IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE, MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 287 OF 2016

BETWEEN

THE LAW SOCIETY OF KENYA

NAIROBI BRANCH ……..……. APPELLANT

AND

MALINDI LAW SOCIETY ……..…….. 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ……..…. 2ND RESPONDENT

THE CHIEF JUSTICE AND PRESIDENT OF THE

SUPREME COURT ……. 3RD RESPONDENT

THE NATIONAL ASSEMBLY ……..…..... 4TH RESPONDENT

THE LAW SOCIETY OF KENYA ……..…….. 5TH RESPONDENT

THE NATIONAL LAND COMMISSION ….……..... 6TH RESPONDENT

THE PARLIAMENTARY

SERVICE COMMISSION ..... 7TH RESPONDENT

CONSOLIDATED WITH CIVIL APPEAL NO. 3 OF 2017

THE ATTORNEY GENERAL ……..…….APPELLANT

AND

MALINDI LAW SOCIETY ……..….. 1ST RESPONDENT

THE CHIEF JUSTICE AND PRESIDENT OF THE

SUPREME COURT …….....……..…… 2ND RESPONDENT

THE LAW SOCIETY OF KENYA ……..…….. 3RD RESPONDENT

THE NATIONAL LAND COMMISSION ……...…… 4TH RESPONDENT

THE NATIONAL ASSEMBLY ……..…… 5TH RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Malindi (Anyara Emukule, Mugure Thande & Chitembwe, JJ) dated 11th November, 2016 in

MALINDI CONSTITUTIONAL PETITION NO. 3 OF 2016)

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JUDGMENT OF THE COURT

1. The main question for determination in these consolidated appeals is whether it is within the power of Parliament to confer, by legislation, jurisdiction on magistrates? courts to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land or whether the jurisdiction to determine such disputes is the preserve of the courts of equal status (specialized courts) established under Article 162(2) of the Constitution. In other words, do the specialized courts have exclusive jurisdiction to determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land?

2. The appeals arise from the judgment of the High Court (Emukule, Chitembwe, Thande, JJ) delivered on 11th November 2016 in which the court decreed that Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015 "*in relation to the jurisdiction of the subordinate courts, in respect of matters relating to environment and the use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void*."

Background

3. Following its enactment by Parliament, The Statute Law (Miscellaneous Amendments) Act, 2015, Act No. 25 of 2015 received Presidential assent on 15th December 2015. Under Section 2 thereof, several laws were amended as indicated in the schedule thereto. Of relevance to this judgment were amendments made to The Environment and Land Court Act, Act No. 19 of 2011(the ELC Act) with a view to conferring on the Chief Justice the mandate to transfer Judges from the specialized courts to the High Court and vice versa, and clothing Magistrate?s courts with authority to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

4. In that regard, Sections 7,8 and 26 the ELC Act dealing with qualifications of and appointment of judges, tenure of office of judges and sitting of the court were amended by insertion of new provisions as indicated hereunder. The amendments are underlined.

> **"7. Qualifications of and appointment of Judges of the Court**
>
> **(1) A person shall be qualified for appointment as Judge of the Court if the person—**
>
> **(a) possesses the qualifications specified under Article 166(2) of the Constitution; and**
>
> **(b) has at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.**

(2) *Deleted by Act No. 12 of 2012, Sch.*

(3) The Chief Justice may, on recommendation of the Judicial Service Commission, transfer a judge who meets the qualifications set out at sub-section (1) to serve in the court."

"8. Tenure of office of Judge of the Court

A Judge of the Court shall hold office until the Judge—

(a) retires from office in accordance with Article 167(1) of the Constitution; ?

(b) resigns from office in accordance with Article 167(5) of the Constitution; or ?

(c) is removed from office in accordance with Article 168 of the Constitution. ?

(d) is transferred from the Court to the High Court or other court with the status of the High Court."

"26. Sitting of the Court

(1) The Court shall ensure reasonable and equitable access to its services in all Counties.

(2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court."

5. Other related amendments were made to Section 101 of the Land Registration Act which was amended by inserting the words ***"and subordinate courts***" immediately after the expression "2011" and Section 150 of the Land Act that was amended by deleting the words ***"is vested with exclusive jurisdiction"*** and substituting therefor the words "***and the subordinate courts as empowered by any written law shall have jurisdiction*.**"

6.The Magistrates? Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15th December 2015. It was to commence on 2nd January 2016. Section 9 of that Act deals with claims in employment, labour relations claims; land and environment cases and provides that:

"A magistrate's court shall —

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv)public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations."

7. Malindi Law Society, the 1st respondent, a society registered under the Societies Act, Chapter 108 of the Laws of Kenya, (the Society) considered that those provisions, among other provisions with which we are not concerned for purposes of this judgment, were unconstitutional. It petitioned the High Court at Malindi seeking declarations that: the Statute Law (Miscellaneous Amendments) Act, 2015 is unconstitutional, null and void; that Sections 7(3), 8(d) and 26(4)(b) of the Environment and Land Court Act are unconstitutional, null and void; that Sections 9(a) (b) and 10(6) of the Magistrates? Court Act are unconstitutional, null and void; that Sections 13(1)(b) and 36(3) of the High Court (Organization and Administration) Act is unconstitutional, null and void; and an order of certiorari to quash Gazette Notice Numbers 1472 dated 1st March 2016 published on 11th March 2016 and 1745 dated 14th March 2016 published on 18th March 2016 by which the Chief Justice, in exercise of powers conferred by Section 26(3) of the ELC Act appointed magistrates to preside over cases involving disputes relating to Environment and Land in their areas of jurisdiction.

8. The petition was supported by the 5th respondent (LSK) but opposed by the 2nd respondent (the AG); the 3rd respondent (the CJ and President of the Supreme Court); the 4th respondent (the National Assembly) and the 6th respondent (the NLC).

9. The High Court agreed with the Society and partially allowed the petition to the extent that it declared that: Section 2 the Statute Law (Miscellaneous Amendments) Act, 2015 is unconstitutional, null and void in so far as it relates to the transfer of Judges from the High Court to the specialized courts and vise versa as it is inconsistent with Articles 165(5) and 162(2) of the Constitution; and that in relation to the jurisdiction of the subordinate courts in respect of matters relating to environment and use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution and therefore null and void. The court also held that Sections 7(3), 8(d) and 26(3) and (4) of the Environment and Land Court and Sections 9(a) and (b) of the Magistrate?s Court Act, 2015 are unconstitutional and therefore null and void. The court issued an order of certiorari to quash Gazette Notice Numbers 1472 dated 1st March 2016 published on 11th March 2016 and 1745 dated 14th March 2016 published on 18th March 2016.

10. Aggrieved by the decision of the High Court, the Law Society of Kenya, Nairobi Branch (Nairobi LSK,)(the appellant in Civil Appeal No. 287 of 2016) and the Attorney General (the appellant in Civil Appeal No. 3 of 2017) have appealed to this Court. Also challenging the decision of the High Court are: the Law Society of Kenya, West Kenya Branch; The Law Society of Kenya, Mount Kenya, Branch; the Chief Justice and President of the Supreme Court; and the National Assembly who also lodged notices of appeal although those parties did not file memoranda of appeal.

Application to strike out notices of appeal

11. On 28th November 2016, the Society filed a motion seeking orders for striking out the notices of appeal filed by the respondent branches, ~~of~~ which motion we must dispose of before examining the main appeal.

12. The motion was brought pursuant to **Rules 39(b) 42, 43 & 84** of the Court of Appeal Rules, 2010, **section 3A** of the Appellate jurisdiction Act, and Article **159(1) 2 (b) & (e)** of the Constitution of Kenya 2010 and is based on the grounds on its body and a supporting affidavit. Learned counsel for the 1st respondent **Mr. Charles Kanjama,** swore an affidavit in opposition to the motion on the 22nd day of December, 2016.

13. In support of the application, learned counsel **Mr. Tukero ole Kina**, leading **Mr. Benjamin Binyenya,** submitted that since the impugned Judgment arose from the proceedings in Malindi Constitutional Petition Number 3/2016, to which the respondents were not parties in their individual capacities, no right of appeal accrued to them to file appeals as of right; that it is the Law Society of Kenya which had a right of appeal because it entered appearance and then filed a statement through the firm of **Khatib and Company Advocates** supporting the petition; that the respondents as branches of LSK do not have autonomy and can only act through the LSK and as such, they have no mandate to take a view contrary to that taken by the LSK. Counsel submitted that **Rules 75** of the Court of Appeal Rules, and **Articles 22, 159, 258, 259** and **260** of the Kenya Constitution 2010, do not aid the respondents? cause as these refer to institution of proceedings and not an appeal. The respondents therefore stand non suited and the impugned notices of appeal ought to be struck out.

14. To buttress the above submissions, **Mr. ole Kina** cited the case of **Football Kenya Federation vs. Premier League Limited & 4 Others [2015] eKLR;Olive Mwihaki Mugenda & another vs. Okiya Omtata & 4 others [2016] eKLR; JMK vs. MVM & another [2015] eKLR;** and **Invesco Assurance Co. vs. MW (minor suing thro' next friend and another [2016] eKLR,**to support the view that the respondents as unincorporated Societies have no legal capacity to sue and/or to be sued; that the respondents ought to have applied to be joined in the petition for them to have *locus standi* to impugn the Judgment; and lastly that the respondents who are organs of the LSK are bound by the position taken by the LSK and are therefore estopped from taking a contrary position to that taken by LSK.

15. Learned counsel **Mr. Ogutu**, on behalf of the LSK intimated to the Court that LSK was taking a neutral position in the matter.

16. In opposition to the application, **Mr. Kanjama** and **Mr. Allen Gichuhi** leading **Mr. Caxstone Kigata** for the respondents, cumulatively submitted that the respondents are among the eight (8) statutory branches of the LSK established under the LSK Act No. 21 of 2014 (the Act); that these have a statutory duty to take care of the practice and the welfare of their members; and that they are autonomous and it is not correct as submitted by the applicant that the respondents are subject to the directions of the LSK in the discharge of their mandate.

17. With regard to both statutory and constitutional anchoring of the respondents' *locus standi*, it was submitted, *inter alia,* that the respondents have *locus standi* to intervene in the proceedings at the appellate stage for the reason that **Article 3(1)** of the Constitution obligates them to uphold and defend the Constitution and, in the learned counsel?s view, institution of court proceedings inclusive of appellate proceedings, is one such way of upholding and defending the Constitution; that since the decision of the High Court was made in exercise of the power donated by **Article 165(3) (d) (ii**) of the Constitution, the same is subject to challenge or appeal by the respondents without leave of court; that **Rule 75 (**1) of the Rules of the Court mandates any person who desires to appeal against such a decision to file an appeal; that Article **260** of the Constitution defines "a person" to include an association or some other body whether corporate or unincorporated and the respondents as statutory Branches of LSK fall into the category of associations or some other corporate or unincorporated body, and therefore qualify to institute proceedings, inclusive of appellate proceedings, before a court of law in their own right in terms of **Articles 22 (1)** and **258 (1)** of the Constitution; and that the branches created under **section 24** of the Act

in line with the principle of devolution under **Article 6** as read with **Article 174** of the Constitution are autonomous.

18. To buttress the above submissions, the respondents cited the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** and the case of **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another [2015] eKLR** for the proposition that a right of appeal vests as of right to a party who is aggrieved by the decision sought to be impugned and such a party does not need leave of court to file a notice of appeal.

19. We have given due consideration to the above rival submissions and the provisions of the law cited before us. In our view, only one issue falls for our consideration, that is; whether the impugned notices of appeal are competent. Put differently, whether the respondents have any *locus standi* to challenge the impugned judgment on appeal in their own right, not having been party to the petition giving rise to the said judgment.

20. It is not in dispute that the respondents were not parties to the petition whose proceedings gave rise to the impugned judgment; that LSK was party to the said petition and filed a statement supporting the petition; that both the LSK and the respondent branches are creatures of the same statute; that the LSK itself is established under **section 3** of the Act as a body corporate with perpetual succession and a common seal to discharge the mandate provided for under **section 4** of the Act; and that **section 24** of the Act creates the Branches, while **section 15** designates them as part of the organs of the LSK.

21**. Section 24(2)** of the Act provides as follows:-

> ***" 24. Branches of the Society***
>
> ***(1) There shall be the following eight branches of the Society consisting of the centre set out in the schedule***
>
> ***(a) Coast***
>
> ***(b) Rift Valley***
>
> ***(c) North Rift***
>
> ***(d) West Kenya***
>
> ***(e) South West Kenya***
>
> ***(f) Mount Kenya***
>
> ***(g) South Eastern, and***
>
> ***(h) Nairobi***
>
> ***(2) The branches shall-***
>
> ***(a) deal with issues regarding practice within their centres;***
>
> ***(b) address issues relating to the welfare of the members practicing in their centres;***
>
> ***(c) inform the Council of any matters that affect members with the branches that require the Council's engagement with other stake-holders on behalf of the branch."***

22. We have construed the above provision on our own and find nothing either in sections **15** or **24 (2)** of the Act to suggest that the branches are not autonomous in their own sphere of influence. There is no

inbuilt mechanism in those provisions that requires LSK to sanction each and every action executed by the branches for and on behalf of their respective members. We therefore agree with the submission of the respondents that the branches are semi-autonomous, if not autonomous. Further, the issues raised by the said branches of LSK are in line with the provisions of Section 24 (2) (a) of the Act as they relate to practice within their centres.

23. Turning to the constitutional provisions cited on both sides, **Article 3(1)** of the Constitution obligates every "person" to respect, uphold and defend the Constitution. **Article 260** of the Constitution defines "person" as including a company, association or other body of persons whether incorporated or un incorporated. **Article 22 (1)** guarantees a right to every person to institute proceedings to protect Fundamental Rights or Freedoms, while Article 258(1) on the other hand guarantees a right to any person to institute proceedings to protect the Constitution. **Article 258 (2)** goes further and mandates a person acting on behalf of another person who cannot act in their own name, a person acting as a member of, or in the interests of a group or class of persons, a person acting in the public interests, or an association acting in the interests of one or more of its members to institute court proceedings.

24. The Supreme Court in the **Mumo Matemu case**(supra) has provided guidelines on the interpretation of the above Articles which we find prudent to highlight:-

> ***[67] It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya V. Attorney General, Petition No. 60 of 2012' [2013] eKLR the High Court thus expressed the principle (paragraph 4):***
>
> ***"…the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice…"***
>
> **…….**
>
> ***[71] Articles 22 and 258 of the Constitution provide that every person has the right to institute proceedings claiming that the Constitution has been contravened; and "person" in this regard, includes one who acts in the public interests."***
>
> **…….**
>
> ***"The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this Court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened."***

25. It seems to us from that interpretation that the issue as to who has *locus standi* before a court of law has now been crystallized. It is any aggrieved party.

26. This brings us to the applicability of **Rule 75** of the Rules of this Court.

It provides:

> ***"75 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court."*** [Emphasis added]

27. The Rule is specific about "a person who desires to appeal" and not a party to the impugned decision. **Halsbury's Laws of England's 4th Edition Para. 49 page 52**, has this to state on *locus standi:*

> ***"In order to maintain proceedings successfully, a plaintiff or applicant must show not only that***

the court has power to determine the issue, but also that he is entitled to bring the matter before the court…..

In other contexts, locus standi depends primarily on the nature of the remedy or relief sought ……a right of appeal……is frequently confined to a " person aggrieved" or a person who claims to be or feels aggrieved…."

28. **Paragraph 66** page 92 of the same treatise defines an aggrieved party as follows:-

"The meaning of a person aggrieved may vary according to the context. However, as a matter of general principle, any person who has a decision decided against him (particularly in adversarial' proceedings) will be a person aggrieved for the purposes of appealing against that decision unless the decision amounts to an acquittal of aspiral criminal offence."

29. When Rule 75 as well as the above extracts from **Halsbury's Laws of England** are read in conjunction with the Supreme Court?s interpretation of **Articles 22, 258** and **260** of the Constitution , this creates no doubt in our minds that a person, association, body corporate or an unincorporated body, have the *locus standi,* not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged. The respondent branches asserted that they were aggrieved by the impugned decision as the same had impacted negatively on their legal practice in particular and the general welfare of their members. In our view, such an assertion was sufficient justification for them to intervene irrespective of its ultimate outcome.

30. In the result, and for the reasons stated above, we decline the request to strike out the impugned of notices appeal. Accordingly, the application is dismissed.

The appeal and submissions by counsel

31. In its memorandum of appeal, Nairobi LSK complains that the High Court erred in failing to follow previous decisions of the High Court and of the specialized courts in which it was held that magistrates? courts have jurisdiction over the types of disputes in controversy; that contrary to the dictates of the Constitution the High Court applied a restrictive interpretation of the Constitution; and that the High Court erred in failing to uphold the parties? legitimate expectation to have their cases heard and determined by subordinate courts.

32. In his memorandum of appeal, the AG asserts that the High Court misapprehended and misinterpreted the provisions of Article 169 of the Constitution; that the High Court should have purposively and holistically interpreted the Constitution; and that the decision of the High Court has created uncertainty.

33. During the hearing of the appeal, learned counsel for Nairobi LSK, Mr. A. Gichuhi, expounded on the grounds set out in the memorandum of appeal. He submitted that based on the decision of the Supreme Court of Kenya in the case of **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR**, the Court should, in interpreting the law, bear in mind that the Constitution has incorporated non-legal considerations. In that regard, counsel urged that the Court should consider the impact of the impugned judgment which has had the effect of paralyzing "*hundreds of thousands of cases*" thereby impacting many litigants and advocates in their quest for access to justice.

34. Referring to the decisions of this Court in **Mohammed Abushiri Mukullu vs. Minister of Lands and Settlement & 6 others [2015] eKLR** and **Martin Nyaga Wambora vs. County Assembly of Embu & 37 others [2015] eKLR** for the proposition that a judge is required, under the doctrine of *stare-decisis,* to follow the decision of a judge of equal status unless such decision appears wrong, counsel submitted that the learned Judges of the High Court erred in failing to heed at least seven other decisions in which the High Court determined that magistrates? courts have jurisdiction over the types of disputes in question.

35. In reaching its decision, counsel submitted, the High Court should have taken a purposive, rather than

a restrictive, interpretation of the Constitution. Had the court done so, counsel argued, it would have had regard to edicts of the Constitution that require: national state organs to ensure reasonable access to its services (Article 6(3)); social justice for all (Article 10(2)); access to justice (Articles 25, 48 and 50); courts to promote the purpose, values and principles of the Constitution (Article 159 and 259). Counsel drew our attention to the 10th edition of N. S. Bindra?s book, **Interpretation of Statutes,** with respect to the principles of purposive interpretation that the Court should embrace.

36. Referring to Articles 162, 169(2), 165 and 259 of the Constitution, and drawing extensively from a decision of the High Court (Majanja, J) in **United States International University (USIU) vs. Attorney General [2012] eKLR** incorporating comparative analysis from South Africa, Mr. Gichuhi submitted that Parliament in exercising its legislative authority under Article 94(1) of the Constitution did not confer exclusive jurisdiction on the Environment and Labour Court and the Employment and Labour Relations Court to the exclusion of subordinate courts. Counsel referred to the recent Supreme Court decision in **Republic vs. Karisa Chengo & 2 others [2017] eKLR** for the proposition that under the Constitution, Parliament was given the discretion to elaborate on the limits of the jurisdiction of courts of equal status by legislation .The court therefore erred, counsel urged, in declaring the provisions in question unconstitutional, null and void.

37. Counsel went on to say that parties? had filed cases before the subordinate courts based on the law and that the High Court erred in failing to uphold those parties? legitimate expectation to have their cases concluded before the subordinate courts.

38. On behalf of the AG, (the appellant in Civil Appeal No. 3 of 2017), learned counsel Mr. Waigi submitted that the only issue for determination in these consolidated appeals is whether magistrates? courts can hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. He submitted that under Article 162 of the Constitution, Parliament is empowered to create courts and to determine the jurisdiction of such courts; that magistrates? courts have jurisdiction over the matters in question, subject to the prescribed pecuniary limits; that under Sections 13 and 16 of the ELC Act, the ELC court has original as well as appellate jurisdiction which means that magistrates courts should hear such matters in the first instance.

39. Learned counsel for the Chief Justice, (the 3rd respondent) Mr. K. Wakwaya, submitted that Parliament is empowered under Article 162(3) to determine the jurisdiction of the courts of equal status; that under Article 169(2) of the Constitution, Parliament is also empowered to determine the jurisdiction of magistrates? courts; that it was not demonstrated by the 1st respondent that Parliament violated the constitution in conferring jurisdiction on magistrates? courts to hear and determine the disputes in question.

40. According to Mr. Wakwaya, this Court should also determine whether the Chief Justice has power to transfer judges between the High Court and courts of equal status and vise versa. In his view, the Supreme Court of Kenya did not resolve that issue in the case of **Republic vs. Karisa Chengo & 2 others** (above). He urged the Court to distinguish between the power of empaneling a bench and the power of appointment; and that it was not demonstrated that it was unconstitutional for the Chief Justice to make such transfers.

41. Mr. Mwendwa, learned counsel for the National Assembly, the 4th respondent, supported the foregoing arguments in support of the appeal; stressing that under Article 259 of the Constitution, a purposive interpretation of the Constitution should have been adopted by the High Court and that it erred in its interpretation of Articles 162 and 169 in limiting the power of Parliament to confer jurisdiction.

42. Mr. C. Kanjama, learned counsel for the branches of the LSK, supported the appeals. He submitted that as regards jurisdiction, the High Court and the courts of equal status have a similar „vertical? hierarchical structure; that everything the High Court can do under Article 165(6) of the Constitution in respect of ordinary civil matters, the ELRC and ELC can do in relation to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land respectively. He gave examples of Sections 13 and 26(4) of the ELC Act in relation to the general and appellate and

supervisory jurisdiction of the ELC and Section 12 of the Employment Act.

43. Counsel submitted that the jurisdiction conferred on specialized courts under Article 162(2) of the Constitution is not exclusive and that Parliament is permitted by the Constitution to give original and appellate jurisdiction to magistrates? courts. In his view, if the intention was to confer exclusive jurisdiction on the specialized courts, a provision similar to Article 165(5) would have been included under Article 169 of the Constitution providing in express terms that subordinate courts shall not exercise jurisdiction with respect to matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

44. Counsel argued that the powers that can be given to magistrates? courts include powers to grant judicial review reliefs under Article 23 of the Constitution. He posited that a distinction ought to be drawn between „horizontal? jurisdiction where there should be no intermingling of jurisdiction and vertical jurisdiction aforesaid. Magistrates? courts, he argued, should work below courts of equal status and based on the doctrine of *stare decisis*, those courts would supervise, correct and imprint their jurisprudence on the subordinate courts. In counsel?s view, an interpretation of the Constitution that supports the view that magistrates? courts have jurisdiction is consistent with the recent decision of the Supreme Court in **Republic vs. Karisa Chengo & 2 others** (above).

45. Opposing the appeals, learned counsel Mr. T. Ole Kina for the Society (1st respondent in Civil Appeal No. 287 of 2016) submitted that the High Court correctly interpreted Article 162 of the Constitution; that the constitutional provisions under Article 162 on the specialized courts or courts of equal status have historical underpinnings and are premised on land policy; that the High Court and specialized courts have equal but distinct jurisdictions; that Parliament has no mandate under the Constitution to establish or confer jurisdiction on inferior courts with respect to matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land; that the existence of appellate jurisdiction of the ELC and ELRC does not, *ipso facto*, mean that another body has original jurisdiction; that it is clear from the report by the Committee of Experts that there was a deliberate effort to divest magistrates courts of the powers to deal with matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

46. Counsel argued that the question of the High Court decision occasioning prejudice does not arise; that the law must be obeyed; that the question of retroactivity can be addressed on a case by case basis; that in any event no cases had been filed under the impugned provisions as the coming into force of those provisions were stayed by the High Court from the onset.

47. On the power of the Chief Justice to transfer judges from the High Court to the specialized courts and vice versa, Mr. Ole Kina submitted that the issue has been resolved by the Supreme Court in **Republic vs. Karisa Chengo & 2 others** (above) and that consistent with that decision, the High Court was right in annulling the provisions purporting to confer such power on the Chief Justice.

Analysis and Determination

48. As already indicated, the main issue for determination in these appeals is whether the High Court was right in holding that the specialized courts or courts of equal status established under Article 162(2) of the Constitution have exclusive jurisdiction to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land and whether Parliament therefore lacks the power to confer, by legislation, jurisdiction on magistrates? courts to hear and determine such disputes. The other issue is whether the Chief Justice has the power to transfer judges from the High Court to the Specialized Courts and vice versa.

49. The quest for an answer to the main question calls for an interpretation of Articles 162 and 169 of the Constitution. Article 162 on the system of courts provides:

> **“System of courts.**

l62. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article."[Emphasis added].

50. Article 169 of the Constitution on subordinate courts identifies four types of subordinate courts. It provides:

"Subordinate courts.

169. (1) The subordinate courts are—

(a) the Magistrates courts;

(b) the Kadhis' courts;

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1)."[Emphasis added].

51. The Society argued, and the High Court agreed, that the power given to Parliament by the Constitution under Article 169(2) to enact legislation conferring jurisdiction, functions and powers on subordinate courts is circumscribed by Article 169(1)(d) to the extent that Parliament cannot establish or confer jurisdiction on a court, other than the specialized courts established under Article 162(2) with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. Agreeing with the Society, the High Court had this to say:

"Our understanding of sub-article 1(d) of Article169 is that whereas Parliament could enact legislation conferring jurisdiction on subordinate courts, Parliament could neither establish any other court or local tribunal, similar to courts referred to in Article 162(2) (courts of equal status), nor could it purport to confer jurisdiction to a court which is not of equal status with the High Court. That is the conundrum which needs to be resolved by Parliament in line with the Constitution's architectural harmony."

52. The issue, therefore, is whether that was a correct interpretation of those constitutional provisions.

53. There is no controversy with regard to the principles that should guide the Court in interpreting the Constitution. Article 259 of the Constitution demands that it (the Constitution) should be interpreted ***in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance***. It also demands that every provision of the Constitution ***"shall be construed according***

to the doctrine of interpretation that the law is always speaking."

54. In **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR**, the Supreme Court of Kenya in re-affirming that the Constitution must be "*purposively interpreted*" in

> "*a manner that eschews formalism, in favour of the purposive approach*" adopted with approval pronouncements by the Namibian Supreme Court in **S. vs. Acheson, 1991 (2) S.A.805** that "*the spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation*" to avoid what, in yet another decision of the Namibian Supreme Court, was referred to as "*the austerity of tabulated legalism*"(**Minister of Defence, Namibia vs. Mwandinghi (1992(2) SA 366 at p. 362**)

55. We were referred to numerous decisions to the same effect. We were invited to consider a decision of the Court of Appeal in Botswana in the case of **Attorney-General vs. Dow (2001) AHRLR 99 (BwCA 1992)** for the proposition that the Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions and that all relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution.

56.The Constitutional Court of Uganda took a similar approach in the case of **Kigula and others vs. Attorney-General (2005) AHRLR 197 (UgCC 2005)**. In that case the court expressed the view that the Constitution is a living document, having a soul and a conscience of its own, and that courts must endeavor to avoid crippling it by construing it technically or in a narrow spirit but construe it with the lofty purposes for which its makers framed it. Okello, JA of the constitutional court of Uganda articulated the principles of constitutional interpretation in that case as follows: That the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; that the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; that a constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the right guaranteed; and that in determining constitutionality both purpose and effect are relevant.

57.The decision of the Court of Appeal of Tanzania in the case of **Ndyanabo vs. Attorney-General [2001] 2 E.A. 485** to the same effect has been cited with approval by our courts[1]. It also stands for the proposition that there is a rebuttable presumption that legislation is constitutional and that the onus of rebutting the presumption rests on those who challenge the legislation.

58.Guided by those legal principles, what then is the status of magistrates? courts vis a vis the jurisdiction to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land?

> 1. See for instance the decision of this Court in Nderitu Gachagua vs. Thuo Mathenge & 2 others [2013] eKLR.

59. Lenaola, J (as he then was) grappled with the question "*whether the jurisdiction to hear and determine new cases relating to the environment and use and occupation of, and title to land vested exclusively on the Environment and Land Court established under Article 162(2) of the Constitution*" in the High Court in the case of **Edward Mwaniki Gaturu & another vs. Hon. Attorney-General & 3 others [2013] eKLR**. The learned Judge had no difficulty in rejecting the argument that magistrates? courts lack jurisdiction over those matters. The Judge held that the ELC court does not have exclusive jurisdiction to hear and determine such matters. In reaching that decision, the Judge reasoned:

> ***"41. …Article 162(2) of the Constitution provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) then provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of***

this provision that Parliament enacted the Environment and Land Court Act. No. 19 of 2011 which came into effect on 30th August 2011…

42. In my view, Article 162(3) is clear and requires no more than a literal interpretation. It empowers Parliament to determine the jurisdiction and functions of the Environmental and Land Court. For one to determine whether the Environmental and Land Court has exclusive jurisdiction to hear and determine matters related to environment, and the use and occupation of, and title to land, one must turn to the provisions of the Environmental (sic) and Land Court Act to determine what jurisdiction Parliament granted this Court as stipulated by Article 162(3).”

60. The Judge then proceeded to hold that based on Section 13(1) of the ELC Act, it is clear that Parliament did not intend that the ELC court should have exclusive jurisdiction to hear and determine matters related to environment, and the use and occupation of, and title to land. There are numerous other decisions of the High Court to which we were referred to the same effect.

61. However, the Society?s argument in these appeals goes beyond what the intention of Parliament was in enacting the ELC Act. The argument is that Parliament did not, and does not, have the mandate, under the Constitution, to confer jurisdiction in relation to such matters on an inferior court. According to the Society, the constitutional injunction against Parliament having or exercising any such powers is in Article 169(1)(d) which refers to

> **“any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).”**But does Article 169(1)(d) bar Parliament from enacting legislation conferring jurisdiction on magistrates? courts with respect to disputes within the jurisdiction of the specialized courts? A closer examination of Article 169 is necessary.

62. Article 169 of the Constitution has already been reproduced elsewhere in this judgment. It identifies four types or classes of subordinate courts, namely, magistrates? courts, Kadhis? courts, court martials, and any other court or local tribunal “**as may be established by an Act of Parliament**”. In our view, it is in respect of the fourth category of subordinate courts that a restriction is placed so that Parliament is not at liberty to establish, under that category, courts established under Article 162(2). That is to say, while Parliament is empowered under Article 169(1)(d) to **establish** “any other court or local tribunal”, that power of establishing courts and tribunals does not extend to the power to establish the specialized courts required under Article162 (2).

63. We are unable to construe that Article as limiting the power of Parliament to **confer** jurisdiction, on the courts already established by the Constitution under Article 169(1)(a), (b) and (c). Article 169(2) provides that Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause 169(1). A distinction should thus be drawn between the power given to Parliament under the Constitution **to establish courts**, which in this case is restricted, and **the power to confer jurisdiction** on courts. It is acknowledged in the preamble to the Magistrates? Courts Act, that it is an Act of Parliament to give effect to Article 169(1)(a) of the Constitution “to confer jurisdiction, functions and powers on the magistrates' courts”. We do not consider that in doing so, Parliament in any way exceeded its mandate or acted ultra vires.

64.We do not think this interpretation of the constitutional provisions negates “the historical perspective, purpose, and intent of the provisions in question.”[2] As explained by the Supreme Court in **Republic vs. Karisa Chengo & 2 others** (above) the provisions in Article 162(2) have their genesis in the rejection by the Committee of Experts of a proposal by the Parliamentary Select Committee on Constitutional Review that had been made to establish the specialized courts “merely by ordinary legislation” in that in doing so “*jurisdictional issues that* [had] *historically existed between the High Court and the Industrial Court*” would not have been solved. The Supreme Court stated:

> **“In addressing the latter historical controversy, the Committee of Experts reinstated the provision allowing Parliament to establish, by legislation, employment and land/environment**

Courts with a status

The words of the Supreme Court in In the Matter of the National Land Commission [2015]eKLR. **equivalent to the High Court as had been provided for in the earlier drafts of the Constitution including the 2005 Referendum draft by the Constitution of Kenya Review Commission (CKRC).**

[48] The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment and the ELRC as covering matters of employment and labour relations but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court."

65. In our view, conferring jurisdiction on magistrates? courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates? courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates? courts and the specialized courts would therefore undoubtedly imprint the „specialized jurisprudence? on the magistrate?s courts.

66. As noted, it is an important cannon of interpretation of the Constitution that it must be considered as a whole. It should also be interpreted to ensure that the outcome of such interpretation does not give rise to absurdity or an illogical result as was observed by this Court in the case of ***Center for Rights Education and Awareness & Another vs John HarunMwau& 6 others*** **[2012] eKLR,** when it was held that;

"There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise.

67. Devolution, access to services and access to justice, among others, are critical pillars of our constitutional architecture. Article 6(3) of the Constitution demands reasonable access to services. Article 48 demands that the state "shall ensure access to justice for all persons." Access to justice has many facets. One facet is the geographical location of the courts and proximity of the courts to the people intended to be served by the courts. There are undoubtedly more magistrates? courts in Kenya than there are specialized courts or even High Court stations for that matter. The close proximity of magistrates? courts to the people ensures efficiency and access to justice at reasonable cost. It would be illogical and unreasonable to prohibit magistrates? courts from determining land and employment disputes, when it is undeniable that their reach to the citizenry is much wider than that of the specialized courts. Public interest, in our view, would be better served by increasing the number of courts with the capability of resolving such disputes.

68. It is in the spirit of these constitutional demands that Parliament is clothed with the power, under Article 23, to enact legislation conferring original jurisdiction to subordinate courts in appropriate cases to hear and determine applications regarding protection and enforcement of the Bill of Rights, notwithstanding that the High Court, under the same provision, has jurisdiction over similar matters. Had the framers of the Constitution intended to restrict the power of Parliament to enact legislation conferring jurisdiction on magistrates? courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to land, it would have done so in express terms in the same way that the High Court is expressly barred, under Article 165(5), from exercising jurisdiction in respect of matters "falling within the jurisdiction of the courts contemplated in Article 162(2)."

69. The choice of language in Article 165(5) is also instructive. Article 165(5) provides:

> **"(5) The High Court shall not have jurisdiction in respect of matters—**
>
> **(a) <u>reserved for the exclusive jurisdiction</u> of the Supreme Court under this Constitution; or**
>
> **(b) <u>falling within the jurisdiction</u> of the courts contemplated in Article 162 (2)."**

70. Contrast the expression *"reserved for the exclusive jurisdiction"* with the expression *"falling within the jurisdiction"*. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be "reserved for the exclusive jurisdiction" of the specialized courts under Article 162(2). It is also noteworthy that**<u>In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR</u>**, the Supreme Court of Kenya in construing Article 165(3) of the Constitution that confers jurisdiction on the High Court to hear any question respecting the interpretation of the Constitution noted that although the High Court was entrusted, under that Article, with the mandate to interpret the Constitution, that

> "*empowerment by itself, however, does not confer upon the High Court an **exclusive** jurisdiction*."

71. By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrate?s courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.

72. We think we have said enough to demonstrate that we are unable, respectfully, to agree with the interpretation accorded by the High Court to Articles 162(2) and 169 in relation to the power of Parliament to enact legislation conferring jurisdiction on magistrates? courts with respect to disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

73. There remains the question whether the Chief Justice can transfer judges from the High Court to the specialized courts and vice versa. This issue has since been conclusively settled by the Supreme Court in **<u>Republic vs. Karisa Chengo & 2 others</u>** (above). The Supreme Court was categorical in that case that a judge appointed to the specialized courts or courts of equal status

> ***"undertakes to perform stewardship of the particular office in respect of which he or she takes the oath, and not of a different office."*** The Supreme Court stated that:
>
> ***"…although the High Court and the specialized Courts are of the same status, as stated, they are***

different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes.”

74. It follows that a judge appointed to serve in the specialized courts cannot administratively be transferred to serve in the High Court and vice versa. The High Court was therefore right, in our view, in holding that the Chief Justice has no mandate to transfer judges from the High Court to the specialized courts and vice versa.

75. The result of the foregoing is that the appeal partially succeeds. We accordingly make the following orders:

(a) The judgment and order of the High Court declaring Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015; Sections 7(3), 8(d) and 26(3) and (4) of the ELC Act; Sections 9(a) and (b) of the Magistrates Court Act, 2015 as unconstitutional, null and void is hereby set aside.

(b) The order of certiorari issued by the High Court quashing Gazette Notice Numbers 1472 dated 1st March 2016 published on 11th March 2016 and 1745 dated 14th March 2016 published on 18th March 2016 is hereby set aside.

(c) Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 19th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

……...

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……

JUDGE OF APPEAL

A. K. MURGOR

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR