the 1st respondent’s amended petition raised a material constitutional question relating to, ancillary to, or incidental to the use, occupation of, and title to land.

46. The actions and decisions whose constitutionality were in question in the subject suit before the ELC were the recommendations made by the National Assembly in the report on Ownership of Mombasa Cement Limited Land in Kilifi County, and the decisions made by Cabinet Secretary of the 2nd respondent in implementing the said Report. It is not in dispute that the subject of the said report and decisions were the suit properties, which were registered in the 1st respondent’s name, and that the 3rd respondent had already made a finding to this effect, which was also the subject of inquiry by the appellant. In addition, the complaint before the National Assembly was by parties laying rival claims to the suit properties. It is therefore difficult to fathom and appreciate the appellant’s argument that this was not a dispute relating to title to land, and specifically the 1st respondent’s title to land.
47. The arguments put forward by the appellant that the dispute solely involved an interpretation of the National Assembly’s powers *vis-a-vis* the National Land Commission’s powers is also not valid, as this was merely one of the grounds for challenging the impugned report and decisions, and which, irrespective of the manner of its resolution, would at the end of the day still affect the 1st respondent’s title to the suit properties. The constitutionality or otherwise of the actions and processes undertaken by the National Assembly in this respect were therefore material facts giving rise to the dispute, not in isolation, but ancillary to the decisions made as regards the subject property.
48. Having clarified the nature of the constitutional question before the ELC, it also becomes evident that at the stage of intervention by the ELC, the appellant had more or less become *functus officio*, as it had undertaken the necessary parliamentary processes, the subject report had been tabled for approval and the report’s recommendations were in the process of implementation. The appellant did not demonstrate how any of its functions in this regard were interfered with by the ELC. All that the ELC did was to determine the constitutionality of its report and recommendations, which is the preserve and proper role of the of courts as explained by the Supreme Court of Kenya in *In the Matter*



of the Speaker of the Senate & another [2013] eKLR as follows as regards when courts will properly intervene:

“(62) However, where a question arises as to the interpretation of the Constitution, this court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the court to make a determination by way of an Advisory Opinion, it would be remiss of the court to look the other way. Understood in this context therefore, by rendering this opinion, the court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.”

49. Likewise, in *Republic v Speaker of the National Assembly & 4 others ex parte Edward RO Ouko* [2017] eKLR, the Supreme Court held that:

“Parliament in Kenya cannot enjoy privilege, immunities and powers which are inconsistent with the fundamental rights guaranteed in [the Constitution]. Thus, whereas parliamentary privilege is recognized, it does not extend to violation of the Constitution hence Parliament cannot flout the Constitution and the law and then plead immunity; where a claim to parliamentary privilege violates constitutional provisions, the court’s jurisdiction would not be defeated by the claim to privilege; that the concept of statutory finality does not detract from or abrogate the court’s jurisdiction in so far as the complaints made are based on violation of constitutional mandates or non-compliance with rules of natural justice; that whereas the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected, the courts can however interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.”

50. Arising from these reasons, we find that the ELC did not err in assuming jurisdiction to hear the 1st respondent’s amended petition, nor was its intervention inimical to the doctrine of separation of powers.

51. The second issue before us is whether of the National Assembly is precluded from exercising its powers under article 95 of the Constitution with respect to land disputes determined by the National Land Commission. Mr Awadh made reference to article 95(2) of the Constitution as giving the National Assembly the power to deliberate on and resolve issues of concern to the people. The counsel made



reference to the powers of Parliament specified in section 795 of *Mason's Manual of Legislative Procedure* to investigate any subject regarding which it may desire information in connection with the proper discharge of its function to enact, amend or repeal statutes or perform any other act delegated to it by the *Constitution*, and the holding in *Howard Gosset* (1845) 10 QB 359 at 379 that Parliament may inquire into everything which concerns the public and is the one entrusted with the determination of what falls within category. In addition, that the National Assembly's powers under article 95(2) may be exercised on its behalf by committees created under article 124(1) of the *Constitution* and Standing Order No 216 of the National Assembly Standing Orders. As such the Departmental Committee on land had authority and mandate to lawfully conduct the investigations on any matter, including issues of ownership of the disputed properties as the issue before it was an 'issue of concern to the people'.

