REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mutunga, CJ; Rawal, DCJ; Tunoi, Ibrahim, Ojwang & Ndungu, SCJJ.)

ADVISORY OPINION REFERENCE NO. 2 OF 2014

—BETWEEN—

THE NATIONAL LAND COMMISSION .....APPLICANT

—AND—

1. ATTORNEY-GENERAL.....

2. MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT.....

3. THE INSTITUTION OF LAND SURVEYORS OF KENYA.....

4. THE LAND DEVELOPMENT AND GOVERNANCE INSTITUTE.....

5. COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION.....

6. THE LAW SOCIETY OF KENYA.....

INTERESTED PARTIES

—AND—

1. KITUO CHA SHERIA.....

2. KATIBA INSTITUTE.....

AMICI CURIAE

ADVISORY OPINION

A. INTRODUCTION

[1] This Reference was moved by the National Land Commission (NLC), which is established under Article 67(1) of the Constitution of Kenya, 2010, to, *inter alia*, manage public land on behalf of the National and County Governments. The NLC, by its Reference dated 1st April, 2014 (filed on 2nd April, 2014), seeks this Court's Advisory Opinion, pursuant to Article 163(6) of the Constitution. The Reference relates to the NLC's functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development (the Ministry), on the other hand. The issues raised by the applicant were as follows:

(a) On land administration and management functions

(i) what meaning is to be assigned to the words "to manage", and "to administer" public land, unregistered trust land, and unregistered community land—by virtue of Articles 62(2), 62(3), 67(2)(a) and 67(3) of the Constitution of Kenya; and Sections 5(1)(a) and 5(2)(e) of the National Land Commission Act No. 5 of 2012 [NLC Act]?

(ii) are Land Registrars (recorders of titles) and Land Surveyors answerable to the NLC, or to the Cabinet Secretary of the Ministry?

(iii) which functions that were previously performed by the Ministry, before the creation of the NLC, have now been transferred to the NLC?

(iv) when Article 62(2) and (3) of the Constitution, and Section 5(2)(b) of the NLC Act provide that the NLC is to administer public land "on behalf of" the National and County Governments—do these provisions envisage an agency relationship between the National and County Governments, the latter being the principals?

(v) are the provisions of Executive Order No. 2 of 2013 consistent with the terms of the Constitution?

(b) On land taxation and revenues

(i) should the Ministry relinquish the land-tax function, roles, records and powers to the NLC; and if so, by what date?

(ii) should the Ministry account for, and remit to the NLC the rent (annual ground rent and stand premium), royalty and payments under any lease or licence that the Ministry has collected, as well as the records for such collection since the 27th February, 2013 and if so, by what date?

(iii) are the monies received, earned, or accruing to the NLC, and the balances at the close of each financial year, in the nature of monies excluded from payment into the Consolidated Fund under Article 206(1)(a) of the Constitution?

(iv) is the NLC entitled under Article 206(1)(b) of the Constitution to retain monies received, earned, or accruing to the NLC, and the balances at the close of each financial year, for the purpose of defraying the expenses of the Commission?

(v) has the Ministry, in failing to account for and to remit to the NLC the funds due to the Commission under Section 26(1)(a) of the NLC Act, been in breach of the terms of the Constitution?

(c) On human resources and staff issues

(i) are officers who perform functions that were previously performed by the Ministry before the creation of the NLC, and which have now been transferred to the NLC, answerable to the NLC, or to the Cabinet Secretary of the Ministry?

(ii) should the Ministry transfer to the NLC part of the staff that previously worked in departments of the Ministry, whose functions have been transferred to NLC, or transfer the entire staff in such departments?

(iii) can the Ministry rescind the appointment of the members of staff deployed to the NLC?

(iv) is the Ministry obliged to remit to the NLC money for the payment of salaries of the members of staff that the Ministry deploys to the NLC, and if so, by what date?

(v) is the NLC entitled to recover from the Ministry monies that the Commission has so far used to pay salaries of the Members of Staff that the Ministry deployed to the NLC?

(d) On land registration and issuance of titles

(i) what does the phrase "to monitor the registration of all rights and interests in land provided for in Section 5(2)(b) of the NLC Act", entail?

(ii) are Land Registrars accountable to the NLC, or to the Ministry?

(iii) is land registration a function of the NLC, or the Ministry?

(iv) is it practical that the NLC be charged with the task of creating registration units, registration sections, or registration blocks; of prescribing nomenclature for land titling; of regulating rectification of land registers by Registrars; and of annually reporting to the President and Parliament as regards the progress made in the registration of title in land—when the NLC is not the agency mandated to control the process of registration of land?

(e) On the National Land Information Management System (NLIMS)

- upon which agency does the development of NLIMS fall?

(f) On transfer of assets

- is the Ministry obliged to transfer to the NLC all property and assets of the departments whose functions have now, by law, been transferred to the NLC; and if so, by what date?

(g) On private land

- which agency has the mandate to administer and manage dealings in private land?

(h) On land settlement

- is the Ministry obliged to transfer to the NLC the Land Settlement Fund; and if so, by what date?

B. BACKGROUND

(a) Proceedings in the Supreme Court

[2] On 15th July, 2014, the Attorney-General and the Ministry (1st and 2nd interested parties) filed a preliminary objection contesting the *jurisdiction of this Court to hear and determine the reference for Advisory Opinion,* on the following grounds:

(a) the Court's jurisdiction to render an Advisory Opinion is restricted, and confined to "matters concerning County Government";

(b) the Supreme Court has in previous decisions outlined what constitutes "matters concerning County Government", and the instant matter is not included;

(c) at the heart of the controversy raised by the Reference, is the proper constitutional and statutory boundaries between the powers and functions of the National Land Commission on the one hand, and the Ministry on the other;

(d) the proper judicial forum for the adjudication of the controversy is the High Court, with a right of appeal to the Court of Appeal and, ultimately, to the Supreme Court;

(e) as this very question has already led to a suit filed in the High Court (Constitutional Petition No. 219 of 2014), the invocation of the Advisory Opinion jurisdiction of this Court amounts to an abuse of Court process; and

(f) the Advisory Opinion jurisdiction is discretionary in nature, and is to be exercised judiciously, whereas the applicant has made no plausible case for such opinion.

[3] Upon hearing the submissions of all the parties, the Court in a Ruling of 30th October, 2014, held that the Reference met the admissibility requirement as set out in Article 163(6) of the Constitution, provided that it adopts a re-framed set of issues for consideration.

[4] The Court further held that before it rendered an Advisory Opinion, it was necessary for the parties to engage one another in good faith, and to seek mutual understanding. The Court made the following specific Orders:

"(i) The preliminary objection dated 15th July, 2014 is hereby disallowed.

"(ii) Prior to the conduct of a hearing, the Court allows a 90-day interlude during which the parties may undertake a constructive engagement towards reconciliation and a harmonious division of responsibility.

"(iii) Failing due action in the terms of Order No. (ii), the Reference herein shall be set down for hearing through the office of the Registrar, and a hearing date shall be given on the basis of priority.

"(iv) In the event that Order No. (iii) takes effect, and subject to such other directions as shall be given during formal conferencing, the issues for consideration shall be scaled down to the question:

What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Land, Housing and Urban Development, on the other hand – in the context of Chapter Five of the Constitution; the principles of governance (Article 10 of the Constitution); and the relevant legislation?"

[5] The applicant, by letter dated 28th January, 2015, requested to invoke clause (iii) of the Court's Orders, seeking a hearing of the Reference on priority. The matter was subsequently set down for hearing on 24th June, 2015 and 21st July, 2015.

C. SUBMISSIONS OF THE PARTIES

(a) The Applicant

[6] Learned Senior Counsel for the applicant, Prof. Ojienda began with a reflection on the troubled history associated with access to, and ownership of land in this country. He submitted that the historical situations documented in *The Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land* (the Ndungu Report), and *The Report of the Judicial*

Commission of Inquiry into Tribal Clashes (the Akiwumi Commission Report), had played a role in the enactment of Chapter Five of the Constitution, which makes provisions in respect of "Land and Environment".

[7] Counsel submitted that in the earlier constitutional dispensation, Section 3 of the now repealed Government Lands Act (Cap 280, Laws of Kenya) had given power to the President, acting through the Commissioner of Lands, to allocate land to any applicant—and that this broad land-disposal empowerment had led to certain abuses.

[8] Learned counsel submitted that the question of the powers of the Commissioner for Lands had featured in the Courts of law in earlier cases, such as ***Hassan Hashi Shirwa and Another v. Swaleh Mohamed and 7 Others***, Malindi ELCC No. 41B of 2012, where the trial Judge considered the procedure governing the alienation of public land, under both the former Constitution and the current Constitution. He urged that the mandate previously exercised by the Commissioner of Lands, in relation to the management, alienation and allocation of public land, now exclusively vests in the applicant.

[9] Counsel urged that all the departments currently falling under the Ministry, and dealing with registration of land and related matters, ought to be ceded to the NLC. It was Counsel's contention that the registration process, at every stage, ought to be controlled by the NLC. Counsel urged that the applicant ought to appoint the Director of Physical Planning and Survey, who would be accountable to the applicant as a member of staff of the NLC, rather than of the Ministry. He submitted that to do otherwise, would subject the NLC to possible sabotage of its constitutional mandate, with Directors and staff declining to comply with directives or instructions from the applicant.

[10] As regards the administration and management of public land, learned counsel urged that Article 62(2) of the Constitution mandates the NLC to administer public land. He invoked the case of ***Serah Mweru Muhu v. Commissioner of Lands and 2 Others*** [2014] eKLR, in support of the proposition that all land management must fall under the charge of the NLC, since the Commissioner of Lands had ceased to have administrative oversight. Counsel urged that the mandate of the applicant under Articles 62(2),62(3) and 67(2)(a) of the Constitution is a constitutional one, which neither the National nor the County Government could dispense, and is thus incapable of withdrawal by either level of Government.

[11] Counsel urged that it was a violation of the Constitution and the NLC Act (Act No. 5 of 2012, Cap 5D, Laws of Kenya) [NLC Act], for the Ministry to exercise powers of management and administration of land. Learned counsel submitted that the NLC should be in charge of directing and performing the roles related to land, as contemplated under Article 62 of the Constitution, and Section 5 of the NLC Act.

[12] Counsel submitted that the NLC should be the one to supervise all other departments dealing with land. He urged that the function of registering land falls to the NLC, and that the attendant departments currently under the Ministry must fall under the NLC.

[13] Counsel submitted that the office of the Land Registrars, are important in enabling the NLC to execute its administrative and management functions over land, unregistered trust land, and unregistered community land—and so they must be answerable to the NLC; for in alienating public land, the NLC depends on the Registrar, while undertaking the process of land-title registration. He submitted that the NLC cannot effectively undertake its constitutional mandate, without having control over the Registrars.

[14] Learned counsel urged that "Commissions" and "Independent Offices", such as the applicant, had been instituted under the Constitution so as to make them accountable to other arms of Government; and in this way, to ensure functional separation of powers. In support of this position, Counsel relied on the case of ***Judicial Service Commission v. Speaker of the National Assembly and 8 Others***, Nairobi HC Petition No.518 of 2013.

[15] Counsel submitted that Section 5(2) (a) of the NLC Act mandates the NLC "on behalf of", and with the "consent" of the National and County Governments, to alienate public land. He urged that the NLC is required to seek the consent of the "National Government", and not the "National Executive", in alienating public land. It was submitted that this distinction signalled a separate conception of "National Government" from the "National Executive***" (Okiya Omtatah and Another v. the Attorney-General*** [2013] eKLR).

[16] Counsel submitted that the power to manage and administer public land falls under the docket of the NLC, as an agent of the public; and thus, the Court should find that this function cannot be withdrawn by any authority, because by the Constitution, it falls to NLC.

[17] Counsel submitted that Presidential Executive Order No.2 of 2013 [Executive Order] had provided for the functional roles of the Cabinet, but with no regard for the mandate of the NLC under the Constitution; and that such an Order stood in breach of Chapter Five of the Constitution, and the relevant statutes. He urged that where an Executive Order does not conform to the Constitution, the Constitution must override the order.

[18] Counsel submitted that under Section28 of the Land Act, Act. No. 6 of 2012 (Cap 280, of the Laws of Kenya) [Land Act], the Commission is mandated to receive any rent, royalties and payments reserved under any

lease or licence, and to account to either the National Government or the County Government. He urged that the applicant was entitled to budgetary allocation from the Consolidated Fund, and is entitled to keep the monies that accrue in the course of exercising its mandate, without being required to remit such funds to the Consolidated Fund.

[19] Counsel urged that where a function previously performed by a Department of the Ministry is transferred to the applicant, then Section 31(2) of the NLC Act is applicable, and thus provides: "*every person who immediately before the Commencement of the National Land Commission … was an employee of the Government in the Ministry of Lands in any of the departments whose functions have been transferred to the Commission shall upon the Commencement of the Act of Parliament, be employed or appointed as a member of staff of the Commission*." It was Counsel's submission that it would be illegal for the Ministry to deploy, or place on secondment to the NLC, staff in departments whose functions are deemed to have been taken over by the applicant, while continuing to retain such staff at the Ministry.

[20] It was submitted that all staff of the applicant, including the staff that the Ministry seconded to the applicant, are by dint of the provisions of Section 31(2) of the NLC Act, accountable and answerable to the Commission, and not to the Ministry.

[21] On the question as to whether there was a role for the National Government in the management of land, and as to the relationship between the NLC and the Ministry, counsel urged that the Commission is to be viewed as a fourth arm of Government, created to cater for a specific need, but ultimately independent of Government. He further submitted that the Constitution is a product of the people, and that the specific functions of management and administration of land are conferred upon the applicant

under Chapter Five of the Constitution, the Ministry being left with control over policy issues only.

[22] As to whether the NLC could collect taxes related to land, learned counsel invoked Article 209 of the Constitution, submitting that the NLC's role would be no more than that of a collector, and would be performing the same role the Ministry currently exercises.

[23] Learned counsel, relying on principles evolved in this Court, urged that the NLC Act, the Land Act and the Land Registration Act, Act No. 3 of 2012 (Cap 300, Laws of Kenya),were normative derivatives of the Constitution, enacted pursuant to Articles 67 and 68 of the Constitution; and thus, in interpreting the said statutes the Court ought to look at the constitutional framework as it relates to the applicant—as the agency intended to exercise power in the management of land in Kenya.

[24] Counsel submitted that registration of land title is a process that commences with the creation of registration units, and ends with the issuance of title; and in this context, Section 7(3) of the Land Registration Act could not exclude the role of the NLC. He urged that just as the NLC is a creature of the Constitution, so is the Executive and thus, the NLC is by no means in a subservient position to the Executive.

[25] On the function of assessing tax by the NLC, the counsel submitted that this function should not be perceived as separate from the act of collection; as one cannot assess tax without collecting it—assessment of the taxes being made at the point of collection.

[26] Counsel urged that the intent of Article 62 was to cede the control of land management and administration to the NLC; and the NLC is the body mandated to administer the land registries, and the process of registration of title to all land.

(b) The 1st and 2nd Interested Parties

[27] Learned counsel Mr. Kilukumi, for the 1st and 2nd interested parties, submitted that the issue before the Court was one of interpretation of Article 67(2) and (3) of the Constitution, with a focus on the alignment of the land law to the constitutional provisions.

[28] Counsel submitted that Article 67(2) of the Constitution creates the NLC as a body with largely advisory functions, though with two executive functions—to manage land, and to assess tax. He urged that the dispute that led to the filing of this Reference was occasioned by internal inconsistencies in the Land Registration Act. Counsel submitted that Article 67(c) of the Constitution empowers the NLC to advise Government on a comprehensive programme for the registration of title, but does not empower the Commission to register land.

[29] With regard to Section 2 of the NLC Act, which empowers NLC to monitor the registration of land, counsel urged that this by itself did not confer the registration function upon the National Land Commission.

[30] Mr. Kilukumi submitted that Section 6 of the Land Registration Act confers upon the NLC, the mandate to establish registration blocks and units. That Section thus provides:

> ***"For the purposes of this Act, the Commission in consultation with National and County Governments***

may, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units."

[31] Counsel urged that this provision of the law is inconsistent with other provisions in the same statute, in view of the provisions of Section 110 of the Land Registration Act, which empowers the Cabinet Secretary to establish registration areas.

[32] Counsel submitted that the NLC is required to manage public land, as well as unregistered community land, for and on behalf the National and the County Governments; however, there was no definition in the relevant laws, of what constitutes administration and management of public land. Indeed, counsel urged, the Constitution uses the words "manage" and "administer" interchangeably.

[33] Learned counsel submitted that the NLC must work in harmony, consultation and cooperation with the Ministry. He urged that Section 9 of the Land Act provides for conversion of public land to private land and *vice versa,* and is an instance of co-operation and coordination that is expected in the exercise of the mandates of the NLC and the Ministry. This Section makes provision for the conversion of public land to private land, as may be approved by the National Assembly or County Assembly.

[34] Counsel urged that in land matters, the National Government is represented by the Ministry, and that public land vests only in the National or County Government. He submitted that the only branch of the National Government with responsibility for land issues is the Executive.

[35] Counsel submitted that since the relevant problem has been identified, the appropriate remedy would be to allow Parliament to intervene, and align the statutes with the terms of the Constitution. Counsel further urged that registration of land is not a stand-alone function, but involves, among other processes, the delineation as well as the survey of land. Such functions, he submitted, must fall within the ambit of the National Government. Counsel urged that it had not been the intent of the Constitution to vest such functions in the NLC.

[36] Counsel submitted that the object in the sights of the law-maker had been the power to alienate public land. He urged that under the Torrens System, which historically forms part of Kenya's land tenure, only the National Government can guarantee title to land. And it is on the basis of such guarantee, that the land becomes an asset for commercial stakeholders.

[37] On the question as to whether private land fell within the control of the NLC, counsel submitted that private land does not fall within the functions of the NLC: because it would be impossible to run parallel registries, one for public land, the other for private land. Counsel submitted that both stakeholders must work together, and their approach ought to be one of consultation.

[38] On the issue of assessment and collection of taxes and premiums on land, counsel submitted that the role of the NLC is limited to assessment of taxes and premiums that fall due on land and immovable property, and that upon determination of the rate or amount payable as taxes or premium on land, its role comes to an end. He urged that the collection of taxes is not the business of the NLC.

[39] Counsel submitted that Section 28 of the Land Act improperly expands the mandate of the NLC, to make it the collector of rent, premiums and

royalties. He urged that this provision was contrary to the terms of the Constitution, and that the various statutes that donate power to the NLC to collect rent, taxes and premiums, should be amended, so as to align them with the proper role of the NLC under the Constitution.

[40] Counsel drew inferences from the country's history of constitution-making: the Bomas Draft; the Wako Draft; and the Harmonized draft; and he urged that the functions reserved to the NLC were more or less similar to those eventually donated by the Constitution of Kenya, 2010. In all the three drafts, the reserved term consistently applied was "tax assessment"; and it was not contemplated the NLC would be the collector of Government revenue.

[41] On land registration and issuance of title, counsel submitted, the Constitution expressly mandates the NLC to advise the National Government. He urged further that, Section 5(2)(b) of the Land Act does not grant the NLC power to register land, but only to monitor the process of registration. Counsel submitted that the registration of title, and all attendant processes such as adjudication and surveying, throughout the country, are functions reserved to the National Government by the Constitution itself.

[42] Counsel submitted that there is no constitutional provision that mandates the NLC to be the State organ responsible for registration and issuance of title. He urged that the constitutional role of the NLC in relation to registration, is purely advisory and, more specifically, limited to advising Government on "a comprehensive programme for registration of land title".

[43] Learned counsel urged the Court to be disinclined to assign functions to a body whose role, in relation to the registration function, is only advisory. Doing otherwise, he submitted, would not only negate the terms of Article 67(2)(c) of the Constitution, which limits the NLC's role to advising the National Government on a registration programme, but would claw back on

the gains made to-date, in the management and administration of land in Kenya.

[44] On the relationship between the Commission and the National Government, counsel submitted that the NLC, which is a Chapter-15 Commission, is an agency *sui generis*. For it is the only Commission acting as an agent of both National and County Government.

[45] In response to the question raised by the Court, on whether Article 249 of the Constitution would be applicable to the NLC in light of the supposed agency relationship, counsel submitted that the agency relationship can be maintained, and the NLC will still realize the objectives intended by Article 249. He submitted that unlike other Commissions, the NLC is an agent, and therefore it has to consult the principals; and in so doing the NLC would not be derogating from the requirements of Article 249.

