REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 9 OF 2019

— BETWEEN—

DICKSON NGIGI NGUGI .....APPELLANT

-AND-

COMMISSIONER OF LANDS.....RESPONDENT

-AND-

DR. S. F. OWINDO & 63 OTHERS ..... INTERESTED PARTIES

(*Being an appeal from the Judgment of the Court of Appeal at Nairobi (Githinji, Sichale & Kantai, JJ.A.) delivered on 8th February, 2019, in Civil Appeal No. 1 of 2013*

Representation:

Dr. Kamau Kuria, SC for the appellant
(*Kamau Kuria & Co. Advocates*)

Mr. Oscar Eredi for the respondent
(Office of the Attorney General)

Mr. James Makori for the interested parties
(James T. Makori Advocate)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Land as a resource is one of the most important means of livelihood for many people in developing countries and remains an emotive issue. It has been cited as

an obstacle to social cohesion and economic growth in Kenya since independence. That should explain why Kenya's Vision 2030 (2008) identified the absence of a national land policy as the reason the country has had weak land administration, which in turn has led to historical land injustices amongst some communities. Today, the Constitution devotes the entire Chapter 5 to matters relating to land and environment, and directs that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. It guarantees equitable access to land; security of land rights; as well as transparent and cost-effective administration of land.

[2] The Constitution further outlines definitions of land and land systems in Kenya and sets out a land legislative obligation on Parliament, to revise, consolidate and rationalise existing land laws. Pursuant to this edict, Parliament has enacted new land laws to replace some of the past land law regimes.

[3] One of such repealed laws is the Government Lands Act (Cap 280), which conferred powers upon the President of Kenya to make grants or dispositions of any estates, interests or rights over unalienated government land. The powers were delegated in specified cases to the Commissioner of Lands.

[4] At the heart of this appeal is a controversy concerning proprietary interest over unalienated government land which was allocated to Dickson Ngigi Ngugi, the appellant under the Government Lands Act (repealed).

B. BACKGROUND

[5] Sometime in 1969, the appellant's application for grant of unalienated government land in Nakuru was approved by the then Minister for Lands and Settlement. Subsequently, the Commissioner of Lands (the respondent) issued him with a letter of allotment dated 7th June, 1977 to an unsurveyed parcel of land described as LR No. 519/223 (the suit land) located in Njoro Township and comprising 118 hectares (approximately 291 acres). The grant was subject to a number of conditions. For example, the appellant was required to accept the offer

contained in the letter of allotment and to pay allotment fees in the sum of Kshs. 6,484.15/-; the land was to be used for agricultural purposes only; the allocation was initially for a period of three years; payment of annual rent of Kshs. 2, 354 within the first three years; and upon expiration of the three years, the appellant was entitled to a free hold title provided that he had developed the land to the satisfaction of the District Agricultural Officer and paid a purchase price of Kshs. 235,400/-.

[6] The appellant accepted the offer and paid the allotment fees. Consequently, the respondent directed the Director of Surveys to undertake the survey of the suit land. However, the surveyor, by a letter dated 10th January, 1978 to the Director of Surveys expressed his inability to complete the exercise due to interference by the District Commissioner of the area through the police. The matter was escalated to the Provincial Surveyor, who upon consulting the District Commissioner, directed the suspension of the survey.

[7] It was the Clerk of the then County Council of Nakuru who in his letter of 20th July, 1981 explained to the appellant that at the time the suit land was allotted to him, the people of Njoro had been cultivating it with the authority of the Government for several years; and that as a matter of fact, the District Commissioner of Nakuru had in the past encouraged the people in the area to continue utilising the suit land until they were otherwise instructed by the Government.

[8] A new development arose in 1982 when the Rift Valley Provincial Planning Officer submitted to the respondent for approval a part development plan (PDP) with respect to a portion of the suit land which was set apart for the construction of Egerton College (now Egerton University) staff residential houses. Initially, the request was declined by the respondent. However, after exchange of numerous letters and being satisfied that the proposed PDP did not encroach on any private property, the respondent approved it and the sub-division of portions of the suit

land began in 1984 with local residents seeking to benefit from the sub-division exercise.

[9] So as not to be left behind, the appellant too approached the Provincial Commissioner of the former Rift Valley Province with a request to be considered afresh for allocation of a portion of the suit land disclosing his long-running interest over it. This time round, the Provincial Commissioner supported his bid by writing to the respondent on 21st May, 1984 to consider allocation of a portion of the suit land to the appellant, justifying this intervention on the ground that the appellant was unable to fully benefit from the initial allocation of the suit land due to occupation by local people who had been authorized to cultivate it.

