Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)

Neutral citation: [2023] KESC 30 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 8 (E010) OF 2021

PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

APRIL 21, 2023

BETWEEN

DINA MANAGEMENT LTD ..... APPELLANT

AND

COUNTY GOVERNMENT OF MOMBASA ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

LAND REGISTRAR, MOMBASA ..... 3RD RESPONDENT

DIRECTOR OF SURVEYS ..... 4TH RESPONDENT

DIRECTOR PHYSICAL PLANNING ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal sitting at Mombasa (Warsame, Musinga & Murgor, JJ.A) delivered on 4th June, 2021 in Civil Appeal No. 150 of 2019.)

The ownership of land whose title was not acquired regularly is not protected under article 40 of the Constitution on the protection of right to property.

Reported by Kakai Toili

Constitutional Law *– rights and fundamental freedoms – enforcement of rights and fundamental freedoms – right to property - whether the right to property under article 40 of the Constitution extended to property that had been found to have been unlawfully acquired - Constitution, article 40.*

Land Law *– ownership of land – proof of ownership of land - whether having the instrument of title was sufficient proof of ownership of land where the registered proprietor's root title was under challenge.*

Land Law *– allocation of land - allocation of unalienated Government land - what was the procedure for the allocation of unalienated land?*

Devolution *– intergovernmental disputes – nature of intergovernmental disputes - what were the factors to consider in determining what amounted to an intergovernmental dispute?*

Civil Practice and Procedure *– appeals – appeals to the Supreme Court - appeals as of right in a matter involving the interpretation or application of the Constitution - what were the limits of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution on appeals as of right in a matter involving the interpretation or application of the Constitution - Constitution, article 163(4)(a).*

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine issues which were not articulated in trial courts - whether the Supreme Court had the jurisdiction to determine an issue which was not articulated at the trial court but only at the appellate court - Constitution, article 163(4)(a).*

Civil Practice and Procedure *– doctrine of res judicata - nature of the doctrine of res judicata - what were the elements to be proven before a court could determine that a matter was res judicata - Civil Procedure Act (cap 21) section 7.*

Precedent *– precedents from courts of concurring jurisdiction - binding nature of precedents on courts of concurring jurisdiction – whether decisions made by courts of concurrent jurisdiction made in rem were binding on courts of equal jurisdiction.*

Words and Phrases *- bona fide purchaser – definition of bona fide purchaser – one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims - Black's Law Dictionary 9th Edition.*

Brief facts

The appellant's grievance was that on various dates in September 2017, the 1st respondent, the County Government of Mombasa, without prior notice, forcefully entered the suit property registered to the appellant and demolished the entire perimeter wall facing the beachfront. The 1st respondent claimed that the entry and demolition were an enforcement action to create a thoroughfare to the beach, as the suit property was public land and not private. Prior to the filing of the petition, a suit had been filed and determined in favour of the appellant in HCCC. No 131 of 2011, *Elizabeth Karangari Githunguri v Dina Management Limited,* which the appellant averred had settled the issues concerning the ownership and validity of title over the suit property and had conclusively addressed the issue of whether there was a public road in the suit property.

Aggrieved by the 1st respondent's actions, the appellant filed a petition at the Environment and Land Court (ELC Petition No. 8 of 2017) against the 1st respondent and sought, among other orders, declarations that the 1st respondent's actions violated its rights under articles 27(1) and (2), 29, 40, and 47(1) and (2) of the Constitution and a permanent injunction against the 1st respondent to restrain it from interfering with the suit property. The 1st respondent filed a separate petition (ELC Petition No. 12 of 2017) against the appellant and the 2nd–6th respondents wherein it sought, among other declarations, that the suit property was public land and that the subsequent acquisition by the appellant was, from inception, null and void *ab initio.* The two petitions, ELC Petition Nos. 8 and 12 of 2017, were consolidated.

The trial court determined that: the alienation of the suit property was unprocedural and unlawful for lack of an approved part development plan (PDP) from the Director of Physical Planning and Central/Regional Authority in compliance with the provisions of the repealed Land Planning Act, cap 303; there existed an access road through the open space to the sea, which was later blocked by the allotment of the suit property; the 1st respondent acted within the law in removing the wall which blocked the access road; the 1st respondent's suit was not *res judicata*; the 1st respondent's suit was not time barred as it related to constitutional violations of a continuing nature; and the appellant could not be protected as an innocent purchaser without notice as it failed to demonstrate that it was diligent before purchasing the suit property.

Aggrieved by the judgment of the trial court, the appellant filed an appeal at the Court of Appeal, and the 2nd to 6th respondents filed a cross appeal challenging the court's jurisdiction on the grounds that the dispute between the 1st respondent and the National Government, *to wit*, the Ministry of Lands and Physical Planning, the Chief Land Registrar, the Land Registrar, the Director of Survey, and the Director of Physical Planning, was intergovernmental and hence contrary to articles 6, 159(c), and 189(3) and (4) of the Constitution as read with sections 30 to 35 of the Intergovernmental Relations Act (IGR Act). The appellate court dismissed the appeal and the cross-appeal and affirmed the trial court's decision. Aggrieved, the appellant filed the instant appeal.

Issues

i. What were the limits of the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution on appeals as of right in a matter involving the interpretation or application of the Constitution?
ii. Whether the Supreme Court had the jurisdiction to determine an issue that was not articulated at the trial court but only at the appellate court.
iii. What was the nature of the doctrine of *res judicata*?
iv. What were the elements to be proven before a court could determine that a matter was *res judicata*?
v. Whether decisions made by courts of concurrent jurisdiction made in *rem* were binding on courts of equal jurisdiction.
vi. Whether the right to property under article 40 of the Constitution extended to property that had been found to have been unlawfully acquired.
vii. Whether having the instrument of title was sufficient proof of ownership of the land where the registered proprietor's root title was under challenge.
viii. What was the procedure for the allocation of unalienated land?
ix. What were the factors to consider in determining what amounted to an intergovernmental dispute?

Held

1. A party had the liberty to appeal against the whole decision of the Court of Appeal to the court. However, it must be within the confines of the law, in the instant case, article 163(4)(a) of the Constitution.
2. The appellant electronically filed its record of appeal within the stipulated time under rule 12(1) of the Supreme Court Rules and submitted the hard copy thereof on July 19, 2021. The record of appeal, however, did not contain the signed and stamped notice of appeal by the Registrar of the Court of Appeal, Mombasa. Nevertheless, the appellant subsequently filed an application dated October 21, 2021, seeking leave to file a supplementary record of appeal which solely contained the signed and stamped notice of appeal. That application was allowed, and the notice of appeal was properly on record.
3. A court's jurisdiction emanated from either the Constitution or legislation or both. The limits of the court's jurisdiction under article 163(4)(a) of the Constitutionwere as follows:
    a. The jurisdiction revered judicial hierarchy, and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the trial court in the first instance, with a further determination on the same issues on appeal at the Court of Appeal.
    b. The jurisdiction was discretionary in nature at the instance of the court. It did not guarantee a blanket route to appeal. A party had to categorically state to the satisfaction of the court and with precision those aspects/ issues of his matter which in his opinion fell for determination on appeal in the Supreme Court as of right. It was not enough for one to generally plead that his case involved issues of constitutional interpretation and application.
    c. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involved little or nothing to do with the application or interpretation of the Constitution,did not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

d. Only cardinal issues of constitutional law or jurisprudential moment, and legal issues founded on cogent constitutional controversies, deserved the further input of the Supreme Court under article 163(4)(a).
e. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing, and evaluating evidence did not bring up an appeal within the ambit of article 163(4)(a).

4. The court had no jurisdiction to revisit the factual findings of the superior courts, and the court was limited to its jurisdiction under article 163(4)(a) of the Constitution.
5. The interpretation or application of articles 27(1) and 47 of the Constitutionhaving not been a question for determination before the superior courts, the instant court would have no jurisdiction to entertain an appeal brought under article 163(4)(a) of the Constitution. Accordingly, the instant court had no jurisdiction to establish whether the 1st respondent's enforcement actions violated the appellant's right to property (article 40), right to equal protection before the law (article 27(1)) and the right to fair administrative action under article 47 of the Constitutionas that would amount to converting the court into a court of first instance. The appellant was no more than seeking compensation and/or damages, both liquidated and special, matters that were not in the purview of consideration by the instant court.
6. Whether the dispute was intergovernmental was a jurisdictional issue. Indeed, jurisdiction was a pertinent question for determination. A court was bound to always satisfy itself whether or not it had jurisdiction to hear and determine a matter before it. Whereas the issue of intergovernmental dispute was not articulated at the trial court but only at the appellate court, the inherent jurisdiction of the instant court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates necessitated that the instant court should assume jurisdiction and interrogate those alleged wrongs. The court had jurisdiction to entertain the consideration and determination of that issue under article 163(4)(a) of the Constitution.
7. Not all four grounds set out by the appellant satisfied the court's jurisdictional threshold under article 163(4)(a) of the Constitution. The appeal correctly invoked the court's jurisdiction to the extent of determining only three questions:
    a. whether the appellant's rights under article 27(1) and 50(1) of the Constitutionwere violated by the court's application of the doctrine of *res judicata* or, in the alternative, issue estoppel;
    b. whether the appellate court's interpretation of *bona fide* purchaser amounted to a violation of the appellant's right to property under article 40 of the Constitution; and
    c. whether the suit amounted to an inter-governmental dispute under article 189(3) of the Constitutionand the Inter-Governmental Relations Act.
8. The doctrine of *res judicata* was founded on public policy and was aimed at achieving two objectives, namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where *res judicata* was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. *Res judicata* was embodied in section 7 of the Civil Procedure Act.
9. The elements to be proven before a court could conclude that a matter was *res judicata* were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed *res judicata* on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject, and cause of action.