[46] Learned counsel submitted that the NLC, established under Article 67 of the Constitution, bears functions relating to the classification of land, on behalf of National and County Governments; and that such a public orientation of mandate, is distinct from a charge in respect of private property. Counsel urged that the NLC's main constitutional role, as typified by the functions and roles donated under Article 67(2) of the Constitution, is that of an adviser, overseer, and a watchdog of the public interest, with a responsibility to recommend the correction of historical injustices in relation to public land. Such a body, counsel urged, has no role in so far as dealings in private land are concerned.

[47] As regards the issue of extension of leases, in accordance with Section 13(2)(a) of the Land Act, counsel urged that the Ministry bears the constitutional mandate. He submitted that land that is already alienated, could not be re-constituted as public land, under the Constitution.

[48] On the issue of staff transfer, it was submitted that in light of Section 31 of the NLC Act, and in order to promote the spirit of co-operation, harmony and consultation, the Ministry had seconded some of its staff to assist the NLC in the interim period, as NLC proceeded to establish internal systems. He submitted that Article 252(1) (c) of the Constitution, read together with Section 31(2) and (3) of the NLC Act, indicates that the Commission had the responsibility for recruiting its own staff.

[49] Learned counsel submitted that the NLC was not to substitute its role for that of Government; and that the NLC's role was advisory—that of an oversight body, with limited and designated powers, providing guidance and direction, for purposes of bringing reforms, and for the better and more efficient management of land in Kenya.

[50] In support of submissions by Mr. Kilukumi, Senior Counsel Mr. Muite urged that the creation of the NLC was intended to bring to an end the common practice of "land grabbing", by persons in privileged positions.

[51] Mr. Muite doubted that such a blemished history in respect of access to land, would find a conclusive remedy in an unlimited empowerment of the NLC; and he urged that the powers held by the NLC should not be extended beyond proportion.

[52] Learned Senior Counsel invoked Article 62(2) of the Constitution, urging that insofar as land vests in the National and County Governments, the power to alienate the same should not be vested in those very Governments; and a role should be entrusted to the NLC, to undertake oversight.

(c) The 5th Interested Party

[53] Learned counsel for the 5th Interested Party, Ms. Omuko, submitted that the role of the NLC and the Ministry is one of co-operation and consultation. She urged that any payments received by the NLC are collected on behalf of the National and the County Governments, and are for onward transmission.

[54] Counsel submitted that the relationship between the NLC and the Ministry was not one premised on agency, but was one of co-operation.

[55] Departing from the applicant's stand, that the NLC was entitled to collect and retain rent and fees, Ms. Omuko submitted that the same was only being collected on behalf of the National and County Governments, as the NLC had no legal right to such payments. Counsel urged that while, by Sections 28, 35, 56 of the Land Act, the NLC is authorised to collect the land rent, such money is collected on behalf of the National and County Governments; and the same should be deposited in the Consolidated Fund.

[56] How is the accountability of the NLC to be assured? Learned counsel submitted that there is no agency relationship; and thus, the various transactions, and the general workings of the NLC, should be approved by the National Assembly and County Assembly.

[57] Learned counsel called for harmony in working relationships: for Article 67(3) of the Constitution assigns the various functions of the NLC; and Articles 132(3) (c) and 154 establish the Ministry, and office of the Cabinet Secretary. The two entities, by virtue of the constitutional mandate, have to carry out their duties harmoniously, as contemplated by the principles in Article 10 of the Constitution.

[58] Counsel invoked Section 110 of the Land Registration Act, and Article 67(2)(b) of the Constitution as read with Section 6 of the Land Act, urging that it was within the NLC's mandate to make recommendations with regard to the development of a land policy. It is open to the Ministry, counsel submitted, to develop a policy based upon the NLC's recommendation.

[59] The administration and management of public land, counsel submitted, involves allocation of public land, upon approval by the National and County Governments (Articles 62 and 67 of the Constitution and Section 5(c) NLC Act).It further involves, he submitted, renewal and extension of leases, as provided under Sections 15 to 19 of the Land Act, as well as conversion of ecologically-sensitive land (Section 11 of the Land Act). It was argued that in view of the above provisions, while exercising the relevant functions, the NLC needs to consult and co-ordinate with various arms of the Government, such as the Ministry, County Government, and Parliament.

[60] As regards community land, counsel's submission was that the NLC's mandate is derived from Article 63(4) of the Constitution, and Section 5(2)(b) of the NLC Act: to advise the National Government on programmes for registration of community land; and the NLC is to register all rights and interests in the unregistered land. Against this background, counsel urged that Section 5(2)(e) of NLC Act is inconsistent with Article 63(3) of the Constitution, as regards unregistered land; and he invited the Court to resolve this contradiction.

[61] Counsel submitted that the NLC is only authorised to assess tax and premium on immovable property, as provided in Articles 67(2)(g) and 209(3)(c) of the Constitution; Section 5(1)(g) NLC Act; Sections 2 and 4 of the Stamp Duty Act(Cap 480 Laws of Kenya); and Section 5 of the Kenya Revenue Authority Act(Cap 469, Laws of Kenya).

(d) The 6th Interested Party

[62] Counsel for the 6th interested party (the Law Society of Kenya), Mr. Gichuhi, submitted that pursuant to Articles 62(2) and (3) and 67(2) of the Constitution, the NLC's administrative function entails determining, recording, storing, updating and disseminating information regarding physical and legal characteristics, and ownership of public land. He urged that the Ministry is the depositary of national titles, and that the Constitution envisages co-operation between the Cabinet Secretary and the NLC, while performing their roles.

[63] With regard to consent, counsel submitted that when administering land earmarked for alienation in County units, then in accordance with Section 5 (2) (a) of the NLC Act, consent should be granted by the respective County Executive members, on grounds that the framers of the Constitution intended land to be administered by institutions, and not individuals.

[64] Counsel submitted that, by Article 67(2) of the Constitution, the NLC does not have an agency relationship with the National or County Government; but that the NLC is an independent institution, just like the County Governments. In this regard, Counsel relied on *Mutunga, C.J.'s* concurring opinion in ***In Re Senate Matter*** Sup. Ct. Advisory No. 2 of 2013; [2013] eKLR, (paragraphs 160, 165 and 167), and on the *Final Report of Commission of Kenya Review Commission* (paragraphs 173 to 175).

[65] Learned counsel submitted that under Section 8(1) of NLC Act, it was the NLC's mandate to appoint County Land Management Boards, subject to consultation with the County Governments; and that the broader mandate of managing public land had been devolved to the County Governments.

[66] As regards land registration and issuance of titles over private land, learned counsel submitted that in accordance with Articles 61, 64 and 249 of the Constitution, the NLC's mandate is confined to the management of public land. It was submitted that Sections 11, 12 and 26 of the Land Registration Act relate to the Chief Registrar appointed by the Public Service Commission, who issues a certificate for a transfer or transmission, on the basis of regulations made by the Cabinet Secretary. Counsel submitted that despite Section 13 of the Land Act empowering the NLC to give pre-emptive rights to lease allocation subject to verification, it does not reflect any dealings with private land.

[67] Counsel cited Sections 55(b) and 56(4) of the Land Registration Act, relating to rent clearance certificates and charges, urging that these must be read with part III of the Land Act, which deals with the administration of public land.

[68] As regards Article 67(2)(g) of the Constitution, counsel submitted that the area in which the collection of premium may take place has to be defined by law; and the rents and royalty payments contemplated under Section 28 of the Land Act, should be read as applicable under the function of administration of public land—in particular such general conditions as relate to leases, licences, and agreements regarding public land.

(e) The 1st Amicus Curiae

[69] Learned counsel for the 1st *amicus curiae* (Kituo Cha Sheria), Dr. Khaminwa urged the Court to focus on the constitutional demarcation between the two State organs, and to decide whether their roles and functions are properly aligned to the Constitution.

[70] Counsel invoked background history, showing that the administration of public land in Kenya had been marred by corruption. He urged the Court to ensure that the NLC remains an independent organ, to be treated in the same way as any other Commission under Chapter Fifteen of the Constitution.

[71] Invoking the terms of Article 249 of the Constitution, learned counsel urged that the National Government ought not be granted a hand in the running of the NLC.

[72] Learned Senior Counsel directed the Court's attention to various land reports, and in particular the *Ndung'u Report*, which gave an account of misuse of powers, and patronage, that had characterised the land administration processes in Kenya.

[73] Relying on Articles 62 and 67 of the Constitution, counsel submitted that the NLC was intended to be independent, and that the Constitution did not contemplate it as part of Government. He submitted that it is not to be assumed that any function provided for by legislation, but not listed under Article 67, is unconstitutional; and that so long as consistency with the Constitution was maintained, it was permissible to allocate to the NLC functions additional to those provided under Article 67 of the Constitution.

[74] Counsel drew from examples in other countries —Uganda, Ghana and South Africa—in support of the proposition that the Constitution contemplates an independent Commission, that is not controlled by the Government.

[75] On the question whether the doctrine of checks and balance applies to NLC, counsel submitted that there were indeed checks and balances, because firstly, the Commissioners are only in office for a limited period of time; secondly, the Commission is required to avail annual reports to the National

Assembly; and thirdly, the media also has free access to the operations of the Commissions.

[76] As to whether there exists an agency linkage between the NLC and the Ministry, counsel submitted that no such relationship exists, because agency is a concept of commercial law that has no bearing in this matter. Counsel acknowledged, however, that certain provisions of the statute were indeed in conflict with the terms of the Constitution; though these, in his opinion, should not be so interpreted as to detract from the proper role of the NLC.

[77] Learned counsel highlighted the state of the Constitution and the law as reposing in the NLC a vital advisory role, as well as a responsibility in land administration; he drew a distinction between such a position, on the one hand, and certain apparent attempts to vest in the NLC exclusive control over the management and administration of public land.

(f) The 2nd Amicus Curiae

[78] Katiba Institute, the *2nd amicus curiae*, through learned counsel Mr. Lempaa, submitted that the comprehensive policy statement on land management and administration in Kenya is contained in the *National Land Policy 2009 (Sessional Paper No. 3 of 2009)*. Counsel urged that the content of the National Land Policy is critical in resolving the issues in the instant Reference, as the policy took cognizance of findings from previous Government initiatives in land reform, such as the Presidential Commission of Inquiry into the Land Law System of Kenya (Njonjo Land Commission), the Ndung'u Land Commission, and the Constitution of Kenya Review Commission Final Report (CKRC Final Report).

[79] Counsel submitted that the agency contemplated under the law was not one that was preoccupied with the relationship between the NLC and any other arm of Government, but rather, an agency more responsive to the relationship between the NLC and the people of Kenya.

[80] On the question whether the National Government was the only organ of Government that should hold out a guarantee on land, to assure the processes of business and entrepreneurship, counsel submitted that the accent should be on co-operation between the various agencies of Government.

[81] Counsel submitted that the provisions of Chapter Five of the Constitution are closely modelled on the National Land Policy, and that the objective of the NLC is reflected in both the Constitution, and Section 5(2) of the NLC Act.

[82] Counsel submitted that the principles under Article 60, relating to land governance and management in Kenya, are a replica of those in the various drafts of the Constitution: the Bomas Draft (Clause 77); the Wako Draft (Clause 78); the Committee of Experts Draft (COE); the Harmonized Draft (Clause 77); and Revised Harmonized Draft (Clause 73). He urged that principles regarding land are consistent with a summary of what the people told the CKRC in relation to land, and which is set out in the CKRC Final Report (pages 270-271, 279, 280 and 284).

[83] Counsel submitted that the CKRC Report (page 281) had called for the establishment of an independent Commission, to administer and manage land in Kenya, and the decision to institute a land commission is to be viewed in that context.

[84] On the NLC and its independence, as a principle, counsel submitted that while the classical understanding of the separation of powers relates to the three arms of Government, independent Commissions, in modern Constitutions, are perceived as the fourth arm of Government. He submitted that it is erroneous for one to argue that the NLC falls within the Executive arm of Government, as the Constitution is not one in the mould of the traditional Montesquieuian tripartite separation of powers.

[85] In advancing the foregoing argument, counsel relied on Articles 57 and 62, and Chapter 15 of the Constitution; and he cited the South African Constitutional Court case, ***S. and Others v. Van Rooyen and Others (General Council of the Bar of South Africa Intervening)*** [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810, in which *Chaskalson, CJ* sustained that very argument, on the basis of several works of scholarship.

[86] Counsel submitted that the best known independent Commissions, throughout the world, are the Human Rights Commissions, that are the subject of internationally-agreed sets of principles—such as that of their financial independence. He urged that Commissions are intended to address situations where ordinary Government departments may fail the neutrality test, as they act upon certain sensitive matters, such as corruption, or elections. And in the case of Kenya, counsel urged, the mischief of irregular allocation of Public land, and corruption in land matters, have been a disturbing reality—and this led to the creation of an independent NLC,with the necessary provision for financial independence.

[87] It was submitted that the independence of the NLC is governed by Article 249 of the Constitution, and involves three elements: terms of appointment (the appointees should not be under obligation to those who have a vested interest in the outcome of decisions); terms of operation; and security of tenure. Counsel relied on several South African cases:

Independent Electoral Commission v. Langerberg Municipality [2001] ZACC 23; 2001 (CC); 2001(9) BCLR 883; and ***New National Party v. Government of the Republic of South Africa and Others*** 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (paragraph 98)—where the Constitutional Court held that adequate financial support is essential for the efficient functioning of an independent Commission.

[88] Counsel submitted that, by virtue of Article 10 of the Constitution, the NLC has to be accountable; and thus, it has to report to Parliament and the President annually, as provided under Article 254; the Auditor General must audit its accounts (Article 229 (2) (d); and the removal of a Commissioner is subject to the determination of an Independent tribunal appointed by the President (Article 251). Counsel submitted that the Commission is constitutionally protected, in contrast to the Ministry, which has a mandate determined by the President.

[89] Counsel submitted that the subject, "land administration and management" repeatedly appears in certain constitutional and statutory provisions: Articles 62(1)(f)(m), (62)(2), 63(2)(d)(i), 67(2)(a), 67(3); Sections 5(2)(c) and (e) of NLC Act and Section 8 of the Land Act—but that these provisions have given no definition of the same. He asked this Court to provide the necessary definition.

[90] Counsel submitted that as Section 8 of the Land Act provides for the role of the NLC in the "management of land", the NLC ought to participate in the identification of the parcels of public land, sharing of data, and the direction of mode of land-use. He urged that, by virtue of Section 9(4) of the Land Act, the NLC has to keep a register of private land converted to public land, as well as community land converted to private or public land; and that by virtue of Sections 9(5), 10 and 11 of the Land Act, the NLC is to develop

guidelines on the management of public land, these being approved by Parliament.

[91] Counsel submitted that any meaning given to the words “management" and “administration”, in relation to land, must reflect the various historical processes, and the attendant documents: the CKRC Report; the National Land Policy; and the rationale behind the creation of an independent Commission (NLC) under the Constitution.

[92] Counsel submitted that the authority to assess tax on premiums on immovable property, in any area designated by law as contemplated in Article 67(2)(g) of the Constitution, relates to rates, as a source of revenue allocated to Counties under Article 209(3) of the Constitution.

[93] As regards the payment of monies accruing at the end of the financial year, it was submitted that the NLC is legally required to remit such earnings to the Consolidated Fund. In this regard, counsel urged that Section 26(2) of the NLC Act is contrary to the Constitution.

D. ISSUE FOR JUDICIAL OPINION

[94] In our analysis we will limit the Advisory Opinion to the main issue recorded in Order (iv) of this Court's Ruling dated 30th October, 2014 as follows:

> ***What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Land, Housing and Urban Development, on the other hand– in the context of Chapter Five of the Constitution; the principles of governance (Article 10 of the Constitution); and the relevant legislation?***

[95] Such a course of advice, it seems clear, will involve a consideration of certain provisions of the Constitution, and the statute law: Article 10 of the Constitution; Chapter 5 of the Constitution (specifically Articles 62 and 67); the National Land Commission Act, 2012 (Act No. 5 of 2012) (Sections 5 (2) and 18); the Land Registration Act (Sections 6, 7, 9, 12, 14, 15, 17, 19, 22, 23, 36, 38, 39, 55, 74 and 86); and the Land Act (Sections 6, 8, 9, 10, 12, 13, 15, 20, 23, 107, 110, 111, 112, 113 and 134).

E. ANALYSIS

[96] In the light of the issues and perspectives emerging from the submissions of counsel, we have formulated four basic themes, as a framework for our analysis, as follows:

(a) the Land Question in History;
(b) the National Land Commission;
(c) the Constitution, and the National Land Commission;
(d) the National Land Commission, National and County Governments.

(a) The Land Question in History

(i) Introduction

[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. Indeed, this Court has previously underlined the need for a historical and cultural perspective when interpreting the Constitution, as this

brings the Court closer to its objectives, as provided for in Section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011),which include to—

> ***"(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;***
>
> ***(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation , to be determined having due regard to the circumstances, history and cultures of the people of Kenya".***

[98] In ***Re Speaker of the Senate***, Sup. Ct. Advisory Opinion Reference No. 2 of 2013; [2013] eKLR, *Mutunga, CJ & P* thus expressed the object of Section 3 of the Supreme Court Act (paragraph 157):

> ***"...In my opinion, this provision grants the Supreme Court a near-limitless and substantially-elastic interpretive power. It allows the Court to explore interpretive space in the country's history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment."***

[99] We have a basis, therefore, for beginning from the historical background, specifically of public land in Kenya, so as to appreciate the mischief sought to be addressed by Chapter 5 of the Constitution.

(ii) Land in the traditional communities

[100] Before the advent of colonialism in Kenya, access to, and use of land was governed by African traditional systems that had a common pattern. Land was held under a system of customary tenure, governed by certain rules and practices. Land supply had not yet become so limited, and ownership was communal. There was a distinction between rights of access to land, and the control of those rights. A recognized communal authority controlled, allocated and guaranteed those rights. There was no element of exclusivity under African customary law, as contrasted with the position in English property jurisprudence. "Public land" was recognised in such areas as common pathways, watering points, grazing fields, recreational grounds, meeting venues, ancestral and cultural grounds; these served the interests of the community as a whole.

(iii) The land system under colonial rule (1895-1963)

[101] The arrival of the Omani Arabs at the Kenyan Coast, and subsequently, that of the British, significantly altered the land-use patterns. Kenya became a British Protectorate in 1895; and it was the stand of the officers of the British Crown, that rights over land arose from conquest, agreement, treaty, or sale involving the indigenous people. One such agreement was made between the Imperial British East Africa Company (IBEAC) and the Sultan of Zanzibar. All rights to land in the Sultan's territory were ceded to IBEAC, and the British Government, by virtue of an agreement in 1895. At the beginning, the colonial government took the position that the Crown had to assert original (radical) title to the land. The government would in this way, be able to evolve a system of law that guarantees secure rights to land, for purposes of developing the agricultural potential of the region.

[102] In 1901, the East African (Lands) Order-in-Council was issued by the British Government, conferring upon the Commissioner of the Protectorate (later named Governor) power to dispose of all public lands, on such terms and conditions as he might think fit. Land was converted into Crown Land, and vested in the Commissioner in trust for the British Crown. The said instrument was followed by the Crown Lands Ordinance, 1901 which defined Crown Land as: *all public lands within the East Africa Protectorate which were controlled by His Majesty by virtue of any Treaty, Convention or Agreement.*

[103] Then followed the Crown Lands Ordinance, 1902 empowering the Commissioner to sell freeholds in Crown Land up to 1,000 acres, to any person; or to grant leases of 99 years. Another Crown Lands Ordinance followed in 1915, conferring wide powers upon the Colonial Government to deal with Crown Land. It empowered the Commissioner of Lands to allocate Crown Land by direct grant. Indigenous Africans were declared tenants-at-will of the Crown; they were dispossessed of their land. The Governor was empowered to make grants of freehold and leasehold, in favour of individuals and corporate bodies, on behalf of the Crown. "Community land" ceased to exist, and customary law usages remained applicable only subject to a repugnancy clause, as enforced by the Courts.

[104] In 1954, the colonial administration instituted the Swynnerton Plan, which established a process of land adjudication, consolidation, and registration of adjudicated parcels of land in the names of those identified as owners. By this plan, land was registered in the names of male heads of household, who then held rights of use. The plan did not recognize the use-rights of women whose husbands had died. The policy preferred by the Colonial Government was one that promoted individual ownership, at the expense of community or group ownership.

