Narok County Government v Ntutu & 2 others (Petition 3 of 2015) [2018] KESC 11 (KLR) (11 December 2018) (Judgment)

Narok County Government v Livingstone Kunini Ntutu & 2 others [2018] eKLR

Neutral citation: [2018] KESC 11 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 3 OF 2015

DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

DECEMBER 11, 2018

BETWEEN

NAROK COUNTY GOVERNMENT ..... APPELLANT

AND

LIVINGSTONE KUNINI NTUTU ..... 1ST RESPONDENT

OL KIOMBO LIMITED ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal from the Judgment and decision of the Court of Appeal sitting in Nairobi (Nambuye, Musinga and J. Mohammed JJA) deliveredon the 24th April 2015 in Civil Appeal No.109 of 2014)

The Supreme Court does not have jurisdiction to determine appeals concerning the ownership of title of private land.

Reported by Chelimo Eunice

Jurisdiction *- jurisdiction of the Supreme Court to hear appeals from the Court of Appeal - the test to evaluate the jurisdictional standing of the Supreme Court in handling an appeal - appeal involving interpretation or application of the Constitution- guiding principles before hearing appeals brought before Supreme Court pursuant to article 163(4)(a) of the Constitution - claim that the appeal did not involve the interpretation or application of the Constitution – whether Supreme Court had jurisdiction to hear an issue of the constitutionality and legality of title to land allegedly converted from public land or land held in trust to private land-whether in the circumstances, the Supreme Court would hear the appeal on account of public interest - Constitution of Kenya 163(4), 81 and 86; Supreme Court Act (cap 9B) section 15.*

Land Law *– trust land – public land – process of conversion from trust land to public land - whether the title land which was originally part of the Maasai Mara National Reserve, was lawfully excised from public trust land and registered as private land - Land Adjudication Act (cap. 284) sections 5, 13, 14, 19, 23, 24, 25, 26, 27; Wildlife Conservation And Management Act (cap 376) sections 2; 7(1)(2), and 8*

Civil Practice and Procedure *– consent judgment – consent judgment entered on illegalities - whether a consent judgment, which had resolved a prior dispute over the ownership of the suit land, could be set aside on grounds that it ignored questions regarding the illegality of the title acquisition – Constitution of Kenya (repealed) sections 115 (1) and (2), 116 and 117; Civil Procedure Act (cap 21) section 80; Civil Procedure Rules (cap 21 Sub Leg) rule 1.*

Land Law *– registration of land – indefeasibility of title – first registrestration – consequence of first registration - Whether the first registration of the suit land under the Registered Land Act provided the title-holder with an indefeasible title, even where allegations of fraud were raised - Registered Land Act (repealed) (cap 300) section 3(2), and 143(1)*

Brief facts

The appellant had challenged in the High Court a consent judgment on the premises, among others, that it was in contravention of the Constitution and that the title to the suit land was also unconstitutionally and illegally acquired, that it was marred with fraud and irregularity and that it offended various statutory provisions. The High Court set the consent judgement aside on the grounds, among others, that it was in the public interest and in interest of justice that the issue of the said constitutionality and legality of title be determined conclusively and that it would be against public policy in the circumstances to uphold the consent judgment. That decision was set aside by the Court of Appeal, thus necessitating the instant appeal.

Issues

i. Whether the title land, which was originally part of the Maasai Mara National Reserve, was lawfully excised from public trust land and registered as private land.

ii. Whether a consent judgment, which had resolved a prior dispute over the ownership of the suit land, could be set aside on grounds that it ignored questions regarding the illegality of the title acquisition.

iii. Whether the first registration of the suit land under the Registered Land Act provided the title-holder with an indefeasible title, even where allegations of fraud were raised.

Held

1. A matter coming on appeal to the court ought to have first been subject of litigation before the High Court and risen through the judicial hierarchy on appeal. The test to evaluate the jurisdictional standing of the Court in handling an appeal was whether the appeal raised a question of constitutional interpretation or application, and whether the same had been canvassed in the superior courts and had progressed through the normal appellate mechanism so as to reach the court by way of appeal, as contemplated under article 163(4)(a) of the Constitution.
2. In order to invoke the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution, the matter in issue should have been first resolved by the High Court and risen through the judicial appellate hierarchy. However, such a narrow conclusion would defeat the Court's mandate under the Constitution as the apex court and hinder the realization of its objectives under section 3 of the Supreme Court Act. There was need for a holistic and pragmatic approach when considering the scope of the court's jurisdiction under article 163(4)(a) of the Constitution.
3. There was a multiplicity of factors that the Supreme Court ought to always, and on a case to case basis, consider in determining whether it had jurisdiction in a matter under article 163(4)(a) of the Constitution. Whether the matter was first decided by a superior court was one such and primary consideration but not necessarily the only one.
4. Where specific constitutional provisions could not be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate was that the court's reasoning and the conclusions which led to the determination of the issue, put into context, could properly be said

to have taken a trajectory of constitutional interpretation or application. A trajectory of constitutional interpretation or application was an important yet flexible consideration.

5. The court would only assume jurisdiction if satisfied that the appeal fell squarely within the four corners of article 163(4)(a) of the Constitution. The question of whether the High Court was right or wrong in the application of the principles for setting aside a consent judgment did not lie on appeal before the court. Those principles were well set out in statute and case law and they could not raise a matter of constitutional interpretation and/or application. Had the principles themselves been the subject of constitutional interpretation, the court would have readily assumed jurisdiction. Had the setting aside issue been the only issue to be considered, then the court would not have had jurisdiction.
6. The land, subject matter of the instant appeal formed part of the Maasai Mara National Reserve. The Maasai Mara National Reserve was the subject of a constitutional trust. What was in issue was how the said parcel of land was excised from the Maasai Mara National Reserve and registered in the name of the 1st respondent. That issue would have been settled had the initial matter, Civil Suit No. 1565 of 2000, been allowed to go full course and to be determined. That was not to be as a consent was apparently entered into settling the dispute as at then. Before the consent was signed, questions were raised as regards the legality or otherwise of the title held by the 1st respondent and the consent did not otherwise specifically address that issue.
7. The court was obligated, like all other courts to uphold the values of transparency, legality and public interest in matters of land, more so public land. The process of conversion of public land or land held in trust to private land had to be beyond reproach. Under the Constitution, that was the rationale behind the formation of the National Land Commission and at the core of the instant case was the legality of the title to the suit land held by 1st respondent, an individual who obtained it upon its purported excision from public land known as the Masaai Mara National Reserve.
8. The issue of the constitutionality and legality of that title was live both in the High Court and the Court of Appeal. Upon finding that the constitutionality and legality of that title was not clear, the High Court set aside the consent judgment and ordered that the matter should go for trial to determine that issue.
9. Public policy went to the protection of the public interest which was safeguarded by the national values and principles of governance in article 10 of the Constitution. The allegations of trust land being annexed for private purposes had not been determined on merits**.** The allegation of unconstitutionality and illegality of the title to the suit land raised a serious policy issue that the court had to have regard to in determining whether it had jurisdiction and to be seized of the matter before it and in making the relevant orders.
10. The court and any other appellate court, even where there were no specific provisions to do an act, had inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Also, there lay the power for the court to act to prevent abuse of the court process by one party so that fairness was maintained between all parties.
11. The instant matter warranted the court's consideration given its importance. The issue before the court was also exceptional and would require that the court's inherent jurisdiction be invoked to hear and determine the same. The court in exceptional circumstances, and so as to meet the ends of justice, could invoke its inherent jurisdiction to consider and review judgments. Hence, the court invoked its' inherent jurisdiction to admit and consider the instant appeal limited only to a consideration of the constitutionality and legality of the title to the suit land.
12. Parties could not consent to an illegality, hence a consent that upset the provisions of the Constitution also defeated the principle of legality and could not stand.
13. There was need to establish the constitutionality and legality of the title to the suit land. To establish the status of the title to the suit land, the consent had to be set aside and for the substantive matter to be heard. To determine the status of the title called for evaluation of evidence to determine how

the process was undertaken and if it infringed any law. That determination was yet to be made even as important as the matter was.