[10] To support the appellant's application, the District Agricultural Officer also wrote to the respondent on 10th December, 1985 to confirm that the appellant had developed and utilized about 48 of the 50 acres of the suit land by planting sunflower; and that he had paid Kshs. 40,500 being the purchase price for this portion. It was on that basis that the appellant was granted a lease over 50 acres out of the said land.

[11] It would appear that the appellant was still aggrieved by the respondent's decision allocating part of the suit land to other parties and ignoring the letter of allotment it had itself issued to him.

C. LITIGATION HISTORY

i) Before the High Court

[12] The foregoing events precipitated the institution of judicial review proceedings before the High Court in **Misc. Applic. No. 18 of 1993** for orders that:

i. mandamus do issue directed to the respondent to issue a lease in respect of the entire L.R. No. 519/223 in the appellant's name.

ii. *prohibition do issue prohibiting the respondent, his servants and/or agents from further proceedings with the sub-division and alienation of L.R. No. 519/223.*

[13] To support his claim, the appellant contended that upon receiving the letter of allotment dated 7th June, 1977, he immediately complied with the stipulated conditions; that thereafter the survey was carried out in accordance with the PDP before the respondent, in collusion with the defunct County Council of Nakuru and the provincial administration allowed strangers to move onto and remain on the suit land to the appellant's prejudice; and that the respondent did not only purport to sub-divide the suit land into smaller portions but also allocated the resultant portions to third parties without the appellant's knowledge or consent and contrary to the letter of allotment. The appellant explained that his efforts and attempts to develop the suit land within the period stipulated in the letter of allotment were frustrated by public officers.

[14] For these reasons, he urged the court to hold that upon payment of the allotment fees he was entitled to the suit land unless it was forfeited in accordance with the procedure set out in the Government Lands Act (repealed).

[15] In response, the respondent through Phoebe Amiani, a senior lands officer in the then Ministry of Lands and Settlement, swore an affidavit in which she deposed that the allotment of the suit land to the appellant was cancelled after he failed to develop it in contravention of the terms and conditions of the letter of allotment. Following that failure, the suit land reverted to the Government. It was subsequently sub-divided and allocated to various public bodies for the benefit of the public. She explained that as a matter of fact, part of the suit land had been earmarked for a proposed airport.

[16] Some of the beneficiaries of the sub-division and subsequent allotment were joined in the proceedings as interested parties both in the High Court and before this Court by a consent order dated 3rd August, 2022. On their behalf, Anthony

Karanja, the chairman of their Welfare Association, swore an affidavit in opposition to the application to the effect that the appellant did not fulfil the conditions of the letter of allotment or take any legal action against those who were on the suit land when the letter of allotment was issued to him; and that upon expiry of the 3 years, the suit land reverted back to the Government in terms of the offer.

[17] He added that at the time of commencing the judicial review proceedings, L.R No. 519/223 (the suit land) was non-existent, having been allocated to them and the appellant; that, as a result, the orders sought were of no effect without the quashing of the titles registered in their favour; that the appellant ought to have filed the proceedings in 1984 and before accepting the subsequent allocation of 50 acres of the suit land which was tantamount to relinquishing his claim to the rest of the suit land. In conclusion, Anthony Karanja deponed that, should the orders sought be granted they would suffer huge and irreparable damage and loss.

[18] Upon considering these rival arguments, Dulu, J. by a judgment dated 19th January, 2010 dismissed the appellant's review application with costs to the respondents, holding that it was devoid of merit on two fronts. Firstly, that the appellant had failed to demonstrate that he had been prevented from developing the suit land by anyone with the support of the Government. That notwithstanding, the letter of allotment expired on 7th June, 1980 after the 3 years period hence there was nothing for the appellant to enforce as against the respondent. Secondly, that he ought to have first sought an order of *certiorari* to quash the allotment to the interested parties in line with the well-known case of ***Kenya National Examination Council v. Republic Exparte Geoffrey Gathenji Njoroge***, Civil Appeal No. 266 of 1996; [1997] eKLR, because the orders of *mandamus* and *prohibition* were inefficacious.