[105] The colonial policy on access to land took certain specific manifestations: the status of radical title-change; indigenous inhabitants lost their claim to all land; an agricultural economy, managed and controlled by the settlers, became dominant; and new political structures emerged, founded upon ownership and control of land. The "landed gentry" were in control of the machinery of Government; and this was the onset of persistent land problems in Kenya.

(iv) Post-independence land issues

[106] Land reform, naturally, became a central issue in nationalist demands at the time of Independence, in 1963. After independence, the Government Lands Act (Cap 280) superseded the Ordinance of 1915. "Government land" was placed in two categories—alienated Government land, and un-alienated Government land. The Act established a new system of administration and registration of Government land, and brought adjustments to the earlier scheme of registration.

[107] Section 3 of the Government Lands Act (GLA) conferred powers on the President to make grants of freehold or leasehold of un-alienated Government land. Section 7 prohibited the Commissioner of Lands from exercising the powers of the President under Section 3, subject to certain exceptions; though the President could (and did) delegate his powers to the Commissioner. Procedures were laid out, to guide the allocation of Government land; but those were not duly followed, subsequently. The Government treated public land as its "private property", and the public-interest element in administration and allocation of public land was negated. The Commissioner of Lands was making allocations of land by direct grant, routinely exceeding his authority. (Such excesses of power are well documented in the *Ndungu Report*).

[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.

[109] Section 53 of the Trust Land Act conferred direct powers upon the Commissioner of Lands, to administer Trust Land on behalf of the County Councils. Given that the Commissioner of Lands was also the one mandated on behalf of the President to administer Government Land under the GLA, questions arose as to whether he could again be trusted to administer Trust Land, on behalf of local residents. Indeed Section 53 did provide a leeway, used to appropriate trust lands, and deny local inhabitants the benefits envisaged by the Constitution.

[110] In effect, access to land was controlled by the Commissioner of Lands. There was widespread manipulation, and corrupt practices, in the alienation of Government land. Consequently, there was a widespread loss of confidence in the system of land administration, and in the land market as a whole. The main source of grievance was the concentration of power over land in the hands of the President and the Commissioner of Lands. Thus, there was a call

for decentralization of power over the administration of land; there was need for legal and institutional reform.

[111] The post-independence land laws were inefficient, ineffective, incoherent, and inconsistent. The land administration set-up, and the land-rights delivery systems were bureaucratic, expensive, and undemocratic, resulting in inordinate delays, apart from lending themselves to corrupt practices. As regards "Trust lands", communities were not accorded a voice in governance and management of land.

[112] The overall effect was that, by the turn of the century, misappropriation of public land had assumed chronic dimensions. So a progressive path began, which culminated in the establishment of the NLC, by the Constitution of 2010.

(v) The Akiwumi Commission Report, 1998

[113] This Commission's mandate was to inquire into tribal clashes that had repeatedly occurred in certain parts of Kenya, since 1991. The Report concluded that the tribal clashes were politically motivated, and were fanned by conditions associated with ethnicity and land ownership.

[114] The Commission observed that the acquisition of land in former settler-owned areas, by Kenyans of different origins who purchased the same with Government assistance, had been resisted by the indigenous people of the areas in question. Such animosities formed the groundswell for political tensions and ethnic violence.

[115] The Commission reported, and with regard to the incidents of violence witnessed in 1991 and 1997, that the land issue had been the excuse for politicians to incite local residents to evict individuals who were opposed to

their political agenda. Land, therefore, was perceived as the foundation of the political tensions of the relevant periods.

(vi) The Njonjo Commission Report

[116] The Commission's purpose was to make recommendations for administrative and legislative plans to resolve the persistent land problem in Kenya. It addressed three main issues: *the principles of a National Land Policy Framework; the Constitutional Position of Land; and a New Institutional Framework for Land Administration*.

[117] The Commission considered the causes of landlessness among the indigenous people in the ten-mile coastal strip. Its report states that certain factors have had a bearing on the land question, since the time of colonialism: first, since the economy was dependent on land, issues about tenure, access and distribution, and regulation of use, were always at the centre of the land question; secondly, control of the land-resource emerged over time as a critical basis of administrative and political power; thirdly, the constant linkage between land and social structure in African agrarian relations, meant that the land question remained central to the success of the African economy; and fourthly, the land question, given its centrality in the local socio-economic set-up, needed to be secured in law, to give it legitimacy as well as certainty.

[118] The Commission called for the formulation of a land policy framework, defined by considerations such as: *the economic importance of land; the political sensitivity of land; the social and cultural complexity of the land question; and the overall governance framework in which land issues are regulated.*

[119] The Commission proposed that the land resource in Kenya be categorized in three tenure-sets: public, commons, and private. The Commission recommended, as regards land title, that an institutional scheme be established by legislation, with entrenchment in the Constitution, as the point of origin of land rights, at both the national and the community levels—for certainty and for security.

[120] More specifically, the Commission had proposed as follows: all land-titles, depending on the tenure category, should originate from either a national institution to be known as the Kenya National Land Authority, or a community-based institution to be known as a District Land Authority; the National Land Authority should devise a suitable mechanism, whether documentary or otherwise, for the ascertainment of land-rights under each tenure category; a flexible mapping mechanism should be developed to identify and map all existing customary-land rights at different levels, collective, household and individual; existing land rights obtained by grant or registration should be deemed to have been derived from the National Land Authority or District Land Authorities, as the case may be; and the process of verification of land titles, where appropriate, should be commenced by the National Land Authority, and a comprehensive register under each category, prepared accordingly.

[121] The Commission recommended that public land should be held and managed by the National Land Authority, in trust for the Citizens so that the radical title to such land should vest in the National Land Authority. The National Land Authority was to hold such land under specific legislation, setting out the terms and conditions of the trust governing such holding. Where proof of irregularity in the acquisition of public land was established, it was recommended that such land should not be protected by the Constitution, but should be repossessed by the National Land Authority, without any compensation. Thus, the concept of a separate body dealing with public land

was first conceived by the Njonjo Commission, which proposed the creation of a National Land Authority.

[122] The Commission recommended that the radical title to the commons be vested in District Land Authorities, established by legislation, and entrenched in the Constitution; while that for private land should vest in the National Land Authority, or in the District Land Authorities, depending on the source from which title was derived. These authorities were to be run professionally, insulated by the Constitution from political interference, and standing accountable to the people at the local level, through elective representation. They were to control their finances, and to account to the Minister in charge of Land, at regular intervals during the financial year. For effective operation, District Land Authorities were to be accountable to the National Land Authority, and the Minister, in some respects; and the National Land Authority was to be accountable to the Minister.

[123] The Commission thus wrote, on the state of land management then prevailing:

> *"Land-rights delivery is a process which entails the mobilization of institutional mechanisms and personnel for ascertainment of rights, registration, demarcation and/or survey, the preparation of [cadastral maps] and Land market regulation among others.* ***These are processes which, in Kenya, are run as part and parcel of public administration.*** *The operation of the specific modalities established for this purpose, therefore, has been overtly political. At the territorial level, Government and Trust Lands are administered by the Commissioner of Lands directly or, in the case of the latter, on behalf of the County councils. This means that ultimately land in Kenya is controlled by the Commissioner. Private (registered) land is registered by the proprietors themselves*

but under the facilitation of a complex bureaucracy consisting of staff from the central Government line-ministries, local political functionaries and local or traditional administrators. The overall effect is that decision-making on these issues is often contradictory and ineffectual. Need therefore exists to rationalize and simplify this system" (emphasis supplied).

[124] In the context of the foregoing recommendation, the Commission proposed a policy that all land-delivery functions should be centralized in the proposed National Land Authority. The Authority was to have the power to create a decentralized system of land registries, drawing where possible on community-level structures, and organs of Government.

[125] The Commission recommended that, notwithstanding the divestiture of the radical title from the State to other bodies created by the Constitution, the power of compulsory acquisition was to still vest in the State, exercised by the President. The conditions for the exercise of this power were to be clearly defined by legislation, and exercisable irrespective of the applicable land tenure. Regulatory power over land, though held by the State, was to be exercised through the National Land Authority. The Commission recommended that, *"in order to ensure uniformity in the exercise of the power throughout the country the State should enact legislation to empower the National Land Authority to develop guidelines and clear standards for adoption by District Land Authorities and other planning authorities."* These recommendations, however, were not implemented.

(vii) The Ndungu Commission Report (2003/2004)

[126] President Kibaki, by *Gazette Notice* No. 4559 of 30th June, 2003, formed a Commission *to inquire into the illegal/irregular allocation of public land,* led by Mr. P. N. Ndungu.

[127] The Commission's mandate included:

> *"(a) to inquire generally into the allocation of lands, and in particular—*
>
> *(i)* ***to inquire into the allocation, to private individuals or corporations, of public lands or lands dedicated or reserved for a public purpose****;*
>
> *...*
>
> *(e) to recommend—*
>
> *(i) ... legal and administrative measures for the restoration of such lands to their proper title or purpose, having due regard to the rights of any private person having any bona fide entitlement to or claim of right over the lands concerned;*
>
> *(ii) legal and administrative measures to be taken in the event that such lands are for any reason unable to be restored to their proper title or purpose;*
>
> *(iii) criminal investigation or prosecution of , and any other measures to be taken against, persons involved in the lawful or irregular allocation of such lands; and*
>
> *(iv)* ***legal and administrative measures for the prevention of unlawful or irregular allocations of such land in future"*** (emphasis supplied).

[128] The Commission recounted in detail the abuse of the President's authority to allocate public land under Section 3 of the GLA, and the further *ultra vires* allocations by the Commissioner for Lands. The report showed that the practice of illegal and irregular allocations had redoubled in the late

1980's, and throughout the 1990's, and that land was no longer allocated for development purposes, but as political reward, and for speculative purposes. So pervasive was this practice of 'land grabbing', that by the turn of the century there was a real risk that Kenya would lose its public-land tenure system. Upon completion of its work, the Commission recommended thus:

> *"At present, the country lacks a comprehensive land policy which can guide all matters relating to the administration, ownership and use of land. In addition, the powers to administer public land are largely vested in the President and in certain instances, the Commissioner of Lands. Some ministers have administrative powers over certain protected areas while County councils hold trust land on behalf of the local communities. The absence of a centralized and professional body charged with the duty of land administration has facilitated the illegal allocation of land.*
>
> ***"It is consequently recommended that a National Land Commission be established to deal with all land matters in the country. The Commission should be vested with powers of allocating public land and supervising the management and allocation of Trust land.*** *In this regard, Section 3 and all other Sections in the Government Lands act which empower the President or the Commissioner of Lands to make grants of un-alienated Government Land should be repealed"* (emphasis supplied).

[129] The Commission recommended that a Land Titles Tribunal be established. This Tribunal would have the power to declare any registered title to land either valid, illegal or irregular, and to rectify any title, upon such condition as it would impose, to ensure that the State in its role as trustee for the people of Kenya, would receive the full benefit of any disposition of its land. The Commission recommended that land records be computerized and

digitalized, as a remedy to ineffective record-keeping in the Ministry of Lands and Settlement, and in the district registries. Also recommended was a comprehensive land title insurance scheme, to eliminate the risk of dealing with forged titles. The Commission recommended that the Government should prepare an inventory of all public land in the country, and harmonize land legislation, to prevent double issuance of titles.

[130] The Ndungu Commission set the agenda for formation of the National Land Commission. Whereas the Njonjo Commission had recommended a National Land Authority, the Ndungu Commission called for a National Land Commission (NLS). The NLC was to be vested with powers to allocate public land, and to supervise the management and allocation of trust land. The express recommendation for the repeal of Section 3 of the Government Land Act, as well as the provisions empowering the President, or the Commissioner of Lands to make grants of un-alienated Government land, shows a clear intent to de-link the Executive from dealings with public land. It was the Commission's stand that to save public land, a separate entity from the Government (Executive) should be charged with the management of land in the country. This report, however, was not implemented.

(viii) The land issue in the Constitution-making process

- *Constitution of Kenya Review Commission: The Ghai Draft, 2002*

[131] The Constitution-making process actively began with the Constitution of Kenya Review Commission (CKRC), set up in 2000, and which produced a draft Constitution in September 2002 (the Ghai Draft). In this draft, land was classified as public, private, or community (Section 234). Section 235 (1) (a) provided for the vesting of public land: *"Public land is the collective property*

of present and future generations and shall vest in and be held by the National Land Commission in trust for the people."

[132] Community land was to vest in communities; and private land in individuals, or other jural persons, in terms of legislation specifying the nature and extent of rights to private land. The Draft provided for the establishment of the NLC thus:

> ***"237. (1) There is established a National Land Commission consisting of a chairperson, a deputy chairperson and eight other members nominated and appointed in accordance with the provisions of Chapter Seventeen of this Constitution.***
>
> ***(2) The functions of the National Land Commission are to—***
>
> ***(a) Hold title to public land in trust for use by the people of Kenya;[1]***
> ***(b) Administer public land on behalf of the Government and local authorities,[2]***
> ***(c) Define and keep constantly under review the National land policy;***
> ***(d) Consolidate and from time to time review all laws relating to land;[3]***
> ***(e) Exercise residual land administration function on behalf of local authorities; and***
> ***(f) Perform such other functions as may be entrusted to it by law.***

[1] This function is not among the functions in Article 67 of the Constitution.
[2] In Article 62 of the Constitution the NLC administers land on behalf of the people.
[3] This is not a function under the 2010 Constitution.

(3) Parliament shall enact a law to define the organization and powers of the Commission."

[133] Section 17 of the transitional and consequential provisions in the Eighth Schedule provided that until communities were identified and their titles registered, community land was to be held by the NLC, on behalf of the communities. Hence from the onset, the makers of the Constitution had intended the establishment of the NLC. The Ghai draft set the agenda for the establishment of the NLC in the new Constitution.

- *The National Constitutional Conference: The Bomas Draft*

[134] The Constitution of Kenya Review Commission (CKRC) convened a National Constitutional Conference (the Bomas Conference) for deliberations on the text of a new Constitution. In the deliberations, with broad-based participation from all the districts, access to and control of land was listed as one of the main issues in controversy. The concerns of delegates in respect of the structure and functions of the proposed NLC were that—

(i) its jurisdiction appeared limited to the control and administration of public land;

(ii) similar structures had not been proposed for the administration of land by the devolved units of Government;

(iii) other land administration functions such as registration, land- market regulation, and transactional processes, were not included in its mandate; and

(iv) the relationship between the proposed Commission and existing structures of land administration, had not been clarified.

[135] Consequently, the key recommendations by the technical working committee on land rights were that*:*

(i) all land should be collectively vested in the people of Kenya and held in trust for people;

(ii) there should be a national land policy;

(iii) land should be classified as public, community, or private;

(iv) non-citizens may hold land only on leasehold, for a period not exceeding ninety-nine years, and there should be legislation to down-grade all leaseholds greater than ninety-nine years to at most ninety-nine years;

(v) surviving spouses should have a right to the matrimonial home;

(vi) the State should have the power to oversee the proper use of land, so as to ensure public safety, order, health, morality;

(vii) the State should provide a conducive political, social and economic atmosphere for the development and management of land; and

(viii) there should be established a National Land Commission, with decentralised offices throughout the country.

[136] Chapter 7 of the "Bomas Draft" was devoted to land and property. The delegates found common cause with the Ndungu Report, recommending for the establishment of a National Land Commission. The "Bomas Draft" thus provided:

> ***"85 (1) There is established the National Land Commission.***
>
> ***(2) The functions of the National Land Commission are—***
>
> ***(a) to*** *manage* ***public land on behalf of the National and devolved Governments;***[4]
>
> ***(b) to formulate and recommend to the Government a National land policy;***
>
> ***(c) to advise the Government and devolved Governments on a policy framework for the development of selected areas of Kenya, to ensure that the development of community and private land is in accordance with the development plan for the area;***
>
> ***(d) to investigate disputes of land ownership, occupation and access to public land in any area provided for by legislation;***
>
> ***(e) to advise the Government on, and assist in the execution of a comprehensive programme for the registration of title in land throughout Kenya;***

[4] While the Bomas draft talked of management of public land, the Ghai draft had talked of administration.

(f) to conduct research related to land and natural resource use, and make recommendation to appropriate authorities;

(g) to initiate investigations on its own or upon a complaint from any person or, other persons or institutions on land injustices both present and historical and ensure appropriate redress;

(h) to facilitate the participation of communities in the formulation of land policy;

(i) to encourage the application of traditionally accepted systems of dispute resolution in land conflicts;

(j) to assess tax on land and premiums on property in any area designated by law;

(k) to monitor and have oversight responsibilities over land use planning throughout the country;

(l) to consolidate and from time to time review all laws relating to land;[5] and

(m) to initiate revision of all sectoral land use laws in accordance with the National land policy."

[137] Such proposed functions, in their formulation, come close to the drafting in Article 67(2) of the current Constitution. The "Bomas Draft" also made certain significant provisions (in Chapter 18) regarding the place of "Commissions" in the constitutional set-up:

[5] A function contained in the Ghai Draft but not in the 2010 Constitution.

"288 (1) The objectives of constitutional Commissions are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic principles and values; and

(c) ensure the maintenance of constitutionality, by insulating essential democratic functions from improper influence, manipulation or interference.

"(2) Constitutional Commissions—

(a) are subject only to this Constitution and the law;

(b) are independent and not subject to direction or control by any person or authority; and

(c) shall be impartial and perform their functions without fear, favour or prejudice.

"(3) Where appropriate, a constitutional Commission shall –

(a) establish branches at all levels of devolved Government; and

(b) offer its services to the public free of charge.[6]"

[138] It was proposed in the "Bomas Draft" that constitutional commissions were to be bodies corporate, with commissioners appointed by the President, with the approval of Parliament. It was proposed (Clause 295) that funds for the commissions should come directly from Parliamentary allocation—as a means to ensure independence. On accountability, it was proposed that all commissions should submit an annual report to the President and to Parliament, seven months after the end of each financial year.

[6] This provision is reproduced in Article 249 of the Constitution.

[139] The "Wako Draft", which came after the "Bomas Draft", substantially retained the proposals of the latter with regard to land matters, and with regard to constitutional commissions.

[140] It is apparent that in the trajectory of the reform process, a common position had been arrived at, regarding the issue of land: that there should be the National Land Commission, a Constitutional Commission. Thereafter, indeed, the Government took another land-reform step—by way of a Sessional Paper of 2009.

- *Sessional Paper No. 3 of 2009*

[141] The post election-violence negotiations of 2007-2008, led by Kofi Annan, had five agenda-items, one centred on land reform; the relevant statement thus reads: "w*e recognize that the issue of land has been a source of economic, social, political and environmental problems in Kenya for many years. We agree that land reform is a fundamental need in Kenya and that the issue must be addressed with the seriousness it deserves. Towards this end, we agree to fully support efforts to establish the factors responsible for conflicts over land and to formulate and implement actionable short, medium and long-term recommendations on the issue."*

[142] It led to an expedited Cabinet approval of the draft national land policy, and its subsequent presentation to and adoption by Parliament, as Sessional Paper No. 3 of 2009. The paper included most of the recommendations already made by the various Commissions, and recognised that since Independence the country had not adopted a single National Land Policy. The object of the Sessional Paper was to *"guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity".*

[143] The Sessional Paper thus states (paragraphs 34 and 35):

"Land is a central category of property in Kenya. It is the principal source of livelihood and material wealth, and invariably carries cultural significance for many Kenyans. Fundamental issues in the Policy should be anchored in the Constitution. For this reason, land should be treated as a constitutional issue…

"In an ideal situation, a constitution should set out the broad principles for the governance of land, and establish an efficient and equitable institutional framework for land ownership, administration and management. ***Land policy reforms are not likely to succeed in the absence of such a sound constitutional framework. Accordingly, land reforms should be accompanied by constitutional reforms if they are to be effective"*** (emphasis supplied).

[144] The Sessional Paper stated the principles to guide the land policy as: *transparency and accountability; participation of the citizenry in decision-making; equitable access to land; resolution of genuine historic and current land injustices; and protection of human rights.* The Sessional Paper thus declared (Clauses 40 and 41):

"The Constitution should embrace the Constitutional principles outlined above and establish a firm foundation for the implementation of land policy reforms.

"The Constitution shall provide for the establishment of a National Land Commission (NLC) to carry out efficient, equitable and sustainable land administration and management."

[145] The Sessional Paper also identified the shortcomings of the land law and administration as it then stood: "*the existing institutional framework for land administration and management is highly centralized, complex, and exceedingly bureaucratic. As a result, it is prone to corruption and has not been able to provide efficient services. In addition, it does not adequately involve the public in decision making with respect to land administration and management, and is thus unaccountable*."

[146] The Sessional Paper recommended the overhaul of the existing institutional framework for land administration and management. It proposed the setting up of three land management institutions: NLC; the District Land Boards (DLBs); and Community Land Boards (CLBs). As regards NLC, it stated:

> ***"232. The NLC shall be a constitutional body. Its composition shall take into account the need to ensure broad representation, expertise, integrity and equity. The nominees shall be vetted by Parliament and appointed by the President. The NLC shall be operationalized by an Act of Parliament.***
>
> **"233. The NLC shall have the following functions:**
>
> ***(a) Hold title to and manage public land on behalf of the State;***[7]
> ***(b) Establish and maintain a register of all public, private and community land in the country;***
> ***(c) Ensure the realization of the multiple values of land, namely, economic productivity, equity, environmental sustainability and conservation of National heritage;***

[7] Previously, only the Ghai Draft had given the power to hold title to public land to the NLC. The sessional paper talks of management but not administration which is the language of the Ghai Draft.

(d) Exercise the powers of compulsory acquisition and development control on behalf of the State and local authorities or Government;

(e) Levy, collect and manage all land tax revenues except rates which shall be collected by local authorities or Governments;

(f) Develop the capacity of both DLBs and CLBs;

(g) Provide technical services and co-ordinate the work of DLBs and CLBs through the establishment of NLC district offices;

(h) Ensure the development and operation of effective digital Land Information Management Systems at all levels;

(i) Establish a Land Policy Research Centre (LPRC) in partnership with universities and research institutions to co-ordinate land policy research;

(j) Establish and manage a National Land Trust Fund (NLTF) to mobilize and pool financial resources for implementing this Policy. The NLTF shall be administered by the NLC; and

(k) Provide technical support to the Ministry in-charge of land in preparation and implementation of a National land use policy and other land related policies."

[147] The validity of the Sessional Paper's content was presumed, as its implementation was entrusted to the NLC that would form part of the Constitution. On the issue of independence and accountability, the Sessional Paper thus stated (Clauses 235, 236 and 237):

"The existing legislative practice of giving Ministers the 'power to give directions of a general nature' to public agencies has invariably compromised their independence including agencies dealing with land.

"The NLC should be accorded sufficient autonomy and independence to perform its functions effectively and fairly. It should, however, be accountable to the people of Kenya.

"In order to ensure the independence and accountability of the NLC, the Government shall enact an 'NLC Act' to:

- ***(a) Grant the NLC operational autonomy;***
- ***(b) Require the NLC to be accountable to Parliament for its operations;***
- ***(c) Require ministerial policy directions to the NLC to be laid before Parliament in writing; and***
- ***(d) Facilitate public participation and application of democratic principles in the establishment and management of the NLC."***

[148] With this Sessional Paper, the ground was set for the establishment of the NLC as an autonomous body, de-linked from the interference of the Government *'via ministerial directions of a general nature'*—to administer and manage land matters. There was agreement that the NLC should be a constitutional body, accountable to the people through their elected representatives. Hence in the proposed organizational structure, the Ministry in charge of lands, and the NLC, while at the same level and mutually linked, were each answerable to Parliament. Although this Sessional Paper was not implemented, it served as an influential factor during the Constitutional Review process, in respect of land.

- *The Harmonised Draft Constitution*

[149] The Constitutional Review process, however, took on a new dimension, with the coming on board of a Committee of Experts. On 17th November, 2009, the Committee of Experts published a *Harmonized Draft Constitution*, synthesised from a collation of the several earlier drafts. Chapter 7 of this draft was devoted to Land and Property; and Clause 84 provided for the establishment of the NLC with functions that included: *managing public land on behalf of the National Government and the devolved Governments; and recommending to the National Government a national land policy*. Chapter 18 dealt with Commissions and Independent Offices, and provided for the NLC as one of the Commissions. Clause 296 provided for objects of the Commissions and Independent offices thus:

> ***"The objects of the Commissions and the Independent offices are to—***
>
> ***(a) protect the sovereignty of the people;***
> ***(b) secure the observance by all State organs of democratic values and principles; and***
> ***(c) ensure the maintenance of constitutionality, by insulating essential democratic functions from improper influence, manipulation or interference.***
>
> ***"(2) The Commissions and holders of independent offices—***
> ***(a) are subject only to this Constitution and the law;***
> ***(b) are independent and not subject to direction or control by any person or authority***

(c) shall be impartial and perform their functions without fear, favour or prejudice."

[150] The effect of the deliberations of the various committees, and the published records thereof, was that the place of the NLC in a new Constitution, was assured. The Committee of Experts, which published its final report on 11th October, 2010, had as its primary mandate "*to identify contentious issues and propose solutions; and harmonize the non-contentious matters."* Chapter 5 of that report set out the agreed issues, recording that: "*the CKRC report noted the importance of constitutional commissions as bodies that were separate from Government and capable of applying and protecting the Constitution.*" The NLC is included as No. 2 in the list of eleven Independent Constitutional Commissions.

- *The Constitution of Kenya, 2010*

[151] The creation of the NLC was realised with the promulgation of the Constitution of Kenya, 2010.The Constitution dedicated an entire chapter to the subject, Land and Environment[8]. Article 62 stated the guiding principles of land policy, with Article 62 classifying land into three categories: *public, community* and *private.* Article 62 defines public land, and states how it will be administered:

"(2) Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission, if it is classified under—

(a) Clause (1) (a), (c), (d) or (e); and

[8]Chapter 5 of the Constitution.

(b) Clause (1)(b), other than land held, used or occupied by National state organ.

(3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission."

[152] Article 67 provides for the establishment of the NLC and its functions:

"(a) to manage public land on behalf of the National and County Governments;
(b) to recommend a national land policy to the National Government;
(c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;
(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

"(3) The National Land Commission may perform any other functions prescribed by National legislation."

[153] The NLC has the safeguards of all the other Independent Commissions and Independent Offices provided for in Chapter 15 of the Constitution. Article 249 makes express provisions regarding the objects, authority and funding for such Commissions, as follows:

"(1) The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people

(b) secure the observance by all State organs of democratic values and principles; and

(c) promote constitutionalism.

"(2) The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.

"(3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote."

- *The National Land Commission—Parliament's Perception*

[154] By the Constitution, ordinary legislation was required to operationalize the NLC. The parliamentary debate attending the enactment of such legislation, illuminates the wider perception on this question.

[155] The then Minister of Lands, the *Hon. Orengo,* thus addressed the National Assembly:

> ***"We will require a Land Commission that is going to manage public lands and register rights and interests in lands, but at the same time, monitor the registration of all rights and interests in land. It shall monitor because below it, there will be Registrars all over the Republic and in the counties who shall be doing the technical work, but the Commission shall monitor that process. The other function is to develop and maintain an effective land information system at the National and County levels."***

And the Hon. Kimunya, Minister for Transport, seconded the Bill in the following terms:

> ***"These are things we need to safeguard and we hope that when we now set up this National Land Commission the men and women who we are going to put in that Commission will be people of high integrity who will take on the challenge knowing where we are coming from as a country; knowing that people have shed their blood to protect this land; knowing all the fights that we have seen have been to do with land...; people will be seeing that we have an institutional framework that guarantees us our***

rights as enshrined in the Constitution that what is yours is yours. You have rights to own property anywhere in the country and there is an institutional body that protects that for you and that you can now move with your investment to whichever County you want to settle, now and in the future—with that guarantee. Once you have those guarantees peace will be sustained in this country."

[156] From such a tone in the legislative deliberations, it may be inferred that public land was perceived to fall within the administrative competence of the NLC, safeguarding it from abuse of the kind associated with history. The NLC is a permanent commission under Chapter 15 of the Constitution (unlike, say, the Commission on the Implementation of the Constitution); and can be discontinued only on the basis of a positive referendum vote, in the terms of Article 255 of the Constitution.

(b) The Constitution of Kenya, 2010 and the National Land Commission

(i) General Issues

[157] The Constitution introduced the National Land Commission (NLC) as a Constitutional Commission under Chapter 15, Article 248 (2) (b). Chapter 15 is devoted to "commissions and independent offices". Article 248 of the Constitution reads:

"(1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.

"(2) The commissions are—

(a) the Kenya National Human Rights and Equality Commission;
(b) the National Land Commission;
(c) the Independent Electoral and Boundaries Commission;
(d) the Parliamentary Service Commission;
(e) the Judicial Service Commission;
(f) the Commission on Revenue Allocation;
(g) the Public Service Commission;
(h) the Salaries and Remuneration Commission;
(i) the Teachers Service Commission; and
(j) the National Police Service Commission.

"(3) The independent offices are—
(a) the Auditor-General; and
(b) the Controller of Budget."

[158] While some of these commissions were previously provided for under the 1969 Constitution, there had been no safeguard for their independence. According to the CKRC Report (page 79), the reason for the formation of the current set of commissions was to introduce the element of *independence* from the influence of other arms of Government. The "Wako Draft" and the "Bomas Draft" had proposed the introduction of numbers of commissions; and the Committee of Experts' Final Report, on such a scheme, noted (page 52) that: an increase in the number of commissions would lead to overlaps in functions—and thus, some of the functions should be performed by Government.

[159] In addition to the Article 248-Commissions, the Constitution introduced a unique commission, the Commission on the Implementation of the Constitution, which is provided for under Section 5 of the Sixth Schedule. It was formed as a temporary agency, to assist in the implementation of the Constitution.

[160] Article 249 of the Constitution specifies the essential purposes of the Commissions and Independent offices, as follows:

> ***"(1) The objects of the commissions and the independent offices are to—***
>
> ***(a) protect the sovereignty of the people;***
> ***(b) secure the observance by all State organs of democratic values and principles; and***
> ***(c) promote constitutionalism.***
>
> ***"(2) The commissions and the holders of independent offices—***
> ***(a) are subject only to this Constitution and the law; and***
> ***(b) are independent and not subject to direction or control by any person or authority. "***

[161] The foregoing provision establishes two broad principles. Firstly, it asserts the duty of the commissions and independent offices to protect the sovereignty of the people, ensure that all State organs adhere to and observe the democratic values and principles, and promote constitutionality—three of the key pillars of the Constitution. Secondly, the Constitution ordains that the commissions, and the holders of independent offices, are subject only to the Constitution and the law, and are independent, and not subject to the

direction or control by any person or authority. This is the pivotal provision guaranteeing independent status to the commissions and independent offices.

[162] A number of scholars, [Prof. Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) *Harvard Law Review* 633][9]; Prof. B. M. Sihanya 'Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects', *FES Occasional Paper No.5*(2011), at page 38] have advanced the argument that contemporary Constitutions have constituted a fourth arm of Government, in the form of independent bodies which they refer to as the *'integrity branch', 'constitutional watchdogs'* or *'democracy branch'*. Prof. Sihanya has argued that the Constitution of 2010 creates a fourth arm of Government in the form of commissions and independent offices, with express provisions outlining their independence from other arms of Government.

[163] The perception of commissions as a fourth arm of Government is canvassed by Professors P.L.O. Lumumba and L.G. Franceschi in their work, *The Constitution of Kenya, an Introductory Commentary*, 2014 (page 19); they observe that the newly-formed commissions and independent offices carry out functions which were previously performed by the traditional arms of Government; and hence the framers of the Constitution must have deliberately intended that certain Government functions be separated from the familiar arms of Government, in order to promote transparency, fairness and objectivity.

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[9]Prof. Ackerman discusses an additional branch of Government by recognising the functions of the Federal Election Commission, noting (page 718) that—

> "Granted, the function of representational reinforcement does not find an easy home within the standard Legislative/Executive/Judicial trichotomy. But so much the worse for the trichotomy! A better understanding of the separation of powers would recognize that agencies like the FEC deserve special recognition as a distinct part of the system of checks and balances. Call it the "democracy branch." The powers delegated to this branch will depend, of course, on the particular conception of democracy embraced at the Constitutional convention."

[164] On the basis of the foregoing, learned counsel for the NLC argued that the NLC is an independent Commission which had been re-designed under the Constitution, so as to make it not accountable to other arms of Government, and thus it was secured by the separation-of-powers principle. It was submitted that the NLC could be viewed as a fourth arm of Government, created to cater for a specific need, but ultimately independent of Government. Counsel urged that the NLC is a creature of the Constitution, just like the Executive, and was not to be treated as being subservient to the Executive.

[165] A differing approach was taken by the 1st and 2nd interested parties, who urged that the NLC must work in harmony, consultation and co-operation with the Ministry of Land, Housing and Urban Development. The interested parties submitted that the NLC was not to supplant the National Government, with the effect of rendering the Executive's role otiose, but rather, the NLC's role was to act as an advisory and oversight body with limited powers, providing guidance and direction towards reforms, and for the better and more efficient management of land in Kenya.

[166] Counsel for the 2nd *amicus curiae* submitted that it would be erroneous for one to argue that the Commission falls within the Executive arm of Government: because the Constitution does not coincide with the template of the Montesquieuian tripartite separation of powers. It was urged that it was clear from the actual constitutional allocation of power, especially from Articles 62 and 67, and Chapter 15, that the Kenyan scenario was more complex than the traditional scheme of separation of powers.

[167] The notion of a fourth arm of Government is certainly a departure from the tripartite separation of powers, involving just the Executive, the Judiciary and the Legislature. In his separation of powers theory, Montesquieu had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [*The Spirit of the Laws* (1948)]:

"When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty—there is no liberty if the power of judging is not separated from the legislative and Executive—there would be an end to everything, if the same man or the same body were to exercise those three powers."

[168] In order to determine whether commissions and independent offices are a fourth arm of Government, the starting point is the Constitution. Those who argue that commissions and independent offices are to be considered as a fourth arm of Government, urge that these bodies exercise public powers akin to those held by the three branches.

[169] The recognition of the traditional three arms of Government is mirrored in Article 1 (3) of the Constitution. Article 1(2) recognises that the people may exercise their sovereign power directly or through their democratically-elected representatives. Article 1(3) then proceeds to state that—

> *"Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*
>
> **(a)** ***Parliament and the legislative assemblies*** *in the county governments;*
> **(*b*)** *the national* ***executive*** *and the executive structures in the county governments; and*
> **(c)** *the* ***Judiciary*** *and independent tribunals***"** (emphasis supplied).

[169A] Article 2(2) goes further to prohibit persons from claiming or exercising State authority unless provided for under the Constitution.

[170] The Constitution defines Commissions and independent offices as State organs in Article 260, which provides that *"State organ means* ***a commission,*** *office, agency or other body established under this Constitution*". The same provision of the Constitution also defines 'State' to mean that *"when used as a noun, means the collectivity of offices, organs and other entities comprising the Government of the Republic under this Constitution".* In addition, a 'State office' is defined as *"any of the following offices—President; Deputy President; Cabinet Secretary; Member of Parliament; Judges and Magistrates; member of a commission to which Chapter Fifteen applies; holder of an independent office to which Chapter Fifteen applies…*"

[171] The definition clauses of the Constitution, therefore, leave no doubt that commissions are *State organs*. Although many bodies mentioned in the Constitution are categorised as State organs, a plain reading of Article 1(3) shows only three specific State organs in which the *people's sovereign power* is vested: the *Executive,* the *Legislature* and the *Judiciary*. This perception is further supported by the description of the distinctive roles of the three State organs. Article 94(1) states that legislative authority is derived from the people and, at the national level, is exercised by Parliament; Article 129 affirms that Executive authority is derived from the people; and Article 159 provides that Judicial authority is derived from the people, and vests in and is to be exercised by courts and tribunals (See Rawal DCJ & V-P's concurring Judgment in ***Speaker of the Senate & Another v. Attorney-General & 4 Others,*** Sup. Ct. Advisory Opinion Reference No. 2 of 2013; [2013] eKLR— in which she recognises that the three arms of Government derive their authority from the people).

[172] The wording of Chapter 15 of the Constitution, in our perception, does not signal the vesting of the sovereign power of the people in commissions and independent offices. This is not to say that commissions and independent offices are excluded from exercising public power. Indeed, as State organs, they are part of Government, and one of their core mandates is to protect the sovereignty of the people; so they ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence the depiction 'people watchdogs' or 'constitutional watchdogs'. They are to be distinguished from the three arms of Government through the functions they discharge. Prof. Christina Murray [in 'The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?', in *Potchefstroom Electronic Journal* 2006(2) at pages 9-10], in distinguishing the South African Chapter 9 independent commissions and offices (which have similar features to the 2010 Constitution commissions), noted thus:

> ***"As already noted, the Chapter 9 institutions are not a branch of Government. They do not have Governmental power. Unlike the courts, they cannot conclusively declare Government action to be unconstitutional or illegal. Unlike Parliament they cannot require the Executive to resign. Unlike the Executive, they cannot control the legal system by choosing our top judges or control the implementation of policy by managing the budget. They cannot order the Executive to act in a certain way and they cannot penalise unconstitutional behaviour."***

[173] We make reference to this Court's decision in ***Speaker of the Senate & another v. Attorney-General & 4 Others,*** Sup. Ct. Advisory Opinion

Reference 2 of 2013; [2013] eKLR ***[In Re Senate]***[10]***,*** where we analysed the relationship between the Legislature and the Judiciary, and recognised the three arms of Government as follows (paragraph 61 and 62):

> **"*...The institutional comity between the three arms of Government must not be endangered by the unwarranted intrusions into the workings of one arm by another.***
>
> ***"However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land."***

[174] The High Court has held that Kenya's Constitution of 2010 still reflects the Montesquieuian separation of powers. In ***Trusted Society of Human Rights v. The Attorney-General and Others,*** High Court Petition No. 229 of 2012; [2012] eKLR, that Court, while considering the principle of separation of powers in relation to the Judiciary and the Legislature, thus observed (Judgment, paragraphs 63-64):

> ***"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian***

[10]See also Rawal DCJ's concurring judgment at para 229 and Njoki SCJ's dissenting judgment at para 248 in which she remarks:

> ***"The Constitution however does not oust the doctrine of separation of powers between the three arms of Government."***

influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."

[175] Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the *Executive, Legislature* and *Judiciary*. It is in this context that we now consider the specific characteristics of the independent commissions.

(ii) The Constitutional Commissions—and the Question of Independence

[176] The Independence of the commissions is provided for in Article 249(2), in the following terms:

"The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and
(b) are independent and not subject to direction or control by any person or authority."

[177] It is quite clear that while the commissions are independent, and no person or authority may control them, they are still subject to the Constitution and the law. This Court has addressed the issue of the independence of

commissions, in ***In Re the Matter of the Interim Independent Electoral Commission*** Sup. Ct. Application No. 2 of 2011; [2011] eKLR ***[In Re IIEC]***. One of the issues raised in the application for an advisory opinion was whether the procedural requirement for parties to seek the advice of the Attorney-General, before requesting the Court for an Advisory Opinion, did compromise the independence of the commission. In answering this question, the Court thus observed (paragraphs 59 and 60):

> ***"[T]he real purpose of the 'independence clause', with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of Government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of Government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause'.***

"While bearing in mind that the various Commissions and independent offices are required to function free of subjection to 'direction or control by any person or authority', we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. ...For due operation in the matrix, 'independence' does not mean 'detachment', 'isolation' or 'disengagement' from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of Government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead 'independence' as an end in itself; for public-governance tasks are apt to be severely strained by possible 'clashes of independences'."

[178] In ***Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others,*** Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR ***[CCK]***, this Court considered the meaning of

independence in relation to Article 34(5) of the Constitution, which requires the enactment of legislation to provide for an independent body to establish media standards, as well as monitor and regulate the operation of such standards. The Court thus held (paragraph 169 and 170):

> ***"'[I]ndependence' is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.***
>
> ***"How is the shield of independence to be attained? In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence. "***

[179] In the case, ***Judicial Service Commission v. Speaker of the National Assembly & 8 Others,*** Petition No. 518 of 2013; [2014] eKLR ***[JSC v. Speaker of the National Assembly and Others]***, the High Court arrived at a finding that the Judicial Service Commission, which is a Chapter 15 independent commission, was subject to Parliamentary oversight. It held as follows (paragraph 213):

> ***"Like other constitutional commissions and independent offices, the JSC must however operate within the confines of the Constitution and the law. While enjoying financial and administrative independence, the JSC is accountable to Parliament. The JSC is also a partner to Parliament in supporting constitutional democracy."***

[180] Further, in ***Independent Policing Oversight Authority & Another v. Attorney General & 660 Others,*** Petition No. 390 of 2014; [2014] eKLR ***[Independent Policing Oversight Authority & Another],*** the High Court had to determine several issues including, whether the National Police Service Commission acted independently in its functions related to the recruitment of police. Considering the independence of that Commission, the Court observed (paragraph 98):

> ***"It is important that the NPSC should not be seen to have been directed and/or controlled by any person or authority because that would be a direct affront to the independence granted to it by Article 249 (2) (b) of the Constitution."***

[181] In a comparative reference, we found that in South Africa, Chapter 9 of the Constitution, regarding 'State Institutions Supporting democracy', and Section 181, elaborately establish such institutions, which include

commissions, and safeguards their independence, as well as their functions and objects.

[182] The functioning of those provisions were depicted in ***New National Party v. Government of the Republic of South Africa and Others*** (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489, in the Supreme Court of South Africa. *Langa DP*, in his concurring Judgment, considered the independence of the Election Commission in relation to Parliament. He observed that structural independence is exercised through the control of the commission's functions and duties, whereas its financial independence is exercised through the power to use allocated funds in the manner suitable for the commission. The appellant had challenged the actions of the Government, as being contrary to the independence and impartiality of the Election Commission. Specifically, the appellant had alleged that: (i)the Government had refused to accept the advice of the Commission, that bar-coded IDs should not be the only identification documents acceptable for the purposes of registering and voting—and this had resulted in a delay in the passing of the Electoral Act; and (ii), the Government had inadequately funded the commission and, as a result, it had been unable to appoint the necessary officials to attend to the registration of voters—and this had led to such functions being taken over by the Government. The finding of the Court was thus stated (paragraph 78):

> ***"The Constitution places [an] obligation on those organs of state to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness. If this means that old legislative and policy arrangements, public administration practices and budgetary conventions must be adjusted to be brought in line with the new constitutional prescripts,***

so be it. It is therefore against this background that the conduct complained of has to be examined."

[183] The Court proceeded to define "financial independence" and "administrative independence" as follows (paragraphs 98 and 99):

"In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to 'independence'. The first is 'financial independence'. This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other National interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

"The second factor, 'administrative independence', implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and

the Act. The Executive must provide the assistance that the Commission requires 'to ensure [its] independence, impartiality, dignity and effectiveness'. The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the Government for assistance to provide personnel to take part in the registration process, Government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary."

[184] It emerges that independence is a pivotal feature in the newly-established commissions and independent offices. This Court, in ***In Re IIEC*** and the ***CCK*** case, and the High Court in ***JSC v. Speaker of the National Assembly and Others,*** and in ***Independent Policing Oversight Authority & Another,*** have defined certain key features of the independence of commissions. From the precedent in the earlier decisions, we would set out such principles as are coming forth, in relation to the object of independence in a commission.

- *Functional independence*: this entails commissions exercising their autonomy through carrying out their functions, without receiving any instructions or orders from other State organs or bodies. This has also been referred to as *administrative independence* (See ***JSC v. Speaker of the National Assembly and Others;*** and the South African Constitutional Court decision in ***New National Party of South Africa.)*** Functional independence is in line with the general functions and powers of commissions, as provided under Articles 252 and 253 of the Constitution.
- *Operational independence:* this includes functional independence, and is a safeguard or shield for independence, manifested through the

procedure of the appointments of commissioners; composition of the commission; and procedures of the commission. Article 255(1)(g)[11] provides an elaborate procedure for the amendment of the Constitution in matters dealing with the independence of the Judiciary, as well as commissions and independent offices to which Chapter 15 applies.

- *Financial independence*: it means that a commission has the autonomy to access funds which it reasonably requires for the conduct of its functions. However, according to Article 249(3) of the Constitution, Parliament is mandated to set for the commission the budget considered adequate for its functions.

- *Perception of independence*: this means the commissions *must be seen* to be carrying out their functions free from external interferences. In ***CCK*** and ***Independent Policing Oversight Authority & Another,*** this Court and the High Court respectively held that the *perception of independence* is crucial in showing proof of independence.

- *Collaboration and consultation with other State organs*: it emerges from precedent, that independence of commissions and independent offices does not, perforce, entail a splendid isolation from other State organs. This is demonstrated by Article 249(1), which expressly entrusts the National Land Commission with the duty to "protect the sovereignty of the people", "secure the observance by all State organs

[11] Article 255(1)(g) provides:

> ***"A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—(g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies…"***

of democratic values and principles", and "promote constitutionalism". By the broad and diffuse nature of such a mandate, commissions acting in isolation, have no capacity to discharge their mandate. So they have to consult with other State organs, and work with such State organs in co-operation and harmony. The Commissions are required to promote the national values and principles entrenched in Article 10 of the Constitution. Those national values and principles are: patriotism; national unity; sharing and devolution of power; the rule of law; democracy and participation of the people; human dignity; equity; social justice; inclusiveness; equality; human rights; non-discrimination and protection of the marginalised; good governance; integrity; transparency and accountability; and sustainable development. It is clear, for instance, that a mandate borne by the commissions, namely, "democracy and participation of the people", forms an overlapping continuum with operational logistics devolving to all public agencies.

[185] As this Court observed in ***In Re IIEC*** (paragraph 60), *constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. And in* ***In Re Senate,*** this Court remarked (paragraph 146) as follows:

> ***"As we hereby render an Advisory Opinion, we categorically affirm that lawful public-agency conduct under Kenya's Constitution, requires every State agent to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency harmony and co-operation. No State agency, especially where it is represented by one person, should overlook the***

historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays."

[186] Clearly, independence, as an attribute of the various constitutional commissions, is not an end in itself. Ultimately, what matters to the people, from the governance-docket, is the operational benefits that flow from the role of the public agency in question.

(iii) Commissions and Independent Offices: the Question of Checks and Balances

[187] It was recorded in the Committee of Experts Final Report (page 26) that the Kenyan people had expressed lack of faith in the formation of commissions, because the reports of such commissions had not been made public, and had then been shelved, and not implemented.

[188] Such a record signals that the public had wanted all commissions to be accountable. Good governance, integrity, accountability and transparency are perceived as core values in the functioning of public institutions.

[189] The commissions and independent offices are required to operate only subject to the Constitution and the law. Article 249(3) establishes a mechanism by which Parliament is to allocate adequate funds to commissions, to enable them to perform their functions. Article 254 sets up further mechanisms for the guidance of commissions and independent offices, in the discharge of their functions: *as soon as practicably possible, at the end of each financial year, they are to submit a report to President and to Parliament; at any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a*

report on a particular issue; and, every report required to be submitted by the commissions and independent bodies shall be published and publicised. These Articles establish mechanisms of checks and balances, directed towards the workings of the Constitutional commissions, by other State organs.

[190] Accountability and transparency are ordained under Article 10(2)(c)of the Constitution, as "national values and principles of governance". Article 10 (1) of the Constitution binds all State organs, State officers, and public officers, whenever they: *(a) apply or interpret the Constitution; (b) enact, apply or interpret any law; or (c) make or implement public policy decisions*. It is this call for accountability and transparency, that imports the principle of checks and balances. And "checks and balances", in relation to the land question, is to be seen in relation to Article 60(1)(d),which requires that Land in Kenya shall be managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with *transparent and cost-effective administration of land.*

[191] This Court, in ***In Re Senate***, was considering the relationship between two Parliamentary chambers, the National Assembly and the Senate. *Mutunga CJ* in his concurring Judgment, recognised the importance of checks and balances in relation to equitable distribution of resources. His remarks have a relevance to this request for an Advisory Opinion, which revolves around a much-valued resource, land (paragraph 197):

> *"One of the cardinal principles of the Constitution that can be gleaned from its architecture and wording is,* ***'the more checks and balances, the better' for good governance.*** *...In the equitable distribution of resources owned by the people of Kenya, the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual, granted that they are all invoked in the interests of the people of*

Kenya. Since judicial authority is also derived from the people of Kenya, the Constitutional duty of the Supreme Court in this Reference is to reinforce these principles, so as to ensure that the rights and interests (economic, social, political, and cultural) of the people of Kenya …" (emphasis supplied).

[192] The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity—for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from the opinion of *Njoki, SCJ* in ***In Re Senate*** (paragraph 249):

> ***"The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting*** *ultra vires* ***the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."***

[193] The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies

which exercise public power. The commissions and independent offices restrain the arms of Government and other State organs, and *vice versa*. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. If the NLC was created as a watchdog and an oversight body, it cannot carry out the direct functions of the Ministry, even as it performs its oversight role.

[194] In the case, ***In Re IIEC***, this Court thus remarked on the doctrine of separation of powers:

> ***"The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of Government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation."***

[195] This Court went further and observed that the independence of commissions does not entail that they must act on their own accord (paragraph 59 and 60):

> ***"...The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause'.***
>
> ***"...These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the 'independence clause' does not accord***

them *carte blanche* ***to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law."***

[196] In the case, ***In Re Senate***, this Court, with regard to the separation of powers doctrine, thus remarked (paragraph 49):

"Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution."

[197] The Court of Appeal too, in ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others,*** Civil Appeal No. 290 of 2012; eKLR [2012],thus observed, in relation to the separation doctrine:

"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other's functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with

the High Court's dicta in the petition the subject of this appeal that: Separation of powers must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent."

[198] In ***JSC v. Speaker of National Assembly,*** the High Court analysed the system of checks and balances between the Parliamentary Oversight Committee and a Chapter 15 Commission, namely the Judicial Service Commission. The Court held that Parliamentary oversight over the Judicial Service Commission was not an infringement of the Commission's independence. It also found (paragraphs 237) that:

"In carrying out its oversight role, Parliament must respect the independence of the JSC and other independent offices. This is particularly important because of the pivotal role assigned by the Constitution to the JSC to facilitate and promote the independence and accountability of the Judiciary under Article 172. As we have stated before, the JSC plays a complementary role to Parliament in overseeing the entire Judiciary. It is not a competitor, or intended to be a competitor against Parliament. It is ideally a partner in the Constitutional scheme."

[199] The High Court proceeded to caution Parliament to avoid encroaching on the independence of commissions, when exercising its oversight mandate (paragraphs 227 and 228):

> ***"Parliament's oversight mandate is not a*** *carte blanche*. ***It must be exercised in obedience and full perspective of all provisions of the Constitution and the law. The power to oversee organs of state, including independent commissions like the JSC, does not extend to a violation of the independence of the commission acting within their mandate. Such is the construction that accords with Article 259 of the Constitution. ...Parliament can only summon the JSC over a legitimate cause."***

[200] These cases show that the doctrine of separation of powers requires that organs of Government should carry out their functions without encroaching on each other. It is thus recognised that there is scope for a Government organ to act in excess of its proper mandate, or to abuse its powers. The system of checks and balances is put in place to empower other organs of Government to apply their countervailing powers, to prevent, or limit the excessive use of powers.

[201] While the doctrine of separation of powers, and the principle of checks and balances, have conventionally been associated with the Executive, the Legislature and the Judiciary, it is entirely proper to associate them with any State organ that exercises public power—and thus ought to be checked and balanced, to avoid abuse of power. The effect is that, the independence of commissions does not exempt them from being overseen, and held accountable in their operations.

[202] As already noted, Article 249(1) of the Constitution signals the checks that the commissions have on other arms of Government. On the other hand, Article 254 indicates the checks which the Executive and the Legislature have upon the commissions. This takes the form of accountability and

transparency mechanisms. Article 254(1) requires commissions to file annual reports to the President and to Parliament; and by Article 254(2), the President and the National Assembly may require a commission to submit a report on a particular issue.

[203] There exists also a kind of vertical accountability, which the commission holds towards *the people in general*. This was expressed at an earlier stage, in the CKRC report: publication of, and implementation of recommendations contained in commission reports. Article 254(3) requires every commission or independent office to publish and publicise it reports. This is a check-and-balance mechanism, as well as an exercise of inclusivity, accountability, transparency, good governance and integrity—as recognised under the national values and principles of governance (Article 10(2) of the Constitution). It is also a mode of promoting constitutionalism, as required by Article 249(1).

[204] The NLC is also subject to financial checks, by a counterpart independent office—the Auditor-General. Article 229(4)(d) thus provides:

> ***"Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on—***
>
> **.....**
>
> ***(d) the accounts of every commission and independent office established by this Constitution"***.

[205] Article 229 (7) provides that audit reports are to be submitted to Parliament. This means that any audit report which the Auditor-General drafts in relation to the NLC will be presented to Parliament, for scrutiny and appropriate approbatory courses of action.

[206] It is therefore essential to strike a balance between the independence of commissions, which is integral to their functioning, and the obligations of accountability and transparency. In this instance, there is to be a power-balance between the NLC and the National and County Governments, holding each institution within its prescribed powers. Failing such a course, the very rationale of independent offices and commissions would have been negated.

[207] While thus endowing the Commissions and independent offices with competence, the Constitution (Article 67) itemises the functions of the National Land Commission, which include: "*to manage..., to recommend..., to advise..., to monitor and to assess"*. Such an enlarged mandate, of course, is to be exercised in the best interest of the people, whose sovereignty is to be protected.

[208] Furthermore, Article 259(11) of the Constitution provides that:

> ***"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise."***

Obtaining 'consent' from the National or County Governments, as stipulated in Section 5 (2) (a) of the NLC Act, is therefore a relevant factor in the discharge of the NLC's mandate.

[209] Thus the NLC is not to work in isolation, but rather in consultation and co-operation with the Ministry. This is an *interdependent* relationship, with one body formulating the policy, whereas the other implements the policy; it is not prudent for any State organ to be the one formulating, implementing, and at the same time overseeing the implementation of the policy. This apportionment of responsibility does not invalidate the doctrine of separation of powers, but rather, redefines and consolidates the essential principle that *separation is not the goal in itself*, but is a vital means to assert checks upon each organ of Government, so as to achieve constitutionally-restrained governance.

[210] This is well depicted in the High Court decision in ***The Institute of Social Accountability and Another v. The National Assembly and 4 Others,*** Nairobi High Court Constitutional and Human Rights Division Petition No. 71 of 2013 ***[the CDF Case].*** The Court, while taking into account the Supreme Court decision in ***In the Matter of the Interim Independent Electoral Commission,*** held (paragraph 127) that:

> ***"The principle of separation of powers is at the heart of the structure of our Government; each organ is independent of [the] [others] but acting as a check and balance to the [others] and also working in concert [with the others] to ensure that the machinery of the state works for the good of Kenyans."***

[211] Collaboration between different State agencies is essential, as it ensures that no State organ doubles up as implementer and overseer of operations.

(c) The National Land Commission, and the National and County Governments

- *Preamble*

[212] The three main land law statutes were enacted in line with Article 68 of the Constitution, as read with the Fifth Schedule thereto. The relevant provisions placed a duty on Parliament to revise, consolidate, and rationalise existing land laws. The task was to be carried out within the limited time-frame of 18 months following the promulgation of the Constitution. Such a time-constraint, it appears to us, was a factor occasioning certain defects in the new legislation, especially in the form of inconsistencies, and overlap of the functions attributed to the NLC and the Ministry. *Shortcomings of this kind will certainly fall to Parliament's legislative agenda, and it should be a matter of interest to the Attorney-General as well as the Kenya Law Reform Commission.*

[213] Chapter Five of the Constitution is the reference-point, in seeking clarity on the issue of land ownership and land administration. Article 62 affirms that all land belongs to the people of Kenya collectively, as a nation, as communities, and as individuals. It specifies the manner in which public land vests, as well as the institution responsible for its administration.

[214] Article 62(2) of the Constitution provides that public land shall vest in and be held by a County Government, in trust for the people resident in the county, and shall be administered on their behalf by the NLC. Further, Article 62(3) provides that certain classifications of public land shall vest in and be held by the National Government in trust for the people of Kenya, and shall be administered on their behalf by the NLC.

[215] Article 62 (4) provides that:

"[P]ublic land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."

[216] To give effect to those terms, Article 67 establishes the NLC, indicating that its function includes the management of public land on behalf of the National and County Governments, as well as any other functions such as may be prescribed by legislation (Article 67 (3)). The additional functions that may be prescribed by legislation, in terms of Article 67 (3), are in line with Article 252 (1) (d) of the Constitution, which provides that "*[e]ach commission, and each holder of an independent office may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.*" Article 68 further empowers Parliament to revise, consolidate, and rationalise existing land laws.

[217] In that context, Parliament enacted the NLC Act, the Land Act and the Land Registration Act, to give effect to the provisions of the Constitution. A consideration of these several statutes will illuminate our perception of the relationship between the NLC, and the National and County Governments.

- *The National Land Commission Act, 2012*

[218] This statute, enacted to fulfil the object of Article 67(3) of the Constitution, was intended for the purposes enumerated in its Section 3:

"(a) to provide for the management and administration of land in accordance with the principles of land policy set out in Article 60 of the Constitution and the National land policy.

(b) to provide for the additional functions of the Commission as contemplated under Article 67(3) of the Constitution.

(c) to provide for a linkage between the Commission, County Governments and other institutions dealing with land and land related resources."

[219] Section 3(a) of the Act is anchored upon the principles of land policy enumerated in Article 60 of the Constitution, namely:

"(a) equitable access to land;

(b) security of land rights;

(c) sustainable and productive management of land resources;

(d) transparent and cost-effective administration of land;

(e) sound conservation and protection of ecologically sensitive areas;

(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and

(g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution."

[220] Article 60(2) provides that the foregoing principles are to be implemented through "a national land policy developed and reviewed regularly by the National Government and through legislation". By Article 67, it falls to the NLC to recommend a national land policy to the National Government. These provisions, by their essential design, in our view, fall within *a scheme of co-operation and interdependence between the NLC and the Ministry*.

- *The Functions of the NLC*

[221] Apart from the functions listed under Article 67(2) of the Constitution, Section 5(2) of the Act assigns other tasks to the NLC, in the following terms:

> ***"(a) on behalf of, and with the consent of the National and County Governments, alienate public land;***
> ***(b) monitor the registration of all rights and interests in land;***
> ***(c) develop and maintain an effective land information management system at National and County levels; and***
> ***(d) manage and administer all unregistered trust land and unregistered community land on behalf of the County Government."***

[222] The Land Act defines "alienation" as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal.

[223] It may be inferred that, the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC's function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration.

- *Section 5(2)(e) of the NLC Act—versus—the Constitution's terms*

[224] Section 5(2)(e) of the NLC Act mandates the Commission to manage and administer *all unregistered trust land* and *unregistered community land* on behalf of County Government. Counsel for the Commission for the Implementation of the Constitution submitted that this provision was contrary to the terms of the Constitution. In the case, ***In Re IIEC,*** this Court had held that while exercising its Advisory Opinion jurisdiction, it may undertake the interpretation of the Constitution.

[225] As already noted, land in Kenya is classified as *public, community* or *private*. With regard to "community land", Article 63 provides:

> *"(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.*
>
> *"(2) Community land consists of—*
>
> *(a) land lawfully registered in the name of group representatives under the provisions of any law;*
> *(b) land lawfully transferred to a specific community by any process of law;*
> *(c) any other land declared to be community land by an Act of Parliament; and*
> *(d) land that is—*
> *(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;*

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) land that is lawfully held as trust land by the County Government, but not ***including any public land held in trust by the County Government under Article 62(2).***

"(3) Any unregistered community land is held in trust ***by County Governments on behalf of the communities for which it is held"*** (emphases supplied).

[226] Article 62(2) specifies the categories of public land that vest in county governments. And the NLC Act confers power upon the NLC to administer and manage public land that is vested in County Government. However, "community land", as defined in Article 63(1), has its own place and system of governance; and the land referred to in Section 5 (2)(e) of the NLC Act, is "community land", and not "public land". These distinct definitions of "community land" and "public land", as well as their applicable governance systems as provided in the Constitution, do not require any special professional input, as a basis for interpreting the provisions of Articles 62(2) and (3) and 67 (2) (a). The Commission has no special claim to the remit of administering or managing community land. From the historical background already set out, a recognition of the special character of community land is essential, with attendant cautions in its management. *In our opinion it is necessary for Parliament to make amendments to Section 5(2)(e) of the NLC Act, to bring it into line with the constitutional provisions we have cited.*

- *County Land Management Boards*

[227] Section 18 of the NLC Act provides for the establishment and functions of County Land Management Boards, in the following terms:

> ***"(1) The Commission shall, in consultation and cooperation with the National and County Governments, establish County land management boards for purposes of managing public land.***
>
> ***"(2) A County land management board shall comprise—***
>
> ***(a) not less than three and not more than seven members appointed by the Commission; and***
>
> ***(b) a physical planner or a surveyor who shall be nominated by the County Executive member and appointed by the governor.***
>
> ***...***
>
> ***"(6) The appointment of the members shall be approved by the County assembly and shall take into account the National values referred to in Article 10 and Article 232 of the Constitution and shall reflect gender equity and ethnic diversity within that County.***
>
> ***...***
>
> ***"(8) In the discharge of their functions, the boards shall comply with the regulations made by the Commission under this Act.***
>
> ***"(9) The boards shall:***
>
> ***(a) subject to the physical planning and survey requirements, process applications for allocation of land, change and extension of user,***

subdivision of public land and renewal of leases; and

(b) perform any other functions assigned by the Commission or by any other written law."

[228] The functions assigned to the Board, with regard to the processing of land allocation; change and extension of user; conducting subdivision of land; and renewal of leases—give indications as to the essence of the phrase, "administering and managing public land". The functions undertaken by the Board are ordinarily, the preparatory steps towards acquisition of ownership to land, which culminates in registration and issuance of title by the National Government. It can thus be inferred, that the purpose of the Board is to effect the devolution of land-administration to the counties.

- *The Land Act, 2012*

[229] This Act enjoins the NLC and the Cabinet Secretary responsible for land, to undertake certain functions, for the effective management of land. Sections 6 and 8 of the Act prescribe the functions of the Cabinet Secretary and the Commission, as regards the management and administration of land. These provisions give an impression as to the roles of the Ministry and the NLC, in the management of land. Section 6 thus provides:

"The cabinet secretary shall in relation to the management and administration of land—

(a) develop policies on land upon the recommendation of the commission;

(b) facilitate the implementation of land policy and reforms;

(c) co-ordinate the management of the National Spatial Data Infrastructure;

(d) co-ordinate the formulation of standards of service in the land sector;

(e) regulate service providers and professionals including physical planners, surveyors, valuers, estate agents and other land related professionals to ensure quality control; and,

(f) monitor and evaluate land sector performance."

[230] Section 8 of the Act provides for the role of the Commission in the management of public land, in the following terms:

"In managing public land on behalf of the National and County Governments the Commission—

(a) shall identify public land, prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for survey;

(b) shall evaluate all parcels of public land based on land capability classification, a land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning; and

(c) shall share data with the public and relevant institutions in order to discharge their respective functions and powers under this Act; or

(d) may require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument."

[231] It emerges clearly from the foregoing provisions that *neither the Ministry nor the NLC is in a position to perform its tasks in isolation.* The Ministry is required to develop and facilitate land policies on the basis of advice and recommendations from the NLC; while the land database to be prepared and kept by the NLC has to be geo-referenced and authenticated by the statutory body in charge of survey, which is the Land Surveyors' Board, established under the Survey Act. The officers serving on that Board are appointed by the Public Service Commission, and, by Section 6(e) of the Act, are to be regulated by the Cabinet Secretary, as an aspect of quality control. This is a typical instance in which *it falls to the Executive to exercise check-and-balance upon a different State organ.*

[232] Section 9 of the Act provides for the conversion of land from public to private, and *vice versa,* with a specific provision that any major transaction involving conversion of public land to private land, requires the approval of both the National Assembly and the County Assembly. It is provided as follows:

"(1) Any land may be converted from one category to another in accordance with the provisions of this Act or any other written law.

"(2) Without prejudice to the generality of subsection (1)—

(a) public land may be converted to private land by alienation;

(b) subject to public needs or in the interest of defence, public safety, public order, public morality, public health or land use planning, public land may be converted to community land;

(c) private land may be converted to public land by—

(i) compulsory acquisition;

(ii) reversion of leasehold interest to Government after the expiry of a lease; and

(iii) transfers; or

(iv) surrender.

(d) Community land may be converted to either private land or public land in accordance with the law relating to community land enacted pursuant to Article 63(5) of the Constitution…

(i) Any substantial transaction involving the conversion of public land to private land shall require approval by the National Assembly or County assembly as the case maybe."

[233] Section 9(4) of the Act requires the NLC to keep a register of all conversions of public land, while Section 9(5) allows the NLC to make rules on the process of conversion, in the following terms:

"Under Section 9(5) the Commission may make rules for the better carrying out of the provisions of this Section,

and without prejudice to the generality of the foregoing, the rules may provide for the following—

> ***(a) prescribing substantial transactions requiring approval of the National Assembly or the County Assembly;***
> ***(b) prescribing anything required to be prescribed under this Section;***
> ***(c) regulating and controlling the conversion of land from one category to another;***
> ***(d) prescribing the factors to be applied or taken into account in determining land that is to be converted."***

[234] The provisions of Section 9 (3) and (5) are, further, annexed to sub-Section 7, which requires that such rules be tabled before Parliament for approval.

[235] Under Section 10 of the Land Act, the NLC is empowered to develop guidelines on the management of public land by public agencies and bodies that are in actual occupation, or that use such land. Section 11 further requires the NLC to take measures to maintain such public land as serves as custody for endangered species of flora and fauna, as well as any protected areas.

[236] Section 12 makes general provisions for the manner in which the Commission may allocate public land, on behalf of the National or County Governments. It thus provides:

> ***"(1) The Commission may on behalf of the National or County Governments, allocate public land by way of—***

(a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;

(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;

(c) public notice of tenders as it may prescribe;

(d) public drawing of lots as may be prescribed;

(e) public request for proposals as may be prescribed; or

(f) public exchanges of equal value as may be prescribed.

"(2) ...

"(3) Subject to Article 65 of the Constitution, the Commission shall set aside land for investment purposes."

[237] Section 13 empowers the NLC to renew and extend leases. It is also empowered to make rules on the procedure to be followed, and factors to be considered in the extension of leases, in the following terms:

"(1) Where any land reverts back to the National or County Government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land...

"(2)The Commission may make rules for the better carrying out of the provisions of this Section, and without prejudice to the generality of the foregoing, the rules may provide for the following—

(a) prescribing the procedures for applying for extension of leases before their expiry;

(b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee;

(c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land;

(d) other covenants and conditions to be observed by the lessee."

[238] Section 15 provides that subject to Article 66(1) of the Constitution, the NLC, in consultation with the National and County Governments, may reserve certain public land for a public-interest purpose. Section 19 empowers the NLC to make rules and regulations for the sustainable conservation of land-based natural resources.

[239] Part III of the Act *('administration of public land')*confers upon the Commission further functions related to issuance of leases, licences, and agreements regarding public land.

[240] Section 20 permits the Commission to issue licences for the use of unalienated public land, for a period not exceeding five years, on specified terms and conditions, as follows:

"(1) The Commission may grant a person a licence to use unalienated public land for a period not exceeding five years subject to planning principles as it may prescribe.
"(2)…
"(3) The fee payable under a licence under this Section, the period and the agreements and conditions of the licence, shall be prescribed by the Commission."

And Section 23(2) provides for a grant of public land to be made in the name of the Commission, on behalf of the National or County Government.

[241] It is clear that the responsibility of the NLC to issue licences, leases and grants in respect of public land, is subject to the conditions set out in law. Section 28 provides for the collection of rent charged on the use of land, and requires the NLC to account for the payments received under any lease or licence, to the respective Governments. It is thus provided:

"(1)The rent, royalties and payments reserved under any lease or licence is a debt owed to the Commission and shall be paid at the Commission's office or at such other place as the Commission may prescribe.

"(2) The annual rent reserved under any lease or licence shall be payable in advance on the first day of January in each year of the term.

"(3) The payments made under subsection (2) shall be accounted for to the respective Governments."

These provisions are a clear indication of the constitutional design of decentralising the powers of public governance, within a context of checks-and-balances.

[242] Section 107 (1) of the Act provides that when the National or County Government seeks to compulsorily acquire public land, it is to submit a request for acquisition thereof to the NLC, to acquire the land on its behalf. This further underlines the interdependence of the NLC and the Government; hence the primacy of the principle of co-operation between the two State organs. The Section thus provides:

> ***"Whenever the National or County Government is satisfied that it may be necessary to acquire some particular land under Section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf***."

[243] Section 110(1) specifies that land can only be compulsorily acquired upon certification by the NLC, that such land is required for public purposes, or in the public interest. Section 111(2) requires the NLC to make rules to guide the assessment of just compensation, in relation to the compulsory acquisition of land.

[244] Sections 112 and 113 of the Act require the NLC to make necessary inquiries, and to consider claims for compensation, before allowing compulsory acquisition of land. The Act makes provisions for compensation-inquiry proceedings, in the context of Article 10 (2) of the Constitution. The process of inquiry is to be fair, equitable, transparent and accountable, and is subject to judicial review, in a proper case.

[245] Section 134 empowers the NLC to implement settlement programmes, that provide access to land for shelter and livelihood, on behalf of the National and County Governments; and also empowers the NLC to assist the Governments in the administration of settlement programmes. The Act further establishes the Land Settlement Fund under Section 135, to be administered by the NLC.

[246] The foregoing provisions entrust the NLC with the responsibility of protecting and overseeing the public's rights and interest, under the Constitution. However, *the NLC's mandate in that regard is not held single-handed, and is not unqualified: provision is made for approval from the National Assembly; and the consent of the National Government, or relevant County Government. This provides a check-and-balance, to ensure that the NLC operates within the prescribed limits*.

- *The Land Registration Act, 2012*

[247] The Land Registration Act confers various powers upon the Registrar of Land, the Cabinet Secretary, the NLC, and other named officers. It is necessary to outline the scope of such powers, and their mode of conferment.

[248] In relation to the creation of registration units, Section 6 (1) of the Act thus provides:

> ***"For the purposes of this Act, the Commission in consultation with National and County Governments may, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units."***

[249] The NLC is thus empowered to establish registration units, and to determine the span of each registration unit; but it does so only in consultation with the National or County Government. The NLC, it follows, has to make consultations with the National Government or the County Government, as the case may be, as to the areas to be covered in each of the registration units to be gazetted.

[250] The Act provides that such registration units shall be divided into Sections, which may be further divided into blocks having distinctive numbers, or letter-denominations, or combinations of both. The Act empowers the officer responsible for land survey to combine or divide the registration sections, or blocks, or cause their boundaries to be altered. Section 6(4) thus provides:

> ***"The office or authority responsible for land survey may, at any time, cause registration Sections or blocks to be combined or divided, or cause their boundaries to be varied, and immediately inform the Registrar of the changes."***

[251] Of relevance in this regard, is the Survey Act (Cap 299, Laws of Kenya), which establishes the Land Surveyors' Board, chaired by the Director of Surveys. Section 22 of that Act thus provides:

> ***"Any survey of land for the purposes of any written law for the time being in force relating to the registration of transactions in or of title to land (other than the first registration of the title to any land made in accordance with the provisions of the Land Consolidation Act (Cap. 283) or the Land Adjudication Act (Cap.284)) shall be***

carried out under and in accordance with the directions of the Director."

[252] The Survey Act authorizes the Director of Surveys to delegate his or her powers to another officer or officers, though this by no means divests him or her of such powers. Section 3 (3) thus provides:

"The Director may delegate in writing all or any of his powers, duties or functions under the provisions of this Act, or of any regulations made thereunder, either generally or specially to any officer appointed under subsection (1) of this Section and may at any time revoke or vary any such delegation:

Provided that no such delegation shall be deemed to divest the Director of all or any of his powers, duties or functions, and he may, if he thinks fit, exercise and perform such powers, duties and functions notwithstanding the fact that he has so delegated them."

[253] Thus, the Director of Surveys, or his or her delegate, is the officer vested with the powers conferred by Section 6(4) of the Land Registration Act. It is to be noted that the officers under the Director of Surveys are appointed by the Public Service Commission. The effect of the said provisions is that the NLC determines which area will fall within a given registration unit, as well as the registration sections and blocks that will be established within that unit. However, the officer in charge of survey may vary or alter the boundaries of these sections or blocks, thereafter informing the Registrar of the changes made. Such officer, it is clear, has not been authorised to vary the boundaries of the registration unit itself. It goes to confirm that the relationship between the NLC and the National and County Government is one of *mutual co-*

operation, co-ordination, and consultation. The functions of these constitutional organs are complementary, and no organ may purport to carry on its operations in isolation. This element is a recurring theme, throughout the Act.

[254] It is to be noted, for instance, that Section 7 of the Act requires that a land registry be maintained in every registration unit, in which a land register is to be kept, together with other relevant documents. The relevant provision thus reads:

> ***"There shall be maintained in each registration unit, a land registry in which there shall be kept—***
>
> ***(a) a land register, in the form to be determined by the Commission..."***

[255] The NLC's role in this respect is to determine the form of the land register. However, the obligation to establish the land registry rests with the Public Service Commission and the Cabinet Secretary. This arises from the wording of Section 7 (3), which states that—

> ***"In establishing the land registry, the Public Service Commission and Cabinet Secretary, shall be guided by the principles of devolution set out in Articles 174 and 175 of the Constitution."***

[256] The Act also requires that a community land register be maintained by the Registrar, in addition to the land register. However, the community land register shall not include unregistered community land, held in trust by County Governments on behalf of communities under Article 63(3) of the Constitution.

[257] It emerges from Section 9 of the Act that it is the Registrar's role to maintain the register, as well as any other document required to be kept under the Act, making them accessible to the public.

[258] The Public Service Commission is empowered to appoint a Chief Land Registrar and other public officers to discharge functions under the Act. Section 12 thus provides:

> ***"(1) There shall be appointed by the Public Service Commission, a Chief Land Registrar, and such other officers who shall be public officers as may be considered necessary for the effective discharge of functions under this Act.***
>
> ***"(2) Any officer appointed under this Act shall be competitively recruited and vetted by the Public Service Commission."***

[259] It follows that the NLC's officers who ensure the taking and implementation of its decisions, are appointees of the Public Service Commission. The powers exercised by Land Registrars are set out in Section 14 of the Act, as follows:

> ***"The Chief Land Registrar, County Land Registrars or any other land Registrars may, in addition to the powers conferred on the office of the Registrar by this Act—***
>
> ***(a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;***

(b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;

(c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;

(d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and

(e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit."

[260] Section 15 of the Act empowers the officer or authority responsible for the survey of land, to prepare and maintain a map or series of maps, to be known as the cadastral map, for every registration unit. It is to be noted that the officer in charge of survey of land is the Director of Surveys, or his or her delegate, appointed under the Survey Act.

[261] The officer in charge of survey may make alterations to any boundary on the cadastral map, in accordance with the law. He/she may rectify the line or position of any boundary on the cadastral map, acting on the written instructions of the Registrar.

[262] The officer in charge of survey is required, under Section 17(3) of the Act, to submit a copy of the cadastral maps to the NLC. This Section stipulates that the NLC shall be a depositary of the maps. However, the Registrar is not precluded from maintaining separate records of the cadastral information and maps.

[263] The Registrar is further authorized under Section 19, to indicate on a field plan approved by the officer in charge of survey, or to define in the Register, the precise position of the boundaries of a parcel of land. The Registrar is empowered under Section 20, to order in writing the demarcation of any boundary mark, and to determine which of two adjoining proprietors of land shall be responsible for the care and maintenance of any feature demarcating a common boundary. The Registrar is also empowered under Sections 22 and 23 of the Act, to combine, divide, or effect re-parcellation upon parcels of land, in accordance with the law.

[264] The Cabinet Secretary is empowered under Section 36 (3) of the Act, to prescribe the terms and conditions of sale of land. Section 36 (4) further provides as follows:

> ***"Subject to Article 67(2)(c) of the Constitution, the Cabinet Secretary shall make regulations prescribing the time within which instruments presented for registration must be registered and providing for the supervision of the registration process to achieve the objectives of efficiency, transparency and good governance."***

[265] The Cabinet Secretary, while undertaking these functions, is to take into consideration the advice of the NLC, on the comprehensive programme for the registration of title to land in Kenya, in accordance with the Constitution. Article 67 (2) (c) of the Constitution thus provides:

> ***"The functions of the National Land Commission are—***
>
> ***.....***
>
> ***(d) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya..."***

[266] The Registrar is required, in the course of transfer or lease of land, to ensure that the rates, rents and other charges payable to the relevant authorities have been paid, before registering any instrument purporting to transfer or lease the land. Section 38 (1) stipulates:

> ***"The Registrar shall not register any instrument purporting to transfer or to vest any land, a lease of land, situated within the area of a rating authority, unless a written statement by the relevant Government agency, certifying that all outstanding rates and other charges payable to the agency in respect of the land including rates and charges for the last twelve months and up to the date of request for transfer have been paid,... is produced to the Registrar."***

[267] Similarly, Section 39 provides:

> ***"(1) The Registrar shall not register an instrument purporting to transfer or create an interest in land, unless a certificate is produced with the instrument,***

certifying that no rent is owing to the National or County Governments in respect of the land.

"(2) The Registrar shall not register an instrument effecting a transaction unless satisfied that any consent required to be obtained in respect of the transaction has been given by the relevant County Land Management Board on the use of the land, or that no consent is required."

And Section 55 specifies that—

"If a lease contains a condition, express or implied, by the lessee that the lessee shall not transfer, sub-let, charge or... part with the possession of the land leased or any part of it without the written consent of the lessor,... the dealings with the lease shall not be registered unless—

(a) the consent of the lessor has been produced to, and authenticated to the satisfaction of the Registrar and the Registrar shall not register any instrument purporting to transfer or create any interest in that land; and

(b) a land rent clearance certificate and the consent to the lease, certifying that no rent is owing to the Commission in respect of the land, or that the land is freehold, has been produced to the Registrar."

[268] Section 38 of the Act relates to land that falls within the area of a County authority; Section 39 relates to land rents owing to the National or County Governments; while Section 55 requires that a land-rent clearance

certificate, and consent to the lease, showing the full payment of rent for the land to the Commission, be produced before the Registrar. The requirement of consent operates as a check on the exercise of power by the Registrar, allowing the registration of an instrument that effects a transaction on public land.

[269] Under Section 74 (4) of the Act, the Registrar is vested with the power to rectify the register, or any instrument presented for registration in certain specified circumstances. As a check-and-balance scheme on this exercise of power, the NLC is authorized to make regulations prescribing the guidelines to be followed by the Registrar, before effecting, or directing a rectification.

[270] In the event that any question arises with regard to the exercise of the powers conferred upon the Registrar, or in relation to the performance of the duties imposed, the Registrar, or an aggrieved person, may state a case for the opinion of the Environment and Land Court. In this regard, Section 86 provides as follows:

> ***"(1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties."***

[271] This provision restricts the Registrar to his or her mandate, any failure in this regard being the subject of judicial restraint. Any person aggrieved by the Registrar's exercise of power, or mode of discharge of duty, may seek recourse to the Court, this serving as a check-and-balance on the Registrar.

- *To "administer", and to "manage"*

[272] In a previous Ruling on the subject of this Advisory Opinion Reference, this Court had thus depicted the relevant question:

> ***"What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Land, Housing and Urban Development, on the other hand – in the context of Chapter Five of the Constitution; the principles of governance (Chapter 10 of the Constitution); and the relevant legislation?"***

[273] It is plain that at the heart of the Reference before the Court is the issue of 'land administration and management', which arises from the wording of Articles 62(2) and 67 (2)(a) of the Constitution. These Articles have expressly stipulated the mandate of the NLC. Article 62 (2) provides that:

> *"Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be* ***administered*** *on their behalf by the National Land Commission…"* (emphasis supplied);

while Article 67(2) states that:

> *"The functions of the National Land Commission are—*
> *(a) to* ***manage*** *public land on behalf of the National and County Governments…"* (emphasis supplied).

[274] The interpretation of the terms 'manage' and 'administer', as applied by these two Articles of the Constitution, is inescapable—and especially so because, the same terms are replicated in the NLC Act, the Land Act and the

Land Registration Act, which are the primary statutes dealing with *land management and administration* in Kenya.

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

[276] The Constitution itself provides a guide as to how it is to be interpreted. Article 259 (1) states:

> ***"This Constitution shall be interpreted in a manner that—***
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance."***

[277] This Court has previously held that constitutional interpretation has its distinct features, as compared to ordinary statutory interpretation: the former consistently exalting substance and intent, rather than form. In ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011; [2012] eKLR, the Court held (paragraph 86) as follows:

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20 (4) and 259 (1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction... The values and principles***

articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."

[278] The Court thus recognised the place of the *key motions in society, that express themselves in broad values and principles, as relevant considerations in constitutional interpretation*. The Court observed (paragraph 89) as follows:

"It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation."