14. The court would not usurp the jurisdiction of other courts to determine matters which rightly ought to be determined by them at the first instance.
15. The cancellation of the title called for determination of facts by a trial court. Such a determination did not exist both in the High Court and the Court of Appeal. That called for determination *de novo* by a court of competent jurisdiction. Thus, the prayer of cancellation of title could not be issued unless there was a proper determination by the Environment and Land Court, the court with the requisite competent jurisdiction to make that factual finding.
16. In making a determination on the remedies to issue, the court had wide powers under section 3 of the Supreme Court Act and particularly, rule 3(5) of the Supreme Court Rules. The remedies preferred by the court had to be tailor-made so as to be consistent with the objects in section 3 of the Supreme Court Act. What was before the court was a matter involving trust land that was alleged to have been excised to a private individual. The dispute raised the issue of constitutionality and legality of the title to the suit land, which issue had not been heard and determined on merits by superior courts.
17. The court allowed the determination of the status of the title to the suit land, in the public interest and so that such a determination was made to bring certainty in the matter. The referral of the matter back to the Environment and Land Court and not the High Court which no longer had jurisdiction on such a dispute to determine the constitutionality and legality of the title to the suit property was the appropriate remedy.

Petition allowed.

Orders

i. *The judgment and orders of the Court of Appeal (R.N Nambuye, D.K Musinga and J. Mohammed J.J.A) dated April 24, 2015 in Nairobi Civil Appeal No. 109 of 2014 was set aside.*
ii. *The ruling and orders of the High Court dated March 19, 2014 in HCCC 1565 of 2000 were reinstated save to the extent expressed in (iii) below.*
iii. *An order was issued that the matter be remitted back to the Environment and Land Court for hearing, pursuant to the ruling in HCCC No.1565 of 2000 dated March 19, 2014, on a priority basis.*
iv. *Each party ordered to bear own costs.*

Citations

Cases

Kenya

1. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
2. *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* Civil Application 16 of 2012; [2014] KECA 872 (KLR) - (Explained)
3. *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) - (Followed)
4. *Elija Syekei v Headmaster Afraha High School* Civil Case 320 of 2009; [2012] KEHC 1941 (KLR) - (Mentioned)
5. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] KESC 6 (KLR) - (Explained)
6. *In Re the Matter of the Estate of George M'Mboroki (Deceased)* Miscellaneous Succession Cause 537 of 2004; [2008] KEHC 3646 (KLR) - (Explained)
7. *In the Matter of the National Land Commission* Advisory Opinion Reference 2 of 2014; [2015] KESC 3 (KLR) - (Explained)
8. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR) - (Mentioned)

9. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Explained)
10. *Kenya Airways Limited v Satwant Singh Flora* Civil Appeal 54 of 2005; [2013] KECA 545 (KLR) - (Mentioned)
11. *Kenya Power & Lighting Company v Njumbi Residents Association & another* Civil Appeal 178 of 2013; [2015] KEHC 1094 (KLR) - (Followed)
12. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Followed)
13. *Mapis Investment (K) Limited v Kenya Railways Corporation* Civil Appeal 14 of 2005; [2006] KECA 344 (KLR) - (Mentioned)
14. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2 of 2014; [2014] eKLR - (Explained)
15. *Murugu, Ngatuni v Mukindia Magambo & 4 Others* Civil Appeal 327 of 2009; [2013] KECA 198 (KLR) - (Followed)
16. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Mentioned)
17. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Explained)
18. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR) - (Explained)
19. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai Estate of & 4 others* Petition 12 of 2014; [2014] eKLR - (Explained)
20. *Republic v Kenya Urban Roads Authority & 2 Others Exparte Tamarind Village Ltd Mombasa* Miscellaneous Application 35 of 2012; [2015] KEHC 5453 (KLR) - (Mentioned)
21. *Shah , Milankumar & 2 others v City Council of Nairobi & another* Civil Suit 1024 of 2005 - (Mentioned)
22. *Wasike v Wamboko* Civil Appeal 81 of 1984; (1982-88) 1 KAR - (Followed)

Uganda

1. *Activie Automobile Spares Ltd v Crane Bank Ltd & another* Civil Appeal No. 21 of 2001 - (Mentioned)
2. *Makula International Ltd v His Eminence Cardinal Nsubuga & Another* [1982] HCB 13 - (Mentioned)
3. *Mistry Amar Sigh v Serwano Wofunira Kulubya* [1963] EA 408 - (Mentioned)
4. *Shell Uganda Ltd & 10 others v Muwema and Mugerwa & another* Civil Appeal No 2 of 2013 - (Mentioned)

South Africa

Andre Oosthuizen v Road Accident Fund ((258/10) [2011] ZASCA 118) — (Explained)

India

1. *Anil Rishi v Gurbaksh Singh* AIR 2006 SC 1971 - (Mentioned)
2. *Atam Ram Mittal v Ishwar Singh Punla* 1988 SCR Supl (2) 528; 1988 AIR 2031 - (Followed)
3. *Delhi Judicial Service Association v State of Gujarat and others* 1991 AIR 2176; 1991 SCR (3) 936 - (Explained)

United Kingdom

1. *Attorney General of Gambia v Momodue Jobe* [1984] UKPC 10 - (Followed)
2. *Black-Clawson International v Papierwerke Waldhof- AG* [1975] UKHL 2; [1975] AC 591 - (Mentioned)
3. *Scott v Brown, Doering McNab Co* [1892] 2 QB 724 - (Mentioned)

Regional Court

Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266 - (Explained)

Texts

Taitz, J., (Ed) (1985), *The Inherent Jurisdiction of the Supreme Court* Cape Town: Juta Publishers pp 8-9

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 80 - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 45 rule 1 - (Interpreted)
3. Constitution of Kenya articles 2 (1); 2(2); 40 (6); 63 (2) (d) (iii) ;63 (4); 159(2)(d); 163(4)(a); Schedule 1 section 7 - (Interpreted)
4. Constitution of Kenya (Repealed) sections 115, 115(2); 116; 117 - (Interpreted)
5. Land Adjudication Act (cap 284) sections 5, 13, 14, 19, 23, 24, 25, 26, 27 - (Interpreted)
6. Registered Land Act (Repealed) (cap 300) sections 3(2); 143(1) - (Interpreted)
7. Registration of Titles Act (Repealed) (cap 241) In general - (Cited)
8. Supreme Court Act (cap 9B) sections 3, 15(2)- (Interpreted)
9. Supreme Court Rules, 2012 (cap 9B Sub Leg) rules 3(5); 9 ; 33 - (Interpreted)
10. Wildlife Conservation and Management Act (cap 376) sections 2, 7(1)(2); 8 - (Interpreted)

Advocates

1. *Prof. Ojienda*, Senior Counsel, and *Mr. Okong'o Omogeni*, Senior Counsel for the appellant
2. *Mr. Kioko Kilukumi* for the 1st respondent.
3. *Mr. Gichamba* for the 2nd respondent.
4. *Mr. Mutari* for the 3rd respondent.

JUDGMENT

A. Introduction

1. The appellant moved this court vide a Petition dated May 13, 2015 and filed on May 14, 2015. The appeal is premised on article 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act* as well as rules 9 and 33 of the *Supreme Court Rules, 2012*. The appellant is challenging the entire judgment and order of the Court of Appeal (R.N Nambuye, DK Musinga and J. Mohammed JJA) in Nairobi Civil Appeal No. 109 of 2014.

2. The appellant in support of its case filed its submissions dated July 7, 2015, further submissions dated September 21, 2015 and further submissions dated January 28, 2016. The 1st respondent in response filed his submissions dated August 10, 2015, while the 2nd respondent filed its submissions dated September 7, 2015. The 3rd respondent on its part filed submissions dated February 8, 2016 and further submissions dated February 13, 2017.

3. Concurrent with the filing of the petition, the appellant approached this Court through a notice of motion Civil Application No 6 of 2015, under certificate of urgency dated May 13, 2015 supported by an affidavit of Lenku Seki of even date. The Application sought stay of the execution of the Judgment and Orders of the appellate court'sdecision pending the hearing and determination of both the Application and the Petition. On May 18, 2015 Rawal DCJ, (as she then was) certified the Application urgent and ordered that the same be placed before the Deputy Registrar for grant of an urgent inter partes hearing date and that the status quo be maintained in the meantime. The parties later agreed that instead of hearing the Interlocutory Application, all issues in contest be canvassed during the hearing of the Petition. On July 2, 2015, Ojwang, SCJ, thus ordered that pending the hearing and determination of the Appeal, the status quo obtaining at the locus in quo be maintained.

B. Background

a. Proceedings in High Court; Civil Suit No 1565 of 2000

4. Mr Ntutu, the present 1st respondent and plaintiff before the High Court filed an amended plaint in Civil Suit No 1565 of 2000 dated December 18, 2000 wherein, he inter alia claimed that vide Legal Notice No 412/92 dated October 28, 1992, the Minister for Tourism and Wildlife, in exercise of his legal powers, declared the Talek area of Narok District as having ceased to be part of the Maasai Mara National Reserve. He claimed that thereafter, the Narok Land Adjudication Officer pursuant to section 5 of the *Land Adjudication Act*, declared the Talek gazetted area an adjudication area vide a Declaration Notice dated May 6, 1997.