ii) Before the Court of Appeal

[19] Aggrieved by this outcome, the appellant sought to overturn it in the Court of Appeal on 9 grounds, summarised as follows- that the High Court erred in;

i. *Failing to find that the appellant had made out a case to warrant the orders of mandamus and prohibition being granted.*
ii. *Holding that the appellant ought to have sought an order of certiorari to quash the respondent's decision to allocate land to the interested parties.*
iii. *Failing to hold that the appellant had failed to comply with the condition of development of the suit land due to sufficient reasons beyond his control; and as such, the same could not be a ground for cancelling allocation of the suit land to him.*
iv. *Failing to hold that the executive actions could not hold or suspend the operation of the law and in particular, the Government Lands Act.*
v. *Failing to hold and find that the respondent lacked power to allocate private land to private individuals.*

[20] In support of his appeal, the appellant reiterated his arguments in the High Court. The respondents and interested parties similarly maintained that the appellant had not complied with the conditions in the letter of allotment and was not entitled to the suit land; that a letter of allotment could not be the basis of his claim as it was not proof of title, but rather, a process of allocation of land; and that legal rights over land could only crystalize after registration of title. In the absence of any registrable interest, the suit land reverted to the Government, that in turn properly allocated it to the interested parties as well as to the appellant in the manner it deemed fit.

[21] The Court of Appeal in upholding the High Court's judgment was equally satisfied that, in law a Letter of Allotment is a mere contingent right to a grant of a lease; that for one to be entitled to a grant of lease of unsurveyed government land, the land had to be surveyed; a lease for a term of three years could only be issued upon meeting the conditions contained in the Letter of Allotment; and finally, that the lease had to be registered in accordance with the Government Lands Act. In the Court of Appeal's view, the survey of the suit land was not completed and the

appellant did not take possession. As a result, the court found that the Letter of Allotment lapsed before its implementation which meant that the appellant had no legal or equitable proprietary interest in the suit land.

[22] In the circumstances, the court found that an order of *mandamus* would be tantamount to compelling the respondent to grant a freehold title contrary to the Government Lands Act. In any event, the appellant had sought judicial review orders after a period of 15 years from the date of the allotment letter; and after portions of the suit land had been sub-divided and allocated to third parties and himself. Therefore, like the High Court, the Court of Appeal held that in absence of an order of *certiorari*, the orders of *mandamus* and *prohibition* would not be efficacious in the circumstances; and would occasion great injustice to third parties. Ultimately, by a judgment dated 8th February, 2019, the court dismissed the appellant's appeal with costs to the respondents.

iii) Before the Supreme Court

[23] Undeterred, the appellant lodged this appeal on the grounds that the learned Judges of the Court of Appeal erred by holding that:

i. *In the absence of a registrable lease granting the appellant a leasehold interest to the suit land and without fulfilment of the mandatory condition of development, the letter of allotment lapsed before its implementation; and that the appellant had no legal or equitable proprietary interest in the suit land capable of being enforced by an order of mandamus.*
ii. *An order of mandamus would compel the respondent to grant a freehold title to government land in contravention of the provisions of Government Lands Act and public policy.*
iii. *Without an order of certiorari quashing the previous allocations an order of mandamus would require the respondent to perform a duty which is legally impossible.*

iv. *If the orders sought were issued, they would occasion great injustice to innocent third parties.*

[24] Accordingly, the appellant seeks that the judgments of both the superior courts below be set aside and substituted with an order allowing his Notice of Motion dated 12th February, 1993 filed before the High Court.

[25] The respondent's objection to the appeal is premised on the grounds that the appeal does not raise matters of general public importance since the appellant's claim has throughout been private in nature. There is no cogent and recurrent constitutional issue(s) or point(s) of law that would require interpretation or application by the Court. On merit, the respondents and interested parties advanced the same arguments they presented before the two superior courts below.

D. PARTIES SUBMISSIONS

i. The Appellant

[26] The appellant sought to persuade us from the onset that his appeal falls within the Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. In particular, he claims that his case before the superior courts below was to the effect that his right to property within the meaning of Section 75 of the former Constitution was violated in so far as the Government failed to allocate to him the entire 118 Hectares of the suit land, despite issuing to him a letter of allotment; that he had a right not to be subjected to arbitrary exercise of public power under Section 82 of the repealed Constitution. Citing ***Fitzgerald v. Muldoon*** (1976) 2 NZLR 615 (HC), the appellant submitted that the Executive arm of Government, through the Provincial Commissioner of Rift Valley Province lacked power to suspend the provisions of the Government Lands Act which conferred the power to administer the said Act solely on the respondent; and that, for these reasons, he had a right to redress under Section 84 of the repealed Constitution which are in the nature of declaration of rights, injunctions, conservatory orders and judicial review orders.