[279] The Court of Appeal has similarly held, in ***Law Society of Kenya v. Centre for Human Rights and Democracy & 13 Others,*** Civil Appeal No. 308 of 2012; [2013] eKLR, that when interpreting the Constitution the first point of reference is *'the interpretative blueprint set out in Article 259'*. The Court *(Kiage JA)* thus held:

"I have taken the view, consistent with a long line of authorities, that when it comes to interpreting the

Constitution, the proper approach is first a faithful adherence to the interpretative blueprint set out in Article 259 …"

[280] The Appellate Court *(Otieno-Odek JA)* reinforced that position thus:

"Article 259 of the Constitution provides guidelines on how to interpret the Constitution. It is stipulated that the Constitution should *inter alia* ***be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law and contributes to good governance."***

[281] The Constitution is to be interpreted in *a holistic manner, that entails reading it alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question.* The Supreme Court, in the ***Gender Rule*** case, thus observed (paragraph 83):

"We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution."

[282] In ***In the Matter of Kenya National Commission on Human Rights*** Sup. Ct. Reference No. 1 of 2012, [2014] eKLR, the Supreme Court considered the meaning of "a holistic interpretation of the Constitution," as follows (paragraph 26):

"But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

[283] The Courts have consistently affirmed that a holistic interpretation of the Constitution calls for the investigation of the historical, economic, social, cultural and political background of the provision in question. It was so held by the Supreme Court in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others,*** Petition Nos. 14, 14A, 14B. & 14C of 2014 (Consolidated) [2015] eKLR, (paragraph 137), in which the Court states that *"the Constitution should be interpreted in a holistic manner, within its context, and in its spirit."* The Court in interpreting the Constitution took into consideration the historical, economic, social and political background of the Articles it had been called upon to interpret; and it thus held (paragraph 156):

"As the historical, economic, social, and political background to these fundamental Articles 4(2), 33, 34, and 35 of the Constitution is narrated and analyzed the reasons behind their content must become very clear. That background also illuminates the fundamental rights in Article 34 of freedom of establishment, and independence of the media. It has also demystified and

deconstructed the words independent of control by Government, political interests, or commercial interests in Article 34 within their historical, socio-economic contexts of Kenya."

[284] Such a recognised tempo in the scheme of constitutional interpretation is well reflected in *Mutunga, CJ & P's* concurring opinion in the ***Senate*** case (paragraphs 156 and 157):

"The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. ***The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that constitutions born out of long-drawn compromises, such as ours, tend to create. The Constitutional text and letter may not***

properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras" [emphasis supplied].

[285] The Court, thus, has to take into account the historical background of land issues in Kenya, that necessitated the establishment of the NLC, and the mischief that the NLC was intended to cure in the allocation of public land.

[286] The term 'land administration' is only defined in the Land Registration Act. As regards "disposal or other usage of land", the Constitution provides [Article 62(4)] that *"public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."* It is apparent that "disposal or any usage of public land" is a phrase to be viewed in line with the various Acts of Parliament enacted pursuant to Chapter Five of the Constitution.

[287] The Land Registration Act defines "land administration" as the process of determining, recording, updating and disseminating information about the ownership, value and use of land. Part II of the Land Registration Act, which is entitled 'organisation and administration', describes the whole process of registration of title.

[288] By the relevant provisions under Part II of the Land Registration Act, the process of registration is undertaken by various agencies, starting with the NLC, establishing the registration units; and culminating with the Registrar, registering the title documents. Of interest is Section 6(6), which stipulates

that**,** *"the land registration units shall be established at County level and at such other levels to ensure reasonable access to* ***land administration and registration services*****"** [emphasis supplied].

[289] The foregoing sub-Section separates the role of "land administration" from "registration", notwithstanding that the term "land administration" has a wider meaning under the Act, which suggests the inclusion of functions of registration of title. As implementation is of the essence, we are of the view that a definition on its own, does not confer any definite category of power; only by a substantive provision in the relevant Act, can a specific head of power be vested upon any agency. As observed in para. 287, the position is that, under the Land Registration Act, the NLC has *no power to register title documents*.

[290] We recall that neither of the other statutes have defined the term "management", or "administration". Consequently, the meaning of the two terms can only be inferred from the context within which they have been used. For instance, Section 8 of the Land Act is prescriptive of the management role of the NLC. It should also be noted that the Section falls under Part II of the Act, entitled '*management of public land':* and this gives additional functions to the NLC, separate from those listed under Section 8. These roles include *identifying public land; keeping a database of all public land; sharing of data; and land mapping*, among others. The Act also prescribes the roles to be performed by the *Cabinet Secretary,* with regard to *the management and administration of public land.*

[291] It is proper to observe, thus, that the Land Act substantively addresses the 'management' function of the NLC. This is because it establishes mechanisms with a bearing on interests in public land. This is consistent with the intention of a variety of public documents, and of the Constitution—that of establishing an independent institution that will, in consultation and co-

operation with the National and County Governments, supervise dealings in public land.

[292] Now as regards the NLC Act, it was established to, *inter alia,* provide for the *management and administration of public land;* The roles of the NLC, according to the NLC Act, are in tandem with its roles in the Land Act. These include: *allocation of land; disposing of public land; leasing and effecting change of user.* These roles are the *preparatory steps towards registering a title*. Neither of the two statutes gives the NLC the function of *registration of title*, in express terms.

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

- *The NLC, National and County Governments: Relationship of Agency?*

[294] Mr. Kilukumi, learned counsel for the 2nd Interested Party, urged that the relationship between the NLC and the National Government is one of *agency:* since NLC's mandate is to manage and administer public land "on

behalf of" the National and County Government, in the terms of Articles 62(2) and 67 (2)(a) of the Constitution.

[295] According to the ***Concise Oxford English Dictionary,*** "on behalf of" means:

> "1. In the interests of a person, group, or principle
> 2. as a representative of.
> 3. on the part of; done by."

[296] Roderick Munday, in his book *Agency Law and Principles* (Oxford: Oxford U.P., 2010), cites the American Law Institute's *Restatement of the Law – Agency,* which defines agency as *"the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act."*
He observes that 'agency' has certain distinctive legal traits:

> ***"...agency is a fiduciary relationship; that in most instances the relationship between principal and agent will be consensual, very often contractual: and that the agent's role is to act on behalf of the principal."***

[297] Munday, observes that agency is a fiduciary relationship, and he makes further remarks as follows:

> ***"... a principal places the agent in a position of trust, empowering the latter to act for him and to alter his legal relations with third parties, the agent owes his principal 'single-minded loyalty'. In short, the agent is***

a fiduciary and, alongside any obligations the agent may owe the principal in contract or otherwise, the agent is also subject to the conventional, strict equitable duties owed by fiduciaries: a duty not to allow his interests to conflict with those of the principal, a duty to make disclosure, a duty not to take advantage of his position, a duty not to take bribes or a secret commission, a duty not to delegate his office, and a duty to account."

[298] Robert W. Emerson in his book, *Business Law* 5th Ed. (2009), remarks that an agent acts in a fiduciary capacity to his/her principal. He sets out the fiduciary duties of the agent to the principal as follows: the duty to obey the instruction of the principal; the duty to act with skill; the duty to avoid conflict of interest (duty of loyalty); the duty to protect confidential information; the duty to account; and the duty to notify the principal of all relevant information useful to the principal.

[299] Now considering the matter before this Court, it is by no means apparent that any of the modes of creation of agency has arisen, resulting in an agency relationship between the NLC and the National Government. Besides, the NLC is an independent commission in the terms of Article 248(1)(b), as read with Article 249(2) of the Constitution, and with the provisions of the relevant statutes. The NLC is not subject to direction or control by any person or authority; and it cannot, thus, be considered an agent of the National or County Government, in the legal sense.

[300] We are of the opinion that the relationship intended between the NLC on the one hand, and the National and County Government on the other, does not lend itself to the agency template; rather, it is a straightforward constitutional relationship, in the public-law mode.

F. CONCLUSION

[301] Apprehensions of social, economic and political mischief associated with Kenyan land history, were a vital factor in the dynamics of land reform. This explains the concern to institute a public entity with a land-resource mandate, independent of the hand of central government. It also explains the desire to decentralise the land-management system, and to establish checks-and-balances in that regard.

[302] This is by no means a unique historical path. We may, indeed, learn from the comparative experience. Ireland is an example in which the land-management mandate had been vested in one entity, to discharge in the public interest. The Irish Land Commission was established in 1881, with the narrow mandate of fixing rent-charges. But the Commission later stretched out its mandate, and was able to effect a transfer of some 450,000 acres of land from landlords to small-scale tenants, in a populist undertaking which gave it considerable clout, as the true agent of social engineering. It continued to extend its powers into other spheres, including those of different kinds of securities. This made the Commission unpopular; and it was dissolved, with the passage of the Irish Land Commission (Dissolution) Act, 1992. Its assets and liabilities were transferred to the Central Government's docket with the Minister for Agriculture, Food and Marine Affairs.

[303] The run-up to such radical change had been marked by certain notable developments: the Commission had become an overseer of land matters, and the adjudicator and dispenser of the land-resource; and in the discharge of such tasks, *corruption* had become commonplace, among inspectors and officials.

[304] In Kenya's history, there had been no land commission, as was the case in Ireland. Rather, the Commissioner of Lands and the President had

monopolised the powers to manage, and to dispose of land. This led to large-scale *corruption*. Therefore, through the 2010 Constitution, the people established the NLC to deal with public land. However, unlike in Ireland, *not all the functions relating to land were vested in the NLC; the Land Ministry still had a role to play.*

[305] The highlight of the Kenyan land-resource regime, under the Constitution and the statutory framework in place, is the governing principle of *checks-and-balances,* which regulates in particular, the relationship between the NLC and the Central Government through its relevant Ministry. *Check-and-balances,* which alongside the *safeguards for fundamental rights,* are the special feature of the Constitution of Kenya, 2010, are required to be maintained, and accorded effect, by all State organs, as they discharge their respective mandates.

[306] It emerges from the foregoing account that the NLC's mandate, which is *required to function in a collaborative and consultative constitutional and legal setting,* belongs squarely to the mechanism of *checks-and-balances*, rather than that of an isolated fourth arm of government, entrusted with tasks unrelated to those falling under the dockets of other State organs. Indeed, the neat paradigm of a fourth arm of government appears not to be in the contemplation of the Constitution of Kenya, 2010 which specifies [Article 1(3)] *that the people's sovereign power devolves to just three vital State organs: the Executive; the Legislature; and the Judiciary and independent tribunals.*

[307] *The Constitution's mandate falls to the three State organs, in an operational context of check-and-balances: and the various Commissions act as oversight and watchdog mechanisms. Hence, each of the functions of the NLC and the Ministry stands to be checked by the one or the other, in order to avoid abuse of power in matters relating to land.* The unchanging theme throughout the Constitution, is that the relationship between these two bodies is *inter-dependent,* and based upon *co-operation*; it is not an agency relationship. As the Ministry conducts its functions, the NLC acts as a

watchdog, to ensure compliance with the Constitution, and with legislation. Likewise, *the NLC as an oversight body, maintains its functional, financial and operational independence, while still being overseen and checked by the public, by other independent offices, and by the three arms of government.*

[308] The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in Article 10 of the Constitution: in particular, *the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability.* It is to be noted that, the very essence of checks-and-balances touches on the principles of *public participation, inclusiveness, integrity, accountability and transparency;* and the performance of the constitutional and statutory functions is to be in line with values of *integrity, transparency, good governance and accountability*. In view of the troubled history of land in Kenya, the NLC and the Ministry have to involve the public when carrying out their functions. Only through public participation is it possible to realize the principles of land policy, as set out in Article 60(1), which provides:

> ***"Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in Constitution of Kenya*** *accordance with the following principles—*
>
> *(a) equitable access to land;*
> *(b) security of land rights;*
> *(c) sustainable and productive management of land resources;*
> *(d) transparent and cost effective administration of land;*
> *(e) sound conservation and protection of ecologically sensitive areas;*

(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and

(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution" [emphasis supplied].

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

[310] Falling within that broad opinion are more limited sub-sets—an important one being this: ***The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government.***

[311] That the Ministry of Land is the special entity with authority to register and issue land title, in this Court's opinion, bears restating. Land title, by its singularity as the mark of entitlement to landed property, is the ultimate expression of a vital property right, quite apart from being the very reference-point in numerous financial and business transactions—national and

international. On that account, *the sole national repository to issue, and to guarantee the validity and integrity of title, is the central State machinery, as a player on the international plane, acting through the Executive organ.*

[312] As already noted herein, the various statutes relating to land are not in all cases consistent among themselves; and in some cases they have been framed with imprecision, and without a clear reflection of the relevant principles of the Constitution. We recommend that ***the complete set of land-related statutes, be placed before the Honourable the Attorney-General, and before the Kenya Law Reform Commission, for a detailed professional review, in the context of this Advisory Opinion.***

[313] In the course of rendering this Advisory Opinion, we have considered the mandates of the NLC as set out in the Constitution [Article 67(2) (d), (e) and (f)]. These are: conducting research on land issues and on natural resources—with appropriate recommendations to certain agencies; initiating inquiries into historical land grievances—and recommending courses of redress; promoting traditional methods of resolving land conflict.

[314] From those provisions, it is clear to us that the NLC bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented. As regards such functions, the NLC, on the basis of clearly-formulated statutes, should be able to design a clearly-structured agenda for regular operations and *inter alia*, should seek to devise a well-focussed safeguard-mandate in relation to land issues.

[315] *Co-operation and consultation with other State organs will be important, in identifying, and defining urgent tasks on the NLC's agenda.* And "consultation" in this regard, is aptly defined in comparative judicial experience, in the English case, ***Agricultural, Horticultural and Forest***

Industry Training Board v. Aylesbury Mushrooms Ltd. [1972] 1 All ER. 280 (at p. 284):

> *"The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation."*

[316] As we believe our advice to be clear enough, we should recall its effect in law, as this Court has stated on an earlier occasion, in ***In Re IIEC*** (paragraphs 92 and 93):

> *"All these aspects of the Constitution are critical, in considering the effect of an Advisory Opinion. We, therefore, hold that an Advisory Opinion, in this context, is a 'decision' of the Court, within the terms of Article 163(7), and is thus binding on those who bring the issue before the Court, and upon lower Courts, in the same way as other decisions.*
>
> *"In our discussion of the advisory jurisdiction, we have adopted a circumscribed mandate in relation to the exercise of that jurisdiction. From such a reserved position, and in view of the pragmatic and discretionary nature of the mandate as we conceive it, we perceive that the Supreme Court's decisions in this domain may significantly touch on legal, policy, political, social and economic situations. On this account, it is inappropriate that the Supreme Court's Advisory Opinion should be sought as mere*

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

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

[318] Apart from considering the main issue raised in this Reference, we have taken a side glace at the other constitutional mandates reposed in the NLC: recommending a national land policy to the National Government; advising the National Government on a comprehensive programme for the registration of title to land, throughout Kenya; conducting research related to land, and to the use of national resources—and making recommendations to the appropriate authorities; initiating investigations (on its own initiative or upon a complaint) into present or historical land injustices, and recommending appropriate redress; encouraging the application of traditional

dispute-resolution mechanisms in land conflicts; assessing tax on land and premiums on immovable property in any area designated by law; and monitoring, and asserting oversight responsibilities on land-use planning, throughout the country. *It is our Opinion that the NLC should, upon priority, and with the essential consultations and co-ordinations, formulate a structured scheme of operations which provides not only for the broadly-defined mandate of "managing public land" [The Constitution, Article 67(2)], but also for the specific national-interest mandate, as well as the charges herein specified.*

G. THE CONCURRING OPINION OF MUTUNGA, CJ & PRESIDENT

[319] I have read the main opinion and I agree with the analysis of the advisory opinion and its conclusion. I write separately in this concurring opinion to buttress and expand the opinion on an issue canvassed in the reference, namely, the value and principle enshrined in Article 10(2)(a) of the Constitution- *the participation of the people*. It is worth noting that the text of the Constitution applies the term 'participation of the people', as well as 'public participation'; hence I will use them interchangeably.

[320] In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens

have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation.

[321] The advisory opinion in its comprehensive detail and analysis lays bare the constitutional and legal parameters of the concepts of independence, and checks and balances, in the implementation of the Constitution. Without massive participation of the people, the realization of these pillars of good governance could become weak, and subject to manipulation by the forces of the *status quo*. It is critical that the apex Court takes this opportunity to deconstruct and demystify the participation of the people, as a great value and principle in our Constitution, so that its application and implementation is vitalized, and becomes readily implementable in the development of our democracy, governance, and the rule of law.

[322] In Kenya's colonial era, the participation of the people was not a central principle of governance. This situation was pervasive in many spheres, including land administration. The Executive made decisions concerning land without consulting the people, or interested parties. This policy was continued even after independence. The *Constitution of Kenya Review Commission Report, 2005* (CKRC report) notes (page 47) that historically, the Constitution-making process was reserved for the elite. It states further that in the contemporary transformative constitutions that strive to promote democracy and good governance, the participation of the people is placed at the forefront. This has meant that the role of experts in the Constitution-making process has been radically transformed, to include listening to the people, and translating their views into constitutional terms.

[323] Particular features of public participation in the Constitution-making process involved civic education, community engagement, and consultation with groups that were interested in, or would be affected by the inclusion of certain provisions in the Constitution. Such categories included secular and religious groups, civil society, racial and ethnic communities, politicians, different occupations and classes in society, women, the youth, and all marginalized groups. The CKRC report and the *Committee of Experts Report, 2010* indicate that public participation had to be incorporated into the new Constitution as a national principle.

[324] The 2010 Constitution aptly captures the will of the people, and the importance of the participation of the people. The inaugural line (*"We, the people of Kenya")* in the Constitution, reflected in the Preamble, introduces the vision of the people. Unlike the independence Constitution that failed to articulate the history and struggles of the people, the 2010 Constitution integrates this history, and the people's views. The Preamble further acknowledges that the people adopt and enact the Constitution while "*recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law*" and "*exercising [their] sovereign and inalienable right to determine the form of governance of [their] country and having participated fully in the making of this Constitution*."

[325] This robust recognition of the prominence of the participation of the people in the making of the Constitution is reinforced in Article 1, which declares the sovereignty of the people. Article 1(1), (2) and (4) states that—

> *"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.*

"(2) The people may exercise their sovereign power either ***directly or through their democratically elected representatives…***

"(4) The sovereign power of the people is exercised at–

(a) the national level; and

(b) the county level" (emphasis supplied).

[326] Article 1(1) decrees that the Kenyan people govern the country in accordance with the Constitution. Article 1(2) provides the manner in which the people may govern: either *directly or indirectly, through their democratically elected representatives*. Governance through democratically elected representatives is the commonly recognised form of indirect participation of the people, also known as political participation. The people may also directly participate in governance structures in the country through consultation and involvement in the decision and policy-making processes within the arms of the State, State organs, the national and county governments, as well as commissions and independent offices. There are also instances in which public participation does not depend on the State, and the State becomes relevant only when called upon to protect the rights of the people.

[327] This direct exercise of sovereign power by the people is crucial in the administration and management of land in Kenya. Land is a fundamental resource for the material and cultural livelihoods of the people. The State, for example, through civic education, could ensure that participation of the people takes place on matters concerning land. This is because, ultimately, any decisions made concerning land will affect them and, although the National Land Commission (NLC) or the Ministry of Lands may make information on land available, the public ought to be educated on how to access the information and participate in consultation processes on land matters

affecting them. Public participation may also take an indirect form, where the national and county Legislatures are mandated to enact legislation on land laws. That those Legislatures are to involve the people they were elected to represent, in law-making processes, is a matter of accountability, and of enrichment of the voices of the people.

[328] Article 1(4) further stipulates that the sovereignty of the people will be exercised at the national and the county level. This means that the participation of the people is not centralized at the national level, because those at the county level should also be accorded the opportunity to have their say on matters concerning land. These provisions signal that a key feature in governance is that the participation of the people is not just a textual principle, that adorns our Constitution; it is a principle that ought to be practically exercised and realized by State organs, government, the public, and other stakeholders. The Legislature has already enacted the County Governments Act No. 17 of 2012 (County Governments Act) to give effect to public participation; and the Government must strive to develop additional policies and guidelines regarding this principle.