52. Mr Awadh submitted that the National Assembly did not violate any fundamental rights and freedoms of the 1st respondent, who was invited to appear before the Committee to respond to the complaint but refused, and was therefore estopped from claiming that their rights were violated or invoking article 47 of the *Constitution*. Reference was made to decisions to this effect in *Republic v District Land Adjudication and Settlement Officer, Igembe District ex parte M'aciita M'Mingaine & another* [2016] eKLR, *Isacko Pius Malicha & 2 others v National Lands Commission & 2 others* [2019] eKLR and the *Union of Insurance Company of Kenya v Ramzan Abdul Dhanji* CA Application No 179 of 1996. Lastly, that the National Assembly was within its mandate to make recommendation regarding the complaint, and that it was up to the ultimate decision makers, the 2nd respondent, to decide on how to proceed, as held in *York Worldwide Holdings Limited v Kenya Forest Service & another; Friends of Karura Community Forest Association (Interested Party)* [2019] eKLR.
53. Mr Onyoni's position on the issue was that section 14 of the *National Lands Commission Act* grants the 3rd respondent the powers to review all grants or disposition of public land to establish their propriety or legality as held in the case of *Republic v Land Registrar, Mombasa & 2 others Ex parte Bhangra Limited* [2012] eKLR, and that while exercising this power, the 3rd respondent rendered a verdict to the effect that the 1st respondent was the lawful proprietor of the suit properties and dismissed the complaint forwarded to it. However, that the National Assembly commenced further hearings on the same issue and issued a contrary verdict to that of the 3rd respondent. The counsel's contention was that it was the 3rd respondent vested with the constitutional power to deal with the complaint; that the independence of the National Land Commission extended to its decisions which are not subject to review or appeal by any other body save for the Environment and Land Court as provided in regulation 30 of the *National Land Commission (Review of Grants and Dispositions of Public Lands) Regulation*, 2017 and as held in *Republic v National Lands Commission ex parte Holburn Properties Limited* [2016] eKLR. Further, that the National Assembly cannot oversight and/or reverse the decision made by an independent Constitutional Commission. Reliance was also placed on the case of *Judicial Service Commission v Speaker of the National Assembly and 8 others* [2014] eKLR for the proposition that the independence of the Constitutional Commissions should be respected by all authorities including the National Assembly.
54. The first question that we need to answer therefore, is whether the functions of the National Land Commission to receive complaints on, and investigate historical land injustices and disputes are exclusive, and therefore prevented the National Assembly from addressing the complaint by Bambani Kilio and the Member of Parliament for Kilifi North Constituency. Article 67 of the *Constitution*, which established the National Land Commission, provides for its functions as follows:
- (2) The functions of the National Land Commission are—
- (a) to manage public land on behalf of the national and county governments;



- (b) to recommend a national land policy to the national government;
 - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (2) The National Land Commission may perform any other functions prescribed by national legislation.
55. Article 252(1) of the [Constitution](#) also grants general powers and functions to constitutional commissions to conduct investigations on their own initiative or upon complaints by members of the public, while section 14 of the [National Land Commission Act](#) granted powers to the Commission to, within five years of commencement of this Act and on its own motion or upon a complaint by the national or a county government, community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
56. The role of the National Assembly on the other hand is set out in article 95 of the [Constitution](#) as follows:
- (1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.
 - (2) The National Assembly deliberates on and resolves issues of concern to the people.
 - (3) The National Assembly enacts legislation in accordance with part 4 of this chapter.
 - (4) The National Assembly –
 - (a) determines the allocation of national revenue between the levels of government, as provided in part 4 of chapter Twelve;
 - (b) appropriates funds for expenditure by the national government and other national state organs; and (c) exercises oversight over national revenue and its expenditure.
 - (5) The National Assembly—
 - (a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and
 - (b) exercises oversight of State organs.
 - (6) The National Assembly approves declarations of war and extensions of states of emergency.



57. Article 68 of the Constitution also gives powers to parliament to enact legislation on land. It is notable that article 95(2) expressly provides for the deliberative role of the National Assembly in exercising its representative function on behalf of the people of Kenya. In addition, public participation in the sittings and functions of the National Assembly and its committees is required by article 118, and article 119 provides that a person has a right to petition Parliament to consider any matter within its authority. The National Assembly is accordingly granted investigative powers as a consequence of this political responsibility and also for purposes of collecting information in order to judge the government's effectiveness of state organs and has powers to call for evidence under article 125 of the Constitution. In addition, the National Assembly Standing Orders 216(5) (j) provides that departmental committees can examine any question raised by its members on any matter relating to their mandate.
58. It is evident from the above cited constitutional provision that both the National Assembly and National Land Commission have a constitutional role and overlapping powers to receive and investigate complaints from the people of Kenya. It is thus our view that there was no constitutional infraction committed by the National Assembly in receiving and considering the complaint from Bambani Kilio and the Member of Parliament for Kilifi North Constituency, irrespective of the fact that the subject matter of the complaint was in relation to land, and had been addressed by the National Land Commission. Indeed, as was noted by the learned Judge in his judgment:
- “62. I do not think that there is any contest that the National Assembly possesses the power to make inquiries, or to debate, or deliberate, on any matter that may be presented before it, as being one that is of concern to the people. It can indeed do this through its Committees. I think what is in issue here is the extent of such deliberation, the decisions/recommendations that can be made, and whether the National Assembly can affect a decision already made by a competent constitutional body .”
59. Methods of resolution of land disputes are varied, including non-judicial methods and alternative dispute resolution methods such as mediation and arbitration, which also apply to land disputes and are expressly encouraged by the Constitution in article 159(2)(c). An example in this respect is disputes over boundaries of counties, which are to be determined by an independent commission and resolution by the National Assembly under article 188. Notwithstanding that under article 159(1) of the Constitution judicial authority vests in and is exercisable by the courts and tribunals established under the Constitution, we therefore do not prescribe to the position held by the ELC that it is only the National Land Commission and courts that have a monopoly over resolution of all types of land disputes. We are in this respect persuaded by the reasoning of a 5-judge bench of this court, (Waki, Nambuye, Musinga, Gatembu & Murgor, JJA) which, when addressing the issue of exclusivity of the powers granted by article 162 of the Constitution, held as follows in Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR :
- “70. Contrast the expression “reserved for the exclusive jurisdiction” with the expression “falling within the jurisdiction”. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be “reserved for the exclusive jurisdiction” of the specialized courts under article 162(2). It is also noteworthy that In Re Matter of the Interim Independent Electoral Commission [2011] eKLR, the Supreme Court of Kenya in construing article 165(3) of the Constitution that confers jurisdiction on



the High Court to hear any question respecting the interpretation of the Constitution noted that although the High Court was entrusted, under that article, with the mandate to interpret the Constitution, that “empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction.”

71. By parity of reasoning, although under article 162(2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrate’s courts to hear and determine disputes stipulated under article 162(2) of the Constitution, it cannot establish a superior court or confer upon a superior court jurisdiction to hear employment and labour relations cases and environment and land cases.”
60. In addition, the Supreme Court of Kenya while recognising that the courts must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance where there exist alternative methods of dispute resolution, held as follows in Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others [2019] eKLR :
 - “(118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.
 - (119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”
61. We are therefore hesitant to uphold the finding by the learned trial judge that the National Assembly and its Committees cannot therefore purport to utilise their deliberative or oversight role to entertain disputes over land. We are of the view that this holding needs to be qualified, so as not to unnecessarily fetter the powers of the National Assembly and administrative agencies that may have a role to