[27] The appellant further submitted that he was entitled to the entire suit land and that by allocating to him only 50 acres out of 118 hectares the respondent was in violation of his right to private property guaranteed under Section 75(2) of the former Constitution which has been preserved under Article 40 of the current Constitution.

[28] Relying on the High Court decision in ***Evelyn College of Design v Director of Children's Department and Another***, HC Petition No. 228 of 2013; [2013] eKLR, the appellant contends that what the State did amounted to a deprivation of his interest or right over the suit land without due process. That being the case, the subsequent letters of allotment issued to the interested parties were a nullity and incapable of conferring any interest.

[29] Further, the appellant posited that the respondent was at all material times aware that there was interference with his possession of the suit land due to squatters' invasion but took no action to evict them. In his view, a legitimate expectation arose in his favour that the time within which he was to comply with the conditions set out in the letter of allotment would be extended.

ii. The Respondent

[30] According to the respondent, the appeal turns on three issues namely, whether the Court has jurisdiction to entertain the appeal; whether the appellant was entitled to freehold title over the suit land under the Government Lands Act; and whether the appellant was entitled to judicial review orders.

[31] The respondent contended that the appeal as drawn does not raise any issue of constitutional interpretation or application and reiterates further that the allotment of the suit land to the appellant was cancelled on account of his failure to develop it as required by the letter of allotment. He argues that at the time the application for judicial review was instituted in the High Court, the only property which would qualify as the appellant's private property, was the 50 acres granted to him as opposed to the entire suit land.

[32] The respondent also submits that the superior courts below correctly found that the judicial review orders of *mandamus* and *prohibition* sought in the application were ineffective in the absence of an order of *certiorari*. Over and above this, the respondent has asked us to note that the suit land had been sub-divided and titles issued to third parties; and that the appellant was guilty of laches, bringing an action after an inordinate delay of over 15 years after the letter of allotment was cancelled. Consequently, the respondent urged the Court to dismiss the appeal.

iii. The Interested Parties

[33] Similarly, the interested parties contend that the Court lacks jurisdiction to entertain the appeal. That notwithstanding, it is their position that the appellant's claim is marred with laches, and no explanation proffered as to why he took out judicial review application many years after the alleged grievance contrary to Section 136 of the Government Lands Act. Citing Section 3(a) of the Government Lands Act, they submit that the President through his representatives could grant interest over unalienated government land. This was done the moment the appellant failed to meet the conditions in the letter of allotment and the suit land reverted to the Government.

[34] Making reference to ***Republic v District Land Adjudication Officer Tana Delta District & Another Exparte Paul Mariga and 192 Others***, Misc. Applic. No. 30 of 2010; [2014] eKLR, the interested parties urged that the appellant had not met the threshold of granting the orders sought. Moreover, they submitted that having been in occupation of part of the suit land coupled with the fact that some subdivisions therein have been resold to third parties, the issuance of the orders would result in confusion and anarchy. Finally, in urging the Court to dismiss the appeal, they insisted that the appellant's alleged ownership of the suit land never crystalised.

E. ISSUES FOR DETERMINATION

[35] Having carefully re-evaluated the arguments in this appeal, the pleadings and the decisions of the two superior courts below, we are of the considered view that the following issues arise;

i) *Whether the Court has jurisdiction under Article 163(4)(a) of the Constitution to determine the merits of this appeal; and*
ii) *If the answer to i) above is in the affirmative, whether the Court of Appeal erred in its decision of 8th February, 2019.*

Of course, should our answer to the first question be in the negative, it may be unnecessary to proceed to consider the second issue.

F. ANALYSIS AND DETERMINATION

Jurisdiction under Article 163(4)(a) of the Constitution

[36] Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is *coram non judice* and amounts to a nullity because, as Nyarangi, JA famously said in the *locus classicus*, ***Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd*** [1989] KLR 1, "*jurisdiction is everything. Without it, a court has no power to make one more step*".

[37] It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even by the court *suo motu*. As a matter of practice, this Court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.

[38] It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by the Constitution or statute. It cannot be conferred by judicial craft. See ***Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others,*** SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.

[39] Applying these principles to this appeal, we have in the previous paragraphs noted that both the respondent and interested parties in their respective submissions have questioned our jurisdiction to determine this appeal since it does not raise any issue or issues involving the interpretation or application of the Constitution.

[40] Article 163(4) has been the subject of interpretation by this Court in a long line of decisions as we are shortly to demonstrate. By those authorities, it is now firmly settled that appeals from the Court of Appeal will lie as of right to this Court under Article 163(4)(a) and (b) of the Constitution, if they involve constitutional interpretation and application, or upon certification, by either the Court of Appeal or this Court, that they involve matters of general public importance.

[41] To ascertain whether or not the jurisdiction has been properly invoked the Court will consider the nature of the pleadings and proceedings in the trial court, the remedy or remedies sought and the decisions of the superior courts below. The onus of proving that the appeal involves a question of constitutional interpretation or application, is upon the party relying on Article 163(4)(a). The Court does not automatically acquire jurisdiction merely because a party claims in their pleadings or submissions that the appeal concerns an issue of constitutional interpretation or application.

[42] A party must also identify with precision the relevant Articles of the Constitution that were the subject of interpretation or application and show that the subject of the appeal before this Court was the same one upon which both the High Court and the Court of Appeal based their respective decisions. Where the decision being challenged on appeal has nothing or little to do with the

interpretation or application of the Constitution, such a decision cannot be the subject of a further appeal to this Court under the provisions of Article 163(4)(a). These considerations are constant and have to be satisfied whether a matter is originated as a judicial review application or a constitutional reference.

[43] These are the *ratio decidendi* to be extracted from our decisions in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd,*** SC Petition No. 3 of 2012; [2012] eKLR, ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & Others,*** SC Petition No. 10 of 2013; [2014] eKLR***, Peninah Nadako Kiliswa v. Independent Electoral & Boundaries Commission (IEBC) & 2 others***, SC Petition No. 28 of 2014; [2015] eKLR and ***Zebedeo John Opore v. Independent Electoral and Boundaries Commission & 2 others***, SC Petition No. 32 of 2018; [2018] eKLR.

[44] The appeal before us is expressed to be brought pursuant to the provisions of Articles 2(4) and 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act, 2011, Rules 30 and 32 of the Supreme Court Rules, 2011. This is so even though the events giving rise to the cause of action took place before the promulgation of the Constitution in 2010. The appellant has been categorical that his appeal falls squarely within Article 163(4)(a).

[45] The genesis of the dispute is a letter of allotment dated 7th June, 1977 granting the appellant an unsurveyed agricultural land, whose terms he admittedly did not fulfill, with the result that it reverted to the Government, which in turn allocated it to third parties, including the interested parties in 1984. The appellant himself was a beneficiary of 50 acres in the second phase of allotment. He went to court in 1993 to challenge the new allotments, way before no one imagined there would be constitutional reforms which would culminate in the passage of the 2010 Constitution.

[46] The High Court *(Dulu, J.)* dismissed the application on 19th January, 2010, seven months before the promulgation of the Constitution. The first appeal to the Court of Appeal was determined on 8th February, 2019, and the instant appeal

lodged on 18th March, 2019. These dates are significant to show that, although the cause of action arose during the former constitutional order, violations committed in that period can be redressed under this Constitution. Indeed, the Court has consistently entertained appeals from the Court of Appeal arising from decisions on violations of the former Constitution. For example, ***Hon. Gitobu Imanyara & 2 Others v. The Honourable Attorney General,*** SC Petition No. 15 of 2017 and ***Monica Wangu Wamwere & 5 Others v. The Honourable Attorney General***, SC Petition No. 26 of 2019 (consolidated with Petition Nos. 34 & 35 of 2019), in a long list of others. In entertaining all those appeals, the Court had to be satisfied that they met the strictures of Article 163(4).

[47] The question before us, is whether this appeal meets the criteria for invocation of Article 163(4)(a) as enunciated in ***Lawrence Nduttu*** (supra), ***Hassan Ali Joho*** (supra), ***Peninah Nadako Kiliswa*** (supra), among other decisions. In other words, does this appeal involve constitutional interpretation or application; if the grievance presented before this Court is one involving a question or questions of constitutional interpretation or application, is it the same question or questions that engaged the two courts below, and upon which both courts based their respective decisions?

[48] The cause was presented to the High Court as a judicial review application for prerogative orders of *mandamus* and *prohibition*. In ***Peninah Nadako Kiliswa*** (supra), the Court proclaimed that whether a matter is originated as a judicial review application or a constitutional reference, the considerations of Article 163(4)(a) are the same.

[49] We have studied the entire record and observe that in the Motion for judicial review, the appellant was concerned, not with breach of any of his constitutional rights and fundamental freedoms but with the respondent being directed to issue to him a lease of the entire suit land and to be prohibited from proceeding with the sub-division of the suit land or alienating it to the interested parties. In the entire

Motion, the statement and affidavit there is no mention of even a single provision of the Constitution.

[50] The two reasons for the dismissal of the application by the High Court were to do with the appellant's failure to comply with the requirement of developing of the suit land within 3 years from June 1977. Secondly, the Court held that an order of prohibition was infective to deal with third parties who had been allotted parts of the suit land. The appellant, the court concluded, ought to have applied for cancellation of those allotments by an order of *certiorari* but failed. In other words, there was no determination of any question of constitutional nature.

[51] There having been no constitutional question before the High Court, none was expected to arise in the Court of Appeal, which affirmed the decision of the High Court. The Court of Appeal confined its consideration of the first appeal to the inordinate delay of over 15 years to institute the judicial review proceedings; that at the time the appellant moved the High Court, the land had been allocated to third parties and character changed. The court also held, in agreement with the High Court, that in the absence of a registrable lease and having failed to fulfill the mandatory conditions for grant of lease, the appellant had no legal or equitable proprietary interest in the suit land which could be enforced by an order of *mandamus*; and that without an order of *certiorari* to quash the fresh allotments, an order of *mandamus* would not be efficacious or appropriate. For these reasons, the Court of Appeal too found no substance in the application and dismissed it. Again, it is important to note that in the entire judgment there is no reference to any provision of the Constitution.

[52] Before this Court however, the appellant expressly cites Article 163(4)(a) of the Constitution on the face of the Petition but proceeds to ask the Court to determine whether his right to property within the meaning of Section 75 of the former Constitution was violated in so far as the Government failed to allocate to him the entire 118 Hectares of the suit land, despite issuing to him a letter of allotment; that he had a right not to be subjected to arbitrary exercise of public

power under Section 82 of the repealed Constitution; and that he had a right to redress under Section 84 of the repealed Constitution.

[53] From the decisions of the two superior courts below which we have summarized above, no such question was presented or determined. As a matter of fact, the appellant has referred to Sections 75, 82 and 84 of the retired Constitution for the first time in his pleadings before this Court. The mere citation of constitutional provisions in the pleadings itself does not bring an appeal within the scope of Article 163(4)(a) of the Constitution.

[54] We come to the inevitable conclusion, on this issue, that the appellant has failed to directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution; and that the matter turned on purely factual issues as applied to a statute, the Government Lands Act (repealed), for which reason this Court lacks jurisdiction to determine this appeal.

[55] Having arrived at this conclusion, and as intimated earlier, we can only consider the second issue in this appeal, if in our opinion the appeal presents exceptional circumstances or distinctive opportunity for the Court to provide interpretive guidance on the question, as was the case in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai and 4 Others***, SC Petition No 4 of 2012; [2013] eKLR; ***In the Matter of the Speaker of the Senate & another***, Advisory Opinion Reference 2 of 2013; [2013] eKLR; and ***Sonko v. Clerk, County Assembly of Nairobi City & 11 others***, SC Petition 11 of 2022; [2022] KESC 26 (KLR).

[56] This is another of those cases where we must down tools at this stage, as no purpose will be served in considering the merits of the appeal beyond what we have said on the jurisdiction, which is sufficient to dispose of the appeal.

[57] We accordingly dismiss this appeal for want of merit.

G. COSTS

[58] Costs follow the event but are in the discretion of the Court, as enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others***; SC Petition 4 of 2012; [2013] eKLR. The party who calls forth the event by instituting a suit, will bear the costs if the suit fails but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. We note too that this is not a public interest matter. For these reasons, we award costs to the respondent and the interested parties who have successfully defended this matter from the High Court to this Court.

H. ORDERS

[59] In light of the above, we order that:

i) The Petition dated 18th March, 2019 is hereby dismissed.

ii) Costs are awarded to the respondent and the interested parties.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **March 2023.**

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA