



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

(Coram: Koome; CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

**REFERENCE NO. E001 OF 2024**

**IN THE MATTER OF: AN APPLICATION BY THE NATIONAL LAND  
COMMISSION FOR ADVISORY OPINION UNDER  
ARTICLE 163(6) OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF ARTICLES 67 (2), 248 AND 260 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 21 (4) OF THE GOVERNMENT  
PROCEEDINGS ACT, CAP 40 LAWS OF KENYA**

**BETWEEN**

**THE NATIONAL LAND COMMISSION ..... APPLICANT**

**AND**

**THE HON. ATTORNEY GENERAL .....1<sup>ST</sup> INTERESTED PARTY**

**THE LAW SOCIETY OF KENYA..... 2<sup>ND</sup> INTERESTED PARTY**

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**Representation:**

Mr. Austine Odoyo for the Applicant

(Kipkenda & Co. Advocates)

Mr. Emmanuel Bitta for the 1<sup>st</sup> Interested Party

(Hon. Attorney General)

Mr. Moses Owuor for the 2<sup>nd</sup> Interested Party

(Ombok & Owuor Advocates LLP)

## ADVISORY OPINION

### A. INTRODUCTION

[1] The Applicant, the National Land Commission (NLC), filed a request for an Advisory Opinion dated 21<sup>st</sup> March, 2024 on 25<sup>th</sup> March, 2024 pursuant to Article 163(6) of the Constitution. The Reference seeks answers to the following questions:

- a. What is the definition and scope of the word ‘Government’ for purposes of the Government Proceedings Act? ;*
- b. Whether the applicant, being an independent constitutional commission/state organ constitutes or is part of ‘Government’ for purposes of the Government Proceedings Act; and*
- c. Whether the applicant is protected and/or insulated from execution proceedings, attachment of its assets and/or garnishee of its accounts in satisfaction of a decree as provided under Section 21 and 25 of the Government Proceedings Act.*
- d. The status of independent commissions in relation to the Government Proceedings Act, Cap 40 Laws of Kenya.*

[2] In the Reference, NLC has stated that it is established under Article 67(1) of the Constitution, with the duty of, among others, to manage public land on behalf of the county and national governments. In the discharge of its functions, it has over the years received requests from government agencies as well as the national and county governments to facilitate compulsory acquisition of land pursuant to Article 40 of the Constitution as read with Part VII of the Land Act, No. 6 of 2012. In the process of compulsorily acquiring such land, the NLC is mandated to receive compensation funds from various acquiring entities for onward transmission to the affected land owners. The applicant thus opened and maintains an account for receiving payment and holding such deposits, being Account Number 01\*\*\*\*\*0 at National Bank, in trust for various designated recipients of compensation, pursuant to Section 111(1) (A) of the Land Act.

[3] The applicant urged that not every acquisition is always settled amicably, and therefore there is bound to be litigation and eventual court decrees to be satisfied by

the applicant as an agent of the acquiring entities. The NLC set out the pending cases in court against it as over 3,300, in relation to compulsory acquisition litigation and several court decrees issued requiring compliance and settlement by the applicant.

[4] The applicant stated that its trust compensation account held at the National Bank has over time been under sustained attack in the nature of garnishee proceedings to satisfy pending court decrees. As a result of the numerous applications for execution and garnishee proceedings, the NLC averred that its functions have significantly been affected, hampering its administrative functions and threatening to grind it to a halt. It contended that its efforts to seek refuge under the provision of Sections 21 and 25 of the Government Proceedings Act have not yielded the desired result as the superior courts below have exhibited split schools of thought, on the one hand holding that the applicant is ‘government’ for purposes of the Act, and therefore insulated by the Act, while on the other hand, it has been held that the applicant is not ‘government’ and thus the provisions of the Act do not apply.

[5] It was the applicant’s contention that the uncertainty offends Article 201 (d) of the Constitution on prudent utilisation of public money thus requiring urgent resolution through an advisory opinion as opposed to the ordinary and lengthy adversarial process. It was also NLC’s case that a barrage of cases and applications for garnishee orders of its accounts continue to be filed for the numerous decrees pending settlement. According to it, the uncertainty and litigation threatens its day-to-day operations, a situation that is detrimental to finance and public administration, and the Reference is of utmost urgency as the resultant Advisory Opinion will guide litigants, state organs and other independent constitutional commissions on the applicability or otherwise of the Government Proceedings Act to them.