10. The issues for determination in ELC Petition 12 of 2017 were not substantially in issue in HCCC No. 131 of 2011. Further, the 2nd to 6th respondents were not parties in HCCC No 131 of 2011, and the court's findings were inconclusive due to the absence of the State organs, specifically, the Registrar of Titles, to enable the court to make a determination. The parties in ELC Petition 12 of 2017 were different from those in HCCC No 131 of 2011, save for the appellant. Therefore, ELC Petition 12 of 2017 was not *res judicata* as the elements to make such a finding had not been met. The appellant's rights to equal protection under article 27(1) and the right to a fair hearing under article 50(1) of the Constitutionwere therefore not violated by the appellate court's interpretation of the doctrine of *res judicata* in the matter.
11. The decisions in HCCC No. 131 of 2011 and ELC Petition 12 of 2017 were made by courts of concurrent jurisdiction. Decisions made by courts of concurrent jurisdiction made in *rem* were not binding on courts of equal jurisdiction. The ideal scenario on *stare decisis* was for trial court judges to follow the decisions of other judges of the same court unless there were compelling reasons to depart from the same. That was to ensure consistency, certainty, predictability, and sound judicial administration.
12. The Inter-Governmental Relations Act was the legislation passed pursuant to article 189 of the Constitutionto establish a framework for consultation and cooperation between the National and County Governments, and amongst county governments, and to establish mechanisms for the resolution of intergovernmental disputes. The intention of article 189 was to have consultation and cooperation between the National and County Governments and have disputes resolved in a less acrimonious way. The two levels of Government were required to make every reasonable effort to settle any arising disputes.
13. There was no express definition of what amounted to an intergovernmental dispute under the Inter-Governmental Relations Act. Section 30 of the Inter-Governmental Relations Act merely defined a dispute as an intergovernmental dispute and that the dispute resolution mechanisms applied to disputes arising between the National Government and a county government or amongst county governments. From article 189 of the Constitutionand section 30, the dispute must first be between the two levels of Government or between county governments. An intergovernmental dispute:
    a. must involve a specific disagreement concerning a matter of fact, law, or the denial of another.
    b. Must be legal. That was a dispute capable of being the subject of a judicial proceeding.
    c. Must be an intergovernmental one in that it involves various organs of State and arose from the exercise of powers or functions assigned by the Constitution, a statute, or an agreement or instrument entered into pursuant to the Constitutionor a statute.
    d. The dispute may not be subject to any of the previously enumerated exceptions.
14. The main issue for determination before the trial court was not a disagreement between the County Government and the National Government agencies, but whether the ownership of the suit property was public or private. The suit property was central to the dispute, necessitating the basis for the consolidation of Petition 8 of 2017 and Petition 12 of 2017. Therefore, the question of the dispute being intergovernmental fell on the periphery and was incidental to the main issue in dispute. The mere fact that the 1st respondent opted to file separate proceedings in response to that filed by the appellant did not change the nature of the proceedings. The issues and challenges to the ownership of the suit property would still have been introduced in response to the petition, even if by way of cross-petition.
15. Where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge, and therefore, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal, and free from any encumbrance, including interests which would not be noted in the register.

16. Under the repealed Government Lands Act (GLA), a PDP had to be drawn and approved by the Commissioner of Lands or the Minister for Lands before any unalienated Government land could be allocated. After a PDP had been drawn, a letter of allotment based on the approved PDP was then issued to the allottees. It was only after the issuance of the letter of allotment and the compliance with the terms therein that a cadastral survey could be conducted for the issuance of a certificate of lease.
17. There was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. The allocation of the suit property to the former President was irregular.
18. Before the allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, the court could not, based on the indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It was not enough for a party to state that they had a lease or title to the property.
19. The suit property was subsequently converted, and the former President registered as the owner and obtained a freehold title. Further, the suit property therein was within the then Mombasa municipality. Section 10 of the GLA was applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.
20. The title or lease was an end product of a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such a title could not be held as indefeasible. The first allocation having been irregularly obtained, the former President had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.
21. Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired. As the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter could not be protected under article 40. The root of the title having been challenged, the appellant could not benefit from the doctrine of *bona fide* purchaser.
22. The appellant's title was not protected under article 40 of the Constitution,and the land automatically vested in the 1st respondent pursuant to article 62(2) of the Constitution. The suit property, by its very nature, being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.
23. Generally, costs followed the event, and they should not be used to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit. As each party was pursuing an apparent genuine constitutional legitimate claim, and the appeal was not successful, there was no reason to burden any of them on the limited question of costs.

Appeal dismissed.

Orders

Each party to bear its own costs.

Citations

Cases

Kenya

1. *African Line Transport Co Ltd v Attorney General* Civil Suit 276 of 2003; [2007] KEHC 2621 (KLR) - (Explained)
2. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
3. *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (amicus curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)

5. *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another* Environment & Land Case 598 of 2016; [2017] KEELC 432 (KLR) - (Explained)
6. *Council of County Governors v Lake Basin Development Authority, Kerio Valley Development Authority, Tana and Athi River Development Authority, Ewaso Ng'iro South River Basin Development Authority, Coast Development Authority, Ewaso Ng'iro North River Basin Development Authority & Attorney General* Petition 280 of 2017; [2017] KEHC 9634 (KLR) - (Explained)
7. *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science and Technology & another* Petition 3 of 2014; [2014] KEHC 7532 (KLR) - (Explained)
8. *ET v Attorney General & another* Petition 212 of 2011 - (Explained)
9. *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* Civil Appeal 252 of 2005; [2014] KECA 882 (KLR) - (Explained)
10. *Ibren v Independent Electoral and Boundaries Commission & 2 others* Petition 19 of 2018; [2018] KESC 75 (KLR) - (Explained)
11. *Isiolo County Assembly Service Board & Clerk, Isiolo County Assembly v Principal Secretary (Devolution) Ministry of Devolution and Planning & Attorney General* Petition 370 of 2015; [2016] KEHC 7728 (KLR) - (Explained)
12. *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* Petition 17 of 2015; [2021] KESC 39 (KLR) - (Explained)
13. *Kamere, Samuel v Lands Registrar, Kajiado* Civil Appeal 28 of 2005; [2015] KECA 644 (KLR) - (Explained)
14. *Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others* Motion 42 & 43 of 2014 (Consolidated); [2016] KESC 6 (KLR) - (Explained)
15. *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* Civil Appeal 153 of 2019; [2020] KECA 875 (KLR) - (Explained)
16. *Kimani, Paul Mungai & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR) - (Explained)
17. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
18. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
19. *Modern Holdings (EA) Limited v Kenya Ports Authority* Petition 20 of 2017; [2020] KESC 53 (KLR) - (Explained)
20. *Muangi, Japhet Nzila v Kenya Safari Lodges & Hotels Ltd* ? 291 of ??; [2003] KEHC 545 (KLR) - (Explained)
21. *Munyu, Maina v Hiram Gathiha Maina* Civil Appeal 239 of 2009; [2013] KECA 94 (KLR) - (Explained)
22. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
23. *Nelson Kazungu Chai, Lawrence Kazani Gohu, Wycliffe Tembo Mwangome, Said Hassan Hemed, Ibrahim Abdi, Festus Mwarere Lenga, Kenga Kilumo Chari, Leonnox Mkutano Ngala, Shadrack Ndhuli & Prudence Mapenzi Mwangori v Pwani University* Civil Case 70 of 2009; [2014] KEELC 109 (KLR) - (Explained)
24. *Njiroine v Maroro* Motion 5 of 2013; [2014] KESC 43 (KLR) - (Explained)
25. *Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties)* Petition 33 of 2021; [2022] KEELC 33 (KLR) - (Explained)
26. *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* Civil Appeal 80 of 1988; [1990] KECA 62 (KLR) - (Explained)

27. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)
28. *Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others* Civil Appeal 617 of 2003; [2004] KEHC 12 (KLR); [2006] 1 KLR (E&L) 563 - (Explained)

Uganda

George William Katerregga v Commissioner for Land Registration & others Miscellaneous Application No 347 of 2013; [2013] UGHCLD 83 - (Explained)

South Africa

Nicholas Francois Marteens & others v South African National Parks Case No 0117 - (Explained)

Nigeria

Alhaji Bello Nasir v Kano State Civil Service Commission & 2 others SC 144/2003; (2010) LLJR SC - (Explained)

Regional Court

Katende v Haridar & Company Ltd [2008] 2 EA 173 - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Hogg, QM (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws of England* London: Buttersworth para 1174
3. Mulla, DF., (Ed) (2013), *The Code of Civil Procedure* London: LexisNexis 18th Edn p 293