5. He stated that a total of 155 parcels of land resulted from the adjudication exercise whereby on October 14, 1997 he was registered as the absolute owner of LR No CIS-Mara/talek/155 (hereinafter referred to as 'the Suit Land') in accordance with the applicable provisions of the *Registered Land Act* (now repealed). He also averred inter alia that despite being the registered owner thereof, the Narok County Council (the predecessor of the Narok County Government) continued to collect rent and other revenues from Ol Kiombo Ltd (a lessee of part of the Suit Land) and had refused to surrender the same to him.

6. The amended plaint specifically sought seven prayers: First, a declaration that all the rights and privileges enjoyed by Narok County Council over the Suit Land be extinguished and the same be now vested in him; second, a permanent injunction restraining Narok County Council or any of its servants or agents from exercising any rights or interests or from collecting any revenues in respect of the leased portion; third, an account of all the incomes received by Narok County Council from Ol Kiombo Ltd or from any other person since October 14, 1997

7. Narok County Council (as it then was), the present appellant and 1st Defendant before the High Court, filed a Defence and Counter Claim dated October 7, 2000. It contended that the Notice of Establishment of an adjudication section dated May 6, 1997 relied upon by the 1st respondent as the basis for his claim to the Suit Land was never implemented as it was cancelled through a correction of declaration notice dated July 31, 1997.

8. It further contended that only 154 parcels of land were created during the adjudication process and the Suit Land did not form part of the degazetted area. The Counter Claim furthermore sought a declaration that the 1st respondent's purported registration as proprietor of the suit land was fundamentally invalid, null and void for all legal and practical intents and purposes. It also sought an order cancelling the purported registration of title as well as the title itself.

9. Ol Kiombo Ltd and the Attorney General (the 2nd and 3rd defendants in the High Court) both opposed the suit vide their Statements of Defence dated March 2, 2001 and October 30, 2001, respectively. They both contended that the suit land had not been adjudicated contrary to the 1st respondent's claim and the recording of the same as an adjudicated area was contrary to the provisions of the repealed *Constitution*, the *Wildlife (Conservation and Management) Act*, the *Land Adjudication (now repealed) Act*, the *Registered Land Act* (now repealed) and the *Registration of Titles Act* (now repealed). They further sought a declaration that the 1st respondent's title to the suit land was null and void ab initio as well as an order that title to the suit land be cancelled and costs of the suit awarded to them.

10. Upon the parties filing their responses and before hearing of the matter, a Consent Letter dated May 13, 2002 was filed by the Counsel for the Plaintiff and the 1st defendant and a Consent recorded on even date. The Consent was for avoidance of doubt signed by M/s Wambuu Wainana & Co. Advocates for

Narok County Council and M/s Kilukumi & Co Advocates for the 1st respondent. The Consent was to the effect that Judgment was to be entered against Narok County Council in favour of Mr Ntutu in terms of the amended plaint dated and filed in court on December 18, 2000. The suit was also to be marked as settled with no orders as to costs.

b. Miscellaneous Application No 1271 of 2002

11. Subsequently, Ol Kiombo Ltd was aggrieved by the said Consent Judgment and instituted judicial review proceedings being Nairobi High Court Miscellaneous Application No 1271 of 2002 to challenge the same. It claimed, inter alia, that the advocates who recorded the Consent were not properly instructed as the Finance Staff and General Purposes Committee, the instructing committee of Narok County Council, was not mandated to pass a resolution to settle/compromise any suit and specifically the one in issue.

12. The Judicial Review Application was opposed by Narok County Council which defended its decision to settle the suit between itself and the 1st respondent. In a Ruling dated May 8, 2009, Khamoni J dismissed the Judicial Review Application in its entirety and pointed out that it was well within Narok County Council's mandate to compromise its interest in any suit.

13. During the pendency of Miscellaneous Application No 1271 of 2002, it appears that an amicable settlement between Ol Kiombo Ltd and the 1st respondent was reached and a second Consent Order was therefore recorded between the two in High Court Civil Suit No 1565 of 2000 vide a letter dated November 16, 2005. The Consent was to the effect that Ol Kiombo Ltd acknowledged that the 1st respondent was the registered owner of the Suit Land and the lease granted to it by Narok County Council was no longer binding nor subsisting. The suit between the 1st respondent and Ol Kiombo Ltd was therefore marked as settled on condition that the 1st respondent would grant a fresh lease to Ol Kiombo Ltd for the leased portion of the Suit Land on similar terms and conditions as its lease with Narok County Council, for the unexpired lease period.

14. Later, a Decree dated November 24, 2005 comprising the content of the two Consent Orders aforementioned was issued. The Decree further stated that there was a notice of discontinuance dated October 13, 2005 filed by the Attorney General and the dispute seemed to have ended there but this was not to be.

c. Application for review and setting aside Consent Judgment in HCCC No 1565 0f 2002

15. Following all the above events and actions, Narok County Council changed its mind as it was apparently aggrieved by the Decree dated November 24, 2005 and proceeded to file a Notice of Motion application dated March 12, 2009 challenging the aforesaid Decree and seeking a stay of execution of the same. It also sought that the Consent Judgment be reviewed, varied, discharged or set aside on the ground that it was fraudulently entered into between the parties; it emanated from an unconstitutional and illegal resolution of the Narok County Council which had since been vacated by the said Council and that it was in any event illegal and unconstitutional ab initio.

16. The Attorney General supported the Application while the 1st respondent opposed it. Ol Kiombo Ltd in its response opposed the Application but during the hearing submitted that it was not taking a position in the matter.

17. The High Court (Nyamweya J), in her Ruling dated March 19, 2014 inter alia summarised the particulars of unconstitutionality and illegality of the 1st respondent's acquisition of the Suit Land as pleaded in the Application in the following words:

a) That the Suit Land was the subject of a Constitutional Trust held by the 1st defendant pursuant to the provisions of Section 115 of the previous *Constitution*, and had never prior to its registration in the plaintiff's name been adjudicated under the provisions of the *Land Adjudication Act*, as was stipulated under Section 116 of the previous *Constitution*.

b) That the area purportedly represented in the Suit Land had never, pursuant to the provisions of Section 7 subsection (1) of the *Wildlife (Conservation and Management) Act*, been excised from the Trust Land of the Maasai Mara National Reserve, and that the registration was not preceded by any resolution of the National Assembly approving the excision thereof as required under Section 7 subsection (2) of the *Wildlife (Conservation and Management) Act*.

c) That the area of the Suit Land did not form part of Gazette Notice No 145 of 1984 under which the Minister of Tourism and Wildlife expressed his intention to declare the Talek excision area or cessation area to cease to be part of the Trust Land of the Maasai Mara National Reserve.

d) That the area of the suit property did not form part of the Minister's Cessation Order published vide Legal Notice 412 of 1992 made under section8 of the *Wildlife (Conservation and Management) Act*, and that area had therefore not been excised from Trust Land of the Maasai Mara National Reserve and therefore was still held in trust by the 1st defendant in terms of section 115 (2) of the previous *Constitution*.

e) That the Councillors of the 1st defendant in office at the time the Consent Judgment was entered acted in an unconstitutional, reckless and negligent manner, without due diligence and in total breach and disregard of their mandate and/or duty as trustees in purporting to yield and cede the proprietorship of the area of the Suit Land to the 1st respondent herein without adjudication or setting apart.

18. In a Ruling dated March 19, 2014 aforesaid, Nyamweya J identified two issues for determination:

i. Whether the Consent Judgment entered into and the subsequent Decree could be set aside and/or reviewed; and

ii. Whether there could be a stay of execution of the Decree entered into.

19. The learned Judge considered the applicable law for setting aside a judgment or decree of the court that is, section 80 of the *Civil Procedure Act* as well as order 45 Rule 1 of the *Civil Procedure Rules*, and held that the only remedy available to parties who want to get out of a consent order is to set it aside or to file a fresh suit in court. The court also found that the High Court has jurisdiction to review, vary or set aside a consent order under the stated provisions.

20. The learned judge further determined that the Decree dated November 24, 2005 had fatal errors on its face and was therefore defective. This was because it bore three different dates and referred to two distinct Consent Orders. She also found that the reference to a notice of discontinuance in the Decree was improper as such notice could not conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit.

21. The court in addition held that the doctrines of res judicata and estoppel did not apply in this case as Khamoni, J in his Ruling aforesaid had not made any substantive findings as to the regularity or otherwise of Narok County Council's resolutions. It was also observed that the 1st respondent had not brought any evidence to controvert the evidence presented by Narok County Council that the area covered by the Suit Land had not been excised for adjudication within the applicable law.

22. Furthermore, the Court determined that the 1st respondent's acquittal of the offence of forgery in Nairobi Chief Magistrate Criminal Case No 2157 of 2003 did not conclusively address the issue of the alleged unconstitutionality and/or the illegality of the registration of the Suit Land as the Magistrate's Court had no jurisdiction in that respect.

23. The learned judge went on to evaluate the issue of unconstitutionality and illegality of the Suit Land under the heading "Other sufficient reasons" set out in Section 80 of the *Civil Procedure Act* as well as order 45 of the *Civil Procedure Rules* as a ground for setting aside a consent order and stated that it was argued in great details by the present appellant that the Consent Judgment was vitiated by its unconstitutionality and illegality and was void ab intio which averment was supported by the grounds as set out in the Application. She noted that the ground of sufficient reason in the context of consent judgments had been the subject of many judicial decisions including *Brooke Bond Liebig Ltd –vs- Mally* (1975) E.A 266 where it was settled that a court could review a consent judgment on the same grounds that would justify the varying and rescinding of a contract between parties. The learned Nyamweya J. then stated thus:

> "Allegations of unconstitutionality and illegality of a consent judgment are a serious policy issue that this court must have regard to, and in addition an established principle under contract law that an illegal contract is not enforceable on grounds of public policy. In the instant Application it has not been disputed that the law applicable at the time of recording the Consent Judgment was section 116 of the repealed *Constitution* ..."

24. She further held:

> "Section 116 of the repealed *Constitution* made it clear that such registration was to be subject to such conditions as were provided in applicable Act of Parliament. In the present case, since the land being registered was a game reserve, the applicable law was then the Wildlife (Conservation and Management) Act (Cap 376)....."

25. The Judge then concluded thus:

> "This court cannot overlook the concerns raised as to the constitutionality and legality of the registration of the suit land from all the relevant offices that were concerned in the process of excision, adjudication and registration of the suit property."

26. The court furthermore opined that it would be in the public interest and interest of justice that the issue of the constitutionality and legality of the 1st respondent's title be determined conclusively and that it would be against public policy in the circumstances to compromise the suit and/or allow the Consent Judgment to stand.

27. Consequently, the learned judge set aside the Consent Judgment recorded on May 15, 2002 as well as the Decree issued on November 24, 2005 and ordered that High Court Civil Suit No.1565 of 2000 proceeds to full hearing.

d. Court of Appeal: Civil Appeal No 109 of 2014

28. Aggrieved by the decision setting aside the Consent Judgment, the 1st respondent sought redress in the Court of Appeal. Narok County Council, Ol Kiombo Limited and the Attorney General all opposed the appeal and in its judgment dated April 24, 2015, the appellate court (Nambuye, Musinga, & Mohammed JJ.A) consolidated the grounds of appeal and determined the appeal on four extensive areas/grounds as outlined below.

29. On the first ground which was 'scope and jurisdiction of review of judgments/rulings', it determined that Nyamweya, J had erred in holding that Khamoni, J did not make substantive findings as to the regularity or otherwise of the resolutions made by Narok County Council on May 10, 2002. The appellate court thus found that Khamoni, J had made a conclusive finding on that legal issue. The court also stated that if any of the parties were aggrieved by Khamoni J's decision, then they were at liberty to appeal the decision but not seek a review.

30. It also found that Narok County Council had acted, through one of its aforementioned committees in making a decision and that the decision to compromise the suit was done procedurally and was binding on the Local Authority and its successors. The court thus found it absurd to imagine that every time a new County Government was elected and came into power, it would be allowed to renege on decisions and/or resolutions made and implemented by officials who were in office earlier.

31. The appellate court also determined that Nyamweya J had erred in setting aside the Consent Judgment due to 'concerns raised as to the constitutionality and legality of the registration of the suit property'. The court held that these cannot be grounds for reviewing and setting aside a Consent Judgment. It held that the allegations of unconstitutionality and illegality in the process leading to the registration of the suit property in favour of the 1st respondent were within the knowledge of Narok County Council and in any event, that these were issues of law that could only be addressed through the appellate process and not vide an application for review.

32. On the second ground of res judicata and estoppel, the appellate court determined that the matters in controversy in the suit became res judicata upon the entry of the Consent Judgment. As such, Narok County Council was estopped from reneging on the consent and attempting to find a new cause of action. The courtfurther observed that it was Narok County Council which reached out to Mr Ntutu for settlement of the suit at the High Court and thus lost the opportunity to prosecute its case against him. The courtalso observed that when Ol Kiombo Ltd attempted to quash the said Consent Judgment, Narok County Council vehemently opposed that application and therefore its conduct, in seeking to set aside its freely negotiated consent, was a classic case of approbating and reprobating which the law frowns upon.

33. On the third ground- fatal error on the face of the record – the appellate courtfound that the Decree issued on November 24, 2005was not defective for the reasons that it bore different dates. It observed in the instance that there were two different consents recorded in the same matter and a notice of discontinuance all of which had to be reflected in the Decree.

34. On the fourth ground of indefeasibility of the 1st respondent's title to the Suit Land, the appellate court observed that there is a plethora of decisions that have restated the indefeasibility of titles obtained on a first registration. The principle being that such registration cannot be defeated even upon proof of fraud. As such, the court found that the learned judge erred in failing to give effect to the express provisions of section 143 (1) of the *Registered Land Act*.

35. Consequently, the appellate court allowed the appeal and set aside the Ruling dated March 19, 2014and thus upheld the Decree dated November 24, 2005.

e. Supreme Court

36. Aggrieved by the Court of Appeal decision, Narok County Government as the successor to the Narok County Council appealed to this court under article 163 (4) (a) of the *Constitution*, section 15 (2) of the *Supreme Court Act* and Rules 9 & 33 of the *Supreme Court Rules*, 2012. The Petition was supported by the affidavit of Lenku Seki sworn on May 13, 2015.

37. The appellant seeks the following orders:

    i. The judgment and order of the Court of Appeal (R.N Nambuye, D.K Musinga and J. Mohammed J.J.A) dated April 24, 2015 in Nairobi Civil Appeal No 109 of 2014 be set aside.

    ii. The ruling and orders of the High Court (Nyamweya J) delivered on March 19, 2014 in HCCC No 1565 of 2000 be reinstated.

    iii. As an alternative to prayer (2) above, an order for cancellation of the Title Number Narok/ Cis-Mara/Talek/155 be issued.

    iv. Costs of this appeal and costs of the proceedings in the Court of Appeal and in the High Court be awarded to the appellant herein.

    v. Any other orders that this Honourable Court may deem fit and just to grant.

38. The appellant preferred 11 grounds of appeal which were collapsed into two by its Counsel, They are;

    i. Whether a consent order that offends the *Constitution* and statutory provisions can be upheld by courts.

    ii. Whether title to the Suit Land is unconstitutional and illegal.

39. The appeal was argued before this court on May 7, 2018. The appellant was represented by Prof. Ojienda, SC. and Okong'o Omogeni, SC. Counsel Mr Kioko Kilukumi appeared for the 1st respondent while Mr Gichamba appeared for the 2nd respondent and Mr Mutari for the 3rd respondent.

Parties' Submissions

a) The Appellant's Case

40. In its written submissions dated and filed on July 27, 2015 the appellant urged that this court's jurisdiction under article 163(4)(a) of the *Constitution* had been rightly invoked. That the issues before us involve the interpretation and application of the *Constitution* as various provisions of the *Constitution* which were directly and materially in issue before the Court of Appeal had been misinterpreted and/or misapplied by that court or that it completely failed to consider them.

41. It was further submitted that before the High Court, constitutional and statutory provisions were in issue to wit: whether the Consent Judgment violated the provisions of section 115(1) and (2), 116 and 117 of the repealed *Constitution*, sections 7 and 8 of the *Wildlife (Conservation and Management) Act* Cap 376, Sections 13, 14, 19, 23, 24, 25, 26 and 27 of the *Land Adjudication Act* Cap 284, (now repealed) sections 1(2) and 20 of the Registration of Titles Act cap 281 (now repealed) and section 2(b) of the *Registered Land Act* cap 300 (now repealed), and Legal Notice Number 100 dated March 27, 1969;

42. That in the Ruling by Nyamweya J delivered on March 19, 2014, the following provisions were also in issue, interpreted and applied: Sections 115 and 116 of the repealed *Constitution*, article 159(2)(d) of the *Constitution*, sections 2, 7 and 8 of the *Wildlife (Conservation and Management) Act*, section 80 of the *Civil Procedure Act*, Cap 376 and Order 45 Rule 1 of the *Civil Procedure Rules*.

43. It was further submitted that, in the impugned Judgment of the Court of Appeal, the court failed to interpret and apply the following constitutional provisions, namely sections 115, 116, 117 of the repealed *Constitution* and section 143(1) of the *Registered Land Act* (now repealed). The appellant thus contended that it seeks the interpretation of Sections 115, 116 and 117 of the repealed *Constitution,*

various other provisions as cited above as well as articles 2(1) 2(2), 40(6), 63(2)(d)(iii) and 63(4) of the *Constitution* and section 7 of the Transitional and Consequential Provisions of the *Constitution of Kenya*. That for the above reasons, it had correctly invoked this court's jurisdiction.

44. In support of its case on jurisdiction, the appellant cited this court's jurisprudence in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* 2014] eKLR at paragraph 37 where it held that in determining a question relating to jurisdiction of the Supreme Court under article 164(4)(a) of the *Constitution*;

> "..... the test ..... is whether the appeal raised a question of constitutional interpretation or application and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism."

45. The appellant also made reference to the decision in *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012] eKLR at paragraph 13 A as well as Gatirau Peter Munya v Dickson Mwenda Kithinji & Another [2014] eKLR in making the above point.

46. Through its counsel, Prof Ojienda SC, the appellant urged that in determining whether it had jurisdiction, the court should adopt the trajectory approach of constitutional interpretation and application as the constitutional thread on validity of the title held by the 1st respondent was a live and an undetermined matter in the High Court and that a Consent Order that is offending to the *Constitution* cannot be allowed to stand. He urged that the Court of Appeal should not therefore have closed its eyes to the apparent unconstitutionality and illegality of the title to the Suit Land and more specifically, the 1st respondent's misuse of his position of authority, as the Treasurer of the then Narok County Council, to acquire the Suit Land. In addition, that the court in doing so departed from its duty to address the issues before it and limited itself to the issue of setting aside of the Consent Order which was not the only issue before it.

47. On the merits of the appeal, the appellant submitted that the area known as Talek Adjudication Area and measuring 48KM^2 excised from the Maasai Mara National Reserve was for the specific benefit of members of the Koyiaki Group and that the 1st respondent, the purported beneficiary of the Suit Land, is not a member of the said group or a resident of the aforesaid adjudication area. Consequently, it was submitted that the portion that was hived off the said National Reserve comprised of 154 sub-divided plots and the 1st respondent failed to demonstrate how he obtained the 155th parcel of land.

48. It was furthermore urged that for any land to be adjudicated and for it to cease to be part of a National Reserve, whether gazetted under the *Wildlife (Conservation and Management) Act* or not, there was requirement under Section 116 of the repealed *Constitution* and section 7 of the foresaid Act for a Local Authority, to first apply to the Minister responsible for Land and Settlements for the provisions of the Land Adjudication Act to be applicable. That Narok County Council did not make such an application and therefore the purported title by the 1st respondent to the Suit Land was illegal ab initio.

49. It was in addition submitted that a Consent Order that offended section 116 of the repealed *Constitution* and other statutory provisions, more specifically section 7 of the *Wildlife (Conservation and Management) Act* could not be upheld by the courts. That the Judgment of the Court of Appeal was therefore erroneous for upholding as valid, such a consent. Further, that the Consent Judgment violated constitutional and express statutory provisions and hence was patently illegal and unenforceable. It relied on the decision in *Flora Wasike v Destimo Wamboko* (1982-88) 1 KAR, *Mike Gideon Sonko v Attorney General and 8 Others* [2014] eKLR and argued that a consent order is akin to a contract between parties and where there is evidence of fraud, then the same has to be negated and nullified. It further relied on the decisions in *Republic v Kenya Urban Roads Authority & 2 Others*

Exparte Tamarind Village Ltd Mombasa HC JR No 35 of 2012, *Scott Brown v Brown, Doering MC NAB* [1892]2QB 724, per Lindley LJ at page 728, *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR, *Mapis Investment (K) Limited v Kenya Airways Corporation* [2006] eKLR on the same principle.

50. The appellant furthermore argued that the Consent Judgment was acquired by fraud which is a ground for setting aside such a Consent Judgment. That the Consent was also crafted with an intent to deceive the court as the advocate who purportedly executed it on behalf of the appellant was not properly on record and that the Notice of Change of Advocate was filed after the Consent had been recorded and hence, that Consent Judgment cannot stand. It is in addition argued that the High Court Judge was therefore right in setting it aside.

51. The appellant also faulted the Court of Appeal in its Judgment for being in complete disregard of the *Constitution* more so for violating articles 2, 40 and 159(2)(e). Further, that the Court of Appeal gave credence to the provisions of section 143(1) of the *Registered Land Act* (now repealed) on indefeasibility of the title to the Suit Land in exclusion of the provisions of article 40(6) of the *Constitution* 2010 limiting the right to property that has been found to have been unlawfully acquired. It was thus submitted that the Court of Appeal erred in taking a more restrictive interpretation thus misinterpreting and/or misapplying the provisions of the *Constitution*.

52. The appellant in addition in arguing its case relied upon the decisions in *Black-Clawson International v Papierwerke Waldhof- Aschaffenburg Aktiengesellschaft*, 1975, UKHL2, *Atam Ram Mittal v Ishwar Singh Punla*, 1988 SCR Supl (2) 528, *In the matter of the Principle of Gender Representation in the National Assembly and the Senate*, Sup Ct Advisory Opinion Appl. No 2 of 2012 and in the Voice of Lord Diplock in *Attorney General of Gambia v Jobe* 1985] LRC (Const.) to set out the principles that guide the interpretation of the *Constitution*, and by extrapolation, statutes.

53. The appellant contended that the onus of proof of unlawful acquisition of title by the 1st respondent had been met before the Superior Court and that in any case the same was never controverted by the 1st respondent. It cited the Indian case of *Anil Rishi v Gurbaksh Singh*, Appeal (Civil) 2413 of 2006 in support of its submissions in this regard. That therefore the Appeal ought to be allowed for the above reasons.

b) The 1st Respondent's Case

54. The 1st respondent filed his submissions on August 10, 2015 and had earlier filed a replying affidavit sworn on May 25, 2015. In the replying affidavit, it was deponed that this court lacks jurisdiction under article 163(4)(a) of the *Constitution* to determine the present appeal as the appeal did not involve the interpretation or application of the *Constitution* in any way. It was thus argued that the appellant has no automatic right of appeal to this court and that this proposition has been restated by this court in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd and Another* 2012]eKLR, *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014]eKLR, *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012]eKLR which position ought to be upheld.

55. It was further contended that article 163(4)(a) does not confer jurisdiction on this court to deal with interpretation or application of the repealed *Constitution* nor does it extend to interpretation or application of statutory provisions. That this court can only exercise its appellate jurisdiction on the proper exercise of the review jurisdiction granted to the High Court in accordance with section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*, since the only question before the High Court and the Court of Appeal was the governing principles in the review of judgments or rulings.

56. The 1st respondent furthermore argued that the appeal lacks the trajectory principle as was advanced in *Gitarau Peter Munya v Dickson Mwenda Kithinji & Others* [2014] eKLR since the reasoning and the conclusion of both the High Court and the Court of Appeal judges leading to the determination of the issues before them did not take a trajectory of constitutional interpretation or application. Furthermore, that the review judge did not make a finding on the constitutionality of the title held by the 1st respondent but on the legality or otherwise of the Consent Judgment.

57. He was emphatic that this court cannot determine how a title to land was acquired as its jurisdiction is limited to matters of law and not facts. And that the constitutionality or illegality of land acquisition can only be on appeal and not review. This court was thus invited to down its tools for lack of jurisdiction to entertain the appeal and reminded of its decision in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR. The court was furthermore urged not to arrogate to itself jurisdiction other than as conferred by the *Constitution* or legislation or both.

58. The 1st respondent in addition submitted that he was a first registered proprietor to the Suit Land and thus enjoyed an indefeasible title under the repealed *Constitution*. He relied on the decision in *Ngatuni Murugu v Mukindia Magambo & 4 Others* [2013] eKLR. He also contended that article 40(6) of the *Constitution* was not applicable as the same was forward looking and was not intended to apply to titles acquired prior to August 27, 2010.

59. Were the court to find that it has jurisdiction, it was submitted that the court should be mindful that it was restricted to look only at the point of law which was whether the Superior Courts erroneously applied the principles governing review as set out in section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. It was further submitted in that regard, that a question arising from an allegation that a Consent Order was offensive to the *Constitution* and statutory provisions was not a subject matter for review but for appeal against such an Order.