[6] The applicant listed the conflicting court decisions as follows:

- i) ***Eldoret High Court, Misc. Application No.29B of 2016- NLC vs. Prof. Tom Ojienda & Associates and others***: the court held that NLC is a body corporate and an independent state organ and could not be therefore be construed as government or a government department, and is thus not protected by the Government Proceedings Act.

- ii) ***Milimani Civil Case No. 445 of 2014, Five Star Agencies Limited vs. NLC & Another***: the court found that the NLC is a Government agency and subject to the Government Proceedings Act and therefore garnishee proceedings could not issue. An appeal on the matter is pending before the Court of Appeal.
- iii) ***Republic vs. NLC & 2 others Ex parte Cabin Crew Investments Limited*** [2019] eKLR: the court noted that the administration of public land had a public element and thus the NLC was a government department for purposes of Section 21 of the Government Proceedings Act.
- iv) ***Vivo Energy Limited (formerly known as Shell Kenya Limited) vs. National Land Commission*** [2020] eKLR: the court noted that independent constitutional commissions are part of government and thus satisfaction of decrees against them are to be done in conformity with the Government Proceedings Act.
- v) ***Rose Aoko Ogwang vs. National Gender and Equality Commission*** [2020] eKLR: the court took the view that the Government Proceedings Act applied only to the government and/or government department and thus independent commissions could not rely on the Act to defend attachment proceedings directed at them.

[7] The applicant, noting the above cases, contended that the pendency of any case before the superior courts below is not a hindrance to the Court exercising its advisory jurisdiction. It urged therefore that, the unique circumstances and the threat presented by the uncertainty expressed above, constitute matters of great public importance ripe for determination, which would not be ideal for the normal adversarial process.

[8] The applicant also urged that its request for an advisory opinion is pegged on the need for clarity on whether the NLC and other independent constitutional commissions constitute ‘Government’ for purposes of the Government Proceedings Act in light of Part 2, Item 6 of the Sixth Schedule on the transitional and consequential provisions under Article 262 of the Constitution. It added that, the Government Proceedings Act does not define the scope of ‘government’, while

Section 3 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya defines ‘government’ as “the Government of Kenya”.

[9] The applicant lastly averred that prior to the filing of the instant Reference, the applicant sought the advice of the Hon. Attorney General through its letter dated 15<sup>th</sup> December, 2023 on the question whether the National Land Commission is ‘Government’ and thus insulated from execution proceedings by dint of Section 21(4) of the Government Proceedings Act. By a letter dated 7<sup>th</sup> March 2024 the Attorney General opined that Constitutional Commissions and Independent Offices are part of Government, hence are within the purview of Section 21(4) of the Government Proceedings Act, but also recommended guidance by a higher Court given the contradicting decisions of the superior courts below.

### C. PARTIES SUBMISSIONS

#### i. *Applicant’s Submissions*

[10] In support of its request for an Advisory Opinion, the applicant filed submissions dated 23<sup>rd</sup> September, 2024 on 25<sup>th</sup> September, 2024. The applicant submitted that it is a state organ within the meaning of Article 163(6) as read with Articles 248(2) and 260 of the Constitution, and therefore it is a competent party within the meaning of Article 163(6) of the Constitution to seek this Court’s advisory. It cites this Court’s decision ***In the Matter of the National Land Commission*** Advisory Opinion Reference No. 2 of 2014 [2015] eKLR and avers that this Court pronounced itself on the status of state organs as being part of Government and therefore state organs are protected from execution proceedings, attachment of their assets and/or garnishee of their accounts, in satisfaction of decrees as provided for under Sections 21 and 25 of the Government Proceedings Act, Cap 40 Laws of Kenya.

[11] The applicant further relied on the South African decisions in ***Directory Advertising Cost Cutters vs. Minister for Post, Telecommunications and Broadcasting and others*** 1996 (3) SA 800 (T) and ***Mittalsteel South Africa Limited (previously known as ISCOR Limited) vs. Mondli Shadrack Hlatshwayo*** [2006] SCA 94 (RSA) where it was held that “the concept ‘organ of state’ had to be confined to ‘...institutions which are an intrinsic part of government.’”