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7 - (Interpreted)
2. Constitution of Kenya, articles 6, 19(3)(c); 20(1)(3); 23; 27(1)(2); 29; 40; 47(1)(2); 50(1); 62(2)(3); 67(2); 159(c); 163(4)(a); 189(3)(4); Chapter 11 part 4 - (Interpreted)
3. Constitution of Kenya (Repealed) section 117 In general - (Interpreted)
4. Government Lands Act (cap 280) In general - (Cited)
5. Government Lands Act (Repealed) (cap 280) section 82- (Interpreted)
6. Inter-Governmental Relations Act (cap 265F) sections 30 - 35- (Interpreted)
7. Land Planning Act (Repealed) (cap 303) In general - (Cited)
8. Land Registration Act (cap 300) sections 26, 106(1)(3); 107(1) - (Interpreted)
9. Limitation of Actions Act (cap 22) sections 41, 42 - (Interpreted)
10. Physical and Land Use Planning Act (cap 303) In general - (Cited)
11. Registration of Titles Act (cap 281) In general - (Cited)
12. Supreme Court Act (cap 9B) sections 15(2); 21(1)(3) - (Interpreted)
13. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 12, 38, 39 - (Interpreted)
14. Survey Regulations, 1994 (cap 299 Sub Leg) regulation 110 - (Interpreted)
15. Trust Land Act (cap 288) section 13 - (Interpreted)

Advocates

Prof Githu Muigai, Senior Counsel & *Mr. Dennis Nkarichia* for the appellant

Mr Paul Buti for the 1st respondent

Mr Nguyo for the 2nd to 6th respondents

JUDGMENT

A. Introduction and Background

1. The appellant, Dina Management Limited, vide the petition of appeal dated 15 July 2021 challenges the decision of the Court of Appeal in Civil Appeal No 150 of 2021 which affirmed the judgment of the Environment and Land Court (A Omollo J) in ELC Petition No 8 of 2017 consolidated with Petition No 12 of 2017. The appeal invokes article 163(4)(a) of the *Constitution*, sections 15(2), 21(1) and (3) of the *Supreme Court Act, No 7 of 2011* and rules 12, 38 and 39 of the *Supreme Court Rules, 2020*.

2. The genesis of the appellant's grievance is that on various dates in September, 2017, the 1st respondent, County Government of Mombasa, without prior notice forcefully entered the property known as MN/1/6053 situated in Nyali Beach, Mombasa County, registered to the appellant (hereinafter 'the suit property') demolished the entire perimeter wall facing the beachfront and flattened the whole property to be at the same level as the beach. It was urged by the 1st respondent that the entry and demolition was an enforcement action to create a thoroughfare to the beach as the suit property was public land and not private.

3. Prior to the filing of the above petition, a suit had been filed and determined in favour of the appellant in HCCC No 131 of 2011, *Elizabeth Karangari Githunguri v Dina Management Limited* (HCCC No 131 of 2011) which the appellant avers, settled the issues concerning the ownership and validity of title over the suit property and had conclusively addressed the issue whether there was a public road through the said property.

B. Litigation History

(i) Proceedings at the Environment and Land Court

4. Aggrieved by the 1st respondent's actions, the appellant filed Environment and Land Court Petition No 8 of 2017 (ELC Petition No 8 of 2017) dated 27 September 2017 against the 1st respondent. The appellant sought a total of fifteen orders, asserting its ownership to the suit property. Among the orders sought were declarations that the 1st respondent's actions were in violation of its rights under article 40, 27(1) & (2), 29, 47(1) & (2) of the *Constitution*; a permanent injunction against the 1st respondent to restrain it from interfering with the suit property; the 1st respondent be compelled to meet the costs of its actions assessed at Kshs 10,102,774.08; compensation for malicious damage to property; damages for trespass, interest and costs of the petition.

5. The 1st respondent filed a separate petition, ELC Petition No 12 of 2017 dated 15 November 2017 against the appellant and the 2nd – 6th respondents wherein it sought declarations that the suit property is public land forming part of the beach property within the high and low water marks of the Indian Ocean; that the subsequent acquisition by the appellant was from inception null and void ab initio; an order that the Chief Land Registrar be compelled to revoke the title over the suit property and the Director Surveys to cancel and expunge all survey plans, computations, field notes, deed plans and survey records over the suit property including an order for the eviction of the appellant from the suit property, general damages for trespass and costs.

6. The appellant opposed the 1st respondent's petition on the grounds that the suit property was previously unalienated government land which was lawfully alienated as private property in 1989; that

the suit property was 30 meters above the high water mark as per the law at the time of alienation and regulation 110 of the *Survey Regulations* 1994 which established that all land within the 60 meters from the high watermark was public land was not in force at the time; that no evidence was presented to support the assertion that the suit property was a road reserve; that the suit was time barred as allocation was done close to 30 years from the date the suit was filed; that the appellant was not guilty of any illegalities or irregularities; and that the suit was *res judicata* as the subject matter was determined by Mukunya J in HCCC, No 131 of 2011.

7. The 2nd-6th respondents on the other hand urged that the suit property was initially an open space and the alienation of the suit property to HE Daniel Arap Moi was lawful and all procedures followed, however the letter of application to the Commissioner of Lands seeking to be allocated the suit land and the Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land were missing.

8. The two petitions, ELC Petition No 8 and 12 of 2017, were consolidated by consent of the parties and proceeded to hearing by way of affidavit evidence. The court framed the issues for determination as; whether the suit property was a public utility and there was a public access road through it to the beach; whether the suit property was within 60 metres of the high water mark; were illegalities or faults committed by those responsible for alienating the suit property and whether the appellant should suffer the faults of those third parties (if any); whether the 1st respondent's suit is *res judicata* and/or an abuse of court process; whether the suit was time barred and/or the 1st respondent guilty of latches and indolence; and whether the appellant was the lawful owner of the suit property and entitled to the orders sought. In a judgment dated 10 September 2019 the trial court dismissed the appellant's petition and partially allowed the 1st respondent's petition.

9. The trial court determined that: the alienation of the suit property was unprocedural and unlawful for lack of an approved PDP from the Director of Physical Planning and Central/Regional Authority in compliance with the provisions of the *Land Planning Act,* cap 303 (repealed by the *Physical Planning Act* cap 286); there existed an access road through the open space to the sea, which was later blocked by the allotment of the suit property in disregard of the provisions of section 85 of the *Government Lands Act* (repealed) (hereinafter referred to as "GLA"); the 1st respondent acted within the law in removing the wall which blocked the said access road; the 1994 regulations relied on by the 1st respondent to urge that the suit land was within 60 meters from the high-water mark were not in operation in September 1989 when the property was alienated; the 1st respondent's suit was not res judicata; the 1st respondent's suit was not time barred as it related to constitutional violations of a continuing nature; the appellant could not be protected as an innocent purchaser without notice as it failed to demonstrate that it was diligent before purchasing the suit property; and the appellant's rights were not violated and it was not entitled to the reliefs sought.

(ii) Proceedings at the Court of Appeal

10. Aggrieved by the judgment, the appellant moved the Court of Appeal vide Civil Appeal No 150 of 2019 premised on a total of 22 grounds of appeal. The 2nd to 6th respondents filed a cross appeal challenging the court's jurisdiction on the grounds that the dispute between the County Government of Mombasa and the National Government, to wit, Ministry of Lands and Physical Planning, the Chief Land Registrar, the Land Registrar, the Director of Survey, and the Director Physical Planning was inter-governmental in nature and hence contrary to articles 6, 159(c) and 189(3) and (4) of the *Constitution* as read with sections 30 to 35 of the *Inter-Governmental Relations Act* No 2 of 2012 (hereinafter IGR Act).

11. The 1st respondent filed a notice of grounds for affirming the decision and urged that the suit property was trust land, and such land was not government land available for alienation and any alienation thereof contravened section 117 of the repealed Constitution, section 13 of the *Trust Land* and section 82 of the *Government Lands Act (repealed)*.

12. The appellate court framed seven issues for determination. On the first issue, the appellate court held that the appeal did not relate to an inter-governmental dispute. This is because the mere introduction of the 2nd to 6th respondents by the 1st respondent to the suit could not convert the dispute into an intergovernmental dispute as the ultimate objective of the dispute was to determine the status of the suit property as against the appellant who had moved the court to assert its ownership, the appellant not being a party to any of the levels of government.

13. On the second issue, the appellate court found that the claim of res judicata was devoid of merit as the matter before it went to the root of the ownership of the title. On whether the dispute was statute barred under the *Limitation of Actions Act* it was held that since the suit was framed as a constitutional petition seeking to enforce fundamental rights and freedoms which violations were of a continuing nature, the doctrine of limitations did not apply. Further, that sections 41 and 42 of the *Limitation of Actions Act* excludes application of the Act on matters concerning government land, including proceedings towards recovery of government land.

14. On the nature of the suit property including the road, the court held that it was not trust land, but an open space and the applicable law when the purported alienation took place is the GLA, thus under the realm of the 2nd to 6th respondents. The suit property being within the municipality of Mombasa, the land was to be allotted in accordance with section 10 of the GLA, which is to the effect that "Leases of town plots may be granted for any term not exceeding one hundred years."

15. On whether the title to the suit property was lawfully acquired and whether the appellant was an innocent purchaser for value without notice, the appellate court agreed with the trial court, holding that the appellant cannot enjoy protection under the doctrine of innocent purchaser and that where property is acquired through a procedure against the law, the title cannot qualify for indefeasibility. It held that the title subsequently issued was invalid having been acquired illegally and irregularly. The appellate court found that the suit property was public land reserved for a public utility and that there was a road leading to the beach through the open space that was the suit property. The suit property thus remained a public utility incapable of giving rise to a private proprietary interest capable of being protected by a court of law. The appellate court thus dismissed the appeal and the cross appeal and affirmed the trial court's decision including awarding costs to the 1st respondent.

C. Proceedings before the Supreme Court

(a) Appellant's case

16. The appeal is premised on the grounds that the learned Justices of Appeal (Warsame, Musinga and Murgor JJA) erred in:

    i. determining that the appeal did not relate to an inter-governmental dispute despite Petition No 12 of 2017 being a prima facie declaration of an intergovernmental dispute by a county government *vis-à-vis* the national government;

    ii. in determining that the issue of res judicata or alternatively issue of estoppel did not apply to the instant suit despite the Judgment by Mukunya J in HCCC No

131 of 2011 *Elizabeth Karangari Githunguri v Dina Management Limited* having determined the issue of whether there existed a public access road through the suit property and issued a judgment in rem on the issue;

iii. in their interpretation of the principle of bona fide purchaser for value without notice of defect resulting in a violation of the petitioner's right to property under article 40 of the *Constitution*; and

iv. by affirming the violent, summary, unprocedural and illegal acts of the 1st respondent, resulting in violation of the petitioner's right to fair administrative action protected under article 47.

17. The appellant seeks the following reliefs:

a. The Judgment and order of the Court of Appeal (Warsame, Musinga, & Murgor JJA) delivered on 4 June 2021 be set aside in its entirety and substituted with the reliefs sought by the petitioner in Mombasa Environment and Land Court Petition No 8 of 2017, *Dina Management Limited v County Government of Mombasa*;

b. The judgment and Decree of the Environment and Land Court in Petition No 8 of 2017 be set aside;

c. The petitioner's costs of this petition, the appeal in Mombasa Civil Appeal No 150 of 2019 and the Consolidated Petition in Mombasa Environment and Land Court Petition No 8 of 2017 be borne by the 1st respondent;

d. Such consequential and appropriate relief, further or other order(s) as this honourable court may deem just and expedient in the interest of justice.

18. The appellant filed submissions dated 12 August 2021 in response to the 1st respondent's Grounds of objection raising a challenge to the court's jurisdiction, submissions dated 9 September 2021 in support of its petition of appeal and submissions dated 18 October 2021 in reply to the 1st -6th respondents' submissions.

19. On the competency of the appeal, the appellant submits that the notice of appeal is fit and proper for it is challenging the entire interpretation and application of the *Constitution* by the appellate court, the basis of an appeal under article 163(4)(a) of the *Constitution*. Secondly, it is urged that the appeal was electronically filed on time on July 16, 2021 and that it was only the physical copies that were submitted to the court's Registry on 9 July 2021.

20. On the issue whether the suit was an intergovernmental dispute ousting the court's jurisdiction, the appellant submits that while ELC Petition No 8 of 2017 did not relate to an intergovernmental dispute, upon consolidation with ELC Petition No 12 of 2020, it mutated into an intergovernmental dispute between the two levels of government. It is emphasized that in the second petition, the 1st respondent sought to compel the officers of the National Government to pursue a particular cause of action and that its substratum involved issues of extent, scope and engagement between a devolved unit and the national government. It submits that the appellate court failed to consider the requirements of article 189(4) of the *Constitution* and sections 30-35 IGR Act, which provide for an alternative mechanism for intergovernmental dispute resolution. The appellant urges that the exhaustion principle was binding on the parties and they ought to have resorted to the alternative mechanism under section 34 of the IGR Act first before approaching the court.

21. On whether the appellant's rights protected under articles 40, 27(1) and 47 of the *Constitution* were violated, the appellant contends that at all material times, it was the registered owner of the suit property, and that the 1st respondent does not enjoy any constitutional, statutory or common law mandate to administer public land. It further submits that pursuant to articles 62(3) and 67(2) of the *Constitution*, such powers vest with the National Land Commission, and accordingly the 1st respondent's actions were unlawful, illegal and a violation of its fundamental rights under articles 40, 27(1) and 47 of the *Constitution*. The appellant avers that although the National Land Commission filed an application for joinder as an interested party based on the contention that the substratum of the decision by the superior court fell within its mandate to manage and administer public land, it did not prosecute its application. It urges that the enforcement action was undertaken without prior notice and in breach of its right to natural justice. To this end, it contends that it was immaterial whether the same decision would have been arrived at in the absence of the departure from principles of natural justice.

22. On the issue of whether the Court of Appeal's interpretation of the principle of bona fide purchaser limited the appellant's right to property under article 40 and was a violation of articles 19(3)(c), 20(1)(3) and 23 of the *Constitution*, it is the appellant's case that the Court of Appeal misapplied and misconstrued the doctrine of bona fide purchaser; misapplied the provisions of the *Physical Planning Act* (repealed), specifically the requirements of the Part Development Plan; and failed to apply the provisions of the Government *Land Act* (repealed).

23. On the issue of estoppel and res judicata the appellant contends that the judgment by Mukunya J in HCCC No 131 of 2011 determined the ownership and validity of the appellant's title over the suit property and had conclusively addressed whether there was a public road through the said property. It urges that any judgment that declares, defines, denotes or otherwise determines the status or condition of a property operates directly on the property and the whole world irrespective of the parties in a dispute. It also asserts that decisions in rem by courts of concurrent jurisdiction are binding on each other and that a mere change, addition or deletion of parties to the suit could not alter the status of a decision *in rem*. Consequently, it is urged that the superior courts were estopped from reopening the subject matter. As a consequence of the misapplication of the two doctrines, the appellant's rights to equality and freedom from discrimination protected under article 27(1) of the *Constitution* were infringed.

(b) 1st respondent's Case (County Government of Mombasa)

24. The 1st respondent filed grounds of objection dated 28 July 2021 and an affidavit sworn by Jimmy Waliaula in response to the petition of appeal. It also filed submissions to the petition dated 17 September 2021. the 1st respondent sets out two preliminary jurisdictional arguments. Firstly, that the notice of appeal is defective as it upsets rules 36 and 38(1) of the *Supreme Court Rules* as it was neither lodged in the Court of Appeal, nor dated, signed or sealed by the Deputy Registrar of the said court, and that it was filed on 16 June 2021 while the appeal was lodged on 19 July 2021, three days late and without leave of court. Secondly, the 1st respondent submits that this court does not have jurisdiction as the grounds set out by the appellant do not clothe this court with jurisdiction under article 163(4)(a) of the *Constitution* as they do not concern the interpretation and application of the *Constitution*.

25. On whether the suit was an intergovernmental dispute, it is urged that the proceedings before the superior courts did not raise any dispute touching on either articles 189 or sections 30-35 of the *IGR Act*. In any event, it submits that the dispute does not satisfy the mandatory requirements set out under section 32 of the Act as there was no agreement between the two governments to trigger an alternative dispute resolution mechanism under the Act. In the alternative, it is argued that the transactions

leading to the dispute were finalized before the advent of the *Constitution*, 2010 and the enactment of the *IGR Act*. Moreover, that as provided under section 106(1) and 107(1) of the *Land Registration Act*, the two laws would not apply to any ensuing rights, liabilities or remedies. For that proposition it relies on this court's decisions in *Samuel Kamau Macharia v Kenya commercial Bank & others* [2012] eKLR and *Daniel Shumaria Njiroine v Naliaka Maroro* [2014] eKLR.

26. On estoppel and its applicability, the 1st respondent argues that the doctrine is an equitable remedy which must follow the law and only applies to issues of fact, and neither of law nor on interpretation and application of the *Constitution*. Furthermore, it is contended that the doctrine of estoppel cannot be invoked against a statute citing this court's pronouncement in the *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR to support its submission.

27. As to whether the appellant was an innocent purchaser without notice, the 1st respondent submits that the crux of the superior courts' judgments was that the suit property was public land reserved for a public utility and any subsequent acquisition would be contrary to the original purpose. For this reason, it urges that the issue at hand was not the basis of the Court of Appeal's determination and therefore could not form the basis of an automatic right of appeal pursuant to article 163(4)(a) of the *Constitution*.

28. On whether the 1st respondent's acts were procedural, it is submitted that the conversion of the suit property from public to private land was illegal and void ab initio as was upheld by the superior courts, which decision was not based upon a consideration of article 47 of the *Constitution*. It is therefore submitted that in the circumstances, the application of article 47 of the *Constitution* was not in issue before the superior courts and cannot similarly be the subject of commencing an appeal as of right before this court. It relies on this court's decisions in *Lawrence Nduttu & 6000 others vs Kenya Breweries* [2012] eKLR; *Ibrahim Ibren vs IEBC & others* [2018] eKLR; and *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & others* [2020] eKLR to buttress this argument. Moreover, the 1st respondent submits that the appellant has challenged the appellate court's statutory interpretation and application, that is, of the *Physical Planning Act* (repealed) and the *Government Lands Act* (repealed), which challenge cannot fall for appellate determination as of right.

The 2nd to 6th Respondents' Case

29. The 2nd to 6th respondents filed grounds of objection dated 15 September 2021 and submissions dated 29 September 2021 . They submit on only two issues, whether the suit property was lawfully allocated, and whether the dispute was intergovernmental in nature.

30. It is their submission that the suit land was unalienated government land legally allotted in accordance with section 9 of the Governments Act (repealed) and in compliance with the set procedural requirements and upon payment of the requisite fees. Consequently, the title to the suit property was indefeasible under section 26 of the *Land Registration Act* No 3 of 2021, had not been cancelled on grounds of fraud or misrepresentation, and had legally passed to the appellant.

31. On whether the dispute is intergovernmental in nature, the 2nd to 6th respondents reiterate that the 1st respondent's petition before the ELC raised a prima facie intergovernmental dispute between the two levels of government as the 1st respondent challenged the actions of the national government. For these reasons, it is contended that the provisions of article 189 of the *Constitution* and the derivative Act were applicable to the dispute. It is therefore urged that the finding by the Court of Appeal was made in error and upset the principle of exhaustion, which requires that where a specific alternative dispute resolution mechanism is prescribed in the *Constitution* or statute, parties must resort to that mechanism before invoking the court's jurisdiction.

D. Issues for Determination

32. The 1st respondent raised preliminary issues in response to the petition. This emanates from the notice of appeal which is argued to be defective for non- compliance with rules 36 and 38 of the Supreme Court Rules. Accordingly, that rule 36 requires the notice of appeal to be in accordance with Form F of the first schedule of the Supreme Court Rules which indicates that it be an appeal "against the whole of the said decision or such part of the said decision." The 1st respondent's case is that for this court to consider an appeal under article 163(4)(a), it must be limited to matters of interpretation and application of the *Constitution* only and does not entitle a party to appeal against the whole of the Judgment of the Court of Appeal.

33. The second facet of the 1st respondent's objection to the non-compliance with Form F of the first schedule is manifest in that the notice of appeal filed in the record of appeal lacks the date when it was lodged, it is unsigned by the Deputy Registrar and lacks the seal of the court. Further, the 1st respondent argues that with all the defects in the notice of appeal, the appeal was lodged out of time. That the notice of appeal having been filed on June 16, 2021, the appeal ought to have been filed on July 16, 2021. It urges that since the appeal was filed on July 19, 2021, it was filed a period of three (3) days outside the date stipulated for filing the appeal and no leave of this court was sought and obtained by the appellant before filing the appeal out of time.

34. In response, the appellant submits that its appeal lies against the Court of Appeal decision in its entirety and its appeal is within the provisions of article 163(4)(a) of the *Constitution*. The appellant also submits that following the delivery of the Court of Appeal Judgment on 4 June 2021, it electronically lodged and paid for its notice of appeal on 16 June 2021, through its Advocates, within the statutory timeline as per the Practice Directions on Electronic Case Management, Gazette Notice No 2357 of 2020. The appellant further states that the appeal was filed electronically and fees paid on 16 July 2021. It is the physical copies of what was filed that were delivered to the court registry on 19 July 2021. The appellant avers that it pursued the appeal while awaiting and following up with the registrar of the appellate court for the signed and stamped copy.

35. We note from the record that the appellant's notice of appeal dated 16 June 2021 indicates that "it is dissatisfied with the decision of the Court of Appeal and intends to appeal to the Supreme Court against the whole of the said decision." It is for this reason, that the appellant in its prayers, seeks to have this court set aside in its entirety the Judgment of the Court of Appeal. A party has the liberty to appeal against the whole decision of the Court of Appeal to this court, however, it must be within the confines of the law, in this case, article 163(4)(a) of the *Constitution* which we shall address later, as we address the jurisdiction of this court.

36. We also note that the appellant electronically filed its record of appeal within the stipulated time under rule 12(1) of the *Supreme Court Rules* and submitted the hard copy thereof on 19 July 2021. The record of appeal, however, did not contain the signed and stamped notice of appeal by the Registrar of the Court of Appeal, Mombasa.

37. Nevertheless, the appellant subsequently filed an application dated 21 October 2021 seeking leave to file a supplementary record of appeal which solely contained the signed and stamped notice of appeal. This application was canvassed by the parties culminating in the ruling dated 19 May 2022 wherein the application was allowed, the 1st respondent's objection was rejected and found that the notice of appeal was properly on record. The 1st respondent contends that the appellant was expected to file the supplementary record of appeal, the same having been annexed to its application for leave. This would form the basis of the 1st respondent filing further submissions since it had already filed

submissions on the appeal. The appellant maintains that it had filed and duly served to all the parties the supplementary record. From the record, when the matter was last mentioned before the Hon Deputy Registrar of this court, counsel for the 1st respondent indicated that he would not be filing any supplementary submissions and he gave no reasons for it. It is only at this hearing that it turns out he had reservations. Having accepted the notice of appeal and the attendant record of appeal in the ruling, the 1st respondent's objection on this limb therefore fails and we do not wish to belabour the same any further.

38. From our careful consideration of the respective pleadings, written and oral submissions in the instant appeal, the following issues emerge for determination:

    i. Whether the appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*;

    ii. Whether the suit amounts to an inter-governmental dispute under article 189(3) of the *Constitution* and the *Intergovernmental Relations Act* No 2 of 2012;

    iii. Whether the appellant's rights under articles 27(1) and 50(1) of the *Constitution* were violated by the appellate court's application of the doctrine of res judicata and/or the doctrine of estoppel;

    iv. Whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under article 40 in violation of articles 19(3)(c), 20(1), 21(3) and 23 of the *Constitution*; and

    v. Whether the 1st respondent's enforcement actions violated the appellant's rights to property, right to equal protection before the law and the right to fair administrative action under articles 40, 27(1), and 47 of the *Constitution*.

E. Analysis and Determination

(i) Whether the appeal meets the constitutional threshold under article 163(4)(a) of the constitution Constitution?

39. The 1st respondent challenges this court's jurisdiction to hear and determine the appeal. It urges that none of the grounds in the appeal relate to interpretation or application of the *Constitution*. Indeed, jurisdiction is a preliminary issue that ought to be dealt with at the onset given that, without jurisdiction a court is obligated to down its tools. It therefore follows that we must first address the issue whether we are clothed with requisite jurisdiction under article 163(4)(a) of the *Constitution* pursuant to which the appeal has been brought.

40. A court's jurisdiction emanates from either the *Constitution* or legislation or both, as we stated in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*, Civil Application No 2 of 2011 as follows:

> " A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

41. Article 163(4)(a) of the *Constitution* states that:

> "(4) Appeals shall lie from the Court of Appeal to the Supreme Court -
>
> a) As of right in any case involving the interpretation or application of this Constitution."

This court has stipulated the limits of its jurisdiction under article 163(4)(a) of the *Constitution* in several of its decisions. In *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* [2020] eKLR we stated as follows:

> "(i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.
>
> ii. The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/ issues of his matter which in his opinion fall for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of constitutional interpretation and application.
>
> iii. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the *Constitution* does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).
>
> iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).
>
> v. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)."

42. Each case must however be evaluated on its own facts. To enable us resolve the question whether the matter concerns the interpretation and application of the *Constitution*, we must establish whether each of the issues raised falls under the court's jurisdiction.

43. The appellant seeks a determination on whether its rights under article 27(1) and 50(1) of the *Constitution* were violated by the appellate court's application of the doctrine of res judicata, in the alternative, issue estoppel. The 1st respondent submits that the doctrine of issue estoppel is concerned with issues of facts and not law, and this does not call for the interpretation or application of the *Constitution*.

44. We note that this is an issue that arose before the ELC, whereby the appellant argued, albeit unsuccessfully, that the 1st respondent's petition, ELC Petition No 12 of 2017 was res judicata as the issues raised had been determined in HCCC No 131 of 2011. This issue was also taken up by the appellate court and now finds its way in this appeal. Is res judicata a factual matter devoid of the application of the *Constitution*?

45. This court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*, Motion No 42 of 2014 [2016] eKLR stated as follows concerning the doctrine of *res judicata*:

> (52) "*Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....
>
> (55) ..*Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept..."

46. The question the appellant seeks this court to determine is not on the principle of *res judicata* per se, but whether the petitioner's rights under article 27(1) and 50(1) of the *Constitution* were violated by the court's application of the doctrine of *res judicata* thus bringing it within this court's jurisdiction. This is in tandem with its argument that decisions in rem by courts of concurrent jurisdiction are binding on each other to facilitate access to justice, rule of law and afford equal protection before the law. As seen above, *res judicata* is not just a factual contest but rather an issue of substantive law. In the context before us, we are persuaded that the issue is worth our input as a matter involving the interpretation and application of the *Constitution* as regards violations of the cited articles above.