60. The 1st respondent, on the issue of constitutionality and legality of the title to the Suit Land argued that the appellant had expressly contested the aforementioned issue before the High Court but on its own volition abandoned it, compromising the suit and making the issue res judicata hence incapable of being re-opened on review. He relied on the decision of this court in *Communications of Kenya & 4 others v Royal Media Services & 7 Others* [2014] eKLR on the same principle. He thus urged that all the decisions in the authorities relied on by the appellant on non-enforceability of illegal contract were of no assistance as it, the Appellant, chose to abandon its argument of illegality before the High Court.

61. He concluded by submitting that the issuance of a title deed to the Suit Land by the Government was prima facie evidence that the underlying processes were undertaken under Section 116 of the repealed *Constitution*.

c) The 2nd Respondent's Case

62. The 2nd respondent relied on its submissions dated September 7, 2015 to argue that the 1st respondent's title to the Suit Land was illegal for failing to follow the laid down procedures under the law, more specifically section 116 of the repealed *Constitution*, section 7 of the *Wildlife (Conservation and Management) Act* and the relevant sections of the *Land Adjudication Act* (now repealed).

63. It was also submitted that the 1st respondent's argument that its title to the Suit Land was indefeasible could not stand because the purported process of acquiring the said title was unlawful and illegal. It was in addition contended that any document issued in contravention of the applicable law was a nullity and of no effect. Reliance was placed on the cases of *Milankumar Shah & 2 Others v City Council*

of Nairobi & Another (Nairobi HCCC Suit No1024 of 2005 and *Elijah Syekei v The Head Master Afraha High School* Civil Case 320 of 2009 on the same principle.

64. The 2nd respondent furthermore urged that courts have previously asserted that they cannot condone an illegality. That once an illegality is brought to the attention of the court, the court cannot overlook it. In this regard, reliance was placed on the decision in *Mistry Amar Sigh Serwano Wofunira Kulubya*, 1963 EA, 1963 408 and Scott Brown (*supra*).

65. Supporting the petition before this court, the 2nd respondent submitted that it was questionable how the Suit Land was registered under the repealed *Registered Land Act* while the other 154 titles issued at the same time in respect to Talek Adjudication section were registered under the repealed *Registration of Titles Act*.

d) The 3rd Respondent's Case

66. The 3rd respondent relied on its submissions dated February 8, 2016 and further submissions dated February 13, 2018. It argued that the Narok District Adjudication Officer in disregard of instructions by the Director of Adjudication irregularly issued a Notice expanding the area of adjudication to be excised from the Maasai Mara National Reserve to include the Suit Land. That subsequently, the notice was cancelled thus, there was no valid notice of demarcation of the Suit Land under section 14 of the *Land Adjudication Act* (now repealed). That in the absence of a valid Declaration Notice under section 5 of the said *Act*, the title to the Suit Land is a nullity.

67. The 3rd respondent, the Hon. Attorney General, was thus emphatic that the Consent Judgment was illegal and offended the provisions of the *Constitution* and express statutory provisions. He argued that this court should not enforce an illegal contract, and cited the decisions of the Supreme Court of Uganda, *Shell Uganda Ltd & 10 Others v Muwema and Mugerwa & Another* Sup Court Civil Appeal No 2 of 2013, *Activie Automobile Spares Lts v Crane Bank Ltd & Another* Sup. Court Civil Appeal No 21 of 2001 and *Makula International Ltd v His Eminence Cardinal Nsubuga & Another* [1982] HCB 13, where the court made a similar finding.

68. In conclusion, the office of the Attorney General submitted that it had discontinued its defence and counterclaim filed before the High Court on the misguided assumption that the appellant was attempting to legitimize the illegal acquisition of the Suit Land.

C. Issues for Determination

69. The following issues emerge for determination by this court:

    i. Whether this court has jurisdiction under article 163(4)(a) of the *Constitution* to hear and determine this Appeal;

    ii. Whether a consent order that offends the *Constitution* and statutory provisions can be upheld by courts;

    iii. Whether this court can and should cancel the title to the Suit Land, subject of this dispute;

    iv. The appropriate remedies to issue;

    v. Costs.

D. Analysis

a. Whether this Court has Jurisdiction

70. The appellant in the above regard has invoked this court's jurisdiction under article 163(4)(a) of the *Constitution* and submitted that the Consent Judgment violated the provisions of sections 115 (1) and (2), 116 and 117 of the repealed *Constitution*, sections 7 and 8 of the *Wildlife (Conservation and Management) Act* as well as other statutory provisions stated in the parties' submissions above. To that extent therefore, it argued that this court has the jurisdiction to remedy the effect of the alleged violations.

71. It was also argued that in the Ruling of Nyamweya J delivered on March 19, 2014, the said constitutional and statutory provisions were in issue, interpreted and applied by the High Court and that, the Court of Appeal, interpreted, applied and/or failed to interpret and apply the same. It is the appellant's further case that it now seeks the Supreme Court's interpretation and application of the aforementioned constitutional and statutory provisions and in addition the interpretation and application of articles 2 (1) 2(2), 40 (6), 63 (2) (d) (iii) and 63 (4) of the *Constitution* as well as section 7 of the Transitional and Consequential Provisions of the *Constitution of Kenya.*

72. On its part, the 1st respondent, was categorical that this court lacks jurisdiction to hear this matter as the Appeal did not involve the interpretation or application of the *Constitution* in any way. He relied on this court's jurisprudence in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another* [2012] eKLR, *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR and *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012] eKLR to buttress his case that the appeal fails to meet the threshold of this court's exercise of its jurisdiction under article 163(4)(a).

73. On our part, having considered the rival arguments placed before us we note that the scope of this court's appellate jurisdiction under article 163(4) (a) of the *Constitution* has been the subject of several determinations. In one of its early decisions *Erad Suppliers & General Contractors Ltd vs. National Cereals & Produce Board*, [2012] eKLR this court held thus:

> "...a question involving the interpretation or application of the *Constitution* that is integrally linked to the main cause in a Superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained. Where before such a court, parties raise a question of interpretation or application of the *Constitution* that has only a limited bearing on the merits of the main cause, the court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court... "

The Court went further to state as follows:

> Firstly, it is now well settled that a matter coming on appeal to this court must have first been subject of litigation before the High Court and risen through the judicial hierarchy on appeal. (Emphasis added.)

74. Furthermore, in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR (The Joho case) at paragraph 37, this court explained that:

> "..... in light of the foregoing, the test that remains to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional

interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this court by way of appeal, as contemplated under article 163(4)(a) of the *Constitution*." (Emphasis added.)

75. Clearly, it follows that for this court's jurisdiction under article 163(4)(a) of the *Constitution* to be invoked, the matter in issue should have been first resolved by the High Court and risen through the judicial appellate hierarchy. We however hasten to add that the foregoing principle is not the only one that the court has to consider. Such a narrow conclusion would indeed defeat this court's mandate under the *Constitution* as the apex court and hinder the realization of its objectives under Section 3 of the *Supreme Court Act*. This court is thus conscious of the need for a holistic and pragmatic approach when considering the scope of its jurisdiction under Article 163(4)(a) of the *Constitution* and that is why in the *Joho case* (*supra*) it stated thus:

> "…. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the *Constitution* may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the *Constitution* should be interpreted broadly and liberally, so as to capture the principles and values embodied in it." (Emphasis added.)

76. The point made above is that there is a multiplicity of factors that the court must always, and on a case to case basis, consider in determining whether it has jurisdiction in a matter under article 163(4)(a) of the *Constitution*. Whether the matter was first decided by the Superior Court is one such and primary consideration but not necessarily the only one. This was well illustrated in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & Others* [2014] eKLR at paragraph 69 when the Court held:

> ".....where specific Constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court's reasoning, and the conclusions which led to the determination of the issue, put into context, can properly be said to have taken a trajectory of Constitutional interpretation or application." (Emphasis added.)

77. A trajectory of constitutional interpretation or application is an important yet flexible consideration and it is on the basis of these principles that we pragmatically approach the question of jurisdiction in this matter. In that context, the crux of the Appeal before this court springs from the review application in HCCC No. 1565 of 2000. That application challenged the consent judgment on the premises that it was in contravention of the *Constitution* and that the title to the Suit Land was also unconstitutionally and illegally acquired.

78. The learned Judge of the High Court considered the applicable law for setting aside a consent judgment or decree as provided for in section 80 of the *Civil Procedure Act* as well as order 45 Rule 1 of the *Civil Procedure Rules*. Taking total notice of the principles for setting aside a consent judgment, the court proceeded to set it aside on the ground that there were unresolved questions of constitutionality and legality of the title to the Suit Land. The court further determined that it would be in the public interest and in interest of justice that the issue of the said constitutionality and legality of title be determined conclusively and that it would be against public policy in the circumstances to uphold the consent judgment which had in any event become the subject of controversy between the parties to it. This decision was set aside by the Court of Appeal which held that the learned judge erred in setting aside the consent judgment on the basis of the allegations of unconstitutionality and illegality of the title.

79. Before this court, the appellants' plea is that while the parties had entered into a consent to settle the matter, first, the said consent was marred with fraud and irregularity as its Finance, Staff and General

Purposes Committee did not have the mandate to compromise the suit and therefore the High Court was right in setting it aside. Secondly, that the title to the Suit Land was unconstitutional and an illegality ab initio and thus the Court of Appeal, in setting aside the Ruling by Nyamweya J, purported to uphold a consent order that offends sections 115, 116 and 117 of the repealed *Constitution*, sections 7 and 8 of the *Wildlife (Conservation and Management) Act* and other various cited statutory provisions. As already stated, this Court will only assume jurisdiction if satisfied that the appeal falls squarely within the four corners of article 163(4)(a) of the *Constitution*. Consequently, on the question whether the High Court judge was right or wrong in her application of the principles for setting aside a consent judgment, we find that that issue does not lie on appeal before this court. Those principles are well set out in statute and case law and they cannot in any way raise a matter of constitutional interpretation and/or application. Had the principles themselves been the subject of constitutional interpretation, we would have readily assumed jurisdiction. Had the setting aside issue been the only issue we had to consider in this matter, then we would have at this juncture held that we have no jurisdiction and downed our judicial tools.

80. However, the above is not the case and this court's attention has also been drawn to the plea of the unconstitutionality and illegality of the title to the Suit Land as an issue that squarely arose before Nyamweya J and which would have required both the High Court and the Court of Appeal to address. The peculiar facts on this issue in that regard are:

i. That the Suit Land was the subject of a Constitutional trust held by the appellant pursuant to the provisions of section 115 of the repealed *Constitution* and had never prior to its registration in the 1st respondent's name been adjudicated under the provisions of the *Land Adjudication Act* as stipulated by section 116 of the repealed *Constitution*;

ii. That the area purportedly represented by the Suit Land has never, pursuant to the provisions of sections 7 (1) of the *Wildlife (Conservation and Management) Act*, been excised from the trust land (Maasai Mara National Reserve) and that its registration was not preceded by any resolution of the National Assembly approving the excision thereof as required under section 7 (2) of the *Wildlife (Conservation and Management) Act*;

iii. That the area of the Suit Land did not form part of the subject matter of Gazettte Notice No. 145 of 1984 under which the Minister for Tourism and Wildlife expressed his intention to declare the Talek excision area of cessation to cease to be part of the trust land of the Maasai Mara National Reserve;

iv. That the area of the Suit Land did not form part of the Minister's cessation Order published vide Legal Notice 412 of 1992 made under section 8 of the *Wildlife (Conservation and Management) Act*;

v. That that area had therefore not been excised from the Trust Land of the Maasai Mara National Reserve and therefore was still held in trust by the appellant in terms of section 115(2) of the repealed *Constitution*; and

vi. That the Councilors of the appellant in office at the time the consent judgment was entered acted in an unconstitutional and negligent manner, without due diligence and in total breach and disregard of their mandate and/or duty as trustees in purporting to yield or cede the proprietorship of the Suit Land herein without adjudication or setting apart.

81. The High Court, in evaluating the expansive submissions under the 'other sufficient reason' as a ground for setting aside the consent judgment, found that the consent was vitiated by the uncertainty of the title to the Suit Land given the allegations of its unconstitutionality and illegality and hence was

void ab initio. That it did not matter that the other principles for setting aside a judgment may not have been applicable but that a sufficient reason had otherwise been presented to it to set aside the Judgment as a matter of law. It thus held:

> "Allegations of unconstitutionality and illegality of a consent judgment are a serious policy issue that this court must have regard to, and it is in addition an established principle under contract law that an illegal contract is not enforceable on ground of public policy."

82. The High Court was also emphatic that a court could not overlook the concerns as to the constitutionality and legality of the registration process of the Suit Land including the process of excision, adjudication and registration. It thus esteemed the need to have the same determined conclusively and held as follows:

> "It would thus be in the public interest of justice that the issue of the constitutionality and legality of the Plaintiff's title be determined conclusively, and it would also be against public policy in the circumstances to compromise on the suit herein. I therefore find that sufficient reason exists in the evidence put forward by the 1st defendant in this regard for the setting aside of the consent judgment entered into by the Plaintiff on May 13, 2002."

83. The Court of Appeal was however of the opinion that the issues raised under the ground 'other sufficient reasons' and more specifically the constitutionality and legality of the title to the Suit Land were issues of law that could only be addressed through the appellate process and not on an application for review. The court in that regard stated thus:

> 50. The allegations of unconstitutionality and illegality in the process leading to the registration of the suit property in favour of the appellant were all along within the knowledge of the 1st Respondent and had been raised by the 2nd Respondent in its application that was dismissed by Khamoni, J. In any event, they are issues of law that could only be addressed through the appellate process and not in an application for review. The review judge erred in law by extending the jurisdiction of the court in dealing with the application that was before her."

84. We are now required to address that divergence of minds in the two courts below and in that context, it is common ground that the land, subject matter of this appeal, formed/forms part of the Maasai Mara National Reserve. That the Maasai Mara National Reserve is subject of a constitutional trust is also not in issue. What is in issue is how the said parcel of land was excised from the Maasai Mara National Reserve and registered in the name of the 1st respondent. This issue would have been settled had the initial matter, Civil Suit No 1565 of 2000, been allowed to go full course and to be determined. This was not to be as a consent was apparently entered into settling the dispute as at then. It is also not in doubt that before the consent was signed, questions were raised as regards the legality or otherwise of the title held by the 1st respondent and the consent did not otherwise specifically address that issue.

85. In that context the Supreme Court, as the apex court and defender of the *Constitution*, is charged with inter alia protection of the *Constitution*. This is a mandate well captured in section 3 of the *Supreme Court Act* on the court's objectives, in the following terms; that the court shall;

    (a) Assert the supremacy of the *Constitution* and the sovereignty of the People of Kenya;

    (b) Provide authoritative and impartial interpretation of the *Constitution*

86. In exercising the mandate under (a) above, we note that the subject of land has been and is an emotive issue in our country. It was on this basis that the framers of the Constitution dedicated Chapter 5 of our *Constitution* to Land. This issue was captured by this Court *in the Matter of the National Land Commission* [2015] eKLR, thus:

> 97. Land, as a factor in social and economic activity in Kenya, has been a subject of constant interest, and of controversy, especially from a political standpoint. Thus, the special importance of Chapter Five of the *Constitution*. Consequently such a background is relevant as an informative dimension, in interpretation."

87. With the above background in mind, this court is obligated like all other courts to uphold the values of transparency, legality and public interest in matters of land, more so public land. *In the National Land Commission case* (*supra*), this Court indeed noted how public land had been the subject of past abuse, particularly by public officers. It stated thus:

> 108. The Trust Land Act (Cap 288, Laws of Kenya) was also the subject of abuse. This Act dealt with the administration of Trust Lands: described under Section 114 of the 1969 Constitution as what were previously known as "Native Reserves" or "Special areas", land situate outside Nairobi whose freehold title was registered in the name of a County Council, or vested in a County Council by virtue of an escheat. Section 115 of the previous Constitution vested the Trust Lands in County Councils, to hold "for the benefit of the persons ordinarily resident on that land". Section 118 of that *Constitution* allowed the President to set aside Trust land for Government purposes, after consulting with the County Councils in which the relevant land was vested. Setting aside Trust lands meant removing them from community ownership and placing them in the domain of public ownership. Community Land could also be lost through adjudication and registration, which then placed Trust Lands under individual ownership."

88. In that regard, it is our view that the process of conversion of public land or land held in trust to private land has to be beyond reproach. Under the *Constitution* 2010, this was the rationale behind the formation of the National Land Commission and we note that at the core of this case is the legality of the title to the Suit Land held by 1st respondent, an individual who obtained it upon its purported excision from public land known as the Masaai Mara National Reserve.

89. The issue of the constitutionality and legality of that title was live both in the High Court and the Court of Appeal. Upon finding that the constitutionality and legality of that title was not clear, the learned judge of the High Court set aside the consent judgment and ordered that the matter should go for trial to determine that issue.

90. We are in agreement with the conclusion made by the High Court only, to the extent where, in the present matter, it stated thus:

> "...allegations of unconstitutionality and illegality of a consent judgment are a serious policy issue that this court must have regard to ...."

91. Public policy goes to the protection of the public interest which is safeguarded by the national values and principles of governance in article 10 of the *Constitution*.

92. In stating as above, we are certain that the allegations of trust land being annexed for private purposes have not been determined on merits. The allegation of unconstitutionality and illegality of the title to the suit land therefore raises a serious policy issue that this court must have regard to in determining whether it has jurisdiction and to be seized of the matter before it and in making the relevant orders.

93. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR, this court considered the unique and enlarged nature of jurisdiction bestowed to it under the *Constitution 2010*. It stated [paragraph 88] thus:

> 88. The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the *Constitution of Kenya, 2010* (article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other courts, has been established..."

94. The court continued at paragraphs 101 and 111 thus:

> 101. We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carries the overall responsibility The *Constitution of Kenya, 2010* article 163(7) for providing guidance on matters of law for the State's judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other courts.
>
> ...
>
> 111. From the principles thus stated, it is clear to us that this court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions. Whatever option it takes, however, this court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the courts below."

95. We are also persuaded by the Supreme Court of India decision in *Delhi Judicial Service v State of Gujarat and Ors*. 1991 AIR 2176, 1991 SCR (3) 936 delivered on 11 September, 1991, where the court deliberated on this unique jurisdiction in these words:

> "...this court as a court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a court of record. In interpreting the *Constitution*, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not accept any such construction. While construing article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme

> Court is designed by the *Constitution* as a court of record and as the Founding Fathers were aware that a superior court of record had inherent power ....."

96. We are further persuaded by the South African Supreme Court decision in the case of *Andre Oosthuizen v Road Accident Fund* (258/10) [2011] ZASCA 118 (06 July 2011) where the court, while invoking its inherent jurisdiction held that:

> "Our courts derive their power from the *Constitution* and the statutes that regulate them. Historically the supreme court (now the high court), in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction."

97. We furthermore note that Jerold Taitz succinctly describes the inherent jurisdiction of the Supreme Court as follows in his book, '*The Inherent Jurisdiction of the Supreme Court' (1985)* pp 8-9: ". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the court may regulate its own procedure independently of the Rules of Court."

98. Back home, the Court of Appeal in addressing the point at hand in *Kenya Power & Lighting Company v Njumbi Residents Association & another* [2015] eKLR cited Ouko J (as he then was) *In the matter of the Estate of George M'Mboroki*, Meru HCSC No 357 of 2004 and aptly put it that;

> "... the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties".

99. Further in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;

> "The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection..." (Emphasis added.)

100. The conclusion drawn from the above citations is that this court, indeed any other appellate court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the courtto act to prevent abuse of courtprocess by one party so that fairness is maintained between all parties.

101. The consequence of the foregoing is that, we find that this matter warrants this court's consideration, and to what extent given its importance. The issue before us, we are certain, is also exceptional and would require that we invoke this court's inherent jurisdiction to hear and determine the same in the context of the appeal before us. In this regard, we echo our pronouncement in the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*, [2017] eKLR where in considering the question whether this court can review its own judgment, the court said that in exceptional circumstances, and so as to meet the ends of justice, the court may invoke its inherent jurisdiction to consider and review its own judgment. Hence, we invoke this court's inherent jurisdiction to admit and consider this appeal limited only to a consideration of the question;

b. Whether this court can determine the Constitutionality and Legality of the title to the Suit Land

102. It was the appellant's submission that the Suit Land was acquired in contravention of sections115, 116 and 117 of the repealed *Constitution* and various statutory provisions earlier cited. That, the purported title to the Suit Land by the 1st respondent was therefore illegal *ab initio*. It submitted that a consent order that offended Constitutional and statutory provisions could not be upheld by the courts as the same was patently illegal and unenforceable. It relied on the cited case law to argue that a consent order is akin to a contract between the parties and where there is evidence of fraud, then the same has to be negated and nullified. This argument was supported by the 3rd respondent, who submitted that the Suit Land was not adjudicated under section 14 of the *Land Adjudication Act* (now repealed) and in the absence of a valid notice of demarcation of the Suit Land under section 5 of the said *Act*, the title to the suit land was a nullity.

103. The 1st respondent on his part argued that this court cannot determine how a title to land was acquired as its jurisdiction is limited to matters of law and not facts. And that the constitutionality or illegality of land acquisition can only be interrogated on appeal and not on review. Further, that he was a first registered proprietor to the Suit Land and he thus enjoyed an indefeasible title under the repealed *Constitution*.

104. We note in the above regard that in the Application for review before Nyamweya J, while the appellant was arguing for setting aside of the Consent Judgment, the issues of constitutionality and legality of the title to the Suit Land were raised. The court held that the Consent was vitiated by the unresolved allegations of the unconstitutionality and illegality of the title. The court hence found that it would be in the public interest and interest of justice that the issue of the constitutionality and legality of the 1st respondent's title to the Suit Land be determined conclusively and that it would be against public policy in the circumstances to compromise the suit as the parties had initially done.

105. We are in agreement with the learned judge of the High Court on her finding as it is trite law that, parties cannot consent to an illegality. Hence a consent that upsets the provisions of the Constitution also defeats the principle of legality and cannot stand.

106. On that issue and without in any way departing from our earlier finding on our jurisdiction to interpret the substance of the consent order, we agree with the High Court decision that there was need to establish the constitutionality and legality of the title to the Suit Land. To establish the status of the title to the Suit Land, the learned judge had to set aside the consentand ordered for the hearing of the substantive matter. To determine the status of the title calls for evaluation of evidence to determine how the process was undertaken and if it infringed any law. This determination has yet to be made even as important as the matter is.

107. We have been called upon by the appellant to determine that issue in this matter. Our jurisprudence on the jurisdiction under article 163(4)(a) is clear that it is an appellate jurisdiction. We hasten to add

that this court has always given credence to the competence of courtsin our judicial set up to determine matters within their jurisdictions. That is why in the case of *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [2012] eKLR it was held:

> 30. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courtsin the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

108. Our finding on this issue is therefore that, this court will not and cannot usurp the jurisdiction of other courts to determine matters which rightly ought to be determined by them at the first instance and we shall shortly make the necessary orders in that regard.

c. Whether this court can and should cancel the title

109. Flowing from our findings above, the cancellation of the title calls for determination of facts by a trial court. Such a determination as earlier demonstrated by an analysis of the High Court and the Court of Appeal decision does not exist. This calls for determination *de novo* by a Court of competent jurisdiction. This prayer thus cannot be issued unless there is a proper determination by the Environment and Land Court, the court with the requisite competent jurisdiction to make that factual finding.

d. The appropriate remedies to issue

110. In making a determination on the remedies to issue, this court has wide powers under section 3 of the S*upreme Court Act* and particularly, rule 3(5) of this *Court Rules* which provides thus:

> "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the court."

111. The remedies preferred by the court therefore have to be tailor made so as to be consistent with the objects in section 3 of the *Act*. It is paramount to restate that what is before this court is a matter involving Trust Land that is alleged to have been excised to a private individual. The dispute raised the issue of constitutionality and legality of the title to the Suit Land, which issue has not been heard and determined on merits by the superior courts.

112. Consequently, the appropriate remedy in this case is that we shall allow the determination of the status of the title to the Suit Land, in the public interest and so that such a determination is made to bring certainty in this matter. Consequently, we find that referral of this matter back to the Environment and Land Court and not the High Court which no longer has jurisdiction on such a dispute to determine the constitutionality and legality of the title to the suit property in line with the Ruling of Nyamweya, J, will be the appropriate remedy to give.

e. Costs

113. Costs always follow the event but at the court's discretion in accordance with the decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR. We see no reason in the circumstances of this case to order any party to pay costs and so each party shall bear its own costs.

f. Orders

114. The upshot of all our findings is that, we make the following orders:

(1) The petition of appeal dated May 12, 2015 is hereby allowed in the following specific terms:

(a) The judgment and orders of the Court of Appeal (R.N Nambuye, D.K Musinga and J. Mohammed J.J.A) dated April 24, 2015 in Nairobi Civil Appeal No. 109 of 2014 is set aside.

(b) The ruling and orders of the High Court dated March 19, 2014 in HCCC 1565 of 2000 are hereby reinstated save to the extent expressed in (c) below.

(c) An order do hereby issue that this matter be remitted back to the Environment and Land Court for hearing, pursuant to the ruling in HCCC No.1565 of 2000 dated March 19, 2014, on a priority basis.

(2) Each party shall bear its own costs.

115. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2018.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

N. S. NJOKI

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA