



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)*

**PETITION NO. 8 (E010) OF 2021**

**—BETWEEN—**

**DINA MANAGEMENT LIMITED ..... APPELLANT**

**—AND—**

**COUNTY GOVERNMENT OF MOMBASA..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR OF SURVEYS ..... 4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR PHYSICAL PLANNING..... 5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

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

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Representation:

Prof. Githu Muigai SC & Mr. Dennis Nkarichia for the appellant  
*(Mohammed Muigai LLP Advocates)*

Mr. Paul Buti for the 1<sup>st</sup> respondent  
*(Paul O. Buti Advocate)*

Mr. Nguyo for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents  
*(Office of the Attorney General)*

## **JUDGMENT OF THE COURT**

### **A. INTRODUCTION AND BACKGROUND**

[1] The Appellant, Dina Management Limited, vide the Petition of Appeal dated 15<sup>th</sup> July, 2021 challenges the decision of the Court of Appeal in ***Civil Appeal No. 150 of 2021*** which affirmed the judgment of the Environment and Land Court (A. Omollo J.) in ***ELC Petition No. 8 of 2017*** consolidated with ***Petition No.12 of 2017***. The appeal invokes Article 163(4)(a) of the Constitution, Sections 15 (2), 21 (1) and (3) of the Supreme Court Act, No. 7 of 2011 and Rules 12, 38 and 39 of the Supreme Court Rules, 2020.

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

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

### **B. LITIGATION HISTORY**

#### ***i. Proceedings at the Environment and Land Court***

[4] Aggrieved by the 1<sup>st</sup> respondent's actions, the appellant filed Environment and Land Court ***Petition No. 8 of 2017 (ELC Petition No. 8 of 2017)*** dated 27<sup>th</sup> September, 2017 against the 1<sup>st</sup> respondent. The appellant sought a total of fifteen orders, asserting its ownership to the suit property. Among the orders sought were

declarations that the 1<sup>st</sup> respondent's actions were in violation of its rights under Article 40, 27(1) & (2), 29, 47(1) & (2) of the Constitution; a permanent injunction against the 1<sup>st</sup> respondent to restrain it from interfering with the suit property; the 1<sup>st</sup> respondent be compelled to meet the costs of its actions assessed at Kshs. 10,102,774.08; compensation for malicious damage to property; damages for trespass, interest and costs of the petition.

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

**[6]** The appellant opposed the 1<sup>st</sup> respondent's petition on the grounds that the suit property was previously unalienated government land which was lawfully alienated as private property in 1989; that the suit property was 30 meters above the high water mark as per the law at the time of alienation and Regulation 110 of the Survey Regulations 1994 which established that all land within the 60 meters from the high watermark was public land was not in force at the time; that no evidence was presented to support the assertion that the suit property was a road reserve; that the suit was time barred as allocation was done close to 30 years from the date the suit was filed; that the appellant was not guilty of any illegalities or irregularities; and that the suit was *res judicata* as the subject matter was determined by *Mukunya J* in ***HCCC, No.131 of 2011***.

**[7]** The 2<sup>nd</sup>-6<sup>th</sup> respondents on the other hand urged that the suit property was initially an open space and the alienation of the suit property to H.E. Daniel Arap Moi was lawful and all procedures followed, however the letter of application to the Commissioner of Lands seeking to be allocated the suit land and the Part

Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land were missing.

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

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

**ii. Proceedings at the Court of Appeal**

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

[11] The 1<sup>st</sup> respondent filed a Notice of Grounds for affirming the decision and urged that the suit property was trust land, and such land was not government land available for alienation and any alienation thereof contravened Section 117 of the repealed Constitution, Section 13 of the Trust Land and Section 82 of the Government Lands Act (repealed).

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

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

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

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

### **C. PROCEEDINGS BEFORE THE SUPREME COURT**

#### ***a. Appellant’s Case***

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

- i) determining that the appeal did not relate to an inter-governmental dispute despite **Petition No. 12 of 2017** being a prima facie declaration of an intergovernmental dispute by a county government vis-à-vis the national government;*
- ii) in determining that the issue of res judicata or alternatively issue of estoppel did not apply to the instant suit despite the Judgment by Mukunya J in **HCCC No. 131 of 2011 Elizabeth Karangari Githunguri vs Dina Management Limited** having determined the issue of whether*

*there existed a public access road through the suit property and issued a judgment in rem on the issue;*

- iii) in their interpretation of the principle of bona fide purchaser for value without notice of defect resulting in a violation of the petitioner's right to property under Article 40 of the Constitution; and*
- iv) by affirming the violent, summary, unprocedural and illegal acts of the 1<sup>st</sup> respondent, resulting in violation of the petitioner's right to fair administrative action protected under Article 47.*

**[17]** The appellant seeks the following reliefs:

- a. The Judgment and order of the Court of Appeal (Warsame, Musinga, & Murgor JJ. A) delivered on 4<sup>th</sup> June 2021 be set aside in its entirety and substituted with the reliefs sought by the petitioner in Mombasa Environment and Land Court Petition No. 8 of 2017, Dina Management Limited vs County Government of Mombasa;*
- b. The Judgment and Decree of the Environment and Land Court in Petition No. 8 of 2017 be set aside;*
- c. The petitioner's costs of this petition, the appeal in Mombasa Civil Appeal No.150 of 2019 and the Consolidated Petition in Mombasa Environment and Land Court Petition No. 8 of 2017 be borne by the 1<sup>st</sup> respondent;*
- d. Such consequential and appropriate relief, further or other order(s) as this Honourable Court may deem just and expedient in the interest of justice.*

**[18]** The appellant filed submissions dated 12<sup>th</sup> August, 2021 in response to the 1<sup>st</sup> respondent's Grounds of Objection raising a challenge to the Court's jurisdiction, submissions dated 9<sup>th</sup> September, 2021 in support of its petition of appeal and submissions dated 18<sup>th</sup> October, 2021 in reply to the 1<sup>st</sup> -6<sup>th</sup> respondents' submissions.

**[19]** On the *competency of the appeal*, the appellant submits that the notice of appeal is fit and proper for it is challenging the entire interpretation and application

of the Constitution by the appellate court, the basis of an appeal under Article 163(4)(a) of the Constitution. Secondly, it is urged that the appeal was electronically filed on time on 16<sup>th</sup> July 2021 and that it was only the physical copies that were submitted to the Court's Registry on 19<sup>th</sup> July 2021.

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

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

this end, it contends that it was immaterial whether the same decision would have been arrived at in the absence of the departure from principles of natural justice.

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

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

**b. 1<sup>st</sup> respondent's Case (County Government of Mombasa)**

**[24]** The 1<sup>st</sup> respondent filed Grounds of Objection dated 28<sup>th</sup> July 2021 and an affidavit sworn by Jimmy Waliula in response to the petition of appeal. It also filed submissions to the petition dated 17<sup>th</sup> September, 2021. The 1<sup>st</sup> respondent sets out two preliminary jurisdictional arguments. Firstly, that the Notice of Appeal is defective as it upsets Rules 36 and 38(1) of the Supreme Court Rules as it was neither lodged in the Court of Appeal, nor dated, signed or sealed by the Deputy Registrar of the said court, and that it was filed on 16<sup>th</sup> June 2021 while the appeal

was lodged on 19<sup>th</sup> July 2021, three days late and without leave of Court. Secondly, the 1<sup>st</sup> respondent submits that this Court does not have jurisdiction as the grounds set out by the appellant do not clothe this Court with jurisdiction under Article 163(4)(a) of the Constitution as they do not concern the interpretation and application of the Constitution.

[25] On whether *the suit was an intergovernmental dispute*, it is urged that the proceedings before the superior courts did not raise any dispute touching on either Articles 189 or Sections 30-35 of the IGR Act. In any event, it submits that the dispute does not satisfy the mandatory requirements set out under Section 32 of the Act as there was no agreement between the two governments to trigger an alternative dispute resolution mechanism under the Act. In the alternative, it is argued that the transactions leading to the dispute were finalized before the advent of the Constitution, 2010 and the enactment of the IGR Act. Moreover, that as provided under Section 106 (1) and 107 (1) of the Land Registration Act, the two laws would not apply to any ensuing rights, liabilities or remedies. For that proposition it relies on this Court's decisions in ***Samuel Kamau Macharia vs Kenya Commercial Bank & others*** [2012] eKLR and ***Daniel Shumaria Njiroine vs Naliaka Maroro*** [2014] eKLR.

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

[27] As to *whether the appellant was an innocent purchaser without notice*, the 1<sup>st</sup> respondent submits that the crux of the superior courts' judgments was that the suit property was public land reserved for a public utility and any subsequent acquisition would be contrary to the original purpose. For this reason, it urges that the issue at hand was not the basis of the Court of Appeal's determination and

therefore could not form the basis of an automatic right of appeal pursuant to Article 163(4)(a) of the Constitution.

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

### ***c. The 2<sup>nd</sup> to 6<sup>th</sup> Respondents' Case***

**[29]** The 2<sup>nd</sup> to 6<sup>th</sup> respondents filed Grounds of Objection dated 15<sup>th</sup> September, 2021 and submissions dated 29<sup>th</sup> September 2021. They submit on only two issues, *whether the suit property was lawfully allocated, and whether the dispute was intergovernmental in nature.*

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

**[31]** On *whether the dispute is intergovernmental in nature*, the 2<sup>nd</sup> to 6<sup>th</sup> respondents reiterate that the 1<sup>st</sup> respondent's petition before the ELC raised a *prima facie* intergovernmental dispute between the two levels of government as the 1<sup>st</sup> respondent challenged the actions of the national government. For these reasons,

it is contended that the provisions of Article 189 of the Constitution and the derivative Act were applicable to the dispute. It is therefore urged that the finding by the Court of Appeal was made in error and upset the principle of exhaustion, which requires that where a specific alternative dispute resolution mechanism is prescribed in the Constitution or statute, parties must resort to that mechanism before invoking the court's jurisdiction.

#### **D. ISSUES FOR DETERMINATION**

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

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

**[34]** In response, the appellant submits that its appeal lies against the Court of Appeal decision in its entirety and its appeal is within the provisions of Article 163(4)(a) of the Constitution. The appellant also submits that following the delivery

of the Court of Appeal Judgment on 4<sup>th</sup> June, 2021, it electronically lodged and paid for its Notice of Appeal on 16<sup>th</sup> June, 2021, through its Advocates, within the statutory timeline as per the Practice Directions on Electronic Case Management, Gazette Notice No. 2357 of 2020. The appellant further states that the appeal was filed electronically and fees paid on 16<sup>th</sup> July, 2021. It is the physical copies of what was filed that were delivered to the Court Registry on 19<sup>th</sup> July, 2021. The appellant avers that it pursued the appeal while awaiting and following up with the Registrar of the appellate court for the signed and stamped copy.

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

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

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

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

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

- i) *Whether the appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution;*
- ii) *Whether the suit amounts to an inter-governmental dispute under Article 189(3) of the Constitution and the Intergovernmental Relations Act No.2 of 2012;*
- iii) *Whether the appellant's rights under Articles 27(1) and 50(1) of the Constitution were violated by the appellate court's application of the doctrine of res judicata and/or the doctrine of estoppel;*
- iv) *Whether the appellate court's interpretation of bona fide purchaser amounted to unjustifiable and unreasonable limitation of the right to property under Article 40 in violation of Articles 19(3)(c), 20(1), 21(3) and 23 of the Constitution; and*
- v) *Whether the 1<sup>st</sup> respondent's enforcement actions violated the appellant's rights to property, right to equal protection before the law and the right to fair administrative action under Articles 40, 27(1), and 47 of the Constitution.*

#### **E. ANALYSIS AND DETERMINATION**

- (i) *Whether the appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution?*

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

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

*“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law.”*

[41] Article 163(4)(a) of the Constitution states that:

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

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

*“(i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.*

*(ii) The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically*

*state to the satisfaction of the Court and with precision those aspects/ issues of his matter which in his opinion fall for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of Constitutional interpretation and application.*

- (iii) A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under Article 163(4)(a).*
- (iv) Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a).*
- (v) Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a).”*

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

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

**[44]** We note that this is an issue that arose before the ELC, whereby the appellant argued, albeit unsuccessfully, that the 1<sup>st</sup> respondent’s petition, ***ELC Petition No. 12 of 2017*** was *res judicata* as the issues raised had been determined in ***HCCC No. 131 of 2011***. This issue was also taken up by the appellate court and now finds

its way in this appeal. Is *res judicata* a factual matter devoid of the application of the Constitution?

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

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

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

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

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

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

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

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

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

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

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

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

**[54]** Thirdly, the appellant urges this Court to determine whether the enforcement actions by the 1<sup>st</sup> respondent violated the appellant’s right to property under Article 40, right to equal protection before the law under Article 27(1) and the right to fair administrative action under Article 47 of the Constitution. The 1<sup>st</sup> respondent counters that by arguing that there was no specific complaint pleaded under Article 47 and this was not for discussion and never for determination by the courts below. Further, it urges that the modalities of raising complaints under Article 47 are set

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out in the Fair Administrative Actions Act, 2015 which actualized the Article 47 of the Constitution.

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

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

[57] The interpretation or application of Articles 27(1) and 47 of the Constitution having not been a question for determination before the superior courts, this court would have no jurisdiction to entertain an appeal brought under Article 163(4)(a). Accordingly, this court has no jurisdiction to establish whether the 1<sup>st</sup> respondent’s “*enforcement actions*” violated the appellant’s right to property (Article 40), right to equal protection before the law (Article 27(1)) and the right to fair administrative action under Article 47 of the Constitution as this would amount to converting the court into a court of first instance. In our view, the appellant is no more than seeking

compensation and/or damages both liquidated and special, matters that are not in the purview of consideration by this court.

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

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

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

*“It is now firmly settled that issues of jurisdiction or competence of a court to entertain or deal with a matter before it, is very fundamental. It is a point of law and therefore, a rule of court, cannot dictate when and how, such*

*point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this Court”*

[61] Whereas the issue of intergovernmental dispute was not articulated at the trial court but only at the appellate court, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates necessitates that this Court should assume jurisdiction and interrogate those alleged wrongs. In ***Modern Holdings (EA) Limited v Kenya Ports Authority*** SC Petition No 20 of 2017 [2020] eKLR we acknowledged that the question of jurisdiction can be raised at any stage of the proceedings and observed that:

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

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

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

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

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

[64] The appellant's case is that the superior courts neglected the existence of the determination in ***HCCC No. 131 of 2011***, a decision *in rem*, regarding the status of the suit property made by a court with equal jurisdiction. For this reason, it urges that the trial court was estopped from reopening the subject matter regardless of the parties. It urges that ***Petition 12 of 2017*** was camouflaged as a constitutional petition to escape the statutory limitation of action. The appellant relies on the decisions in ***Nicholas Francois Marteens & others v South African National Parks, Case No. 0117***, ***George William Katerregga v Commissioner for Land Registration & others Kampala High Court Misc. Appl No. 347 of 2013***, ***Japhet Nzila Muangi v Kenya Safari Lodges & Hotels Ltd*** [2008] eKLR, ***E.T. v Attorney General & another*** [2012] eKLR and ***Pop-In (Kenya) Ltd. & 3 others v Habib Bank AG Zurich*** [1990] eKLR.

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

[66] The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. (*See Mulla, the Code of Civil Procedure, 16<sup>th</sup> Ed. Vol.1 – pg 161*). The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been delivered, subsequent proceedings are estopped. Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that all the legal rights and obligations of the

parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, this is a form of action estoppel. (**See Halsbury's Laws of England, paragraph 1174**).

[67] *Res judicata*, is embodied in Section 7 of the Civil Procedure Act which provides that:

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

*Explanation — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*

*Explanation — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

*Explanation -(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*Explanation — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

*Explanation —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”*

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

*“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:*

- a) There is a former Judgment or order which was final;*
- b) The Judgment or order was on merit;*
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and*
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”*

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

[70] From the record, we establish that ***ELC Petition 12 of 2017*** was filed by the 1<sup>st</sup> respondent against the appellant and the 2<sup>nd</sup> to 6<sup>th</sup> respondents. In the said petition, the 1<sup>st</sup> respondent’s claims were that the alienation and subsequent conversion of the suit property from public to private land was illegally and unlawfully done, and that the appellant cannot enjoy constitutional protection as the suit property was unlawfully acquired.

[71] We establish from the judgment in ***HCCC No. 131 of 2011*** that the Plaintiff, Elizabeth Karunguri Githunguri sought, *inter alia*, a permanent injunction to restrain the appellant herein from dealing with plot No. 6053/MN, (the suit property) and for the Registrar of Titles to revoke/cancel title No. 6053/1/MN and rectify the register. The court framed the questions for determination as *whether the plaintiff’s plot no. 1908/1/MN is a beach plot; whether the construction of the perimeter wall on plot no. 6053/1/MN has encroached the beach plot and is on*

*riparian reserve; whether the blockage of the view of the sea breeze is actionable; and whether a mandatory injunction can be issued to the Registrar of Titles to rectify the register by deleting the entries relating to MN/1/6053 when the Registrar is not a party to the suit.*

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

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

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

[74] Whereas the two suits concern the suit property, the main issue for determination in **ELC Petition 12 of 2017** was whether the suit property is a public utility and it challenged the manner in which the suit property was alienated and subsequently allocated to the 1<sup>st</sup> registered owner and the conversion to freehold property. On the other hand, the main issue in **HCCC No. 131 of 2011** was whether the suit property was a beach plot and on a riparian reserve and whether blocking the Plaintiff’s view to the ocean and sea breeze by the appellant was actionable. The issues for determination in **ELC Petition 12 of 2017** were

therefore not substantially in issue in **HCCC No. 131 of 2011**. Further, the 2<sup>nd</sup> to 6<sup>th</sup> respondents were not parties in **HCCC No. 131 of 2011** and the court's findings were inconclusive due to the absence of the state organs, specifically, the Registrar of Titles to enable the court make a determination. The parties in **ELC Petition 12 of 2017** are different from those in **HCCC No. 131 of 2011** save for the appellant.

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

[76] It is vital to note that the decisions in **HCCC No. 131 of 2011** and **ELC Petition 12 of 2017** were made by courts of concurrent jurisdiction. By majority, this Court stated in **Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment)** that decisions made by courts of concurrent jurisdiction made *in rem* are not binding on courts of equal jurisdiction. The ideal scenario on *stare decisis* is for trial court judges to follow decisions of other judges of the same court **unless there are compelling reasons to depart from the same**. This is to ensure consistency, certainty, predictability, and sound judicial administration.

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

[77] The appellant urges that **ELC Petition No. 8 of 2017** did not relate to an intergovernmental dispute, however, the framing and disposition of the suit evolved into an intergovernmental dispute once it was consolidated with **ELC Petition No.12 of 2017**. The appellant submits that the 1<sup>st</sup> respondent in its petition, sought to compel the national government officers to pursue and enforce a particular course of action and that the subject matter was the issue of the extent, scope, and engagement between a devolved unit and the national government. It relies on the

case of *Council of County Governors v Lake Basin Development Authority & 6 others* [2017] eKLR and *Isiolo County Assembly Service Board & Another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* [2016] eKLR to buttress its argument.

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

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

[80] Article 189 of the Constitution provides that:

*Cooperation between national and county governments*

(1) *Government at either level shall—*

a) *perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;*

b) *assist, support and consult and, as appropriate, implement the legislation of the other level of government; and*

- c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.*
- (2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.*
- (3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.*
- (4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.*

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

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

**[83]** From the provisions of the Constitution and the IGR Act set out above, the dispute must first be between the two levels of government or between county governments. The High Court in ***County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another***

Petition No. 3 of 2014 [2014] eKLR in further defining what an intergovernmental dispute is, stated as follows:

- a. *The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.*
- b. *Must be of a legal nature. That is a dispute capable of being the subject of a judicial proceeding.*
- c. *Must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.*
- d. *The dispute may not be subject to any of the previously enumerated exceptions.”*

[84] This definition found footing in ***Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another*** ELC No. 598 of 2016 [2017] eKLR and ***Okoiti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties)*** (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (Ruling) by the High Court.

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

[86] The main issue for determination before the Environment and Land Court was therefore not a disagreement between the county government and the national government agencies, but whether the ownership of the suit property was public or

private. The suit property was central to the dispute, necessitating the basis for the consolidation of the *Petition 8 of 2017* and *Petition 12 of 2017*. In our view, therefore, and we agree with the appellate court, the question of the dispute being intergovernmental fell on the periphery and was incidental to the main issue in dispute. The mere fact that the 1<sup>st</sup> respondent opted to file separate proceedings in response to that filed by the appellant does not change the nature of the proceedings. The issues and challenges to the ownership of the suit property would have still been introduced in response to the petition, even if by way of cross petition.

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

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

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

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

[90] The ***Black's Law Dictionary 9<sup>th</sup> Edition*** defines a *bona fide* purchaser as:

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

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

*“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:*

- (1) he holds a certificate of title;*
- (2) he purchased the property in good faith;*
- (3) he had no knowledge of the fraud;*
- (4) he purchased for valuable consideration;*
- (5) the vendors had apparent valid title;*
- (6) he purchased without notice of any fraud; and*
- (7) he was not party to the fraud.”*

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

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

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

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

**[95]** The appellant contends that prior to the first allotment and registration in 1989, the suit property was unalienated government land and the applicable law was the Government Land Act (*repealed*) (GLA). It asserts that the allotment was legal, regular and procedural as per the then prevailing legal regime, under the GLA. It is its case that the grant was issued under Section 3 of the said Act, wherein the President had the power, subject to the set limitations, to make grants or disposition of any estate, interest or rights over unalienated government land. It also urges that Section 10 of the Act limiting issuance of leases to a term of one hundred years was inapplicable to the suit property which is a freehold. In the same manner, the Physical Planning Act was inapplicable, retrospectively, as it was enacted and assented to on 24<sup>th</sup> October, 1996 and its commencement on 29<sup>th</sup> October, 1996 after the initial grant had been issued. It is the appellant’s further contention that the 1994 Survey Regulations providing for the coast foreshore reservation at 60 meters of the high watermarks were inapplicable as they were enacted and a corrigenda issued in 1996 after the initial grant had been issued.

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

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

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

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

**[100]** From the record and submissions, we note that the land was first allocated to H.E. Daniel T. Arap Moi in 1989. The applicable law at the time was the Land Planning Act, Cap 303, which was repealed by the Physical Planning Act Cap 286 which has since been repealed by the Physical and Land Use Planning Act No.13 of 2019. The Land Planning Act made provision for open spaces. Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public **open spaces** and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, Section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

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

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

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

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

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

*“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.*

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013* where Njagi J. held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.<sup>132</sup> A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

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

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

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

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

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

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

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

[111] Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of *bona fide* purchaser.

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

*v. Whether the appellant is entitled to the reliefs sought*

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

[114] In light of the above analysis and our findings set out therein, we find that the suit herein does not amount to an intergovernmental dispute; and that ***ELC Petition 12 of 2017*** is not *res judicata* ***HCCC No. 131 of 2011***. The appeal did not surmount the jurisdictional parameters invoked on the other claims of a constitutional nature. What therefore remains is the issue of costs. This Court in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, Sup. Ct. Petition No. 4 of 2012; [2014] eKLR set out the legal principles