47. The second issue the appellant seeks determination of is whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under article 40 and in violation of articles 19(3)(c), 20(1), 21(3) and article 23 of the *Constitution*. The 1st respondent urges that the crux of the decision by the superior courts was on the status of the suit property as a public utility and being so, article 40 of the *Constitution* does not apply; that there is no such provision under article 40, protecting an innocent purchaser for value without notice. Having not been particularized under the article, it urges that it cannot be for determination as a matter of either interpretation or application of the *Constitution*.

48. The 1st respondent urges that the appellant's complaint, instead, relates to the manner in which the courts below applied the provisions of statute, being the *Physical Planning Act* (repealed) and the Government Lands Act and that a question of statutory interpretation and common law are not matters that fall for determination by this court under article 163(4)(a) of the *Constitution*.

49. The appellant urges us to find that the initial allotment was legally and regularly undertaken under the then prevailing legal regime, the Government *Land Act* and further that the Physical Planning Act's date of commencement was in 1998 while that of the Survey Regulations was in 1994, which was after the initial allotment of the suit property to the first registered owner. It is clear that the appellant seeks to have the court make a determination on the application of these statutory provisions, and more so, on the findings of fact upon which the applicable constitutional argument if any, can be applied.

50. To interrogate this issue, the court inevitably has to descend into the factual contestations pitting both sides of the ownership divide. Allotment and allocation of land is a matter that is governed by Statute, be it Government Lands Act, Surveys Act, Physical Planning Act or any such legislation for that matter. Both the High Court and the Court of Appeal, as superior courts enjoined to look at the evidence and make factual findings, undertook their mandate appropriately arriving at the same conclusion relating to the proprietorship of the suit property.

51. We are careful to note that this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court's jurisdiction under article 163(4)(a) of the *Constitution*. In *Paul Mungai Kimani & 20 others* (*supra*) we stated as follows:

> "Not every issue that was before the superior courts is open for this court's determination in exercise of its appellate jurisdiction under article 163(4)(a). Matters of fact that touch on evidence without any constitutional underpinning are not open for this court's review on appeal in exercise of its article 163(4)(a) jurisdiction. The same is also true of matters that purely dealt with interpretation and application of statutory provisions."

52. Similarly, in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* [2021] KESC 34 (KLR) we stated:

> "This court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under article 163(4)(b) of the *Constitution*... We may however not delve into the factual findings of the trial court and Court of Appeal...Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)"

53. From the record and pleadings, the appellant asserted its rights to property under article 40 of the *Constitution*. It averred that it was a bona fide purchaser and the registered owner of the suit property and thus the actions of the 1st respondent amounted to unjustifiable and unreasonable limitation of the right to property under article 40 in violation of articles 19(3)(c), 20(1), 21(3) and 23 of the *Constitution*. On the other hand, the 1st respondent asserted its rights both as public property on the beach and on the basis of article 40(6) of the *Constitution* not to protect illegally acquired property. The question for interpretation and application of the *Constitution* is therefore the extent of the protection, if any, to the suit property. In doing so, we shall interrogate whether the appellate court's interpretation of *bona fide* purchaser amounted to a violation of the appellant's right to property under article 40 of the *Constitution*. We therefore find that we have jurisdiction to hear and determine the matter.

54. Thirdly, the appellant urges this court to determine whether the enforcement actions by the 1st respondent violated the appellant's right to property under article 40, right to equal protection before the law under article 27(1) and the right to fair administrative action under article 47 of the *Constitution*. The 1st respondent counters that by arguing that there was no specific complaint pleaded under article 47 and this was not for discussion and never for determination by the courts below. Further, it urges that the modalities of raising complaints under article 47 are set out in the Fair Administrative Actions Act, 2015 which actualized the article 47 of the *Constitution*.

55. From the record, we note that one of the prayers sought before the trial court was, 'a declaration that the respondent's actions are unconstitutional and a violation of the petitioner's rights under article 27(1) and (1), article 29 and articles 47(1) and (2) of the *Constitution*.' The appellant framed six issues for determination which the trial court adopted. None of these issues included a determination as to whether the rights cited were violated. Similarly, a perusal of the appellant's memorandum of appeal lodged at the Court of Appeal, wherein it raised twenty-two grounds of appeal, does not reveal any fault being attributed to the trial judge for not addressing this issue. As it appears, they were not issues considered by the superior courts. Can they therefore come up at this juncture, on appeal? Hardly.

56. This court has held in several of its decisions including in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*; SC Pet No 3 of 2021 [2012] eKLR and *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* SC Petition No 3 of 2020 [2020] eKLR that to bring an appeal pursuant to article 163(4)(a) of the *Constitution*, it must be demonstrated that the issues of contestation involve the interpretation or application of the *Constitution*, which constitutional issues had been considered and determined by the superior courts. It is that interpretation or application of the *Constitution* by the appellate court that forms the basis of a challenge before this court.

57. The interpretation or application of articles 27(1) and 47 of the *Constitution* having not been a question for determination before the superior courts, this court would have no jurisdiction to entertain an appeal brought under article 163(4)(a). Accordingly, this court has no jurisdiction to establish whether the 1st respondent's "enforcement actions" violated the appellant's right to property (article 40), right to equal protection before the law (article 27(1)) and the right to fair administrative action under article 47 of the *Constitution* as this would amount to converting the court into a court of first instance. In our view, the appellant is no more than seeking compensation and/or damages both liquidated and special, matters that are not in the purview of consideration by this court.

58. Lastly, the appellant seeks a determination on whether the appellate court erred by failing to consider the provisions of Part V of Chapter 11 of the *Constitution* on the relationship between devolved government and the national government, specifically Article 189 of the *Constitution* in relation to resolution of disputes between the national government, its agencies and devolved government.

59. The 1st respondent submits that the issue for determination before the superior courts was the ownership of the suit property which was registered in the name of the appellant in July, 2006. Its case is that the law applicable at the time for a person to assert rights, liabilities and remedies was the *Registration of Titles Act*, which was repealed by the *Land Registration Act*. Further, neither the *Constitution* 2010 nor the derivative Act under Article 189 of the *Constitution* were in existence including the two levels of government for the intergovernmental relations dispute mechanism to apply.

60. We note that this question neither arose nor was it determined by the trial court. It is only at the Court of Appeal vide the Attorney General's cross appeal that the court's jurisdiction to hear and determine the matter was first questioned on this ground. Whether the dispute is intergovernmental in nature is a jurisdictional issue. Indeed, jurisdiction is a pertinent question for determination. A court is bound to always satisfy itself whether or not it has jurisdiction to hear and determine a matter before it. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR we held that jurisdiction is a legal question and it can be raised at any time and by any party. The Nigerian Supreme Court in the case of *Alhaji Bello Nasir v Kano State Civil Service Commission & 2 others*, SC 144/2003 per Ogbuagu, JSC in his concurring judgement held as follows:

> "It is now firmly settled that issues of jurisdiction or competence of a court to entertain or deal with a matter before it, is very fundamental. It is a point of law and therefore, a rule of court, cannot dictate when and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this court"

61. Whereas the issue of intergovernmental dispute was not articulated at the trial court but only at the appellate court, the inherent jurisdiction of this court to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates necessitates that this court should assume jurisdiction and interrogate those alleged wrongs. In *Modern Holdings (EA) Limited v Kenya Ports*

Authority SC Petition No 20 of 2017 [2020] eKLR we acknowledged that the question of jurisdiction can be raised at any stage of the proceedings and observed that:

> "57. In concluding on this issue, it is trite that the question of jurisdiction, can be raised at any stage of the proceedings..."

In our earlier ruling in *Modern Holdings (EA) Ltd v Kenya Ports Authority* (*supra*) we noted that the challenge on jurisdiction of the court had not transcended the court hierarchy but had originated at the Court of Appeal and we accepted to exercise our jurisdiction under article 163(4)(a) of the *Constitution*. To that end, we consequently find that this Court has jurisdiction to entertain the consideration and determination of this issue under article 163(4)(a) of the *Constitution*.

62. We reiterate that not all the four grounds set out by the appellant satisfy our jurisdictional threshold under article 163(4)(a) of the *Constitution*. The upshot is that the appeal correctly invokes this court's jurisdiction to the extent of determining only three questions: a) whether the appellant's rights under article 27(1) and 50(1) of the *Constitution* were violated by the court's application of the doctrine of res judicata in the alternative issue estoppel; b) whether the appellate court's interpretation of bona fide purchaser amounted to a violation of the appellant's right to property under article 40 of the *Constitution* and c) whether the suit amounts to an inter-governmental dispute under article 189(3) of the *Constitution*, and the *Intergovernmental Relations Act* No 2 of 2012.

63. Having delineated our jurisdiction, we now proceed to address the identified issues

(ii) Whether the appellant's rights under article 27(1) and 50(1) of the Constitution were violated by the court's application of the doctrine of *res judicata* in the alternative issue estoppel.

64. The appellant's case is that the superior courts neglected the existence of the determination in HCCC No 131 of 2011, a decision in rem, regarding the status of the suit property made by a court with equal jurisdiction. For this reason, it urges that the trial court was estopped from reopening the subject matter regardless of the parties. It urges that Petition 12 of 2017 was camouflaged as a constitutional petition to escape the statutory limitation of action. The appellant relies on the decisions in *Nicholas Francois Marteens & others v South African National Parks*, Case No 0117, *George William Katerregga v Commissioner for Land Registration & others* Kampala High Court Misc Appl No 347 of 2013, *Japhet Nzila Muangi v Kenya Safari Lodges & Hotels Ltd* [2008] eKLR, *ET v Attorney General & another* [2012] eKLR and *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] eKLR.

