



**Makueni County Government v National Land Commission & 6 others (Environment and Land Appeal E036 of 2023) [2024] KEELC 3666 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3666 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E036 OF 2023**

**LL NAIKUNI, J  
APRIL 24, 2024**

**BETWEEN**

**MAKUENI COUNTY GOVERNMENT ..... APPELLANT**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**OKIYA OMTATA OKOITI ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF TAITA TAVETA ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KWALE ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL EXECUTIVE OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**THE PARLIAMENT OF KENYA ..... 6<sup>TH</sup> RESPONDENT**

**THE HON.ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

*(An appeal from the decision, ruling and order of National Land Commission dated 5th October 2023-In the matter of Historical Land Injustice Reference: No. NLC/HLI/3670/2021)*

**RULING**

**I. Introduction**

1. This Honourable Court was moved by the Appellant/Applicant – County Government of Makueni herein to make a determination from a filed Notice of Motion application dated 24<sup>th</sup> November, 2023. The application was brought under the dint of the provision of Section 13 of the Environment and Land Act, No. 19 of 2019 and Order 42 Rule 6 of the Civil Procedure Rules, 2010.



2. Upon service of the said application, while the 2<sup>nd</sup> and the 1<sup>st</sup> Interested party opposed it, the 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Respondents were in support of the said application. The 6<sup>th</sup> Respondent opted to take a neutral position whatsoever.

## II. The Appellant/Applicant's case.

3. The Appellant/Applicant sought for the following orders.
  - a. Spent.
  - b. That pending the hearing and determination of this application, there be a stay of further proceedings before the National Land Commission in Cause Reference Number NLC/HLI/3670/2021, Okiya Omtatah Okoiti – Versus - County Government of Kwale & 2 others.
  - c. That pending the hearing and determination of the appeal herein, there be a stay of further proceedings before the National Land Commission in Cause Reference Number NLC/HLI/3670/2021, Okiya Omtatah Okoiti – Versus - County Government of Kwale & 2 others.
  - d. That costs of the application be provided for.
4. The application was based on the grounds, testimonial facts and averment made out in the 18 Paragraphed Supporting Affidavit of Dr. Justin Kyambit together with ten (10) annexures marked as “JN – 1 to 10” annexed thereto. He averred on oath as follows:-
  - a. He was the County Secretary, Makueni County Government, the Appellant herein and was familiar with the facts and proceedings in this matter. Hence he was competent to swear this affidavit and duly authorized to swear the affidavit.
  - b. The facts and matters deponed to herein were derived from his own knowledge and partly from information and advice received by him from his Advocates on record Messrs. E. K. Mutua & Co. Advocates. To the extent that any statement made herein was based on information and belief, he has disclosed hereunder the source or ground.
  - c. On or about 23<sup>rd</sup> July 2021 the 2<sup>nd</sup> Respondent, Okiya Omtatah Okoiti filed a Petition dated 19<sup>th</sup> July 2021 in “Mombasa Environment and Land Court Cause No. ELC Petition No. 33 Of 2021 Mombasa, in which he sought the following reliefs:-
    - i. A declaration be and is hereby issued that forcing the residents of Mtito Andei and Mackinnon Road towns to pay double taxes is a gross violation of the affected traders' property rights under Article 40(3) of *the Constitution*.
    - ii. A declaration be and is hereby issued that the double taxation the residents of Mtito Andei and Mackinnon Road towns violates Article 47(1) of *the Constitution*.
    - iii. A declaration be and is hereby issued that the Parliament of Kenya should set up an independent commission to resolve the simmering boundary disputes pitting Taita Taveta County against Makueni and Kwale counties.
    - iv. A declaration be and is hereby issued that the Parliament of Kenya should enact enabling legislation to implement Articles 94 (3) and 188 of *the Constitution*.
    - v. A declaration be and is hereby issued that the National Executive of Kenya has failed failing (sic) to lessen county boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to



Articles 129, 130, 131(1)9b) & (2) (a) & (b), as read together with Article 6(1) and the First Schedule to *the Constitution*.

- vi. A declaration be and is hereby issued that the National Executive of Kenya should survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to Articles 129, 130, 131 (1)(b) & (2) (a) & (b), as read together with Article 6 (1) and the First Schedule to *the Constitution*.
  - vii. A mandatory order compelling the Parliament of Kenya to set up, within three months from the date to this Order, an independent commission to resolve the simmering boundary disputes pitting Taita Taveta County against Makueni and Kwale County.
  - viii. A mandatory order compelling Parliament, after the boundary disputes have been resolved, to direct how the County Governments of Taita Taveta, Makueni, and Kwale will utilize the money held in the joint accounts they opened for revenue collections in Mackinnon Road and Mtito Andei towns as ordered by the court at the beginning of these proceedings.
  - ix. A mandatory order compelling the Parliament of Kenya to enact, within six months form the date of this Order, enabling legislation to implement Articles 94 (3) and 188 of *the Constitution*.
  - x. A mandatory order compelling the National Executive to, within twelve months from the date of this Order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the *Districts and Provinces act*, 1992, with preference being given to the boundaries between Taita Taveta County and Makueni County on the one hand, and Taita Taveta County on the other.
  - xi. A mandatory order compelling the National Executive and the Parliament of Kenya to file in this Honourable Court affidavits demonstrating compliance with the Court Orders at the expiry of the periods within which they have been ordered to act.
  - xii. A mandatory order compelling the respondents to pay the petitioner's costs of this Petition.
  - xiii. The Honourable Court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant." Annexed and marked SN1 is a true copy of the Petition.
- d. Following interlocutory applications and Preliminary Objections, on 23<sup>rd</sup> March 2023, the court delivered a ruling in which it "inter alia" directed and ordered as follows: -

Thatfor the sake of attempting to resolve the existing boundaries dispute facing the three Counties of Taita Taveta, Makueni and Kwale(emphasis),under the circumstances where there exists no clear legal mechanisms to do so, the instant proceedings are stayed for a period of Six (6) months from the date of this ruling.

Thatin the meantime, the Petitioner be and is hereby directed to immediately serve this orders upon the National Land Commission lodge a formal complaint with the National Land Commission (emphasis)to enable them initiate investigations into the historical injustices and the instant county boundary dispute involving these three counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said County boundary dispute once and for all (emphasis).



That in the Petitioner be and is hereby directed to immediately within the next seven (7) days from the date of this ruling extract and serve this orders upon the National Land Commission for their action thereof.

That upon service the Chairman and the Secretary to the National Land Commission be and are hereby directed to file a comprehensive report on the said three County Boundaries (emphasis) before this Honourable court on its recommendations and appropriate redress within the next seven (7) days after its preparation for its adoption by court and further direction.

Annexed and marked as “JK – 2” as a true copy of the ruling.

- e. By a letter dated 12<sup>th</sup> January 2023, they wrote to the NLC seeking to establish “whether the Petitioner filed a complaint with the Commission. Annexed and marked as “JK – 3” was a true copy of the letter.
- f. By a letter dated 8<sup>th</sup> February 2023, they drew to the attention of the NLC the fact that there was no complaint before it which was capable of being determined and that without a formal complaint it was difficult for us to respond to any issues. Annexed and marked as “JK – 4” was a true copy of the letter.
- g. By a second letter dated 24<sup>th</sup> February 2023, (which was copied to the 2<sup>nd</sup> Respondent) they sought to know whether a formal complaint had been lodged with NLC. Annexed and marked as “JK – 5” was a true copy thereof.
- h. On or about 28<sup>th</sup> February 2023, they received copy of a letter dated the same day addressed to the NLC by the 2<sup>nd</sup> Respondent which stated as follows:-

“ - - I duly and effectively moved the Commission by writing to and serving copies of the Ruling and my Petition (Pleadings) on the Commission.”---for the benefit of some parties, I clarify which issues the Commission should determine in the Petition I had served to them, I hereby proceed to elucidate that, the Commission should investigate and determine

1. Which county, between Taita Taveta and Makueni, has jurisdiction over Mtito Andei Town; and
  2. Which county, between Taita Taveta and Kwale, has jurisdiction over Mackinnon Road Town.” (emphasis). Annexed and marked as “SN – 6” was a true copy of the letter.
- i. Following the directions by the NLC, on 20<sup>th</sup> March 2023, they filed a formal Notice of Preliminary Objection on the question of jurisdiction. Annexed and marked as “SN – 7” was a true copy thereof.
  - j. By a ruling delivered on 5<sup>th</sup> October 2023, the NLC held that it has jurisdiction to determine the matter before it. In dismissing the Preliminary Objection, it inter alia stated as follows: -

“ - - - the parties understand the nature of the complaint as communicated by way of an e-mail indicating that Mr. Okiya Omtatah adopts his Petition before the court as his complaint, (emphasis) and, thereafter, upon directions by the Commission, the complaint was formally served, by a letter dated 28th February 2023. Whereas the petitioner would have crafted a fresh complaint, he elected to forward, by email



and letter, the petition as presented before the court and adopting it as his claim. -  
--“Annexed and marked as “SN – 8” is a true copy of the ruling.

- k. On 11<sup>th</sup> October 2023, they applied for a certified copy of the ruling. The same was not made available to us until the 25<sup>th</sup> October 2023. Annexed and marked as “SN – 9” was a true copy of the letter.
- l. Being aggrieved by the said ruling, they filed a Memorandum of Appeal on the 30<sup>th</sup> October 2023. Annexed and marked as “SN – 10” as a true copy thereof.
- m. The appeal herein raises the following fundamental and weighty issues: -
- n. Given the undisputed fact and finding that the complaint before the NLC is as per the Petition filed in Mombasa ELC PET NO. 33 OF 2021, whether the NLC has jurisdiction to interrogate and determine the issues raised in the said Petition.
- o. Whether the NLC has jurisdiction to determine the issues framed by the 2<sup>nd</sup> Respondent (as to which county has jurisdiction over Mtito Andei and Mackinnon Road Towns) vide his letter dated 28<sup>th</sup> February 2023.
- p. Whether by failure to file a formal complaint, there was a violation of Appellant’s right to appreciate and understand with specify the claim in order to answer the same and hence breach of the right to a fair hearing.
- q. Whether the proceedings before the NLC and the ELC Mombasa amount to parallel proceedings.
- r. Unless an order of stay of further proceedings before the NLC, the NLC is likely to proceed with the hearing of the matter a consequence of which substantial loss is to be occasioned as follows: -
- s. Public funds would be spent in an exercise where the jurisdiction of the NLC was under serious challenge.
- t. The Applicant was likely to expend money towards defending the matter and preparing for trial, including gathering of documents and witnesses.
- u. It was in the interest of justice and in the public interest that the appeal herein be determined before further proceedings may be taken before the NLC.
- v. The application herein was extremely urgent because the NLC had already issued the following directions: -
  - i. That parties do file Witness Statements.
  - ii. The matter is to be heard by way of oral evidence.
  - iii. A schedule of site visits was to be agreed upon whereat proceedings were to be conducted.

### **III. The Replies.**

- 5. While opposing this application the 3<sup>rd</sup> Respondent filed a Replying affidavit dated the Replying Affidavit sworn by Habib Mruttu and dated 3<sup>rd</sup> March, 2024. The Court has fully noted its contents and does not wish to reproduce it herein verbatim.



6. The Court notes that the 2<sup>nd</sup> Respondent fully associated himself with the contents of the replies by the 3<sup>rd</sup> Respondent.

#### IV. Submissions

7. On 20<sup>th</sup> March, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24<sup>th</sup> November, disposed off by way of written submissions. Indeed, within the stipulated timeframe, the Applicant and the 3<sup>rd</sup> Respondent obliged and a ruling dated was reserved for 11<sup>th</sup> April, 2014 though due to unavoidable circumstances beyond the control of this Honourable Court including attending an Judges training session for a whole week, was eventually delivered on 25<sup>th</sup> April, 2024 accordingly.

#### A. The Written Skeleton Submissions by the 3<sup>rd</sup> Interested Party.

8. While supporting the Notice of Motion application dated 24<sup>th</sup> November 2023, the Learned Counsel for the Applicant the Law firm of Messrs. E. K. Mutua & Company Advocates filed written submissions dated 6<sup>th</sup> April, 2024. Mr. Mutua Advocate commenced his submission by stating that on 23<sup>rd</sup> March 2022 the Environment and Land Court, Mombasa, delivered a ruling in ELC PET NO. 33 OF 2021 Mombasa, Okiya Omtatah - Versus - The Parliament of Kenya & Others (The County Government of Makueni is named as the 3<sup>rd</sup> Interested Party in the suit) in which it inter alia held, directed and ordered as follows:-

- “ a) .....
- b) Thatfor the sake of attempting to resolve the existing boundaries dispute facing the three Counties of Taita Taveta, Makueni and Kwale (emphasis), under the circumstances where there exists no clear legal mechanisms to do so, the instant proceedings are stayed for a period of Six (6) months from the date of this ruling.
- c). Thatin the meantime, the Petitioner be and is hereby directed to immediately serve this orders upon the National Land Commission lodge a formal complaint with the National Land Commission (emphasis)to enable them initiate investigations into the historical injustices and the instant county boundary dispute involving these three counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said County boundary dispute once and for all (emphasis).
- d) Thatin the petitioner be and is hereby directed to immediately within the next seven (7) days from the date of this ruling extract and serve this orders upon the National Land Commission for their action thereof.
- e) Thatupon service the Chairman and the Secretary to the National Land Commission be and are hereby directed to file a comprehensive report on the said three County Boundaries (emphasis) before this Honourable court on its recommendations and appropriate redress within the next seven (7) days after its preparation for its adoption by court and further direction.

9. The Learned Counsel averred that instead of lodging a complaint with the National Land Commission (NLC), the 2<sup>nd</sup> Respondent provided the NLC with the ruling of the court and the suit (Petition) papers filed before the court. Further, by a letter dated 28<sup>th</sup> February 2023, the Petitioner informed



the NLC that having served it with his Petition and the ruling of the court, it "should investigate and determine: -

- i). which county, between Taita Taveta and Makueni, has jurisdiction over Mrito Andei Town; and
  - (ii) which county, between Taita Taveta and Kwale, has jurisdiction over Mackinnon Road Town."
- He informed Court that on 20<sup>th</sup> March 2023, the Applicant, County Government of Makueni, filed a Notice of Preliminary Objection dated 17<sup>th</sup> March 2023 in which raised an objection to the hearing and determination of the dispute by the NLC on the following grounds:
- a) The NLC lacked jurisdiction to determine the dispute,
  - b) The complainant had not complied with the court ruling by lodging a Complaint with the NLC.
10. According to the Learned Counsel, in its ruling the NLC held that Pleadings and Affidavits filed in Petition N.33 of 2021 constituted the Complaint. The Applicant was aggrieved by the said ruling and filed the appeal herein. Further, the Applicant filed the application under consideration. By the submissions herein, the Applicant would demonstrate that the court should exercise its discretion to stay the proceedings before the NLC so as to determine the issues of fact and law raised in the appeal.

#### **Prima Facie Merits of/Arguable Appeal**

11. The Learned Counsel asserted that given that the NLC had determined through its impugned ruling that the pleadings and affidavits filed in ELC Petition No.33 of 2021Mombasa formed or constituted the complaint, then the NLC would be sitting to hear the same matter as the court in the said matter. It clearly had no jurisdiction to hear the issues raised in the said Petition which were:-
- (i) A question of boundaries between the Counties of Makueni,Kwale and Taita Taveta.
  - (ii) An exercise which may lead to adjustment and or alteration of County Boundaries of Makueni, Kwale and Taita Taveta.
  - (iii) The architecture of the Petition revolves around intergovernmental disputes between the three counties of Makueni, Kwale and Taita Taveta.
  - (iv) Failure by the complainant to lodge a complaint with the NLC as directed by the court, means that there is no dispute before the NLC providing particulars, facts and grounds on alleged historical land injustices.

#### **Optimum utilization of judicial time**

12. He opined that it would save judicial time for the court to temporarily stay the proceedings before the NLC so that it may first determine whether or not, it was handling the matter in the manner directed by the court. Such determination would save judicial time as follows:
- i. Parallel proceedings would be averted given that the court in ELC Petition No. 33 of 2021 had already issued direction on a time frame for determining the dispute.
  - (ii) Time taken by NLC in dealing the matter will be saved.
  - (iii) A similar issue of jurisdiction may not be raised after a determination by the NLC.



### **Application was filed expeditiously**

13. His contention was that the appeal herein was filed on the 31<sup>st</sup> October 2023 while the application was filed on 24<sup>th</sup> November 2023. As at the said date no meaningful step had been taken by the NLC towards the hearing of the matter. In the premises the application was brought to court expeditiously.

### **Conditions precedent for grant of stay of proceedings.**

14. In the cases of “Global Tours & Travel limited; Nairobi Winding Up Cause No. 43 of 2000 and William Kamunge & 2 Others – Versus - Muriuki Mbithi [2016] eKLR the High court held that in order for a court to exercise its discretion to grant an order for stay of proceedings pending appeal it was to consider whether the intended appeal was arguable or had prima facie merit, a prudent and optimum use of judicial time and whether the application had been brought timeously. PARAGRAPH 15.

In conclusion, the Learned Counsel held that Jurisdiction is everything. The appeal herein raises jurisdictional questions. It was within the law and just that the said question be determined before the NLC embarked on an exercise that may be held to have been undertaken without jurisdiction. No prejudice would be suffered by any party if the proceedings were stayed.

### **B. The Written Submissions by the 3<sup>rd</sup> Respondent.**

16. In respect to the Notice of Motion application dated 24<sup>th</sup> November, 2023 and while opposing it, the Learned Counsel for the 3<sup>rd</sup> Respondent, the Law firm of Messrs. Manasses, Mwangi & Associates -MMAS filed their written submissions dated 8<sup>th</sup> April, 2024. Mr. Mwangi Advocate teaming up with Mr. Kipngetich Advocate commenced their submission by providing a brief introduction to the matter. They stated that on 23<sup>rd</sup> July, 2021, the 2<sup>nd</sup> Respondent filed a Petition dated 19<sup>th</sup> July, 2021. In response to the Petition, the National Executive and the Hon. Attorney General filed a Preliminary Objection dated 19<sup>th</sup> October, 2021. The Senate’s Preliminary Objection was dated 21<sup>st</sup> October, 2021. The County Government of Makueni and The County Government of Kwale also filed preliminary objections dated 4<sup>th</sup> September, 2021 and 19<sup>th</sup> October, 2021 respectively.
17. The Applicant’s preliminary objection was based on the ground that the court lacked jurisdiction to hear and determine the Petition which was filed in violation of the express provisions of Article 189 (3) and (4) of *The Constitution* and Sections 31, 32, 33, 34 and 35 of the *Intergovernmental relations Act*, and that the Petition was premature and abuse of the court process.
18. The Learned Counsels informed Court that upon hearing the various preliminary objections, this Honourable Court rendered its decision on 23<sup>rd</sup> March, 2022. In its ruling, the court found that it has original and unlimited jurisdiction under Article 162 (2) (b) of *The Constitution*, Sections 3 and 13 of the *Environment and Land Court Act* No.19 of 2011, Section 101 of the *Land Registration Act* and Section 150 of the *Land Act* to hear and determine the issues raised herein this petition and hence to that extent the preliminary objections raised by the Respondents and the interested parties is disallowed for being unmeritorious.
19. Next, this Honourable Court directed the 2<sup>nd</sup> Respondent to lodge a formal complaint with the National Land Commission to enable them initiate investigations into the Historical Injustices and the instant county boundary dispute involving these three counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said: County boundary dispute once and for all.



20. As directed by this Honorable court, the 2<sup>nd</sup> Respondent lodged a formal complaint with NLC. Thereafter, the Applicant and the 4<sup>th</sup> Respondent lodged preliminary objections dated 17<sup>th</sup> March, 2023 and 20<sup>th</sup> March, 2023 respectively. The main objections raised by the Applicant before the NLC were that:
- a) The commission was not clothed with jurisdiction to determine county boundaries or position of county boundaries.
  - b) That the dispute in an intergovernmental dispute and there is a procedure for resolving such disputes.
  - c) Finally, the Applicant faulted the form in which the complaint had been presented before the commission.
21. Having heard all the parties on the two preliminary objections, the National Land Commission delivered its ruling on 5<sup>th</sup> October, 2023 dismissing the objections and directing that the claim dated 28<sup>th</sup> January, 2023 would proceed to investigation and hearing. It was now this ruling which the Applicant intended to challenge and informed the filing of the Application dated 24<sup>th</sup> November, 2023.
22. The 3<sup>rd</sup> Respondent opposed the said application through the Replying Affidavit dated 3<sup>rd</sup> March, 2024. The Learned Counsels stated that they never wished to belabor this Honourable court by regurgitating the contents of the said affidavit and would invite this Honourable to peruse it. The Learned Counsel stated that in this submissions, they would address only one issue for Court's determination. This was whether the Applicant had met the requirements for grant of stay of further proceedings pending its intended appeal. From the onset, the 3<sup>rd</sup> Respondent maintained that the application never met the threshold for granting of stay of proceedings before the NLC.
23. They averred that the application and the intended appeal was an appeal against the ruling of this court dated 23<sup>rd</sup> March, 2023 disguised as an appeal against the decision of the NLC dated 5<sup>th</sup> October, 2023. They invited Court to look at the preliminary objections that had been lodged by the Applicant in ELC No. 33 of 2021 and also the preliminary objection lodged in complaint no. 3670 of 2021 before the NLC. The two objections were a replica of the other one save that they had been filed in different forums. The Counsel asserted that having directed the NLC to prepare a report, this court's hands were tied in the determination of whether NLC has jurisdiction or not. Indeed, if this court was to consider the issue of jurisdiction of NLC, it would -in effect be revisiting its own decision of 23<sup>rd</sup> March, 2022 which was not proper. That issue could only be addressed by way of an appeal. Indeed, at paragraph 100 of its ruling of 23<sup>rd</sup> March, 2022, this court held that NLC has jurisdiction to handle the dispute before it. It stated that:
- “This court having perused all the relevant provisions is telling the Petitioner to lift his eyes; help is coming from *the Constitution* of Kenya which is the solid foundation of all doings governing this Republic. It is my finding that to resolve the present boundary dispute pitting the three counties and having the disputed areas investigated, surveyed and beacons erected to clearly demarcate the boundaries in issue are best handled by the National Land Commission and make appropriate recommendations and ultimately resolving the boundary dispute will in turn provide clearly which County/ Counties the residents of the towns Mackinnon Road Town and Mtito Andei should pay their taxes to.”



24. The Learned Counsel observed that none of the parties appealed against the above of decision this very court, dismissing the preliminary objection on the jurisdiction of the court and directing Okiya Omtata Okoiti to file a complaint before the National Land Commission to hear the dispute. To date, no serious challenged had been mounted or pursued seriously by any party. I urge this court not to countenance the Applicant's attempt to bring an appeal against the ruling of 23<sup>rd</sup> March, 2022 through the backdoor. Furthermore, the issue of whether the dispute between the parties was an intergovernmental dispute or not was not available for determination by this Honourable Court. This court already made a decision at paragraph 95 of the ruling of 23<sup>rd</sup> March, 2022. While granting that order, this Court was of the view NLC was well mandated to undertake the task as seen at paragraph 100 of its ruling of 23<sup>rd</sup> March, 2022. This court held that:-

“This court having perused all the relevant provisions is telling the Petitioner to lift his eyes; help is coming from the Constitution of Kenya which is the solid foundation of all doings governing this Republic. It is my finding that to resolve the present boundary dispute pitting the three counties and having the disputed areas investigated, surveyed and beacons erected to clearly demarcate the boundaries in issue are best handled by the National Land Commission and make appropriate recommendations and ultimately resolving the boundary dispute will in turn provide clearly which County/ Counties the residents of the towns Mackinnon Road Town and Mtito Andei should pay their taxes to.”

Additionally, at paragraph 95 of the ruling of 23<sup>rd</sup> March, 2022 clearly stated:

“I have taken time to read the aforementioned decisions, I agree that where there exists a proper and suitable alternative forum for resolving disputes then there is need to strictly adhere and present a dispute before: such forum. However, in the instant petition the respondents are clearly mistaken on argument that the current dispute should be resolved as provided under the ambit of article 189(3) of the : Constitution and the provisions of the Intergovernmental Relations Act. Be that as it may, apart from this particular forum under Article 189(3) of the Constitution which by now we all agree: is not applicable to the instant case, and based on the Doctrine of Exhaustion, this court has asked itself if there is any other existing alternative forum: upon which the Petitioner should approach before coming to this court”

25. In view of the above, the Applicant had not demonstrated that it had any arguable appeal because the grounds of the intended appeal had already been determined by this Honourable court. The NLC also largely adopted the reasoning and the holding of this Honourable court in its decision which was the subject of the intended appeal. It was their submission therefore that the application herein is an abuse of the due process of the court. The appeal which was based on issues that had already been determined makes it frivolous and idle. Its sole purpose if to derail the expeditious determination of the main Petition being Mombasa ELC Petition No. 33 of 2021.

26. Additionally, they contended that the applicant had not demonstrated any substantial loss. The provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

An application under the provision of Order 42 Rule 6 of the Civil procedure Rules, 2010 called for the invocation of judicial discretion which must be exercised judiciously and not in a capricious manner. To succeed in an application for stay of further proceedings, the Applicant was required to demonstrate to this court that it would suffer substantial loss in the absence of stay being granted. The big question here was, what kind of substantial loss would the Applicant suffer if the NLC continued with its hearings and investigations geared towards preparing a report as directed by a court order?



There was none. Not one that had been demonstrated. To support their argument, they relied on the case of:- “Kenya Shell Limited – Versus - Benjamin Karuga Kibiru & another [1986] eKLR, Platt Ag. JA held that:

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

27. Considering that the complaint to National Land Commission was filed pursuant to a court order, the appellant should fault the action to be taken in respect to the report, or how the court treats the report, not the ability of the National Land Commission to conduct a fact finding exercise. While referring the matter to the NLC, this court made clear directions that NLC was required to file a report in court with pragmatic and practical recommendations. This court would be deprived of the opportunity to consider the report if proceedings before NLC were stayed.
28. In conclusion, they urged the court to find that the Applicant had failed to demonstrate any substantial loss that it would incur if the National Land Commission continued with its proceedings and make a report of its findings as directed by the court. On the contrary, the Petitioners in ELC Petition No.33 of 2021 would be highly prejudiced with the delay in concluding these matters. In the end, they urged the court to arrive at the inescapable conclusion that the application is without merit and dismiss it with costs.

#### **V. Analysis & Determination.**

29. I have carefully assessed all the issues raised from the filed pleadings with regard to the application dated 24<sup>th</sup> November, 2023, the replies, the filed submissions and the cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
30. For the Honourable Court to fairly, reasonably and equitably reach a sound decision, it has condensed the salient issues for its determination into three (2) aspects. These are:
  - a. Whether the Notice of Motion dated 24<sup>th</sup> November, 2023 by the Appellant/Applicant has merit or not.
  - b. Whether the parties herein are entitled to the reliefs sought.
  - c. Who will bear the Costs of the application.

#### **ISSUE No. a). Whether the Notice of Motion dated 24<sup>th</sup> November, 2023 by the Appellant/Applicant has merit or not.**

31. Under this Sub – heading, arising from the decision of the NLC dated 5<sup>th</sup> October, 2023, whereby the main issue for determination in this application was twofold: - whether the NLC has jurisdiction to hear and make any determination on the matter at hand and secondly the granting of stay of proceedings before the said NLC. As a disclaimer, this Honourable Court will endeavor to steer off from the pari material issues to be determined from the filed appeal from the decision by the NLC in order not to prejudice the Appellant/Applicant. The Appellant/Applicant being aggrieved by the decision of the NLC lodged an appeal before this Court and also filed the instant application. The Appellant/Applicant sought for the afore – stated orders. In a nutshell, the Appellant/Applicant held that by a letter dated 12<sup>th</sup> January 2023, they wrote to the NLC seeking to establish "whether the Petitioner filed a complaint with the Commission - annexed and marked as “JK – 3”. By a letter dated 8<sup>th</sup> February 2023, they drew to the attention of the NLC the fact that there was no complaint before



it which was capable of being determined and that without a formal complaint it was difficult for us to respond to any issues. By a second letter dated 24<sup>th</sup> February 2023, (which was copied to the 2<sup>nd</sup> Respondent) they sought to know whether a formal complaint had been lodged with NLC. On or about 28<sup>th</sup> February 2023, they received copy of a letter dated the same day addressed to the NLC by the 2<sup>nd</sup> Respondent. Following the directions by the NLC, on 20<sup>th</sup> March 2023, they filed a formal Notice of Preliminary Objection on the question of jurisdiction. By dismissing the preliminary objection, a ruling was delivered on 5<sup>th</sup> October 2023, to the effect that the NLC has jurisdiction to determine the matter before it. Being aggrieved by the said ruling, they filed a Memorandum of Appeal on the 30<sup>th</sup> October 2023. According to the Appellant/Applicant. The appeal herein raises the following fundamental and weighty issues and therefore the need for there be stay of the proceedings at the NLC pending the hearing and final determination of the appeal.

32. The application was vehemently opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein. The Learned Counsels informed Court that upon hearing the various preliminary objections, this Honourable Court rendered its decision on 23<sup>rd</sup> March, 2022. In its ruling, the court found that it has original and unlimited jurisdiction under Article 162 (2) (b) of *The Constitution*, Sections 3 and 13 of the *Environment and Land Court Act* No.19 of 2011, Section 101 of the *Land Registration Act* and Section 150 of the *Land Act* to hear and determine the issues raised herein this petition and hence to that extent the preliminary objections raised by the Respondents and the interested parties is disallowed for being unmeritorious. Next, this Honourable Court directed the 2<sup>nd</sup> Respondent to lodge a formal complaint with the National Land Commission to enable them initiate investigations into the Historical Injustices and the instant county boundary dispute involving these three counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said: County boundary dispute once and for all. As directed by this Honorable court, the 2<sup>nd</sup> Respondent lodged a formal complaint with NLC. Thereafter, the Applicant and the 4<sup>th</sup> Respondent lodged preliminary objections dated 17<sup>th</sup> March, 2023 and 20<sup>th</sup> March, 2023 respectively. The main objections raised by the Applicant before the NLC were that:

- a) The commission was not clothed with jurisdiction to determine county boundaries or position of county boundaries.
- b) That the dispute in an intergovernmental dispute and there is a procedure for resolving such disputes.
- c) Finally, the Applicant faulted the form in which the complaint had been presented before the commission.

In the long run the 3<sup>rd</sup> Respondent argued that this court, which had directed to be furnished with the report, would be deprived of the opportunity to consider the report of proceedings before NLC were stayed. Thus, urged court to dismiss the application for lack of merit.

From the very onset, this Court takes cognizance to the fact that the issue of the Jurisdiction of NLC forms the pith and substance of the pending appeal lodged by the Appellant/Applicant and thus the Court will be circumspect will handling it to avoid prejudicing its case. It will only deal with it from a thin membrane while addressing the issue of stay of proceedings by NLC. . The Laws governing the stay of proceedings are governed by the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which the application was based on proved as follows:

“No order for stay of execution shall be made under sub - rule (1)unless-



- (a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

33. An application under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 called for the invocation of judicial discretion which must be exercised judiciously and not in a capricious manner. To succeed in an application for stay of further proceedings, the Applicant was required to demonstrate to this court that it would suffer substantial loss in the absence of stay being granted. Essentially, in my own assessment the Appellant has failed to demonstrate with any empirical evidence that it would suffer any substantial loss the NLC continued with its hearings and investigations geared towards preparing a report as directed by a court order. The Court fully concurs with the legal ratio founded from the case of:- "Kenya Shell Limited (Supra) cited by the Learned Counsel for the 3<sup>rd</sup> Respondent herein. Ideally, it was usually a good rule to see if the provision of Order 42 Rule 6 of the Civil Procedure Rules can be substantiated. If there was no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. On the other hand, I hold that the appeal may be weighty and arguable and thus there would be need to hear and determine it all in all without necessarily interfering with the proceedings of the NLC which if in the long run are found to be unfounded may be easily set aside or reviewed for that matter.

34. For these reason, the Court is not persuaded that the application by the Applicant has any merit and hence it must not succeed fully.

**SUISSUE No. b). Whether the parties herein are entitled to the reliefs sought.**

35. Under this sub – heading, the main issue of contention is pertaining to the Jurisdiction of the NLC. The Honourable Court feels it's the main subject of the appeal instituted by the Appellant. It would be unfair to deliberate on it at this stage in depth as it may prejudice their case and the outcome of the impugned pending appeal. However, while on the one hand and from the ruling of this court dated 23<sup>rd</sup> March, 2023, the Court was desirous of the NLC which was mandated by the provision of the Article 67 (1) (e) of *the Constitution* of Kenya, 2010 to initiate investigations on its own initiative or on a complaint into the present or historical land injustices and recommend appropriate redress. Unless otherwise stated, this Court is still awaiting that report within the stipulated timeframe.

36. But on the other hand, and based on the already pronouncement made on these issues, the Court has already held that the appeal raised arguable and weighty issues, the Honourable Court would wish to hold all these in abeyance awaiting the hearing and final determination of the appeal instituted by the Appellant/Applicant.

**ISSUE No. c). Who will bear the Costs of the application.**

37. Taking that the issue of costs is at the discretion of the Court, in brief I hold that each party bears their costs as the appeal is still to be heard and determined in due course.



#### **IV. Conclusion & Disposition.**

38. From the indepth analysis of the issues framed herein, the Honorable Court makes the following specific orders. These are:-
- a. That the Notice of Motion application dated 24<sup>th</sup> November, 2023 be and is hereby partially allowed.
  - b. That the prayers for stay of execution of the proceedings before the NLC pending the hearing of the appeal of its decision of 5<sup>th</sup> October, 2023 be and is hereby declined.
  - c. That in the meantime and for expediency, the scheduled appeal to be disposed off by way of written submissions as follows:-
    - i. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> Respondents granted 14 days leave to file and serve Written Submissions.
    - ii. The Appellant granted 14 days to file and serve written Submissions.
    - iii. The Court reserves a date to deliver its Judgement on the Appeal on 22<sup>nd</sup> July, 2024.
  - d. That each party to bear their own costs.

It Is So Ordered Accordingly

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS.....24<sup>TH</sup> .....DAY OF.....APRIL.....2024**

.....

**HON. JUSTICE L.L. NAIKUNI**

**ENVIRONMENT & LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Kaleche, the Court Assistant.
- b. Mr. Kalii Advocate holding brief for Mr. E. K Mutua Advocate for the Appellant/Applicant.
- c. No appearance for the 1<sup>st</sup> Respondent.
- d. M/s Ekesa holding brief for Mr. Okiya Omtatah acting in person for the 2<sup>nd</sup> Respondent.
- e. Mr. Mwangi & Mr. Kipngetich Advocates for the 3<sup>rd</sup> Respondent.
- f. M/s. Mwashuruti Advocate holding brief for Mr. Nyamodi Advocate for the 4<sup>th</sup> Respondent.