[12] The applicant also cited the Court of Appeal decision in ***Five Star Agencies Limited vs. National Land Commission and National Bank of Kenya***, Nairobi Court of Appeal No. E290 of 2023 (***Five Star Agencies case***). In the said Judgment delivered on 12<sup>th</sup> April, 2024, the court held that the NLC is a state organ and for all purposes, part of government, and therefore, pursuant to Order 23 Rule 1 as read with Order 29 Rule 2(c) of the Civil Procedure Rules, it is insulated from execution proceedings.

[13] The applicant furthermore submitted that this Court can still render an advisory opinion notwithstanding that the Court of Appeal in the ***Five Star Agencies case (supra)*** delivered its judgment on 12<sup>th</sup> April, 2024 after the filing of the instant Reference, citing this Court's decision in ***Re Matter of Gender Representation to the National Assembly & Senate***, Advisory Opinion No.2 of 2012 [2012] eKLR. It adds that the Reference is of great public importance and there is a possibility of other parties moving to the Court of Appeal in other matters with an application seeking to overturn the decision in the ***Five Star Agencies*** matter thus creating further uncertainty.

**ii. 1<sup>st</sup> Interested Party's Submissions (Attorney General)**

[14] The Attorney General filed submissions dated 30<sup>th</sup> July, 2024 on 6<sup>th</sup> August, 2024. It is the Attorney General's contention that the decisions cited by the applicant and which are said to be contradictory are from the High Court or courts of equal status where judges are not bound by decisions of their colleagues on the issues for determination. The Attorney General adds that the instant Reference was filed on 21<sup>st</sup> March, 2024 when the questions posed for the Court's advisory opinion were subject of pending proceedings before the Court of Appeal, in the ***Five Star Agencies case***.

[15] In the said decision, one of the issues for determination was whether execution against the NLC can proceed by way of garnishee proceedings contemplated under Order 23 rule 1 of the Civil Procedure Rules 2010. The appellate court held that the NLC is a state organ and therefore for all purposes part of government. It further held that the garnishee proceedings instituted were incompetent, bad in law and unsustainable as provisions of Order 23 Rule 1, 2 and 3 of the Civil Procedure Rules

2010 do not apply in execution against the Government and/or State organs, and Five Star ought to have commenced execution proceedings against the NLC in strict adherence with the provisions of Section 21 of the Government Proceedings Act.

[16] It was the Attorney General's submission therefore that all the questions posed for this Court's advisory have been sufficiently answered by the Court of Appeal, whose decisions are binding on all superior courts below it, and there is no uncertainty on the interpretation of the law as regards the application of the relevant provisions of the Government Proceedings Act to independent constitutional commissions, more specifically, the applicant. In the circumstances, it concluded that the applicant's request for an advisory opinion does not meet the guiding criteria for issuance of the Court's opinion and ought to be declined, citing this Court's decision in ***Re Matter of Gender Representation to the National Assembly & Senate***; Advisory Opinion No.2 of 2012 [2012] eKLR.

**iii. 2<sup>nd</sup> Interested Party's Submissions (Law Society of Kenya)**

[17] The Law Society of Kenya (LSK) filed submissions dated 30<sup>th</sup> August, 2024 on 10<sup>th</sup> September, 2024. It submitted that traditionally government is constituted of the three known arms - the Executive, Parliament and the Judiciary, as is echoed at Article 1(3) of the Constitution wherein sovereign power is delegated to them. It avers that the word 'state' is synonymous with what constitutes government. It refers to Article 260 of the Constitution which defines state as "*...the collectivity of offices, organs and other entities comprising the Government of the Republic under this Constitution*" and further that 'a state organ' is defined as "*a commission, office, agency or other body established under this Constitution*". From the definitions set out, it was LSK's submission that the NLC, being such commission established under Article 67 of the Constitution, constitutes part of Government. It relied on this Court's decision ***In the Matter of the National Land Commission*** Advisory Opinion Reference No. 2 of 2014 [2015] eKLR to urge that the question whether independent commissions form part of government was conclusively answered as the Court held that, "*...as state organs, they form part of Government...*"

[18] The LSK contends that the term "Government" should be interpreted contextually to give effect to the legislative purpose, thereby covering a wide array of

public bodies acting on behalf of the State. Further, in determining whether the NLC falls within the scope of “government” under the Government Proceedings Act, the Court must consider the legislative intent, the constitutional framework and the role of the Commission within the broader governance structure. This includes not only the executive branch but also state organs, agencies and commissions established by the Constitution or statute. It cited the House of Lords decisions in ***Town Investments Ltd vs. Department of Environment*** [1978] AC 359 and ***Attorney General vs. De Keyser’s Royal Hotel Ltd*** [1920] AC 508 to urge that the term “government” should be interpreted to include not only the executive but also any entity that performs functions traditionally associated with the state regardless of its independence or the specific nature of its constitutional mandate.

[19] The LSK posited that its independence notwithstanding, the NLC exercises functions that are fundamentally governmental in nature including, land policy formulation, oversight over land use, managing public land, facilitating compulsory acquisition on behalf of the state and land dispute resolution, and its activities are funded by the National Treasury and its officers remunerated from public funds. To buttress its averments, it cites the United States Supreme Court decision in ***Department of the Army vs. Blue Fox, Inc*** 525 U.S. 255 (1999) to urge that the agency, although distinct from the central government was part of the central government.

[20] It further urged that, while the independent commissions are autonomous, they perform critical government functions and are integral to the concept of “government” as envisaged by the Constitution. It cites this Court’s decision, ***In Re the Matter of the Interim Independent Electoral Commission*** Appl. No. 2 of 2011 [2011] eKLR where the Court held that: “*the real purpose of the ‘independence clause’ with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of Government.*”

[21] According to the LSK therefore, the NLC should be considered part of ‘government’ under the Government Proceedings Act, and be afforded the protection

under Sections 21 and 25 of the Act to ensure consistency in the application of the Act and to avoid undermining the effective discharge of governmental functions by independent commissions. On the rationale of the provision of Sections 21 and 25, the LSK averred that this is rooted in the principle of sovereign immunity which shields the State and its agencies from the coercive processes of execution and cites the High Court decisions in ***Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza*** [2012] eKLR, and ***Republic vs. Attorney General & Another ex parte James Alfred Koroso*** [2013] eKLR. In the said decisions, it was held that execution proceedings could not be issued against government and the appropriate remedy for a decree holder is to seek satisfaction of the decree through the budgetary process as outlined in the Government Proceedings Act and involvement of the National Treasury. It also cited the Constitutional Court of South Africa's decision in ***President of the Republic of South Africa & Another vs. Modderklip Boerdery (Pty) Ltd*** [2005] ZACC 5 and the Indian Supreme Court decision in ***Union of India vs. Raman Iron Foundry*** [1974] SCR (2) 664 where a similar position was taken.

[22] The LSK furthermore urged that the government, when acting through independent agencies, remains liable for the actions of those agencies in so far as those agencies are performing functions that are governmental in nature. The LSK additionally contends that there is a lacuna in the enforcement of compensation of awards for compulsory acquisition citing Article 40 of the Constitution, Part VIII of the Land Act No.6 of 2012 and the National Land Policy Sessional Paper No. 3 of 2009 which provide the minimum that the NLC must be assured of before granting an approval for compulsory acquisition. It added that pursuant to the law, the NLC is under an obligation to ensure that the acquiring authority has set aside funds for the acquisition and to ensure that the acquisition has been budgeted for and funds have been allocated for the same.

[23] It added that there are instances where courts have ordered for additional compensation where disputes arise and where compulsory acquisition is conducted in the absence of allocation of funds, land owners are left at the mercy of acquiring institutions and the NLC, as they are dispossessed of their property and therefore

suffer the pain of lack of prompt compensation. Further, compensation awarded for compulsory acquisition that exceeds the fair value should not be enforced through the execution process against the government, but should be satisfied through statutory procedures under the Government Proceedings Act, specifically through requisition from the acquiring authority funded by the National Treasury.

**[24]** It was the LSK's other submission that the procedures under the Government Proceedings Act for realising the fruits of a Judgment are meant to give adequate notice to the government to make arrangement to satisfy the decree of the court. It imposes a statutory duty on the Accounting Officer concerned to pay the sums specified in the order to the person entitled. This advantage, it posited, is not accorded to persons who have pending awards with the NLC, particularly where the acquiring authority has failed to remit funds to the NLC towards the compulsory acquisition of the property. The LSK thus submitted that this inability to execute awards issued as a result of compulsory acquisition constitutes an infringement of the right to property of the persons whose properties have been compulsorily acquired under Article 40 of the Constitution. It therefore urged that it is imperative that the principles and processes for enforcement of awards for compulsory acquisition be developed to ensure that the property rights under Article 40 of the Constitution are realized and secured.

### **C. ISSUES FOR DETERMINATION**

**[25]** From the pleadings and the submissions, the following issues crystallised for our determination:

- i. Whether this Court has jurisdiction to render the advisory opinion and if so;*
- ii. What is the definition and scope of the word 'government' for purposes of the Government Proceedings Act?;*
- iii. Whether the applicant, being an independent constitutional commission/state organ constitutes or is part of 'government' for purposes of the Government Proceedings Act; and*

*iv. Whether the applicant is protected and/or insulated from execution proceedings, attachment of its assets and/or garnishee of its accounts in satisfaction of a decree as provided under Section 21 and 25 of the Government Proceedings Act.*

#### **D. ANALYSIS**

*i. Whether this Court has jurisdiction to render the advisory opinion*

[26] The applicant seeks this Court’s Advisory Opinion on whether the term “government” under the Government Proceedings Act, Cap 40 Laws of Kenya includes constitutional commissions, such as the applicant, and if so, whether it is insulated from execution proceedings, attachment of its assets and/or the garnishee of its accounts in satisfaction of a decree under Sections 21 and 25 of the Government Proceedings Act.

[27] Section 21(4) of the Government Proceedings Act provides that:

***“(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs”.***

Section 25(1) on the other hand provides that:

**“25. Exclusion of proceedings in rem against the Government**

***(1) Nothing in this Act shall authorise proceedings in rem in respect of any claim against the Government, or the arrest, detention or sale of any Government ship or aircraft, or of any cargo or other property belonging to the Government, or give to any person any lien on any such ship, aircraft, cargo or other property”.***

[28] At the outset and before addressing the above sections, we have to determine whether, the jurisdiction of this Court to render an advisory Opinion has been

properly invoked, and if so, whether the Court should exercise its discretion to render the Opinion as prayed. Towards this end, it is instructive to recall our decision in ***Re Matter of Gender Representation to the National Assembly & Senate; Advisory*** Opinion No. 2 of 2012, [2012] eKLR; wherein the following principles were laid down to guide the Court on the exercise of its jurisdiction under Article 163 (6) of the Constitution. At paragraph 83, the Court stated:

*“(i) For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be “a matter concerning county government.” The question as to whether a matter is one “concerning county government “will be determined by the Court on a case-by-case basis.*

*(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.*

*(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.*

*(iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process”.*

**[29]** At paragraph 17 of the decision, the Court re-emphasized that:

*“Only a truly deserving case will justify the Court’s Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in Section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing “rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth.”*

**[30]** The 1<sup>st</sup> limb to the issue of jurisdiction is whether the National Land Commission has capacity to make a request for an advisory opinion. Article 260 of the Constitution describes a state organ to mean “*a commission, office, agency or other body established under the Constitution*”. Article 248 (b) lists the National Land Commission as being one of the independent commissions. Article 67 then establishes the National Land Commission while Article 67 (2) specifically lists its functions to be among others *(a) to manage public land on behalf of the national and county governments*.

**[31]** In *National Land Commission v Attorney General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* [2014] KESC 10 (KLR) we determined that from the National Land Commission’s status and standing it had the capacity to request an advisory opinion. We also held that the NLC being a state organ is entrusted with the function of managing public land on behalf of both the national and county government.

**[32]** In this case, the issues relate to the conversion of private property to public land through compulsory acquisition. Section 9 (1) (c) provides that land may be converted from private land to public land through compulsory acquisition. The Land Act further mandates the National Land Commission to pay out compensation for the said compulsory acquisition. Article 111 (1) & (2) specifically provides that:

*“(1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.*

(2) *The Commission shall make rules to regulate the assessment of just compensation”.*

[33] The conversion of private land to public land is for the benefit of both county and national government. The issue raised herein is therefore one involving county government as the same involve the administration and management of public land.

[34] Having determined that the applicant has capacity to make a request for an advisory opinion, the issues equally concern county government and noting that the applicant herein sought the advice of the Attorney General before instituting the Reference before us, the next question is whether the issues raised have been the subject of proceedings in the lower courts and whether the matter has been substantively determined by the decision of the lower courts.

[35] The applicant urged that the determination by the Court of Appeal in the ***Five Star agencies case*** (supra) is not a hindrance to this Court in exercising its advisory jurisdiction citing this Court’s decision in ***Re: Matter of Gender representation, the National Assembly and Senate*** (supra) where the court held that despite there being proceedings instituted in the lower courts a request for an advisory opinion can still be made. The Attorney General taking a contrary view submitted that in light of the decision of the Court of Appeal in the ***Five Star Agencies case (supra)***, it is not necessary to render an opinion on a matter that has been determined through the regular adversarial system and that the applicant is in any event not aggrieved by the decision of the Court of Appeal and is not in any danger of being denied the protection of the Government Proceedings Act.

[36] In the ***Five Star Agencies case (supra)*** the trial court issued an order of mandamus and also ultimately found that the NLC is a government agency and subject to the Government Proceedings Act and therefore garnishee proceedings could not issue. At the Court of Appeal one of the main issues for determination was *Whether execution against the NLC can proceed by way of garnishee proceedings contemplated under Order 23 rule 1 of the Civil Procedure Rules 2010*. The Court of Appeal determined that the certificate of order against the government is a mandatory condition precedent, the same was not obtained, and it thus follows that the trial court ought not to have issued an order of mandamus directed at the NLC.

It also ultimately found that the procedure adopted by Five Star Agencies in enforcing the decree issued by the trial court was wrong. Paragraphs 98 – 100 of the decision aptly captures the appellate court’s position on that issue as follows:

*“98. In the present circumstances, Five Star did not obtain Certificate of Order against the Government from the trial court, which it was required to. Instead, it obtained a copy of the decree which it served upon the NLC. The obtaining of the said certificate was a condition precedent to the making and issuance of an order of mandamus. In our view, the trial court could only issue an order of mandamus after satisfying itself that the said certificate was issued and served. The trial court vide its ruling dated 13th December 2018 correctly held that a copy of the judgment dated 24th November 2014 and the decree issued on 16th December 2014 had been served on the NLC. However, the court did not satisfy itself as to whether a Certificate of Order against the Government had been obtained and served upon the NLC pursuant to the provisions of section 21 of the Government Proceedings Act. The certificate is mandatory and is a condition precedent to the issuing of an order of mandamus. It follows therefore that in the absence thereof, the trial court ought not to have issued an order of mandamus in favour of Five Star.*

*99. Having noted as above, it follows therefore that the garnishee proceedings instituted by Five Star through the notice of motion dated 20th January 2023 and brought under the provisions of Order 23 Rule 1, 2, and 3 of the Civil Procedure Rules, 2010 were incompetent, bad in law and unsustainable as provisions of Order 23 Rule 1, 2, and 3 of the Civil Procedure Rules, 2010 do not apply in execution against the Government and/or State organs. Five Star ought to have commenced execution proceedings against the NLC in strict adherence with the provisions of section 21 of the Government Proceedings Act.*

*100. We fully agree with Five Star that the Constitution of Kenya, 2010 under Article 40 (3) (b) (i) guarantees every person and/or entity whose land has been compulsorily acquired by the Government prompt payment in full, of just compensation. This obligation is replicated under section 111 and 115 of*

*the Land Act. Five Star is, by all means, entitled to prompt payment in full of the compensation amount as assessed by the trial court. However, the procedure it adopted in enforcing the decree issued by the trial court was wrong. In upshot, therefore, we do not find merit in the argument advanced by Five Star that the provisions of section 21 of the Government Proceedings Act and Order 29 rule (2) of the Civil Procedure Rules, 2010 limits its right to prompt payment as stipulated under Article 40 (3) (b) (i) of the Constitution. The rationale for the requirement that there should be adherence with the procedure laid down under section 21 of the Government Proceedings Act cannot be gainsaid. See Kisya Investments Ltd (supra). This ground of appeal is therefore unmerited and must therefore fail” [ Our emphasis].*

[37] The issues set out in the **Five Star case** (supra) are clearly related and pertinent to the issues raised in this Reference. The conflicting decisions cited by the applicant, herein, and which emanate from the High Court were considered by the Court of Appeal in its determination, and at paragraph 32 of its decision settled whatever confusion may have arisen in the past.

[38] We have equally considered the decision in **Re: Matter of Gender representation, the National Assembly and Senate** (supra) and we note that the dispute therein related to the general principles of the electoral system and the application of the two- third gender representation under Article 81 (b) of the Constitution. The question posed was whether the same should have been applicable in the general election, then slated for March 2013. The Court in the decision noted that there were decisions made by the High Court concerning the same subject. The cases in question were **Federation of Women Lawyers & Others vs Attorney General** 2011 eKLR where the court held that the two-thirds gender principle was subject to progressive realization, **Centre for Rights Education and Awareness & Others vs. the Attorney General and Others** (Nairobi High Court Constitutional Petition Number 16 of 2011); **Milka Adhiambo Otieno & Another vs. The Attorney General & Another** (Kisumu High Court Constitutional Petition Number 33 of 2011) and; **Centre for Rights Awareness & Others vs. The Attorney General and Another** (Nairobi High Court Constitutional Petition Number 208 of 2012 as consolidated with Nairobi High Court

Constitutional Petition Number 207 of 2012 which held otherwise. In the circumstances and noting that the general election was fast approaching, a clear controversy persisted at the time the High Court rendered its determinations hence necessitating further legal clarification by way of an Advisory Opinion. In this case, the Court of Appeal has brought clarity to the issues sought in the Reference by issuing a conclusive and definitive decision. That case is therefore distinguishable from the instant one since there is a clear determination by the Court of Appeal hence establishing a binding precedent on the courts below it. That determination has not been set aside and remains the law on the subject.

**[39]** While we therefore acknowledge that there are instances where this Court can render an advisory opinion while there is a pre-existing dispute before the lower courts, the same can only be done in novel situations. The Court is equally hesitant to make a determination in any situation that will usurp the role of another court in the constitutional set-up. (See, ***In re Application by the County Assemblies of Kericho and Nandi Counties for an Advisory Opinion Under Article 163(6) of the Constitution of Kenya & In re Application by the Governor, Makueni County for an Advisory Opinion Under Article 163(6) of the Constitution the Governor, Makueni County*** (Reference 3 & 4 of 2020 (Consolidated)) [2021] KESC 61 (KLR) (16 March 2021) (Ruling)

**[40]** In addition to our findings above, we also note the applicant's argument that the Supreme Court can still decide the issues herein to avert the likelihood of conflicting decisions emanating from the appellate mechanism, based on similar issues raised therein. To this issue we answer that, rendering an opinion on an issue in the pretext that there is a likelihood of conflicting decision arising in future will be urging us to act on mere speculation an invitation we decline to accept. Further, we reiterate that, in the hierarchy of courts and the principle of *stare decisis*, the High Court and courts below it, are bound by the decision of the Court of Appeal and this Court has been unequivocal in its respect for the hierarchy of courts in Kenya. In ***Peter Ngoge v. Ole Kaparo***, Sup. Ct. Petition No. 2 of 2012, this Court affirmed the same as follows:

*“...The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals.....In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court....”*

[41] It is therefore our determination that the questions for which an opinion has been sought from us by the applicant herein have been answered by the decision in the ***Five star Agencies case*** (supra) and specifically that government under the Government Proceedings Act, Cap 40 Laws of Kenya includes constitutional commissions, such as the applicant, and it is therefore insulated from execution proceedings, attachment of its assets and/or garnishee of its accounts in satisfaction of a decree under Section 21 and 25 of the Government Proceedings Act.

#### **E. COSTS**

[42] Given the context of the issues raised by the applicant, guided by our determination in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*** [2014] eKLR that the Court in exercising its discretion to award costs should accommodate the special circumstance of the case, and noting that the determination in ***Five star*** (supra) was made during the pendency of these proceedings we are inclined to a determination that there shall be no orders as to costs.

#### **E. ORDERS**

[43] While it is our finding that this Court has jurisdiction to render an Advisory Opinion as prayed in the Reference, we nonetheless decline to exercise our discretion in favour of rendering such opinion as sought by the applicant, for the reasons given at paragraphs 34 to 41 of this Ruling. We accordingly issue the following orders:

- i. The applicant’s reference dated 21<sup>st</sup> March 2024 and filed on 25<sup>th</sup> March 2024 is hereby dismissed.**
- ii. There shall be no orders as to costs.**

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of March, 2025.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE PRESIDENT OF THE**  
**SUPREME COURT**

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

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**