65. The 1st respondent on the other hand submits that issue estoppel cannot be invoked against statute so as to render statutory provisions inoperative, citing sections 9, 10 and 85 of the *GLA* and that the principle cannot be used to deprive the public of public land and also reiterating that HCCC 131 of 2011 was a judgment per incuriam.

66. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. (See Mulla, the *Code of Civil Procedure*, 16th Ed Vol 1 – pg 161). The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been delivered, subsequent proceedings are estopped. Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, this is a form of action estoppel. (See *Halsbury's Laws of England*, paragraph 1174).

67. *Res judicata*, is embodied in section 7 of the *Civil Procedure Act* which provides that:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
>
> Explanation — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation -(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
>
> Explanation — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
>
> Explanation —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

68. In *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) we stated as follows:

> " We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former judgment or order which was final;
>
> b. The judgment or order was on merit;
>
> c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

69. The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed *res judicata* on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action.

70. From the record, we establish that ELC Petition 12 of 2017 was filed by the 1st respondent against the appellant and the 2nd to 6th respondents. In the said petition, the 1st respondent's claims were that the alienation and subsequent conversion of the suit property from public to private land was illegally and

unlawfully done, and that the appellant cannot enjoy constitutional protection as the suit property was unlawfully acquired.

71. We establish from the judgment in HCCC No 131 of 2011 that the plaintiff, Elizabeth Karunguri Githunguri sought, *inter alia*, a permanent injunction to restrain the appellant herein from dealing with plot No 6053/MN, (the suit property) and for the Registrar of Titles to revoke/cancel title No 6053/1/MN and rectify the register. The court framed the questions for determination as whether the plaintiff's plot no 1908/1/MN is a beach plot; whether the construction of the perimeter wall on plot no 6053/1/MN has encroached the beach plot and is on riparian reserve; whether the blockage of the view of the sea breeze is actionable; and whether a mandatory injunction can be issued to the Registrar of Titles to rectify the register by deleting the entries relating to MN/1/6053 when the Registrar is not a party to the suit.

72. The court dismissed HCCC No 131 of 2011 for reason that the plaintiff had failed to make her case and further that the court could not make orders against the registrar of Titles who was not a party to the suit. It stated:

> "Not without any feeling to the plaintiff, I am afraid, the plaintiff was not able to make her case before me. Even if she had done so, I would have had great difficulty in ordering a party who has not been made a party to the same suit to comply with court orders before I have an input from them. This suit fails..."

73. In the consolidated petitions at the Environment and Land Court, the issues for determination were: whether the suit property was a public utility and there was a public access road through it to the beach; whether the suit property was within 60 metres of the high water mark; were illegalities or faults committed by those responsible for alienating the suit property and whether the appellant should suffer the faults of those third parties (if any); whether the 1st respondent's suit is res judicata and/or an abuse of court process; whether the suit was time barred and/or the 1st respondent guilty of latches and indolence; and whether the appellant was the lawful owner of the suit property and entitled to the orders sought.

74. Whereas the two suits concern the suit property, the main issue for determination in ELC Petition 12 of 2017 was whether the suit property is a public utility and it challenged the manner in which the suit property was alienated and subsequently allocated to the 1st registered owner and the conversion to freehold property. On the other hand, the main issue in HCCC No 131 of 2011 was whether the suit property was a beach plot and on a riparian reserve and whether blocking the plaintiff's view to the ocean and sea breeze by the appellant was actionable. The issues for determination in ELC Petition 12 of 2017 were therefore not substantially in issue in HCCC No 131 of 2011. Further, the 2nd to 6th respondents were not parties in HCCC No 131 of 2011 and the court's findings were inconclusive due to the absence of the state organs, specifically, the Registrar of Titles to enable the court make a determination. The parties in ELC Petition 12 of 2017 are different from those in HCCC No 131 of 2011 save for the appellant.

75. To this end therefore, we find that ELC Petition 12 of 2017 is not *res judicata* as the elements to make such a finding have not been met. The appellant's rights to equal protection under article 27(1) and the right to fair hearing under article 50(1) of the *Constitution* were therefore not violated by the appellate court's interpretation of the doctrine of *res judicata* in the matter.

76. It is vital to note that the decisions in HCCC No 131 of 2011 and ELC Petition 12 of 2017 were made by courts of concurrent jurisdiction. By majority, this court stated in *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (amicus curiae)* (Petition 12, 11 & 13 of 2021

(Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) that decisions made by courts of concurrent jurisdiction made in rem are not binding on courts of equal jurisdiction. The ideal scenario on stare decisis is for trial court judges to follow decisions of other judges of the same court unless there are compelling reasons to depart from the same. This is to ensure consistency, certainty, predictability, and sound judicial administration.

(iii) Whether the suit amounted to an inter-governmental dispute under article 189(3) of the Constitution and the Intergovernmental Relations Act No 2 of 2012

77. The appellant urges that ELC Petition No 8 of 2017 did not relate to an intergovernmental dispute, however, the framing and disposition of the suit evolved into an intergovernmental dispute once it was consolidated with ELC Petition No 12 of 2017. The appellant submits that the 1st respondent in its petition, sought to compel the national government officers to pursue and enforce a particular course of action and that the subject matter was the issue of the extent, scope, and engagement between a devolved unit and the national government. It relies on the case of *Council of County Governors v Lake Basin Development Authority & 6 others* [2017] eKLR and *Isiolo County Assembly Service Board & Another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* [2016] eKLR to buttress its argument.

78. Conversely, the 1st respondent submits that by virtue of section 106(3) of the *Land Registration Act*, the intergovernmental relations dispute mechanism is not applicable and it is not in compliance with section 32 of the IGR Act, which requires that there be an agreement.

79. The 2nd to 6th respondents on the other hand support the appellant's averments and state that the suit was *prima facie* an intergovernmental dispute by a county government *vis-a-vis* the national government since Petition 12 of 2017 challenged the actions of the national government agencies, that is the Chief Land Registrar and the Director of Survey and sought to have their decision nullified. It is their case that the first point of dispute resolution ought to be the alternative modes of dispute settlement and not litigation in order to allow the two levels of government to continuously engage. They urge that this was the purpose of the setting up of the Council of Governors and the IGR Committee and therefore argue that Petition 12 of 2017 ought to have been struck out and be referred to the alternative dispute resolution forums in accordance with article 189(3) and (4) of the *Constitution* and section 31 of the *Intergovernmental Relations Act*.

80. Article 189 of the *Constitution* provides that:

> Cooperation between national and county governments
>
> 1. Government at either level shall—
>
> a. perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
>
> b. assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

c. liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

2. Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

3. In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

4. National legislation shall provide procedures for settling inter- governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

81. The *Intergovernmental Relations Act* No 2 of 2012 (IGR Act) is the legislation passed pursuant to article 189 of the *Constitution* to establish a framework for consultation and cooperation between the national and county governments, and amongst county governments, and to establish mechanisms for the resolution of intergovernmental disputes. The intention of article 189 of the *Constitution* was to have consultation and cooperation between the national and county governments and have disputes resolved in a less acrimonious way. The two levels of government are required to make every reasonable effort to settle any arising disputes.

82. There is no express definition of what amounts to an intergovernmental dispute under the *IGR Act*. Section 30 merely defines a "dispute" as an intergovernmental dispute and that the dispute resolution mechanisms applies to disputes arising between the national government and a county government or amongst county governments.

83. From the provisions of the *Constitution* and the *IGR Act* set out above, the dispute must first be between the two levels of government or between county governments. The High Court in *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* Petition No 3 of 2014 [2014] eKLR in further defining what an intergovernmental dispute is, stated as follows:

"a. The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.

b. Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceeding.

c. Must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the *Constitution*, a statute or an agreement or instrument entered into pursuant to the *Constitution* or a statute.

d. The dispute may not be subject to any of the previously enumerated exceptions."

84. This definition found footing in *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another* ELC No 598 of 2016 [2017] eKLR and *Okoiti v Parliament of Kenya*

& 2 others; County Government of Taita Taveta & 3 others (interested parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (ruling) by the High Court.

85. In the instant case, ELC Petition 8 of 2017 concerned the appellant's assertions of its rights to the suit property. ELC Petition 12 of 2017 on the other hand was between the 1st respondent against the appellant, which is a private entity and the 2nd -6th respondents which are national government agencies. The main issue in dispute in the petition was the manner in which the suit property was first allocated to the 1st registered owner. The 1st respondent also sought declarations that that the suit property is public land forming part of the beach property within the high and low water marks of the Indian Ocean, and sought to have the court order that the Chief Land Registrar be compelled to revoke the title over the suit property including an order for the eviction of the appellant from the suit property, general damages for trespass and costs.