- play in dispute resolution in land matters, and further clarified in terms of the type and manner of interventions that can be made by the National Assembly in the specific circumstances of this appeal.
62. Our view in this respect is that the National Assembly was performing a political and deliberative role specifically provided for by the Constitution under article 95(2) of the Constitution when receiving and considering the complaint made by Bambani Kilio and Member of Parliament for Kilifi North Constituency, so as to provide representation and services to the electorate that they are directly accountable to. Therefore, its core function in this respect arose from its status as an elected assembly, and was to investigate, deliberate, inform and make recommendations on important political problems and public issues affecting the electorate, in the interests of democratic governance and accountability. The National Land Commission on its part was also performing its functions of investigating and scrutinizing the 1st respondent's title in the context of its constitutional powers, and also in light of the objectives of constitutional commissions set out in article 249 of the Constitution, namely protecting the sovereignty of the people, securing observance of democratic values and principles and promoting constitutionalism.
 63. It is notable in this regards that the design of the constitutional commissions in the Constitution is aimed at granting the said commissions a clear constitutional and independent mandate in a fairly technical and specialized area; secure their sources of funding; and provide suitable and balanced appointment, tenure and support mechanisms, so as to ensure good ethical leadership. The objective in this regard is to enable the commissions independently monitor their area of expertise, and be watchdogs over other state agencies in a depoliticized, impartial and professional manner.
 64. Therefore, the Constitution has granted the National Assembly and National Land Commission overlapping functional powers and roles when it comes to investigation of complaints, including on land matters, but in so doing, article 1 of the Constitution requires the two institutions to perform their functions in accordance with the Constitution, and to observe the national values and principles of governance under article 10. In resolving this functional overlap, it is therefore necessary for each institution to delineate its core function that corresponds to its constitutional role and for which it is the primary actor; to respect powers and roles granted to other institutions in relation to the same function and any constitutional controls that may exist over its core function; and to avoid unnecessary or unwarranted intrusion into the roles and powers accorded to other, and especially more competent institutions in this respect.
 65. Applying these principles to the circumstances of the present appeal, while it was perfectly within the political and deliberative role of the National Assembly to receive and consider the complaint made by a Member of Parliament as regards the 1st respondent's ownership of the suit properties, and to accept an invitation by the Member of Parliament to visit his constituency and interrogate the land matters therein; in so doing, it was required to acknowledge the limits of its role and competencies, in light of the nature of the complaint and dispute that was before it, and the role of other agencies in the resolution of the complaint. In this particular instance, the National Land Commission had already investigated a similar complaint and made a decision on the 1st respondent's ownership of the suit properties. The National Assembly therefore ought to have recognized that the complaint before it involved a dispute as regards ownership of land and the propriety of the 1st respondent's title to the suit properties, and made appropriate recommendations that accord with and take into account the constitutional roles and functions accorded to the relevant state organs and agencies.
 66. In this respect, the core function of resolving disputes as regards title to land, and the attendant adjudicative role is not one of the functions of the National Assembly under article 95 of the Constitution, and is a function and role primarily given to the courts and tribunals established under



the Constitution by article 159. It is notable in this respect that the main distinguishing factor between judicial resolution of disputes and other forms of dispute resolution is that it is only the courts that have the power to construe and apply the law to controversies and disputes, and make binding and final authoritative decisions on the controversies, and on the enforcement of the applicable law. This is essentially what the National Assembly purported to do in its impugned report and recommendations, and purported to bestow enforcement powers on the National Land Commission and the Cabinet Secretary in the Ministry of Lands and Housing in the process. The trial Judge therefore did not err in his findings in this regard.

67. The second question before us is whether the National Assembly could review the National Land Commission's decision in exercise of its oversight powers. It was argued by the 1st and 3rd respondents in this respect that the National Assembly had no powers to exercise oversight over the National Land Commission and review its decision, on account of the Commission's constitutional independence. We are alive to the provisions of article 95(5)(b) of the Constitution which provide that one of the roles of the National Assembly is to exercise oversight of State organs, which state organs are defined under article 260 as "a commission, office, agency or other body established under this Constitution". The rationale for the oversight was addressed by the Supreme Court of Kenya in its advisory opinion in *In Re the Matter of the Interim Independent Electoral Commission* Sup Ct Application No 2 of 2011; [2011] eKLR, as being part and parcel of the system of checks and balances and serves the cause of accountability, so that no single person or institution should have a monopoly of all powers. We are in agreement with the finding by the supreme court that the framework of checks and balances therefore requires commissions and independent offices to restrain the arms of Government and other State organs, and vice versa.
68. The supreme court in addition observed that the independence of commissions does not entail that they must act on their own and stated as follows:

"(60) While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead



“independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences”.

69. It is notable however, that in the present appeal, the National Land Commission had already undertaken its functions of reviewing the 1st respondent’s title at the time of the impugned actions and decisions by the appellant, and the question of interference with the commission’s independence during this process was therefore moot. The relevant question was whether the decision arising from the due performance of the National Land Commission’s functions could be reviewed by the National Assembly in the exercise of its oversight powers.
70. The nature of oversight envisaged by article 95(5) in this regard is the review by the National Assembly of the activities of state organs, so as to ensure that they are achieving expected results; represent good value for money; and are in compliance with applicable policies, laws, regulations, and ethical standards. Specifically, for constitutional commissions, article 254 of the Constitution provides that the Commissions shall submit a report of their activities to the President and Parliament at the end of every financial year, or on any issue as requested, which reports are tabled before the relevant departmental committee of the National Assembly for consideration under Standing Order 216(5)(i).
71. In the present appeal however, the decision made by the National Land Commission that was the subject of the National Assembly’s investigation and oversight was a quasi-judicial decision and not a routine administrative decision, and to which elaborate procedures applied under section 14 of the National Land Commission Act. In addition, the processes of reviewing and overturning administrative, quasi-judicial and statutory decisions are laid down either by the applicable parent statute, the Fair Administrative Action Act and the Constitution, by way of review or appeal mechanisms. No such role is granted to the National Assembly under the National Land Commission Act, Fair Administrative Action Act or the Constitution. Various statutes in this regard reserve the role of review at the first instance to the Cabinet Secretary or other administrative officer in the parent Ministry and Tribunals, and article 165(6) the Constitution and section 7 of the Fair Administrative Action Act reserves the supervisory role and jurisdiction over all persons and bodies exercising administrative and quasi-judicial functions to the courts.
72. To this extent, while the National Assembly could investigate complaints about the processes of the decision making by the National Land Commission and make recommendations thereon, its oversight role did not extend to reviewing and altering quasi-judicial decisions made by the National Land Commission’s, which is a separate function of courts through an impartial and independent process, as a continuum of the system of checks and balances set out in the Constitution. The trial Judge therefore did not err in finding that the National Assembly’s oversight role did not extend to overturning the decision of the National Land Commission.

The Disposition

73. Arising from our findings hereinabove, we accordingly make the following orders:
- (1) The appellant’s interlocutory appeal in Mombasa Civil Appeal 100 of 2019 is dismissed in its entirety with costs to the 1st respondent.
 - (2) The appellant’s substantive appeal being Mombasa Civil Appeal E021 of 2020, is found to be partially merited, only to the extent of the following orders:
 - (a) We set aside order (iii) of the judgment delivered on April 29, 2020 by the Environment and Land Court in Mombasa ELC Petition No 17 of 2018 that the National Assembly and its Committees, including the Departmental Committee on Lands, do not have



power to review grants and dispositions of public land, this power being vested in the National Land Commission (subject to the limitations in section 14 of the National Land Commission Act) and to the courts, and substitute therefore the following order:

That the exercise of the powers under articles 95(2), and 95(5)(b) of the Constitution by the National Assembly and its Committees, including the Departmental Committee on Lands, with respect to disputes over grants and dispositions of public land are subject to, and do not include the Constitutional powers and functions vested in the National Land Commission and the courts pursuant to articles 67, 159(1), 162(2)(b) and 165(6) of the Constitution.

- (b) We set aside order (iv) of the judgment delivered on April 29, 2020 by the Environment and Land Court in Mombasa ELC Petition No 17 of 2018 that the National Assembly and its Committees, including the Departmental Committee on Lands, do not have power to hear disputes over title to land, or make decisions on who has good title or the right to occupy land, and substitute therefore the following order:

That the exercise of the powers under articles 95(2), and 95(5)(b) of the Constitution by the National Assembly and its Committees, including the Departmental Committee on Lands, with respect to disputes over title to, use and occupation of land are subject to, and do not include the Constitutional powers and functions vested in the courts pursuant to articles 159(1), 162(2)(b) and 165(6) of the Constitution.

- (c) All the other declarations and orders by the Environment and Land Court in orders (i), (ii), (v), (vi), (vii), (viii), (ix), (x) and (xi) of the judgment delivered on April 29, 2020 in Mombasa ELC Petition No 17 of 2018 are hereby affirmed and upheld, save to the extent that they may have been modified or qualified by the findings made in this judgment.

- (3) Each party shall meet their own costs of the appeal in Mombasa Civil Appeal E021 of 2020 in light of the public interest issues raised therein.

74. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY, 2023.

S. GATEMBU KAIRU (FCI Arb)

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