[329] The principle of the participation of the people, as provided in Article 10(2)(a), is not repeatedly mentioned in the Constitution. It is firstly classified as a national value and principle under Article 10(2)(a) of the Constitution; and secondly, in Article 174(c) and (d) it is listed as an object of the devolution of government, as follows:

> ***"The objects of the devolution of government are—***
>
> > ***(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.***

(d) to recognise the rights of communities to manage their own affairs and to further their development."

[330] On the contrary, the term 'public participation' is mentioned several times in the Constitution. Under Article 69(1)(d) of the Constitution, which deals with the environment and natural resources, the State is commanded to "*encourage public participation in the management, protection and conservation of the environment."* Article 118(1) also provides for Parliament's rules and procedures—specifically, public access and participation. It places a mandatory duty upon Parliament to*"(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*" This provision is replicated in Article 196, with respect to the County Assembly. Article 201(a) also lists public participation as one of the guiding principles in public finance. It reads:

"The following principles shall guide all aspects of public finance in the Republic—

(a)there shall be openness and accountability, including public participation in financial matters."

Furthermore, one of the values of public service listed under Article 232(1)(d) of the Constitution, is the *involvement of the people in policy making*. These constitutional provisions represent an all-rounded inclusion of the people in the democratic process.

[331] Parliament enacted the County Governments Act to give effect to public participation, as required by Article 196 of the Constitution as read with the

Fifth Schedule. The Fourth Schedule to the Constitution, in Part 2(14), also states that the functions and powers of the County government include:

> ***"Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level."***

[332] *So, who constitutes the public?* Section 3 of the County Government Act defines 'the public' broadly, in relation to public participation:

> ***"(a) the residents of a particular county;***
> ***(b) the ratepayers of a particular city or municipality;***
> ***(c) any resident civic organisation or non-governmental, private sector or labour organization with an interest in the governance ofa particular county, city or municipality;***
> ***(d) non-resident persons who because of their temporary presence in a particular county, city or municipality make use of services or facilities provided by the county, city or municipality."***

[333] Sections 91, 95 and 96 of the County Governments Act further provide for the establishment of modalities and platforms for citizen participation, county communication framework, and access to information respectively. Section 92(2) makes provision for an accountability mechanism to ensure that civic education takes place. It states that the County Governor must submit to the County Assembly an annual report on citizen participation in the affairs of

the county. Section 100(1) also requires each county to implement an appropriate civic education programme, and establish a civic education unit.

[334] The Constitution does not define the principle of participation of the people, or public participation. The County Governments Act, which provides for public participation, also does not define "public participation." A possible point of reference for the definition is, therefore, the *Public Service Commission's Guidelines for Public Participation in Policy Formulation,* 21st January 2015 (page 1), which defines public participation thus:

> ***"the deliberative process by which citizens, civil society organisations, and government actors are involved in policy making and implementation before decisions are made."***

[335] Public participation is also defined in the *Draft Public Participation Guidelines for County Governments* as follows (page 5):

> ***"Public participation for purposes of these guidelines is the community based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision making processes in policy, legislation, service delivery, oversight and development matters. It is a two way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision making and is responsive and accountable to their needs."***

[336] This Court has in the past, in a different context, considered the principle of the participation of the people (see ***Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others*** Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR, and ***Speaker of the Senate & another v. Attorney General & 4 others*** Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR). We, therefore, have the elements of a definition, such as may be applied to the management and administration of land in Kenya. In order to achieve efficient land administration and management, the national and county governments; the arms of government; and the commissions and independent offices, must conduct meaningful consultation, communication, and engagement with the people.

[337] Essentially, Article 61(1) of the Constitution provides that *all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*. So it is mandatory to involve the people in the decision-making process, regarding such a valuable national resource as land. Of critical importance is the involvement of people in areas where land is yet to be registered, thus becoming a commodity. The consequences of private ownership of land need to be made clear to peasants and pastoralists who may want to preserve their communal land tenure. The Constitution decrees no less, when it categorizes land as public, private, and communal.

[338] In this Court's decision in ***Communications Commission of Kenya and 5 Others v. Royal Media Services and 5 Others*** Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR, we examined public participation in the context of sustainable development, with regard to the following national resources—spectrum; the airwaves; and other forms of signal distribution. We held the view (paragraphs 379 and 381) that:

> ***"It is clear that sustainable development under the Constitution has the following collective pillars: the sovereignty of the Kenyan people;*** *gender equity and equality; nationhood; unity in diversity; equitable distribution of political power and resources; the whole gamut of rights; social justice; political leadership and civil service that has integrity; electoral system that has integrity; strong institutions rather than individuals; an independent Judiciary, and fundamental changes in land.* ***Public participation is the cornerstone of sustainable development and it is so provided in the Constitution.***
>
> ***...***
>
> ***"Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights*** *are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of the Constitution would both be subverted"* (emphasis supplied).

We proceeded to classify public participation as one of the foundations of patriotic commitment (paragraph 382).

[339] In the case of ***Speaker of the Senate & another v. Attorney General& 4 others*** Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, this Court also analysed the role of the participation of the people with regard

to devolution and the decentralisation of power. We pronounced ourselves thus (paragraph 136):

> *"The mandate of governance established by the people is defined by particular concepts, principles and values. One of these is devolution ...*
>
> *The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences ...The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment,* ***through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfilment to the concept of democracy"*** (emphasis supplied).

[340] The High Court has time and again examined the principle of public participation. In the case of ***Thuku Kirori & 4 Others v. County Government of Murang'a*** Petition No. 1 of 2014; [2014] eKLR, *Ngaah J.* analysed the concept of public participation and held:

> *"My understanding of the concept of public participation as contemplated under Articles 10 and 174 of the Constitution is that* ***the participation of the public in affairs that concern them should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals who are out to rip maximum profits out of services for which they are neither registered nor qualified to offer; the ultimate goal for public***

> ***engagement as envisaged in the constitution is for the larger public benefit.*** *In my view such benefit would include a county government's provision of the basic infrastructure at a minimum cost for the economic empowerment of its people; this is certainly consistent with the national values and principles of governance enshrined in Article 10 2 (d) of the Constitution and the actualisation of the promotion of social and economic development which the same Constitution subscribes to in Article 174 (f) thereof"* (emphasis supplied).

[341] Cases touching on the environment and natural resources have examined the duty placed upon State organs to consult the people, and to engage communities and stakeholders, before making decisions affecting the environment. These cases were decided before and after the 2010 Constitution was promulgated, and the Courts have held that State organs that made or make decisions without consulting or engaging the people, the community or other interested stakeholders, acted or act outside their powers—and such actions stand to be quashed (see ***Meza Galana and 3 Others v. AG and 2 Others*** HCCC No. 341 of 1993; [2007] eKLR, ***Hassan and 4 Others v. KWS*** [1996] 1 KLR (E&L) 214; ***Mada Holdings Ltd t/a Fig Tree Camp v. County Council of Narok*** High Court Judicial Review No. 122 of 2011; [2012] eKLR; and ***Republic v. Minister of Forestry and Wildlife and 2 Others*** *ex parte* ***Charles Oduor Okello and 5 Others*** HC Miscellaneous Application No. 55 of 2010).

[342] Participation of the people in relation to the processes of enactment of legislation has also been a subject of dispute in the Courts. In the High Court case, ***Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v. County of Nairobi Government & 3 Others*** Petition No. 418 of 2013; [2013] eKLR, the Court had to determine whether a contested Act was invalid

for failing to include public participation in the legislative process. The Court thus held:

> ***"45…The essence of the duty for the public to participate in legislative process is to my mind an aspect of the right to political participation in the affairs of the State. …***
>
> ***…***
>
> ***"47. Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;***
>
> > ***'The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.'***

[343] In ***Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others,*** Petition No. 532 of 2013 consolidated with Petition Nos. 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No. 61 of 2014; [2014] eKLR [***Robert Gakuru*** case], the applicant's main complaint was that there was no meaningful public

participation in the enactment of the Kiambu Finance Act, 2013. *Odunga J* considered the essence of practical public participation, observing as follows (paragraphs 75 to 76):

> "*In my view* ***public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.*** *It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspects as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public 'barazas' national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action…*
>
> *"In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a*

majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation" [emphasis supplied].

[344] The South African Constitutional Court decision, ***Doctors for Life International v. Speaker of the National Assembly and Others*** [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) also considered the role of the public in the law-making process. The Court referred to public involvement as a form of participatory democracy, holding that this issue lay at the heart of democracy, and that (paragraphs115 and 116):

"In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. *General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters.* ***The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.*** *It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*

116.Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly

representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy" (emphasis supplied).

[345] In this Advisory Opinion, in which the anterior question relates to land, one has to highlight the need for the public to participate in its management, and in the decision-making processes associated with it. Grace W. Maingi, in her article, *"Public Participation: Engaging citizens in policy making"* [in Yash Pal Ghai and Jill Cottrell Ghai (eds), ***National Values and Principles of the Constitution*** (Katiba Institute, Nairobi: 2015)], estimates the people's participation in decision-making processes to be the highest level of public participation. In her words (page 41):

> ***"The highest levels of citizen participation reveal increasing degrees of 'citizen power' particularly in the decision-making process of government. The lowest of these is partnership—which means that citizens can negotiate with power holders and thus the responsibility to make decisions is shared."***

[346] The NLC, as well as the national and county governments, are required to promote public participation, as they conduct their functions. Kariuki Muigua, Didi Wamukoya, Francis Kariuki in their book, [***Natural Resources and Environmental Justice in Kenya*** (Glenwood Publishers Limited, Nairobi:2015)] discuss the link between the growth of government structures, and the delegation of decision-making powers to state agencies, such as commissions. They observe as follows (pages 24 to 25):

> ***"In Kenya today, as the size and scope of government continues to grow, decisions that have previously been made by elected officials in a***

political process are now being delegated by statute to technical experts in state agencies and constitutional commissions. The rationale is, therefore, to incorporate public values into decisions, improve the substantive quality of decisions, resolve conflicts among competing interests and build trust in institutions and educate and inform the public."

[347] A point of reference in this regard is Article 254 of the Constitution, which requires the NLC to promote the participation of the people, as it conducts its mandate. It thus provides:

"(1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.
(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.
(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised."

By this article, the NLC is held accountable to the people, and upholds the participation of the people, two ways. Firstly, *the people indirectly participate* in holding the NLC accountable, through their democratically elected officials (the President and Members of Parliament). The NLC is required to submit annual reports to the President and Parliament. Secondly, the people have the opportunity to *participate directly,* and to exercise their right of access to

information, as the NLC is required to publish and publicize its reports. The public is thus accorded an opportunity to examine the reports, and to determine whether the Commission is carrying out its constitutional and legislative mandates, or whether the NLC has made any decisions affecting their land.

[348] It is thus clear that the principle of the participation of the people does not stand in isolation; it is to be realised in conjunction with other constitutional rights, especially the right of access to information (Article 35); equality (Article 27); and the principle of democracy (Article 10(2)(a)). The right to equality relates to matters concerning land, where State agencies are encouraged also to engage with communities, pastoralists, peasants and any other members of the public. Thus, public bodies should engage with specific stakeholders, while also considering the views of other members of the public. Democracy is another national principle that is enhanced by the participation of the people. Article 35 (1) and (3) of the Constitution thus provide:

> ***"Every citizen has the right of access to—***
> ***(a) information held by the State; and***
> ***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***
> ***...***
> ***(3) The State shall publish and publicise any important information affecting the nation."***

[349] The Ministry of Lands, Urban Housing and Development is also required to involve the public when carrying out its functions. Article 232(1)(d), (e) and (f) of the Constitution provides:

"The values and principles of public service include—

...

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information..."

[350] It is also important to note that Kenya has ratified the United Nations International Covenant on Civil and Political Rights, 1966 (ICCPR) as well as the African Charter on Human and Peoples' Rights, 1981 (ACHPR), and these international and regional instruments also recognise the participation of the people in public affairs. By virtue of Article 2(6) of the Constitution, these treaties form part of Kenyan law. Article 25(a) of the ICCPR provides:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives."

Article 13(1) of the ACHPR provides as follows:

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

[351] Commissioners of the NLC, and State officers within the Ministry of Lands, Urban Housing and Development are further subject to Chapter 6 of the Constitution, which is devoted to 'Leadership and Integrity'. The call to uphold the value of integrity in matters concerning land, due to historical

injustices associated with it, is for the overall benefit of the people. Article 73 of the Constitution caters for this, in the following terms:

> ***"73. (1) Authority assigned to a State officer—***
> ***(a) is a public trust to be exercised in a manner that—***
> ***(i) is consistent with the purposes and objects of this Constitution;***
> ***(ii) demonstrates respect for the people;***
> ***...***
> ***(iv) promotes public confidence in the integrity of the office; and***
> ***(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.***
> ***(2) The guiding principles of leadership and integrity include—***
> ***(d) accountability to the public for decisions and actions; and***
> ***(e) discipline and commitment in service to the people."***

[352] The participation of the people is a constitutional safeguard, and a mechanism of accountability against State organs, the national and county governments, as well as commissions and independent offices. It is a device for promoting democracy, transparency, openness, integrity and effective service delivery. During the constitution-making process, the Kenyan people had raised their concerns about the hazard of exclusion from the State's decision-making processes. The Constitution has specified those situations in which the public is assured of participation in decision-making processes. It is clear that the principle of public participation did not stop with the constitution-making process; it remains as crucial in the implementation phase as it was in the constitution-making process. It is further expounded in the County Government Act as well as the *Public Service Commission's*

Guidelines for Public Participation in Policy Formulation. The **Draft Public Participation Guidelines for County Government** are also important, as they reflect the constitutional and statutory requirement of public participation.

[353] I agree fully with the views of *Odunga J*. in the case of ***Robert Gakuru***, that public participation is not an abstract notion and, on matters concerning land, State organs, the Ministry, and the NLC must breathe life into this constitutional principle, and involve the public in land management and administration; legislative plans and processes; and policy-making processes. This is clear from the terms of Article 10 of the Constitution, which requires these bodies to:(*a*) apply or interpret this Constitution; (*b*) enact, apply or interpret any law; or (*c*) make or implement public policy decisions bearing in mind the participation of the people, and the goals of democracy, and transparency.

[354] I would refer to the *Draft Public Participation Guidelines for County Governments,* which is of persuasive authority in this Advisory Opinion. It states that the importance of public participation includes to: strengthen democracy and governance; increase accountability; improve process, quality and results, in decision-making; manage social conflicts; and enhance process legitimacy. Although these are not the final guidelines, they bear similar objectives of public participation as those articulated in the Constitution, and in the County Governments Act. Finally, the Draft Guidelines provide conditions for meaningful public participation, such as: (i) clarity of subject-matter; (ii) clear structures and process on the conduct of participation; (iii) opportunity for balanced influences from the public in general; (iv) commitment to the process; (v) inclusive and effective representation; (vi) integrity; (vii) commitment to the value of public input; (viii) capacity to engage; (ix) transparency; and (x) considerations of the social status, economic standing, religious beliefs and ethnicity of the members of the

public. These conditions are comparable to the constitutional values and principles of democracy, transparency, accountability and integrity.

[355] In conclusion, an array of rich ingredients of the participation of the people, emerge from various sources: decisions by superior Courts in Kenya; comparative jurisprudence from another jurisdictions; works by scholars; draft principles and guidelines bearing upon public participation by various State organs and governments; and relevant constitutional and legal provisions. The categories of these ingredients are not closed. It will devolve to the citizens, as well as stakeholders, to monitor the practicability of these ingredients, and to appraise the scope for improvement, so they may increasingly reflect the vision of the Constitution.

[356] The common denominator in these various ingredients of participation by the people, is the supremacy and sovereignty of the Kenyan people. These ingredients of public participation call for significant mental shifts in our mode of consultation, communication, learning, and accommodation of the views of ordinary Kenyans. We must provide the objective information to facilitate such participation in all societal affairs. We must accept what a famous philosopher wrote a long time ago: *"...it is essential to educate the educator."* The ordinary people are our educators as well.

H. THE CONCURRING OPINION OF NDUNGU, SCJ

[357] I have read the decision of the majority and I concur with the rationale and findings of the same. However, in addition to the Opinion of the majority, I find it necessary to underline the architectural design of constitutional commissions in the Constitution. In particular there is an underlying philosophy in the creation of these bodies, which is to provide an oversight function over some primary arms of Government. In ensuring their inclusion in the new constitutional order, brought about by the promulgation of the

Constitution of Kenya 2010, the people of Kenya wanted to entrust to these institutions a specific oversight mandate. Under the [old] Constitution of Kenya, this function was largely left to Parliament, which in itself presented several challenges, as Members of Parliament also worked in the Cabinet wing of the Executive arm of Government; and State machinery and bureaucracy proved too large for monitoring purposes in an efficient and transparent manner. Conversely, the constitutional commissions were crafted to coincide with specific issues, narrow enough in mandate, to closely monitor their designated areas. To this end, the drafters of the Constitution used language formulated to reflect this specific purpose. It is vital that such wording, as outlined in the Constitution, is not expanded through enabling legislation so as to give it a different purpose, other than that which was intended by the drafters of the Constitution. The watchdog role is therefore so basic to the *nature* of constitutional commissions, that it cannot be understated or undermined through legislative and policy initiatives or practice. Acts of Parliament, and subsidiary legislation ought to be aligned to, and in harmony with the constitutional provisions; and interpretation of such laws must pay fidelity to the form and the vision of the Constitution.

[358] Similarly, the institutions so crafted under the Constitution, must also not run contrary to the general remit of the functions of Chapter 15-institutions. As oversight institutions, any mandate that they are given in the Constitution of Kenya must be construed as narrowly as possible so as to avoid role-conflicts; and should not be extended unreasonably by statute.

[359] This principle must apply to the National Land Commission, notwithstanding the provisions of Article 67 (3), which allows Parliament to grant the Commission 'other' functions. To my mind, the language of Article 67(2)(b) to (h): as to the functions of the National Land Commission, is clear and specific:

"...

(b) to *recommend* a national land policy to the national government;

(c) to *advise* the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct *research* related to land and the use of natural resources, and make *recommendations* to appropriate authorities;

(e) to *initiate investigations*, on its own initiative or on a complaint, into present or historical land injustices, and *recommend* appropriate redress;

(f) to *encourage* the application of traditional dispute resolution mechanisms in land conflicts;

(g) to *assess* tax on land and premiums on immovable property in any area designated by law; and

(h) to *monitor and have oversight* responsibilities over land use planning throughout the country" [emphasis supplied].

The words 'recommend, advise, research, investigate, encourage, assess, monitor and oversight' – are all actions than provide a facilitative role rather than a primary one. The context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented. There is therefore a clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted. In my opinion, this means that unless specified within the enabling constitutional provision, a body with oversight function, and a body that implements the recommendations of the former, are different, and their roles do not overlap.

[360] It is clear from the arguments presented to us in this reference, that there has been a misconception of such roles, which create a conflict between the constitutional provisions relating to the NLC, and statutory provisions that are to be found in the provisions of the Land Act, 2012, and similar legislation relating to Land. It is incumbent upon the Legislature, and the concerned commission and its agents, to tread carefully to avoid the creation of such conflicts.

[361] Counsel Tom Ojienda's proposition, for instance, that the NLC should *collect* tax, when the constitutional provision states that it should *assess* tax, flies in the face of Article 67(g) of the Constitution, which mandates the Commission to "assess" the tax, and not levy or collect the same.

[362] Further, it may also be contradictory to the provisions of Article 209, in the Public Finance Chapter, which reads as follows:

> "209.
>
> ***(1) Only the national government may impose—***
>
> ***(a) income tax;***
>
> ***(b) value-added tax;***
>
> ***(c) customs duties and other duties on import and export goods; and***
>
> ***(d) excise tax.***
>
> ***(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).***
>
> ***(3) A county may impose—***
>
> ***(a) property rates;***
>
> ***(b) entertainment taxes; and***

(c) any other tax that it is authorised to impose by an Act of Parliament.

(4) The national and county governments may impose charges for the services they provide.

(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour."

[363] There are also a number of challenges arising from Professor Ojienda's assertion. If the NLC can collect taxes, it can only be in respect of public land, as private and community land fall outside its mandate. Would the suggestion therefore be, that different systems of collection of revenue or tax exist for different categories of land? I find it difficult to envisage such untidiness being found within the vision of the framework of our Constitution, which clearly provides for an efficient and prudent financial management within the public sector.

DATED and **DELIVERED** at **NAIROBI** this **2nd day** of **December, 2015.**

.....	.....
W. M. MUTUNGA **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K. H. RAWAL** **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**
.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J. B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. N. NDUNGU** **JUSTICE OF THE SUPREME COURT**