86. The main issue for determination before the Environment and Land Court was therefore not a disagreement between the county government and the national government agencies, but whether the ownership of the suit property was public or private. The suit property was central to the dispute, necessitating the basis for the consolidation of the Petition 8 of 2017 and Petition 12 of 2017. In our view, therefore, and we agree with the appellate court, the question of the dispute being intergovernmental fell on the periphery and was incidental to the main issue in dispute. The mere fact that the 1st respondent opted to file separate proceedings in response to that filed by the appellant does not change the nature of the proceedings. The issues and challenges to the ownership of the suit property would have still been introduced in response to the petition, even if by way of cross petition.

(iv) Whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under article 40 in violation of article 19(3)(c), 20(1), 21(3) and article 23 of the Constitution

87. The appellant contends that it is a bona fide purchaser of the suit property, having purchased it from Messrs Bawazir & Co for Kshs 18,000,000.00. That it was a second purchaser and acquired a valid and legal title, having carried out all the necessary due diligence and paid valuable consideration for the purchase of the suit property. That for these reasons, its title was indefeasible and protected under article 40 of the *Constitution*, contrary to the superior courts' findings.

88. The appellant avers that in carrying out due diligence, it sought confirmation from the relevant government registry that a valid title capable of transmission to it existed. It is its case that the consent to transfer was sought and obtained from the Ministry of Lands who also confirmed the validity of the title to the appellant vide the letter dated October 9, 2006 stating that "the above plot is the genuine plot". Further, it states that it obtained a beacon certificate and survey plans to determine the boundaries and extent of the property vide the letter dated August 25, 2010. It asserts that neither the national government nor the local government (the 1st respondent's predecessor) questioned the appellant's title but confirmed the validity or legality of the appellant's title, making the appellant a bona fide purchaser and its title remains indefeasible.

89. The appellant states that it periodically made payments of rates to the then local government and its successor, the 1st respondent. It made an application for Development Permission for the construction of a boundary wall, which was subsequently conditionally approved by the then Town Clerk Mombasa City Council on August 31, 2006 and the National Environmental Management Authority permit was issued for the proposed development on March 15, 2011 after the preparation and submission of an Environmental Impact Assessment Report.

90. The *Black's Law Dictionary* 9th Edition defines a bona fide purchaser as:

> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a *bona fide* purchaser for value as follows:

> "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:
>
> 1. he holds a certificate of title;
> 2. he purchased the property in good faith;
> 3. he had no knowledge of the fraud;
> 4. he purchased for valuable consideration;
> 5. the vendors had apparent valid title;
> 6. he purchased without notice of any fraud; and
> 7. he was not party to the fraud."

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar*, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

> "...in order to be considered a *bona fide* purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR, where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

95. The appellant contends that prior to the first allotment and registration in 1989, the suit property was unalienated government land and the applicable law was the *Government Land Act* (repealed) (GLA). It asserts that the allotment was legal, regular and procedural as per the then prevailing legal regime, under the GLA. It is its case that the grant was issued under section 3 of the said Act, wherein the President had the power, subject to the set limitations, to make grants or disposition of any estate, interest or rights over unalienated government land. It also urges that Section 10 of the Act limiting issuance of leases to a term of one hundred years was inapplicable to the suit property which is a

freehold. In the same manner, the Physical Planning Act was inapplicable, retrospectively, as it was enacted and assented to on October 24, 1996 and its commencement on October 29, 1996 after the initial grant had been issued. It is the appellant's further contention that the 1994 Survey Regulations providing for the coast foreshore reservation at 60 meters of the high watermarks were inapplicable as they were enacted and a corrigenda issued in 1996 after the initial grant had been issued.

96. The 2nd to 6th respondents aver that the prevailing legal and regulatory regime was adhered to in the allocation of the property to its first registered owner. They state that vide an allotment letter dated November 23, 1989, the Commissioner of Lands, in compliance with section 9 of the *GLA* allocated HE Daniel T Arap Moi an un-surveyed parcel of land measuring approximately 0.45 Hectares. The Director of Surveys then caused the property to be surveyed to reflect LR MN/1/6053 as per survey plan F/R 198/30. The Director of Surveys submitted a Deed Plan to the Commissioner of Lands and a grant of title was processed in favour of Daniel T Arap Moi. On 19th December, 1989 the letter of allotment issued was revised to reflect the surveyed acreage of 0.49 Ha. A grant (title) was thus processed and a lease forwarded to the Registrar of Titles Mombasa. They further stated that prior to the allocation of the suit property, records at the lands' office indicate that the property was an open space. It is their contention that HE Daniel T Arap Moi, as the first registered owner, obtained good title protected under Section 26 of the *Land Registration Act* and section 23 of the *Registration of Titles Act* cap 281 (repealed), and it is not public land.

97. According to the 1st respondent, there were pertinent requirements which ought to have been followed before the allocation of public land, including an application to the Chief Land Registrar for such allocation, thereafter a Letter of Allotment is issued spelling out the conditions to be fulfilled, a Part Development Plan (PDP) of the area is subsequently drawn and approved by the local authority of the area, which PDP is then forwarded to the Director Physical Planning. Once the approvals are made, the approved PDP together with the original Letter of Allotment are handed over to the Director of Surveys who prepares a Survey Plan. It contended that it is from this Survey Plan that a Deed Plan of the plot is prepared by the Survey Plan showing the dimensions of the plot and it is only after these procedural stages are completed that a grant or title is issued by the Chief Land Registrar. In this instance, they urge that the procedure was not followed.

98. Under section 2 of the *GLA*, unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment. Under section 3 of the GLA, the President had power to, make grants or dispositions of any estates, interests or rights in or over unalienated government land, subject to any other written law. section 9 of the *GLA*, empowered the Commissioner of Lands "to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner." Further, under section 10 of the *GLA*, the Leases of town plots could only be granted for any term not exceeding one hundred years.

99. The 1st respondent averred that a survey plan of the area drawn in the year 1971 showed that the suit property was in that year designated as an open space and not private land, and which open space was reserved for a public road. The 2nd to 6th respondents in their submissions similarly indicated that prior to the allocation of the suit property to HE Daniel T Arap Moi, the suit property was an open space.

100. From the record and submissions, we note that the land was first allocated to HE Daniel T Arap Moi in 1989. The applicable law at the time was the Land Planning Act, cap 303, which was repealed by the *Physical Planning Act* cap 286 which has since been repealed by the *Physical and Land Use Planning Act* No 13 of 2019. The Land Planning Act made provision for open spaces. regulation 11(3) of the Development and Use of Land (Planning) regulations, 1961 made under the Land Planning Act

defined "public purpose" as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the *Physical Planning Act*, section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

101. The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation.

102. The Court of Appeal in its judgment, while finding that the title was irregularly and illegally allocated to HE Daniel T Arap Moi was persuaded by the High Court decision in *Republic v Minister for Transport & Communication & 5 others Ex Parte Waa Ship Garbage Collector & 15 others* Mombasa HCMCA No 617 of 2003 [2006] 1 KLR (E&L) 563 where Maraga J (as he then was) stated as follows:

> "Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the *Constitution* or under section 1 and 1A of the *Constitution* or under the doctrine of public trust a title would have to be nullified because the *Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept."

103. The appellate court affirmed the trial court's conclusion that the alienation of the open space was unprocedural to the extent of blocking existing access to the sea and unlawful for lack of an approved PDP by the Director of Physical Planning and Central/Regional Authority in compliance with the provisions of the *Land Planning Act* cap 303 (repealed by the Physical Planning Act cap 286. It found that the PDP would have settled the issue of whether there was a public access road to the beach through the suit property and/or at the positioning of the high-water mark in relation to the suit property.

104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows:

> "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
>
> 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan

(PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

105. This process is restated in *African Line Transport Co Ltd v Attorney General*, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, "the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land."

107. We are careful to note that this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court's jurisdiction under article 163(4)(a) in this case. It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to HE Daniel T Arap Moi was irregular.

108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

109. We note that the suit property was subsequently converted and HE Daniel T Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant's averment, section 10 of the *GLA* is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

111. Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title

regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the *Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

112. We therefore agree with the appellate court that the appellant's title is not protected under article 40 of the *Constitution* and the land automatically vests to the 1st respondent pursuant to article 62(2) of the *Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.

(v) Whether the appellant is entitled to the reliefs sought

113. The appellant prays that we set aside the appellate court's judgment and have it substituted with the reliefs sought in ELC Petition No 8 of 2017, in the alternative, that the matter be remitted to the dispute resolution mechanism envisaged under the *IGR* Act with parties granted leave to approach the High Court if dissatisfied with the determination rendered pursuant to their engagement under the IGR Act. From our findings, we have found no reason to disturb the findings of the superior courts below.

114. In light of the above analysis and our findings set out therein, we find that the suit herein does not amount to an intergovernmental dispute; and that ELC Petition 12 of 2017 is not *res judicata* HCCC No 131 of 2011. The appeal did not surmount the jurisdictional parameters invoked on the other claims of a constitutional nature. What therefore remains is the issue of costs. This court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012; [2014] eKLR set out the legal principles that guide the grant of costs and enunciated that generally, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. As each party was pursuing an apparent genuine constitutional legitimate claim, and the appeal not having succeeded, we see no reason to burden any of them on the limited question of costs.

F. Orders

115. Consequently, we order that the petition of appeal dated July 15, 2021 be and is hereby dismissed. Each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA