



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 210 OF 2018

(CORAM: OUKO (P), KOOME & OKWENGU, JJA)

BETWEEN

ABDULKADIR A. KHALIF.....APPELLANT

AND

THE PRINCIPAL SECRETARY

MINISTRY OF LANDS &

PHYSICAL PLANNING .....1<sup>ST</sup> RESPONDENT

THE CHIEF LAND REGISTRAR .....2<sup>ND</sup> RESPONDENT

DIRECTOR OF SURVEYS .....3<sup>RD</sup> RESPONDENT

PUBLIC SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT

THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT

AND

THE NATIONAL LAND COMMISSION ....1<sup>ST</sup> INTERESTED PARTY

DAVID KIBIWOTT ACHIKWA .....2<sup>ND</sup> INTERESTED PARTY

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mativo, J.) dated and delivered on 19<sup>th</sup> February 2018*

in

**Constitutional Petition No. 479 of 2017)**

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**JUDGMENT OF THE COURT**

[1] This appeal arises from a petition dated 26th September, 2017 in which **Abdulkadir A. Khalif** who is now (the appellant) before us sought orders from the court against the Principal Secretary, Ministry of Lands and Physical Planning (the Ministry), The Chief Land Registrar, Director of Surveys, Public Service Commission and The Honourable Attorney General (herein 1st to 5th respondents) and the National Land Commission (NLC) as an interested party. The 2nd interested party, **David Kibiwott Achikwa (Mr. Achikwa)** was joined by the court below as explained in paragraph 17 of this judgment.

[2] According to the grounds stated in the petition and an affidavit sworn by the appellant in support of the petition, the appellant who is a Commissioner of NLC is concerned that there is interference with the constitutional mandate of NLC of managing public land on behalf of the National and County Government. In his view, following the establishment of NLC under **Article 67** of the **Constitution**, as read with

**section 31 and 32 of the NLC Act**, the Ministry ceased to have any responsibility over management and administration of public land, and all staff of the Ministry whose functions had been transferred to NLC were deemed by operation of law to be employed as staff of NLC. All property, assets, rights and liabilities vested in NLC acquired or entered into in regard to the transferred functions, were also deemed to have been transferred to NLC.

[3] The appellant's concerns are well captured in paragraph 29 of his affidavit which we reproduce herein verbatim: -

*“i) The Ministry is running the Land Administration Directorate which is a department in the Ministry that purports to duplicate the function of the NLC to manage and administer public land;*

*ii) The Ministry has on numerous occasions refused to register leases prepared, executed and presented by the NLC for registration;*

*iii) The Ministry continues to benefit from the funds of the defunct office of Commissioner of Lands by collecting revenue arising from public land; which function is now vested in the NLC;*

*iv) The Ministry prepares and executes leases relating to public land which is a function of the NLC;*

*v) The Public Service Commission, despite knowledge of the existence of the NLC, the Constitutional Commission mandated to manage and administer public land, still continues to appoint persons to hold and/or act in the abolished land administration department in the Ministry;*

*vi) The Director of Surveys forwards Registry Index Maps and Deed Plans to the Chief Land Registrar rather than the NLC which is mandated to prepare leases relating to public land;*

*vii) The parallel structure between the Ministry and the NLC is interfering with the land reforms and registration, renewal and extension of leases thus causing a backlog of about 7,000 leases presently.”*

[4] The actions complained of, are notwithstanding an advisory opinion rendered by the Supreme Court at the instance of NLC in ***the Matter of the National Land Commission [2015] eKLR*** (NLC Advisory Opinion), in which the Supreme Court advised on the proper relationship between the mandate of NLC on the one hand, and the Ministry on the other, in the context of, **Chapter 5 of the Constitution**, the principles of governance (**Chapter 10 of the Constitution**), and relevant legislation.

[5] According to the appellant the Supreme Court in the NLC Advisory Opinion, identified the functions of the NLC as preparation of a National Land Policy and other land policies; management of public land on behalf of the national and county government; alienation of public land, allocation of public land, and development of attendant regulations; change and extension of user; sub-division of public land; renewal and extension of leases; reservation of public land for public interest purpose; development of rules and regulations for the sustainable conservation of land based natural resources; issuance of licenses, grants for the use of un-alienated public land, and the prescription of the applicable fee, collection of rent, royalties and other payments on use of land; issuance of land rent clearance certificates, conversion of public land to private land, among other functions. The function of the Ministry was identified mainly as dealing with the registration of land and issuance of titles including format of the Certificates of Lease and Certificates of Title.

[6] The appellant contends that despite, the Supreme Court confirming that the responsibility of NLC was to manage public land; to issue licenses, leases and grants in respect of public land (subject to the conditions set out in law) and the Ministry's mandate was to register land, the Supreme Court did not in its opinion address the need for the existence of a department dealing with land administration in the ministry, nor did the Supreme Court give guidance on the meaning assigned to the words 'to manage' and 'to administer' public land, unregistered trust land, and unregistered community land, as referred to in **Article 62 and 67 of the Constitution**.

[7] The appellant noted that High Court Constitutional Petition No.54 of 2015, ***Antony Otiende Otiende vs Public Service Commission & 2 others*** [2016] eKLR (Otiende petition), had also raised some pertinent issues concerning the promulgation of regulations, rules and forms by the Cabinet Secretary in charge of the Ministry, without consultation with NLC, and that the High Court had suspended the regulations for a period of 12 months to facilitate meaningful engagement. Despite various meetings, there are still operational challenges that have been caused by the Ministry continuing to act to the detriment of NLC.

[8] The appellant swore that **Articles 40, 67, 252 and 209** of the Constitution have been violated as the Ministry still continues to exercise mandate that has been bestowed by the Constitution on NLC. In addition, **Articles 232 (1)(b), 233, 234 and 249** of the Constitution have been violated as the Public Service Commission continues to appoint persons to hold or act in the abolished land administration.

[9] In his petition, the appellant sought several orders which can be categorized as follows:

(i) Declarations that **Articles 40, 67, 252 (1)(d) and 209** of the Constitution have been gravely violated by the Ministry continuing to function and discharge duties reserved for NLC; and a declaration that **Articles 232 (1)(b), 233, 234 and 249** of the Constitution have been violated by the continued appointment of persons in the land administration department by the Public Service Commission.

(ii) Orders of mandamus: compelling the Ministry and/or its employees and authorized agents, to close down the accounts of the Commissioner of Lands, account for all funds from that account and transfer the funds to the NLC for use in the functions of management and administration of public land in accordance with **Articles 67 and 209 of the Constitution**; compelling the Ministry to disband the parallel structure between the land administration department in the Ministry and NLC, and transfer the function of

public land with all personnel to NLC by virtue of **Article 67** of the **Constitution** and **sections 31** and **32** of the **NLC Act**; compelling the Director of Surveys to avail to NLC all the Registry Index Maps and Deed Plans relating to public land that has been surveyed; and compelling the Ministry to transfer full control, custody and management of all the correspondence files relating to Public Land under **Article 62** to the NLC so as to enable the NLC prepare leases.

(iii) Orders of prohibition against the ministry, its employees and/or authorized agents: from undertaking any dealings in relation to public land without the express approval of NLC; from registering leases in relation to public land without the same having been prepared and executed by NLC; and from utilizing the already operationalized lease printing system and/or using a lease document that has not been prepared and/or executed by NLC which is the body authorized to execute leases and register leases relating to public land.

[10] The Ministry, Director of Surveys and the Hon. Attorney General responded to the petition through an affidavit sworn by **Edward K. Kosgei (Kosgei)**, the Director of Land Administration in the Ministry's Lands Administration department. In the affidavit, Kosgei swore that the office of the Commissioner of Lands, was abolished upon the repeal of the **Governments Lands Act Cap 280**; that the functions of NLC as created under **Article 67(1)&(2)** of the Constitution, only touched on public land and therefore, except for issues concerning public land, all the other functions that were previously performed by the Commissioner of Lands remained with the Ministry; that NLC was only given powers to administer and manage public land as defined under **Article 62(1)&(2)** of the Constitution, and therefore, the management and administration of community and private land as defined under **Articles 61(2), 63(2)&64(2)** of the Constitution, remained with the Ministry; and thus, it was not correct that the Ministry only retained the function of registration of land.

[11] Kosgei also referred to Executive Order No. 1 of 2016 which assigned both the Ministry and NLC, specific functions which they ought to perform independently; that the functions of the Ministry, include: processing of leases and grants; processing of subdivisions and amalgamations; changes and extension of land use; issuance of consent to transfer, charge, lease and sublease; coordination of activities of respective control boards; collection of land rent; maintenance of plan records; and maintenance of records.

[12] Kosgei pointed out that the Supreme Court ruled in the NLC Advisory opinion that NLC had no role in the registration of titles to land (public, community or private), and that the task of registering land titles lies with the national government (Ministry); that registration of titles entail all categories of land; that land as a symbol of a vital asset requires effectual and conclusive mechanisms of the State's most central agency, which is the Ministry; that the Supreme Court ruled that the functions of NLC are in nature "consultative", advisory, oversight and safeguard oriented.

[13] In regard to employees, Kosgei averred that there were officers working at the Ministry who opted to retire and join NLC. Other officers were seconded by the Ministry to NLC for a specific period, while others opted to remain and work in the Ministry, and therefore, both the Ministry and NLC have their own employees working in their respective places of work, and both the Ministry and NLC have their own properties and assets, rights and obligations, even though NLC operates from the Ministry premises and have been allowed access to peruse files which belong to the Ministry.

[14] As regards funds collected by the Ministry, Kosgei swore that all the monies collected were deposited in the consolidated fund and therefore there was nothing to transfer to NLC; that the Ministry has never refused to register instruments which are validly prepared, executed and presented by NLC or any other entity for registration; and that apart from the NLC Advisory Opinion, the issues relating to the mandate of the Ministry and NLC, have already been canvassed in several other High Court decisions and was therefore *res judicata*. In addition, Kosgei stated that regulations had been prepared by the Ministry and were awaiting publication and approval by Parliament, and these would resolve any confusion or conflict regarding the mandate of the two parties.

[15] The Chief Land Registrar replied to the petition through a replying affidavit sworn by **Pauline N. Muriithi (Pauline)** who was the Acting Chief Land Registrar. She reiterated that the petition was incompetent as the issues raised have already been substantively determined by various courts including the Supreme Court in NLC Advisory Opinion; that under the Constitution, the NLC had the mandate to deal with public land while the Ministry had the mandate to deal with private land and community land. She maintained that land which had been allocated by the Commissioner of Lands prior to the enactment of the Constitution had become private land under **Article 64** of the **Constitution** and therefore such land does not fall under the mandate of the NLC. That following the enactment of the Constitution, any public land that is allocated by NLC becomes private land under Article 64.

[16] Pauline further contended that it is only the Chief Land Registrar, who has the mandate to register leases; that the Director of Surveys forwards the Registry Index Maps and Deed Plans to the Office of the Chief Land Registrar, as it is only that office that can register a title to land. She added that the regulations contemplated under the **Land Registration Act (LRA)**, had been prepared and are awaiting publication and approval by parliament, and that in the meantime, the Ministry was mandated to operate under the transitional provisions in accordance with **Section 108** of the **LRA**.

[17] Following an application made by Mr. Achikwa an order was made by the High Court for him to be joined as an interested party in the appellant's petition. This was because he had previously instituted in the Environment & Land Court at Eldoret, **Judicial Review Petition No 8 of 2017- Republic v Cabinet Secretary for Lands and Physical Planning & National Land Commission** (Eldoret petition) in which he challenged the legality of Gazette Notice No. 5734 of 2017 which purported to confer on NLC the mandate to prepare and execute leases in relation to public land that have been allocated to private persons. The petition was filed following leave to apply for orders of judicial review that was granted to Achikwa in **Eldoret Miscellaneous Application No. 19 of 2017 Republic v Cabinet Secretary for Lands and Physical Planning & National Land Commission** which he had filed on 27th July 2017.

[18] Achikwa urged the High Court to dismiss the appellant's petition on three grounds. First, that the Court lacked jurisdiction to hear and determine the petition as it concerns administration and management of public and private land in Kenya, and by virtue of **Article 162(2)(b)** of the Constitution as read with **section 13(2)(c)** of the Environment and Land Court Act, exclusive jurisdiction in such matters is bestowed upon the Environment and Land Court. In addition, Article 165(5) of the Constitution specifically provides that the High Court shall not have jurisdiction to deal with matters falling under Article 162(2)(b) of the Constitution.

[19] Secondly, Achikwa contended that the issues raised in the appellant's petition were directly and substantially in issue in the Eldoret petition, and the orders sought in the two petitions were similar. He urged the High Court to guard against abuse of its process, as the appellant's petition was contravening the principle of *sub judice*, the main issue in the two petitions revolving around the question whether NLC has the mandate to prepare and execute leases in relation to land that has been allocated to private persons.

[20] The third ground raised by Achikwa is that NLC is a party in the Eldoret petition and the appellant who is a commissioner of NLC must be deemed to have known of the Eldoret petition. Therefore, in filing his petition without disclosing details of the pending Eldoret petition, he was abusing the process of the court.

[21] NLC which was joined in the petition as the 1st interested party, responded to the petition through an affidavit sworn by its Deputy Director, Legal Affairs and Enforcement, **Edmond Kiplagat (Edmond)**. In his affidavit Edmond referred to the mandate of NLC as stated under **Article 67** of the **Constitution**. He also relied on the National Land Commission Act, the Land Act and the Land Registration Act, all of which give full effect to the mandate of NLC as provided under **Article 67(3)** of the **Constitution**. Edmond referred to the NLC Advisory Opinion which in his view identified the management and administration of land as a function of NLC and this included preparation and execution of leases and licenses to public land.

[22] Edmond explained that the administration and management of land involves allocation of public land upon approval by the national and county governments, as well as renewal and extension of leases as provided under **section 15 - 19** of the **Land Act**, and that these functions were to be performed by land administration officers in the land administration department of NLC. As regards the issue of transfer of staff, Edmond referred to **Section 31** of the **National Land Commission Act** and stated that the law requires that any staff who immediately before the commencement of the Act was an employee of the government, and who is to be employed as a member of NLC had to go through a vetting process. NLC had vetted all the members of the department of land administration and the process of secondment, redeployment and employment was finalized. While some of the officers had moved to serve as officers of NLC, some were unlawfully retained in the service of the Ministry and continue to perform land administration functions, reporting to the land secretary. This has resulted in duplication of functions contrary to the constitutional mandate of NLC. Edmond maintained that the office of the land secretary has no anchorage in law.

[23] Edmond averred that what the Ministry referred to as private land, was in fact public land within the meaning of **Article 62(1)(n)** of the Constitution; that the Ministry had adopted the definition of private land to defeat the intent of **Article 62** of the **Constitution**, and to justify the continued existence of the land administration department of the Ministry. He urged that the function of NLC does not terminate upon issuance of letter of allotment under **Section 12** of the **Land Act**, as suggested by the Ministry; that the function continues to the point of preparation and execution of a lease under **Section 23(2)** of the **Land Act, 2012**; that what the Ministry purport to manage and administer as public land, is actually leased public land which remains under the purview of NLC; and that this is contrary to the Constitution and the NLC Advisory Opinion.

[24] The learned Judge upon considering the affidavit and written submissions which were duly filed by the parties' advocates, delivered a judgment in which he determined the petition on the preliminary issues that were argued during the hearing of the main petition.

[25] The first issue was whether he should review his order made on 8th November, 2017 on jurisdiction. The learned Judge had on that day agreed with the parties who were then before him that the High Court had jurisdiction to hear the petition. Achikwa who was subsequently joined as an interested party reintroduce the issue and invited the court to review its order of 8th November, 2017, maintaining that the court did not have jurisdiction to hear the petition as it involved land administration and management of land in regard to which jurisdiction falls under the **Environment and Land Court** as per **Section 13(2)(c)** of the **Environment and Land Court Act**. The learned Judge rejected this submission on the ground that there was no discovery of new or important matter or an error apparent on the face of the record to warrant review of his previous order, and that the question of jurisdiction is a point of law that can only be corrected by way of an appeal.

[26] The second issue that the learned Judge identified for his determination was whether the issues raised in the petition were *res judicata*. In this regard, the learned Judge made a finding that the issues raised in the petition were substantially similar to the issues that were determined by the Supreme Court in the **NLC Advisory Opinion** and therefore it was not open to him to re-visit the same. Similarly, the issues regarding registration forms as well as the forms of title including leases, title deeds, grants and certificates of title promulgated by the Ministry without regard or input of NLC, were determined by the High Court in the **Otiende petition** and was also not open for his determination.

[27] Another issue identified by the learned Judge was whether the issues raised in the appellant's petition are substantially similar to the issues pending in the Eldoret petition. The learned Judge found that the reliefs sought in the Eldoret petition were substantially similar to the issues raised in the appellant's petition as they touched on the functions of the Ministry and NLC, processing title deeds for public land, as well as interpretation of the Constitution and applicable statutory provision. In addition, that the appellant was aware of the existence of the Eldoret petition and if interested, he could be enjoined in that petition as the court cannot proceed with the trial of matters that were also directly and substantially in issue in a previously instituted suit between the same parties. The learned Judge therefore ruled that the issues raised by the appellant were not only *res judicata* but also *sub judice*, and dismissed the petition.

[28] Being dissatisfied with that judgment, the appellant has lodged this appeal raising eight (8) grounds. The appellant filed written submissions that were duly highlighted during the hearing of the appeal by his counsel Mr. Charles Kanjama. Mr Thande Kuria, who appeared for the respondents, did not file any submissions but relied on the written submissions filed in the High Court which were part of the record of appeal. Similarly, Mr Felix Kiprono, counsel for Achikwa, also relied on the written submissions that had been filed for Achikwa in the High Court. NLC who was duly served with the appeal and a hearing notice did not file any submissions and were not represented at the hearing of the appeal.

[29] The appellant argued the 8 grounds in four major clusters, that is, *res judicata*, enforcement proceedings, *sub judice*, and consequences of the court's findings. In regard to *res judicata*, the appellant relied on this Court's decision in ***John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others*** [2015] eKLR, (John Florence decision), where this Court stated

as follows:

***“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”***

[30] The appellant submitted that the learned Judge failed to recognize that his cause of action is failure by the Ministry to implement the Supreme Court’s advisory opinion and not to re-litigate issues already determined by the Supreme Court; that the operational challenges orchestrated by the Ministry to the detriment of NLC were merely referred to, to demonstrate that failure; that the appellant’s cause of action in the petition, and the cause of action in the **NLC Advisory Opinion** were distinguishable, and that the petition did not constitute a cause of action that was *res judicata* as defined in the **John Florence Decision**. Similarly, the appellant was not seeking to revisit issues determined in the **Otiende petition**, but was merely bringing to the court’s attention the fact that the orders given had not been followed, as well as the unresolved issue regarding which body between NLC and the Ministry is constitutionally, and statutorily tasked with preparation and execution of leases relating to public land. It was the appellant’s position that this issue should be determined concurrently with the process of implementation of the land regulations. In addition, the appellant cited the John Florence case, for the proposition that the doctrine of *res judicata* though applicable to constitutional litigation, should only be invoked in constitutional litigation in “*rarest and clearest of cases.*”

[31] As regards enforcement proceedings, the appellant submitted that the learned judge erred in failing to recognize the nature of proceedings before him as enforcement proceedings. This was because, the appellant was seeking to enforce the NLC Advisory Opinion, which was being violated by the Ministry, and thereby obstructing NLC from performing its constitutional mandate. The appellant relied on the Supreme Court’s advisory opinion in ***the matter of Interim Independent Electoral Commission*** [2011] eKLR (**IIEC Advisory opinion**), in which the Court posited that though advisory opinions of the Supreme Court may not be capable of enforcement in the same way as ordinary decisions of the courts (in the shape of Rulings, Judgments Decrees or Orders), they must be treated as authoritative statements of the law. Thus the appellant argued he had the right to seek enforcement of the NLC advisory opinion before the High Court by originating an action stating the specific violations of the Constitution.

[32] On *sub judice*, the appellant submitted that the learned Judge failed to distinguish the substratum of the Eldoret petition from that of the appellant’s petition; that the crux of the Eldoret petition, is the guidelines for extension and renewal of leases, gazetted through *gazette notice No. 75 VOL CX1X*, which the applicant was seeking to quash, and the relationship between the NLC and private land; while the crux of the appellant’s petition is the relationship between the Ministry and NLC post the **NLC Advisory Opinion**. The learned Judge is also said to have failed to recognize the appellant’s *locus standi* in the petition as one acting in public interest and on his own behalf and not as an agent of NLC. The appellant relied on ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others*** [2014] eKLR for the proposition that the Constitution has enlarged the scope of *locus standi* through Articles 22 and 258 that empower any person to move the court concerning the contravention of the Bill of Rights or the Constitution in general.

[33] The appellant argued that the issues that were raised in his petition namely, access and control of correspondence files, the reversionary interest concept, the account of the defunct Commissioner of Lands, and the new land regulations were fundamental and required to be determined by a court of competent jurisdiction. The appellant urged the Court to reappraise the evidence relating to these issues under Rule 29(1)(a) of the Court of Appeal Rules, and find that the prayers in the petition were neither *res judicata* nor *sub judice*, but required determination on merit.

[34] In highlighting the submissions Mr Kanjama added that although the learned Judge upheld the preliminary objection, he should have gone further and considered the petition on merit so that the appellate Court would have the benefit of the court’s assessment of the facts and the law, so that in the event the appellate court finds that the preliminary objection ought not to have been upheld, it would either proceed to determine the appeal on merit or refer it back to the High Court.

[35] The respondents did not file any written submissions. **Mr Thande Kuria** learned counsel who appeared for them made oral submissions and also referred the Court to the submissions which the respondents had made in the High Court. Mr Kuria submitted that the findings and ruling of the learned Judge on the issue of *res judicata* and *sub judice* that were raised by way of preliminary objection (though argued during the hearing of the main petition), disposed of the petition, and made it unnecessary for the learned Judge to consider the merit issues that were posed in the petition.

[36] Contrary to the submissions made by Mr Kanjama, Mr Kuria argued that the appellant’s petition was not for enforcement of the opinion or order made in the NLC Advisory Opinion, but as found by the learned Judge, it raised issues that had already been addressed and determined in the NLC Advisory Opinion. The learned Judge could not therefore re-open the issues. In addition, the prayers sought in the appellant’s petition were similar to those sought in the Eldoret petition which was still live, and thus the learned Judge correctly upheld the plea of *res judicata* and *sub judice*.

[37] Mr Felix Kiprono, learned counsel who appeared for Achikwa, referred the Court to written submissions that Achikwa had filed in the High Court. He argued that the High Court had no jurisdiction to deal with the appellant’s petition as the matters raised fell within **Article 162(2)(b)** of the Constitution which vests jurisdiction on the Environment and Land Court. Furthermore, the orders sought in the appellant’s petition were similar to those sought in the Eldoret petition and therefore the appellant’s petition ought to have been stayed. Finally, counsel pointed out that there was non-disclosure of the material fact that NLC was a party in the Eldoret petition.

[38] It is evident that the learned Judge did not address the merit of the petition because he upheld the objection that the appellant’s cause of action was *res judicata* and that the issues raised in the petition were *sub judice*. The issues that we must therefore address in this appeal are, first, whether there was any justification for the High Court to review its ruling regarding whether it had jurisdiction to hear the appellant’s

petition on account that the dispute concerned administration and management of public and private land, which is in the exclusive jurisdiction of the Environment and Land Court. Secondly, what was the appellant's cause of action? Thirdly, is he re-litigating the same issues that were determined in the NLC Advisory Opinion, the Otiende petition or the Eldoret petition such as to bring *res judicata* or *sub judice* into play? And finally, should the High Court have addressed the substantive merits of the petition

[39] On the issue of review, the learned Judge rendered himself as follows:

***“[34]. A review cannot be claimed or asked for (sic) merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it or for any other sufficient reason. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule. [22] Any attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgment. [23]***

***35. Review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible. [24] It is my view, that the question of jurisdiction is a point of law, which, even if I were to find that I was wrong, it can only be corrected by way of an appeal. In other words, counsel is inviting this court to sit as a appellate court on its own decision, which I can't do. Therefore, the plea for review fails.’***

[40] It is not disputed that the learned Judge had on 8th November 2017 ruled that he had jurisdiction to determine the appellant's petition. Although Achikwa had not been made a party at the time the ruling was made, the court could only review its ruling if there was a new matter or an error apparent on the face of the record. In this case, Achikwa who sought review of the ruling did not raise any new matter. All he sought was to re-argue the issue of jurisdiction again. Nevertheless, the issue being a legal one and the learned Judge having ruled on it, it could only be canvassed again on appeal. For this reason, we agree with the learned Judge that there was no proper basis upon which he could review his ruling on jurisdiction.

[41] In regard to the issue of *res judicata*, the learned Judge properly directed himself as follows:

***“46. The test of determining whether a matter is res judicata was also summarized in Bernard Mugo Ndegwa - vs- James Nderitu Githae and 2 Others, [30] as follows:- (a)***

***The matter in issue is identical in both suits; (b) the parties in the suit are the same; (c) sameness of the title/claim; (d) concurrence of jurisdiction; and (e) finality of the previous decision.***

***47. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case”***

[42] In order to determine whether *res judicata* applies, it is important to understand the appellant's cause of action and compare this with the NLC advisory opinion, so as to determine whether the appellant is re-litigating the same cause of action or substantive issues that were determined in the NLC advisory opinion.

[43] The appellant's cause of action as deduced from the pleadings and submissions, was in a nutshell the alleged interference with the mandate of NLC in violation of specific constitutional and statutory provisions, consequent to which the appellant sought amongst others, orders of mandamus and prohibition. In the petition the appellant pleaded at paragraph 28, 29, 30 and 31 some specific issues regarding the jurisdiction of NLC, upon which it had sought advice from the Supreme Court, but which issues in the appellant's opinion the Supreme Court did not address, hence the appellant's plea for determination of questions that were set out at paragraph 34 of the petition.

[44] That paragraph sets out the following questions:

***“i) Whether there is need for the existence of a department dealing with land administration in the Ministry; and if the answer is in the affirmative why should the said department be the one executing leases for public land yet NLC is constitutionally and statutorily tasked with management and administration of all public land in the following sense:-***

***(a) Upon expiry of leases, the land reverts to the government as public land and NLC has domain over the land by virtue of Article 67 of the Constitution and Sections 4 and 6 of the NLC Act.***

***(b) If and when a lessee fails to perform the obligations outlined in the conditions of lease which conditions are actually prepared by NLC, it is the body mandated, on behalf of both the national and county governments, to take appropriate action against the lessee.***

***ii) Whether the maintenance of the status quo post establishment of the NLC under Article 67 of the Constitution and the coming into effect of the NLC Act can be construed as a violation of the Constitution.***

***iii) Whether the existence of infrastructure in both the Ministry and the NLC post establishment of NLC under Article 67 of***

**the Constitution and the coming into effect of the NLC Act in 2012 can be construed as unnecessary duplication of functions with negative financial consequence to the public.**

**iv) Whether the maintenance of status quo post the Supreme Court Advisory opinion in 2015 can be construed as contempt of court.**

[45] It is not therefore correct as posited by the appellant that his cause of action was simply failure by the Ministry to implement the NLC Advisory opinion. The appellant was in the main requesting the High Court to resolve issues regarding interpretation of its mandate, which in its view, the Supreme Court had not addressed.

[46] In the NLC Advisory opinion, the Supreme Court was alert to its role in giving an advisory opinion, reiterating what it had previously stated in the IIEC Advisory opinion that:

*Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the Applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the Applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an 'idle provision', of little juridical value.*

[47] In the NLC Advisory opinion, NLC had sought the opinion of the Supreme Court pursuant to Article 163(6) of the Constitution on various issues concerning its functions and powers, and the powers and functions of the Ministry. That means that the NLC opinion is binding not just on NLC and the Ministry, but must also be treated as an authoritative statement of the law that is binding on all courts. The question that we must address is whether the issues that were raised in the appellant's petition are identical to the issues that were raised or could have been raised in the NLC Advisory Opinion, and if so, whether the Supreme Court in the NLC Advisory Opinion addressed and determined the issues.

[48] In order to appreciate the questions that were placed before the Supreme Court for its opinion, we refer to *NLC vs Attorney General & 6 others*, [2014] eKLR, (also referred to as reference No. 2 of 2014), in which the Supreme Court considered whether it had the jurisdiction to hear the reference by NLC that ultimately led to the NLC advisory opinion. This is how the Supreme Court puts what was before it for its opinion.

*“The Reference relates to the Commission’s functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development, on the other hand. The range of issues raised by the applicant may be set out as follows:*

- a. “To manage and to administer public land, unregistered trust land and unregistered community land,” is the phraseology in Articles 62(2), 62(3), 67(2)(a) and 67(3) of the Constitution, and in Section 5(1)(a) and (e) of the National Land Commission Act, 2012 (Act No.5 of 2012): but what does it entail, in practical terms”*
- b. Are Land Registrars (Recorders of Title) and Land Surveyors answerable to the National Land Commission, or the Cabinet Secretary of the Ministry of Land, Housing and Urban Development?*
- c. Which functions previously performed by the Ministry of Lands before the creation of the National Land Commission, have now been transferred to the said Commission?*
- d. From which officer of the national government should the National Land Commission obtain the “consent” envisaged in Section 5(2)(a) of the National Land Commission Act, before alienating public land vested in the national government?*
- e. From which officer of county government should the National Land Commission obtain the “consent” envisaged in Section 5(2)(a) of the National Land Commission Act, before alienating public land vested in county government?*
- f. When Article 62(2) and (3) of the Constitution of Kenya, and Section 5(2)(b) of the National Land Commission Act provide that the Commission administers public land “on behalf of” the national and county governments, is a relationship envisaged in which the national or county governments can withdraw the authority of the National Land Commission to administer public land?*
- g. What is the constitutional status of the provisions of Executive Order No. 2 of 2013, in relation to the mandate of the National Land Commission?*
- h. Should the Ministry of Land, Housing and Urban Development relinquish the land-tax function, roles, records and powers to the National Land Commission” If so, by what date?*
- i. Should the Ministry of Land, Housing and Urban Development account for and remit to the National Land Commission the rent (annual ground rent and stand premium), royalty and payments under any lease or licence, which the Ministry has collected, as well as the records for such collection since 27th February, 2013” If so, by what date?*

- j. Are the monies received, earned or accruing to the National Land Commission, and the balances at the close of each financial year, in the nature of money exempted from payment into the Consolidated Fund, under Article 206(1)(a) of the Constitution?*
- k. Is the National Land Commission entitled, under Article 206(1)(b) of the Constitution, to retain monies received, earned or accruing to the Commission, and the balances at the close of each financial year – for the purpose of defraying the expenses of the Commission?*
- l. Has the Ministry of Land, Housing and Urban Development, in failing to account and remit to the National Land Commission the funds due to it under Section 26(1) of the National Land Commission Act, hindered and obstructed the functions of the National Land Commission within the meaning of Section 35(1)(a) of the National Land Commission Act?*
- m. What criterion should Parliament use in allocating funds to the National Land Commission under the provisions of Section 26(1)(a) of the National Land Commission Act?*
- n. Are officers who perform functions previously performed by the Ministry before the creation of the National Land Commission, and which have now been transferred to the National Land Commission, answerable to the National Land Commission or to the Cabinet Secretary, Ministry of Land, Housing and Urban Development?*
- o. Should the Ministry of Land, Housing and Urban Development transfer to the National Land Commission part of the Ministry's staff, or the entire staff that previously worked in the Ministry's departments, and whose functions have been transferred to the Commission?*
- p. Can the Ministry of Land, Housing and Urban Development rescind the appointment of members of staff deployed to the National Land Commission?*
- q. Is the Ministry of Land, Housing and Urban Development obliged to remit to the National Land Commission money for the payment of salaries of the members of staff that the Ministry deploys to the National Land Commission, and if so, within what time-frame?*
- r. Is the National Land Commission entitled to recover from the Ministry of Land, Housing and Urban Development monies that the Commission has so far used to pay salaries of members of staff who had been deployed from the Ministry?*
- s. The phrase "to monitor the registration of all rights and interests in land" is embodied in Section 5(2)(b) of the National Land Commission Act: but, what is its intent?*
- t. Are Land Registrars accountable to the National Land Commission or to the Ministry of Land, Housing and Urban Development?*
- u. Is land registration a function of the National Land Commission, or the Ministry of Land, Housing and Urban Development?*
- v. Is it practical that the National Land Commission be entrusted with the creation of registration units, registration sections, registration blocks, prescribing of nomenclature for land titling; overseeing the rectification of Land Registers by Registrars; and annually reporting to the President and Parliament on the progress made in the registration of land titles – when the Commission is not the agency mandated to control the process of registration of land?*
- w. Who should appoint Land Registrars?*
- x. Whose mandate is it to develop the National Land Information Management System?*
- y. Is the Ministry of Land, Housing and Urban Development obliged to transfer to the National Land Commission all property and assets of the departments whose functions have now, by law, been transferred to the National Land Commission – and if so, by when?*
- z. Who has the mandate to administer and manage dealings in Private Land? aa. Is the Ministry of Land, Housing and Urban Development obliged to transfer to the National Land Commission the Land Settlement Fund and if so, by when?*

[49] Clearly the questions put before the Supreme Court covered a wide range of issues relating to the mandate of NLC, and the interface with the Ministry. The questions posed by the appellant as (i), (ii) and (iii) in paragraph 34 of his petition (reproduced at paragraph 41 of this judgment), fell squarely within the questions that were placed before the Supreme Court for its advisory opinion. Similarly, the questions posed in the appellant's petition on land administration and management function of NLC at paragraph 28, human resource at paragraph 29, management of dealings relating to private land at paragraph 31, are covered in the range of questions that were posed to the Supreme Court by NLC.

[50] In giving its opinion, the Supreme Court reduced the questions posed in the NLC Advisory opinion to one main issue, that is:

**“What is the proper relationship between the mandate of the NLC on the one hand, and the Ministry of Land Housing and Urban Development on the other hand in the context of Chapter 5 of the Constitution, the principles of governance Article 10 of the Constitution; and the relevant legislation?”**

[51] The issue as framed by the Supreme Court was broad enough to cover the many questions that had been raised for its opinion. Moreover, the Supreme Court was alive to the delicate demands of balancing the responsibilities of the various state organs in discharging their mandate and made it clear at paragraph 317 of the opinion that:

*“The purpose of an Advisory Opinion is not only to settle the specific issues raised, but also to present a pragmatic course for problematic aspects of the operation of State organs—in the instant case, the NLC and the Ministry”.*

[52] We have carefully perused the NLC Advisory opinion. Contrary to the contention that the Supreme Court did not address the meaning assigned to the words **“to manage and to administer public land and registered trust land and unregistered community land”** under Articles 62(2) &(3) and 67(2)(a)&(3) of the Constitution, the Supreme Court appreciated that:

*“[273] ‘...at the heart of the Reference before the Court is the issue of ‘land administration and management’, which arises from the wording of Articles 62(2) and 67(2)(a) of the Constitution...”*

*[274] The interpretation of the terms ‘manage’ and ‘administer’, as applied by these two Articles of the Constitution, is inescapable—and especially so because, the same terms are replicated in the NLC Act, the Land Act and the Land Registration Act, which are the primary statutes dealing with land management and administration in Kenya.*

*[275] This Court needs to interpret these two terms as applied in the Constitution, and to consider whether the intent of the Constitution has been duly reflected in the three primary statutes that deal directly with land management and administration, or any other statute that has a bearing on the same issue.”*

[53] The Supreme Court went on to consider at length the constitutional mandate of NLC as provided under Articles 62 and 67 of the Constitution, and the statutory provisions that apply that mandate. In this regard we flag out paragraph 293 of the NLC Advisory opinion in which the Supreme Court stated as follows:

*“In conclusion, the application of the term ‘management’ and ‘administration’, in all the three statutes, is consistent with the functions of the Commission as expressly donated by the Constitution. It is clear to us that the function of “registration of title” is not with reference specifically to “public land”. Registration is conceived to entail all categories of land; and in our view, fragmenting title issuance—such a crucial indicia of the fundamental right of property—could not possibly have been in contemplation during the legislative process. For such would not only negate constitutional principle, but would probably breed such anarchy and abuse, as would certainly harm the public interest. Land title, the symbol of a vital asset, requires the effectual and conclusive mechanisms of the State’s most central agency. A proper interpretation of the provisions of the Constitution and the statute law, in this context, should be aimed at achieving coherence, clarity, and certainty.”*

[54] The Supreme Court was of the clear view that land registration leading to title is crucial and cuts across all categories of land, and requires the states effective participation, hence the mandate of the NLC must be interpreted in a way that would not create confusion or jeopardize public interest. This is further emphasized by the Supreme Court in its conclusion in the advisory opinion as follows:

*“[309] From the foregoing assessment, it is clear that the applicant’s specific request, that this Court delineate the respective functions of the NLC and of the Ministry of Land, is already answered with sufficient clarity: the allocation of discrete functions to the one or the other is not possible, or indeed necessary. The essence of the Supreme Court’s Advisory Opinion is that the vital subject of land-asset governance runs in functional chains, that incorporate different State agencies; and each of them is required to work in co-operation with the others, within the framework of a scheme of checks-and-balances—the ultimate goal being to deliver certain essentials to the people of Kenya.” (underline added)*

[55] The invitation by the appellant to the High Court to interpret the mandate of the appellant as provided by the Constitution, was therefore, rightly rejected as the Supreme Court had provided a clear exposition of the appellant’s constitutional mandate and given an authoritative statement regarding the proper relationship between the constitutional and statutory mandate of the appellant, and that of the Ministry.

[56] In his petition the appellant alleged that the mandate of NLC was being interfered with by the Ministry to the extent that there was violation of the Constitution. This was denied by the Ministry and the other respondents. Therefore, there was a dispute regarding the application of the proper mandate of the appellant and the interface with the mandate of the Ministry. In other words, the appellant’s petition went beyond interpretation of the appellant’s mandate as provided in the Constitution and statutes. It went further by requiring the application of the Supreme Court’s authoritative statement of the law on the proper relationship between the mandate of the appellant and the ministry, as expounded in the NLC advisory opinion, in order to determine whether there is violation of the law.

[57] In our view enforcement of the NLC opinion cannot be a cause of action because it cannot stand alone. In other words, the Court cannot be called upon to enforce the NLC opinion without any dispute that requires resolution. There must be a dispute that the Court needs to resolve through the enforcement of the law, and this dispute is what gives rise to the cause of action. Thus, the appellant’s cause of action is the alleged violation of the law arising from the alleged interference with the mandate of NLC and to that extent it is distinguishable from the

NLC advisory opinion, as the opinion did not address or determine any specific dispute concerning the mandate. The focus of the advisory opinion was exposition and clarification of the law on the mandate.

[58] On the other hand, the Otiende petition addressed a limited issue arising from a dispute concerning the mandate of the Ministry and its relationship with NLC with regard to promulgation of regulations and forms for land transaction. This was whether the regulations and forms promulgated by the Cabinet Secretary in the Ministry, for use by both the various land registries and the public in completing land transactions in Kenya were unconstitutional, null and void, for having been promulgated without advice of NLC, and without the necessary parliamentary approval. It did not address the wide range of issues concerning violations of the mandate of NLC in management and administration of land that have been raised by the appellant in his petition.

[59] The appellant's petition cannot be said to be re-litigating the same cause of action as the Otiende petition, or the NLC advisory opinion. With respect, the learned Judge erred in finding that the appellant's petition was *res judicata* as the appellant's cause of action was different from both the Supreme Court advisory opinion and the Otiende petition.

[60] This leads us to the next issue, which is whether the appellant's cause of action as pleaded in his petition is *sub judice* particularly on the application of the NLC's mandate in light of the Eldoret petition that was filed before the appellant's petition and is still pending. To his credit, the learned Judge properly directed himself on the law stating as follows:

**“65. The basic purpose and the underlying object of Section 6 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings. [39]**

**66. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 6 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical. In the present case, the NLC and the Ministry are parties in the two suits.**

**67. The question which follows is as to whether "the matter in issue is also directly and substantially in issue in the previously instituted suit. The key words in Section 6 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 6 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit....”**

[61] In the Eldoret petition, Achikwa moved the Environment & Land Court at Eldoret for orders of judicial review following the publication of Gazette Notice No. 5734 of 9th June, 2017 by the Ministry. The gazette notice provides guidelines for extension and renewal of leases. Achikwa contends that the guidelines have no basis in law; that NLC does not have the mandate to issue letters of allotment, prepare and execute leases, or draw and execute certificate of leases in relation to private land; and that NLC's functions in land administration is oversight role and not primary functions of managing land.

[62] The crux of the appellant's petition as we have already highlighted above is the dispute arising from the execution of the constitutional and statutory mandate of NLC, and the interface of that mandate with the Ministry. The crux of the Eldoret petition is the dispute arising from the execution of the constitutional and statutory mandate of NLC and its relations with the Ministry, particularly in regard to the administration and management of land, and whether the mandate includes issuance of letters of allotment, preparation and execution of leases, or execution of certificate of leases in relation to private land.

[63] To the extent that both cases require the application of the Supreme Court's authoritative statement of the law regarding the NLC mandate, and relates mainly to the administration and management of land, the matter directly and substantially in issue in both cases is the same and the cause of action is equally the same. It is not denied that the Ministry and NLC are parties in the Eldoret petition. The appellant was at pains to show that he was bringing his petition in his personal capacity. While we are in agreement that the Constitution has expanded the question of *locus standi* in matters involving the enforcement of the rights and fundamental freedoms guaranteed under the Constitution to the extent that any person can move the court, the appellant is not just any person. He is a Commissioner in NLC who is part of the team involved in executing the mandate of NLC. He is to that extent clearly conflicted, and cannot purport to be personally pursuing the litigation independent of NLC. In addition, the Ministry and NLC will be bound by any decision of the court emanating from the two cases. This could easily lead to an embarrassing situation should the two courts make conflicting rulings. We find that in light of the Eldoret petition, the appellant's petition is *sub judice*.

[64] The two petitions demonstrate that there are disputes that need resolution concerning the mandate of NLC and its interface with the Ministry's mandate. Both NLC and the Ministry are each in execution of their mandate, interpreting the authoritative statement of the Supreme Court in the NLC opinion in a way that favours their own interests, and obviously this is causing conflicts. In both the appellant's petition and the Eldoret petition, the court has been called upon to resolve these conflicts. This can only be done by addressing and determining the issues through the application of the law as expounded in the NLC opinion. Having found that the appellant's petition is not *res judicata*, but that it is *sub judice*, we find it appropriate to apply **Section 6 of the Civil Procedure Act** to stay the appellant's petition so that the issues raised by the appellant can be fully addressed and resolved in the Eldoret petition, as it was the one initiated first.

[65] The upshot of the above is that:

- (i) We allow the appeal and set aside the order of the learned Judge of the High Court dismissing the appellant's petition.
- (ii) We order that the appellant's petition shall be stayed in accordance with Section 6 of the Civil Procedure Act, in light of the Eldoret petition.

(iii) For the avoidance of doubt, the appellant is at liberty to pursue in the Eldoret petition, the resolution of the issues raised in his petition regarding the alleged violation of the Constitution and the Statutes, in the execution and interface of the mandate of NLC and the Ministry.

(iv) As the issue of the mandate of NLC and the Ministry is a matter of public interest, we do not find it appropriate to award any costs. Each party shall therefore bear their own costs in this appeal.

Those shall be the orders of the Court.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**