REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E022 OF 2024

–BETWEEN–

KENYA WILDLIFE SERVICE ..... APPELLANT

–AND–

SEA STAR MALINDI LIMITED ..... RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (**Gatembu, Nyamweya & Odunga, JJ. A**) delivered on 12th April, 2024 in Civil Appeal No. E018 of 2022)*

Representation:

Mr. Kiragu Kimani, SC & Mr. Queenton Ochieng for the Appellant
(*Hamilton, Harrison & Mathews Advocates*)

Mr. Kevin Anami for the Respondent
(*Kidenda Onyango Amani & Associates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before us is an appeal dated 24th May, 2024 at the instance of Kenya Wildlife Services (the appellant). The appeal is premised on this Court's appellate jurisdiction under Article 164(4) (a) of the Constitution. The gravamen of the

appeal revolves around whether a decision made in judicial review proceedings prior to the 2010 Constitution can conclusively form the basis of determination of liability in a subsequent civil suit or constitutional petition. More so, taking into account the parameters/scope of judicial review prior to the 2010 Constitution and the Fair Administrative Action Act, Cap 7L.

B. BACKGROUND

(i) Factual History

[2] In 1994, Sea Star Malindi Limited (the respondent) purchased L.R No. 3170 Malindi (suit land), which is adjacent to the Malindi Marine National Reserve and Park (Marine Park), with the intention of erecting a hotel thereon. Towards that end, on 15th August 1996, the respondent obtained approval of its building plans from the Municipal Council of Malindi (Municipal Council), the predecessor of the Kilifi County Government. Thereafter, construction commenced with a projected completion date of 1st December, 1997. However, when the construction was about 40% complete, the appellant, vide a letter dated 21st April, 1997 directed the respondent to stop it on the ground that it was encroaching on a protected area. That being a distance of an area covering 100 feet from the high-water mark of the Indian Ocean which is part and parcel of the Marine Park by virtue of Legal Notice No. 99 of 1968. There was back and forth correspondence between the appellant and the respondent on this issue resulting in a subsequent letter dated 6th June, 1997 where the appellant gave what it termed as special permission to the respondent to complete the construction of the structure it had begun. The respondent was however directed not to put up any other structure or encroach on the protected area.

[3] That notwithstanding, by a subsequent letter dated 20th August 1997, the appellant withdrew the aforementioned permission on the ground that the

respondent had failed to adhere to the conditions thereof. In particular, that the respondent had not only put up waste disposal facilities including a septic tank on porous coral reefs but also continued encroaching on the protected area. All in all, the appellant prohibited the respondent from continuing with the construction. It is that decision that prompted the respondent to file judicial review proceedings in the High Court, **Misc Suit No. 982 of 1997**, seeking *inter alia* an order of *certiorari* to quash the appellant's decision comprised in the letter dated 20th August, 1997. Apparently, thereafter on 9th November, 1997 the appellant's wardens took possession of the suit land and remained thereon in a bid to stop or bar any further construction thereon.

(ii) Litigation History

(a) At the Environment and Land Court

[4] On account of the foregoing, the respondent instituted another suit in the High Court, **HC Civil Suit No. 579 of 1998**, against the appellant among other parties. That suit was subsequently transferred to the Environment and Land Court (ELC) wherein it was assigned a new reference number, **Malindi ELC No. 56 of 2016** (the suit subject of this appeal). Eventually, the respondent maintained the suit substantially against the appellant and withdrew its claim against the other parties. The gist of the suit was that, the respondent is the absolute registered proprietor of the suit land; that at all material times the suit land including the original parcel, LR No. 850 Malindi, from which it was excised was private land; that at no point was the suit land public/government land or compulsorily acquired by the government; that the respondent was entitled to utilise the suit land, a freehold interest, in the manner it deemed fit by putting up a hotel in line with the approved plans by the Municipal Council; that Legal Notice No. 99 of 1968 did not apply to the suit land; and the appellant's conduct of

stopping/barring the respondent from continuing and completing the construction was unconstitutional, illegal and null and void.

[5] In addition, the respondent urged that it suffered heavy financial losses since it was unable to complete the construction of the hotel as projected, and repay the loan of Kshs 70,000,000 which it took out at an interest rate of 35% per annum to finance the construction. Besides, it was the respondent's contention that the appellant's conduct left the construction work unattended exposing it to deterioration which in turn necessitated pulling down and reconstruction of portions thereof. Towards that end, the respondent sought a number of reliefs which can be aptly summarised as follows:

a) *An order restraining the appellant from interfering with the respondent's construction of its intended hotel or use of its suit land.*
b) *A declaration that the suit land is private land, and that Legal Notice No. 99 of 1968 did not apply to any part of it.*
c) *A declaration that the appellant's decision dated 20th August 1997 and 9th November 1997 to stop further construction on the suit land was unconstitutional, illegal and null and void ab initio.*
d) *An order that the appellant is liable for the damages and losses incurred by the respondent from 20th August, 1997 to the date when the reconstruction shall be completed.*
e) *Loss of income of USD 75,000 per month from 1st December, 1997 (when the construction was projected to have been completed) until the construction is completed;*

f) General and exemplary damages to be assessed from 20th August, 1997 plus interest at bank overdraft rates calculated on monthly rests from the date of judgment.

g) Costs of the suit plus interest at commercial bank overdraft rates of 35% from the date of filing the suit calculated on monthly rests until payment in full of the total sum.

[6] In its defence, the appellant maintained that part of the construction had encroached on a protected area (100 feet from the high-water mark) which is delineated as part of the Marine Park. The encroachment had the effect of interfering and adversely affecting the delicate eco-system of the Marine Park. Consequently, the appellant had the requisite power/authority to stop the said construction as it is charged with the responsibility of protecting, conserving and managing the Marine Park under the Wildlife Conservation and Management Act, Cap 376. In any event, the appellant urged that if the construction in issue was allowed to continue it would have led to irreversible consequences and a complete loss of an essential natural resource. Therefore, in its view, it was simply carrying out its statutory duty.

[7] At the hearing of the suit, the respondent called two witnesses, that is, one of its directors and a quantity surveyor who reiterated its case as reproduced above. The respondent urged the court to assess the quantum of damages as presented in the Bill of Quantities produced by the quantity surveyor. What was more, the respondent brought to the court's attention the judicial review proceedings it had filed before the High Court. Apparently, the respondent had filed the judicial review proceedings against the appellant prior to the suit which is the subject of this appeal. In addition, the respondent had also instituted a third suit before the Malindi ELC being **ELC No. 47 of 2006** against the Kilifi County Government,

the successor of the Municipal Council of Malindi over the same subject matter. It was alleged in this third suit that on or about the 15th January 2005, the Municipal Council demolished the hotel which was then 90% complete despite approving the same on 15th August, 1996. Consequently, the respondent in this suit against the Kilifi County Government sought damages for reconstruction.

[8] On its part, the appellant neither called any witnesses nor tendered evidence at the hearing of the suit subject of this appeal. It is instructive to note that meanwhile, by a ruling dated 8th November, 2002 *Onyango Otieno, J.*, (as he then was), concluded the judicial review proceedings by issuing an order of *certiorari* quashing the appellant's decision dated 20th August 1997 restricting, and/or restraining the respondent from constructing a hotel on the suit land. In doing so, the learned Judge found that, the suit land was private land, and extended up to the high-water mark; Legal Notice No. 99 of 1968 did not affect the suit land; and the appellant should have complied with the provisions of the Wildlife Conservation and Management Act and the Land Acquisition Act (repealed) if it wished to have control over suit land. It was also the court's view that the appellant's conduct was manifestly unjust and presented an undue interference with the respondent's enjoyment of its property.

[9] By the time the ELC (*Olola, J.*) was penning the judgment dated 31st July, 2018 pertaining to the suit against the appellant, the subject of this appeal, the judicial review proceedings had been concluded in the terms set out in the preceding paragraph. As a result thereof, *Olola, J.* held that the issue of liability against the appellant had been conclusively determined by the judicial review decision which had neither been reviewed nor challenged on appeal. Rather, the trial Judge found that the only outstanding issue in the suit subject of this appeal was the quantum of damages that should be awarded to the respondent. In that regard and upon

taking into account that the judicial review decision was rendered on 8th November 2002, the trial Judge found that nothing stopped the respondent from continuing with the construction thereafter to mitigate its losses. In particular, the court found that the respondent should not have taken more than three years after the judicial review decision to re-organise itself and continue with the said construction.

[10] It is on the aforementioned basis that the trial Judge assessed the cost of reconstruction and completion of the hotel as at 2005. While the court appreciated that the appellant had not led any evidence at the hearing to controvert the Bill of Quantities produced by the respondent, it declined to apply hook, line and sinker the cost of reconstruction provided therein since it found the same to be mere estimates. Consequently, taking into account that the Bill of Quantities had indicated the cost of reconstruction in 2005 to have been Kshs. 102,239,406.10/=, the trial Judge found that an award of Kshs. 90,000,000 would suffice. Moreover, the court also awarded the respondent general damages in the sum of Kshs. 30,000,000; interest at commercial bank rates until payment in full; and costs of the suit subject of this appeal.

[11] It is also useful to point out that subsequent to the aforementioned judgment in the suit subject of this appeal, the same trial court (*Olola, J.*) delivered a judgment in the third suit against the County Government, **ELC No. 47 of 2006**, on 29th May, 2019. The tenor of it was that there was no evidence to controvert the respondent's case that the Municipal Council demolished its hotel in 2005. Nevertheless, the court declined to assess any damages due to the respondent on the basis that the damages awarded to it in the suit against the appellant in **ELC No 56 of 2016** were sufficient. However, the judgment in regard to the third suit which was against the County Government was set aside by the Court of Appeal in **Civil Appeal No. 121 of 2019** on 21st January 2022, and that third suit was

remitted back to the ELC for assessment of damages. As at the time of hearing of this appeal, the ELC (*Odeny, J.*) by a subsequent judgment dated 4th October, 2023 in the suit against the County Government had assessed the damages payable to the respondent at Kshs. 709, 828,966 being reconstruction costs, general damages, loss of income and professional fees incurred by the respondent plus costs of the said suit. For the sake of clarity that particular appeal is not before us.

(b) At the Court of Appeal

[12] Aggrieved with ELC's decision in **ELC No 56 of 2016**, the appellant, filed an appeal, **Civil Appeal No. E018 of 2022**, before the Court of Appeal premised on nine grounds of appeal. The appellate court condensed the said grounds into four issues *to wit*, *whether the trial Judge erred by relying on the judicial review decision in determining the question of liability; whether there was a legal basis and justification for the award of general damages of Kshs 30,000,000; whether there was a legal basis for the award of special damages of Kshs. 90,000,000; and whether interest was payable and if so, at what rates?*

[13] The Court of Appeal (*Gatembu, Nyamweya & Odunga, JJ.A.*) in a judgment dated 12th April 2024, the majority ((*Nyamweya & Odunga, JJ.A.)* with *Gatembu J.A* dissenting, agreed with the trial court, that the issue of liability was settled by the judicial review decision. However, the majority judgment found that the trial court had misapprehended the essence of an award of general damages in a claim of violation of rights. In that, the trial court ought to have made a nominal award of general damages to protect and remedy the respondent's constitutional right to its property. Accordingly, they set aside the award of Kshs. 30,000,000 issued as general damages on the ground that it was excessive and substituted the same with an award of Kshs. 3,000,000.

[14] With regard to the Kshs. 90,000,000 which was awarded by the trial court as the cost of reconstruction of the hotel, the appellant urged the appellate court to take into account its decision in Civil Appeal No. 121 of 2019 - ***Sea Star Malindi Limited Vs County Government of Kilifi*** (2022) KECA 22 KLR. In particular, that it had remitted the suit against the County Government, **ELC No. 47 of 2006** (arising from the alleged demolition of hotel in January, 2005 by the Municipal Council of Malindi), back to the ELC for assessment of damages. The appellant asserted that since the suit against it, and the suit against the County Government were related/intertwined as they related to the same subject matter, the suit land, the two suits should be pursued and determined together. This is because in its view, the liability between the County Government and the appellant can be fairly determined to avoid double compensation for the same cause of action.

[15] While appreciating that the suit against the County Government was pending before ELC, the majority judgment of the Court of Appeal declined to remit the suit against the appellant to the same court. More so, since it found firstly, that the suit against the appellant had been in court for over 25 years since 1998. Secondly, that the impact of any orders made by the appellate court pertaining to the suit against the appellant can be considered in the determination of the suit against the County Government to obviate the risk of unjust enrichment on the part of the respondent. On that basis, the majority judgment went on to find that there was no reason to interfere with the exercise of the trial Judge's discretion in awarding special damages of Kshs. 90,000,000/= as costs for reconstruction.

[16] As for the issue of interest, the majority interfered with exercise of the trial Judge's discretion on the ground that he had failed to provide the basis for awarding such interest at commercial rates instead of at court's rates. Further that,

the trial Judge failed to take into account the principles relating to the period from which such interest should apply.

[17] On his part, *Gatembu, J.A* in his dissent found that the reliefs sought by the respondent in the suit subject of this appeal and the suit against the County Government revolve substantially around the demolition and reconstruction of the hotel as well as compensation which ought to be resolved by the same court. Towards that end, he held that he would have set aside the award on damages entirely and remitted the suit subject of this appeal, to the ELC to be consolidated and heard together with the suit against the County Government.

[18] Nonetheless, the appellate court in its final orders partially allowed the appellant's appeal before it to the extent that it set aside the award of general damages of Kshs. 30,000,000 and interest thereon at commercial rates by the trial court. The court substituted the same with an award of nominal damages of Kshs. 3,000,000 with interest at court rates from the date of judgment by the trial Court until payment in full. Additionally, save for upholding the award of costs for reconstruction of Kshs. 90,000,000, the Court of Appeal substituted the award of interest thereon at commercial rates, with an order of interest at court rates from the date of filing of the suit in the trial court until payment in full. Lastly, the appellant was condemned to pay the respondent's costs at the trial court and the Court of Appeal.

(c) At the Supreme Court

[19] Undeterred, the appellant filed this second appeal before this Court premised on the grounds that the Court of Appeal erred by –

i. *Finding that the appellant is liable to the respondent for violating its constitutional right to property.*

ii. *Finding that the appellant was liable to compensate the respondent for violation of its constitutional right to property in the sum of Kshs. 3,000,000 together with interest from the date of judgment of the trial court.*

iii. *Finding that it could proceed to assess damages that should be awarded to the respondent pursuant to Article 23(3)(e) of the Constitution.*

iv. *Holding that the respondent was entitled to compensation in the sum of Kshs. 90,000,000 together with interest from the date of filing suit being the cost of reconstruction of the hotel.*

v. *Failing to set aside the award of damages entirely and to order that the question of quantum of damages to the respondent, if any, be remitted back to the ELC so that the ELC can determine the appropriate assessment in light of the claim by the respondent in the third suit (**Malindi ELC Case No. 47 of 2016**) against t*he County Government of Kilifi.

[20] Based on the foregoing, the appellant sought the following reliefs: -

a) *The appeal be allowed.*
b) *The impugned judgment of the Court of Appeal be set aside and substituted with an order allowing the appeal before the said court and dismissing the respondent's case in the ELC.*
c) *Costs of this appeal, the appeal before the Court of Appeal and the ELC case.*
d) *Any other reliefs the Court deems fit to grant.*

[21] In opposing the appeal, the respondent filed grounds of objection dated 28th June, 2024 challenging the jurisdiction of this Court to entertain the same. More

particularly, it is urged that the crux of the dispute between the parties was never on the interpretation and application of the Constitution as prescribed in Article 163(4)(a) of the Constitution.

C. PARTIES SUBMISSIONS

(i) Appellant's Submissions

[22] By its submissions dated 29th January 2025, the appellant delineates 3 issues for determination namely: *whether the Court of Appeal properly assessed the evidence on liability; whether it was proper for the Court of Appeal to award damages pursuant to Article 23(3)(e) of the Constitution; and whether the respondent was entitled to special damages in the sum of Kshs. 90,000,000 million*.

[23] Pertaining to liability, the appellant took issue with the Court of Appeal for relying on this Court's decision in ***Saisi & 7 others Vs Director of Public Prosecutions & 2 Others*** [2023] KESC 6 (KLR) ***(Saisi Case)*** and holding that in determining liability within the confines of judicial review, a court can undertake limited merit review. It maintains that the ***Saisi Case*** was not applicable to the instant appeal as it was decided based on the provisions of the Fair Administrative Action Act (FAA Act) which was not in existence at the time the judicial review decision was made on 8th November 2002. Besides, the appellant submits that it is the FAA Act that expanded the scope of judicial review allowing limited merit review. What is more, that the Court of Appeal ignored this Court's disclaimer in the ***Saisi Case*** that, while dealing with a judicial review application, a court should not embark on merit review of all evidence.

[24] Conversely, it is the appellant's position that the suit subject of this appeal, did not warrant a limited merit review, rather it called for an exhaustive and

comprehensive review of evidence. In any event, the appellant submits that the Court of Appeal failed to take into account this Court's pronouncement in ***John Florence Maritime Services Limited & another Vs Cabinet Secretary Transport & Infrastructure & 3 others*** [2021] KESC 39 (KLR) to the effect that a determination of a judicial review application cannot be termed as a final determination of issues under a constitutional petition. Consequently, the appellant submits that the judicial review proceedings should not have been the sole basis for determining its liability. Further that, the Court of Appeal failed to find that the trial court had abdicated its responsibility to independently review and analyse the evidence before it. Accordingly, it is contended that the Court of Appeal ought to have set aside the ELC's decision on liability.

[25] As far as the appellant is concerned, the Court of Appeal erred by firstly finding that it was liable to compensate the respondent for violation of its constitutional right to property. Secondly, for proceeding to assess and reduce the general damages to Kshs. 3,000,000 pursuant to Article 23(3)(e) of the Constitution yet there was no evidence to substantiate the same. In its view, the Court of Appeal ought to have dismissed the claim for general damages in its entirety. As for the Kshs 90,000,000 awarded for the cost of reconstruction of the hotel, the appellant argued that the two superior courts below should not have only relied on estimates provided by the respondent. Rather, that the onus lay with the respondent to not only establish that it had demolished part of the constructed portion and built it up, but also table the exact sum incurred in the demolition and reconstruction, which it failed to do. Moreover, it is submitted that the Court of Appeal failed to consider the import of its own decision in **Civil Appeal No. 121 of 2019**, which remitted the suit against the County Government back to the ELC for assessment of damages.

(ii) Respondent's Submissions

[26] In opposing the appeal, the respondent by its written submissions dated 10th February, 2025 reiterates the decision of the superior courts below on the issue of liability. It maintains that the judicial review decision settled the question on liability by determining that the actions by the appellant amounted to a breach of its constitutional right to property and thereby caused injury in the nature of a tort. With regard to damages, the respondent argues that Article 23(3)(e) of the Constitution enjoins a court to grant appropriate reliefs to remedy violation of fundamental rights and freedoms, including damages. To buttress that line of argument the Court is referred to its decision in ***Imanyara & 2 others Vs Attorney General*** [2022] KESC 78 (KLR) (***Imanyara Case)*** which set out guidelines for assessment of damages for constitutional violations. Be that as it may, the respondent contends that the Court of Appeal in reducing the general damages from Kshs. 30,000,000 to 3,000,000 failed to factor in the parameters in the ***Imanyara Case*** such as lapse of time and inflation. Therefore, the respondent implores this Court to reinstate the award by the ELC of Kshs. 30,000.000 as general damages.

[27] Moving onto the sum of Kshs. 90,000,000 awarded as special damages, the respondent asserts that the same was to be assessed based on the Bill of Quantities prepared by the quantity surveyor. Furthermore, that the appellant did not present any evidence from an expert to rebut the assessment provided by the quantity surveyor. In any event, the respondent submits that this Court has no jurisdiction to revisit the factual findings of the superior courts, in this case being the special damages awarded to it by the two superior courts below. In this regard, this Court's decision in ***Dina Management Vs County Government of Mombasa & 5 others*** [2023] KESC 30 (KLR) is cited.

[28] Pertaining to the Court of Appeal's decision in **Civil Appeal No. 121 of 2019**, the respondent maintains that the suit against the County Government, **ELC No. 47 of 2016**, was remitted back to the ELC for assessment of damages due to it. More so, since the Court of Appeal found that ELC was wrong in declining to assess and award damages therein on account of the damages awarded to the respondent in the suit against the appellant. Towards that end, the respondent claims that the misapprehension that double payment would arise in its favour does not arise. Elaborating on that line of argument, the respondent emphasises that not only is the cause of action in the two suits different but that it had disclosed to ELC during the assessment of damages in the suit against the County Government of the damages that had been awarded in the suit against the appellant. In the end, the respondent urges this Court to dismiss the appeal with costs.

D. ANALYSIS

[29] Having considered the pleadings, the impugned judgment, and the parties' respective submissions, we find that the appeal turns on the following issues:

i. *Whether this Court has jurisdiction to entertain this appeal;*
ii. *Whether the Court of Appeal, and the trial court, properly assessed evidence on liability; and*
iii. *What relief(s) should issue?*

i. Whether this Court has jurisdiction to entertain the appeal

[30] As a matter of practice, this Court must first determine whether an appeal before it meets the jurisdictional threshold. In this case, the respondent, through a Notice of Motion dated 28th June 2024, sought to have the appeal struck out on the ground that the dispute does not involve the interpretation or application of

the Constitution, and therefore does not fall within the ambit of Article 163(4)(a) of the Constitution.

[31] By a ruling delivered on 20th December 2024, this Court addressed and resolved this preliminary question on its jurisdiction. We found that the appeal does, in fact, fall within the scope of Article 163(4)(a) of the Constitution. Specifically, the Court held that:

> ***"... the suit took a trajectory of constitutional interpretation and application. Therefore, the appellant has properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution."***

Accordingly, this Court has jurisdiction to hear and determine this appeal.

ii. Whether the Court of Appeal, and the trial court, properly assessed evidence on liability

[32] Under this issue, the contestation is whether the Court of Appeal erred in upholding the trial court's finding that imposed liability on the appellant solely based on the judicial review decision, without independently determining the question of liability in the suit. In this regard, the appellant argues that both the ELC and the Court of Appeal erred by treating the judicial review decision, which merely quashed its decision contained in a letter dated 20th April 1997 as conclusively establishing liability for damages. According to the appellant, an order quashing its decision to stop the construction of a hotel on the protected area could not conclusively establish liability for an award of damages, without subjecting the claim to a full evidential assessment. Therefore, this leads to the question on whether the approach of adopting the judicial review decision as proof of liability was erroneous.

[33] The starting point in addressing this question is to understand the nature of judicial review proceedings in the pre-2010 era, compared to the post-2010 constitutional framework under Article 47 and the FAA Act. Under the traditional pre-2010 approach, judicial review was limited to examining the lawfulness, rationality, and procedural fairness of administrative action, without addressing the merits of the decision or questions of civil liability. Remedies were confined to orders such as *certiorari*, *prohibition*, and *mandamus*, and did not include an award of damages.

[34] This approach under the pre-2010 dispensation was appreciated by this Court in ***John Florence Maritime*** where we held that a judicial review decision could not be treated as *res judicata* in a later constitutional petition, because as we noted at para. 108:

> ***"... the High Court in determining a judicial review application, exercises only a fraction of the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different."***

[35] The import of the above pronouncement is that a finding in judicial review proceedings does not automatically amount to a conclusive finding of liability for damages in a subsequent and broader civil suit. Accordingly, findings in judicial review proceedings, particularly under the pre-2010 regime, should not be treated

as a substitute for the factual and legal examination of evidence to arrive at determinations required in a full merit hearing.

[36] In the present case, the Court of Appeal upheld the ELC's finding of liability entirely by reference to the judicial review decision delivered in 2002. The ELC reasoned that the said decision "*settled the issue of liability*" for the appellant's wrongful stoppage of the project, leaving "*only the assessment of quantum of damages*" for determination by the court. The trial court specifically rendered itself as follows:

> ***"The Judicial Review Application was decided during the pendency of this suit. Nevertheless, it did in my humble view, settle the issue of liability as far as the dispute herein is concerned. In the words of Onyango Otieno J, there was no dispute in regard to the fact that the suit property is owned by the Plaintiff; it was not in dispute that the suit land extends to the High Water mark; it is not in dispute that the Legal Notice No. 99 of 1978 that was relied on as giving the Defendants jurisdiction did not apply to the suit land; and there was no dispute that the suit land was never compulsorily acquired.***
>
> ***As it were, that decision was neither appealed nor reviewed. In the matter before me, the Defendant did not adduce any new facts and/or additional evidence that may impeach and/or cast doubt on the findings made on 8th November, 2002 when the Ruling was delivered. In essence the findings that the 1st Defendant was liable for the wrongful stoppage***

of the construction of the Plaintiff's hotel stands. That being the case, my task is then solely to assess the quantum of damages based on the evidence presented before me by the parties." [Emphasis added]

[37] This effectively meant that the trial judge failed to independently assess the evidence as to whether the appellant's actions satisfied the elements of a civil wrong warranting an award of damages, or whether any defence advanced by the appellant answered the claim for liability. The appellant in that regard, contends that the trial court abdicated its judicial duty by treating the outcome of the judicial review proceedings as conclusive in establishing liability in the suit against it.

[38] It is noteworthy that the appellant argued that, as a result of the trial court's approach, the court failed to consider its defence. Particularly, the assertion made at paragraph 5 of the statement of defence that the suit land is adjacent to the Marine Park, a legally protected area. It is further contended that the respondent's construction of the subject hotel was being carried out in violation of the Wildlife Conservation and Management Act. This is because portions of the development encroached upon the coastline area constituting the Marine Park, as delineated and described by the relevant statutory instruments and legal notices.

[39] The trial court failed to address and resolve these critical defences raised by the appellant. Critical in this respect is the contention that the suit land borders the Marine Park and includes sections of the coastal foreshore which, under the law, could not have been lawfully alienated to private ownership. If proven, these averments would have materially affected the question of liability. However, the trial court proceeded on the assumption that the respondent held an indefeasible title over the entirety of the suit land, including up to the high-water mark, without

interrogating the veracity of the appellant's defence regarding the boundaries and legal status of the land in question.

[40] Significantly, the trial court noted in its judgment that in the judicial review decision, the High Court had observed that "***it was not in dispute that the suit land extends to the high-water mark***". That observation raises a clear triable issue that has a significant bearing on the determination of the question of liability in the suit against the appellant. If the two superior courts below had examined the issue raised on whether the subject land indeed extended to the high-water mark, this would have disposed of the appellant's defence. The allegations made by the appellant in its defence that there was encroachment of the high–water mark and that the area was not available for private alienation were not resolved by the trial court as the trial Judge decided to apply wholly the judicial review decision.

[41] While we are careful to not address or determine the question of liability that was before the trial court, to put our observations in context, we note that Section 45 of the Survey Act, Cap. 299 read together with Regulation 110 of the Survey (Amendment) Regulations, 1994, provides for a coastal offshore reservation. Regulation 110(1) provides:

> *"110*
>
> 1) *Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above the high-water mark for Government purposes: Provided that, if the interests of development require, the Minister may direct that the width of this reservation shall be less than 60 metres in special cases.*
>
> 2) *High-watermark in all cases in these regulations means the 'Mean High Water Mark of Spring Tides."*

[42] These provisions were authoritatively interpreted by this Court in ***Kiluwa Limited & Another Vs Business Liaison Company Limited & 3 others*** [2021] KESC 37 (KLR), where we affirmed that any title purporting to cover the 60-metre coastal strip is invalid unless expressly exempted by the Minister. This Court further held that the 60-metre "high water mark" zone is held by the State in public trust as a protective buffer adjacent to the territorial sea, and that alienation of this land to private parties without lawful exemption is both unlawful and void. The Court also emphasized that Section 82 of the repealed Government Lands Act "***outrightly forbade the conferment of any right to the foreshore***," confirming the impermissibility of encroachment upon such land through private conveyances.

[43] It is common ground that the trial court wholly imported the judicial review decision hook, line and sinker in a substantive trial of the suit subject of this appeal and found the appellant liable without evaluating the defence on record. The Court of Appeal similarly fell in error by upholding that finding without re-evaluation of the evidence. Although the appellant was found to have acted irrationally and illegally in issuing the letters stopping the respondent's construction in the judicial review proceedings, in determining the question of liability, it was obligatory for the trial Judge to evaluate the entire pleadings and evidence on merit. It is for this reason that we must find the two superior courts below did not test the merits of the defence by the appellant. The allegations raised by the appellant to the effect that the respondent extended its construction to the prohibited high-water mark; and that the construction of the hotel did not comply with the legal regime remained unresolved as the trial court concluded the appellant was liable merely on the basis of the judicial review decision. The answer to those allegations if found in favour of the respondent is what would have led the court to assess damages while taking into account other parameters such as the extent of damage, the costs

of renovation and mitigation. The trial court therefore, failed to assess the question of liability in light of the appellant's defence and overlooked a critical question in assessing liability.

[44] The Court of Appeal, on its part, justified this approach by the trial court by invoking the evolving scope of judicial review under Article 47 of the Constitution and the FAA Act as well as this Court's decision in the ***Saisi Case***. It is notable that in the ***Saisi Case*** and ***Dande & 3 others Vs Inspector General, National Police Service & 5 others*** *[2023] KESC 40 (KLR),* this Court acknowledged that under Article 47 of the Constitution and FAA Act, courts may conduct a limited review of merits in judicial review, especially where constitutional or fundamental rights are implicated. However, as the appellant correctly pointed out, the Constitution and FAA Act were not in force in 2002 when the judicial review decision in question was rendered on 8th November 2002, by *Onyango Otieno, J, (*as he then was). Accordingly, the said judicial review proceedings were decided under the old legal regime (Order 53 of the Civil Procedure Rules and the Law Reform Act, Cap. 26) which limited the scope of review to a procedural review. It follows therefore that the Court of Appeal's reliance on post-2010 approach to judicial review founded under Article 47 of the Constitution and FAA Act, retrospectively expanded the effect of judicial review proceedings decided in 2002. Therefore, the same was not anchored on any sound jurisprudential ground.

[45] In our considered view, the principles established in ***John Florence Maritime*** are directly applicable to the present case. A judicial review proceeding that is confined to examining procedural impropriety cannot be regarded as conclusively resolving all issues of liability in a subsequent civil claim. The respondent's success in having the appellant's stop-order quashed in 2002 did not

determine the underlying factual and substantive questions forming the basis of the cause of action in the suit against the appellant, which were not within the scope of the judicial review decision.

[46] As Tony Honoré explains in ***Responsibility and Fault*** (Hart Publishing, 1999) at page 101, the imposition of liability in civil suits requires a judicial determination that the defendant's conduct falls within legally recognised categories of fault applicable to that specific cause of action. The holding in a judicial review suit to the effect that the appellant's actions were excessive and failed to follow procedure, did not obliterate its substantive defence. The two superior courts failed to undertake the necessary inquiry, thereby bypassing a fundamental step in the adjudication of civil responsibility for the alleged tort or constitutional tort.

[47] This is a point brought out in persuasive comparative jurisprudence. In ***Canada (Attorney General) Vs TeleZone Inc.***, 2010 SCC 62, [2010] 3 S.C.R. 585, the Supreme Court of Canada affirmed that judicial review and civil liability serve different purposes. Judicial review focuses on the legality, reasonableness, and fairness of government actions to uphold compliance with legality and good governance, while private law claims aim to remedy personal harm through compensation. The court emphasized that an invalid administrative act does not automatically create a basis for civil liability, and conversely, a valid act may still attract liability. In essence, although there may be some overlap in the factual context, the determination of civil liability and the review of administrative validity involve distinct and independent legal questions.

[48] Similarly, the Constitutional Court of South Africa has held that a judgment quashing an administrative act does not automatically render the administrative

body liable in damages in a civil suit. The question of liability must be independently assessed and determined by the civil court. In ***Steenkamp NO Vs Provincial Tender Board (Eastern Cape)*** 2007 (3) SA 121 (CC), a tender award was set aside as unlawful, and the disappointed bidder then sued the Tender Board for out-of-pocket expenses incurred in reliance on and subsequent to the award. The Constitutional Court rejected the claim, holding that, while the award was invalid, the Board's conduct did not satisfy the requirements for delictual/tortious liability. The court held thus at para. 37 of its judgment:

> ***"... a concession that the tender board acted inconsistently with the tenets of administrative justice is neither decisive of the existence of a duty of care nor is it of any avail to the applicant's case. In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense. Therefore, an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful."***

[49] Flowing from the foregoing, we hold that the trial court's reliance on the judicial review decision as the sole basis for determining liability in the suit subject of this appeal denied the appellant a hearing on liability in the said suit. It is a fundamental principle of justice that each cause of action must be determined on the evidence and legal principles applicable to that specific cause of action. While the findings of the judicial review proceedings could be admissible in evidence to support the claim, they could not substitute the trial court's duty to conduct its own merits-based evaluation of liability for the civil claim.

[50] In conclusion, we find merit in this limb of the appeal. Both the Court of Appeal and the trial court erred in treating the judicial review decision as conclusive on the question of liability regarding the suit against the appellant. In doing so, they conflated distinct causes of action and denied the appellant an independent assessment of liability.

iii. What relief(s) should issue?

[51] In the present appeal, we have found that the trial court failed to independently determine the question of liability. This failure is fundamental, as a determination of liability is a necessary precursor to resolving other consequential issues, such as the assessment and award of damages. Before this Court, both parties made detailed submissions on whether it was proper for the Court of Appeal to award damages pursuant to Article 23(3)(e) of the Constitution; and whether the respondent was entitled to special damages amounting to Kshs. 90,000,000, plus interest, to cover reconstruction costs. However, in light of our finding that the trial court did not make a determination on liability, it would be premature and procedurally inappropriate for this Court to pronounce itself on these consequential matters. They can only properly be addressed once liability is conclusively established.

[52] This Court has previously addressed the consequences of a court's failure to resolve issues properly placed before it. In ***Geo Chem Middle East Vs Kenya Bureau of Standards*** [2020] KESC 1 (KLR), we held at para. 47 that:

> ***"... As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the mistaken belief that it lacks jurisdiction to do so, the Court has to remit that matter***

to the lower Court, directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order would a substantive appeal lie to the Appellate Court."

[53] A similar approach was adopted in ***Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch*** [2019] KESC 11 (KLR), where the Court stated at para. 80:

"...Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo, J., the 'journey was a false start'."

[54] This leads to the question of whether we should remit this matter back to the Court of Appeal or ELC. The basis of remitting a matter back for retrial or re-evaluation of evidence is provided under Section 22 of the Supreme Court Act, which empowers the Court to remit proceedings in the following terms:

"22. Power to remit proceedings

The Supreme Court may remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter..."

[55] This Court has applied the above provision in various decisions. In ***Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others*** [2024] KESC 3 (KLR) we remitted a matter to the Court of Appeal to determine the substantive merits of the appeal from a judgment rendered by the Employment and Labour Relations Court. In ***Westmont Holdings SDN BHD Vs Central Bank of Kenya & 2 others***

[2023] KESC 11 (KLR), despite the fact that the matter had taken time in the corridors of justice, we remitted the matter to the Court of Appeal to be determined on merit.

[56] The issue of liability, in the context of this matter, requires an evaluation of the evidence adduced to determine whether it supports the pleaded cause of action or the defence. In this matter, we note that at the trial court, the respondent called two witnesses who testified on its behalf while the appellant did not call any witnesses despite being given the opportunity to do so. Consequently, we find it more appropriate to remit the matter back to the Court of Appeal to re-evaluate the evidence tendered before the trial court as against the parties' pleadings in determining the question of liability, and other consequential reliefs. This is because the primary role of the Court of Appeal as the first appellate court (Rule 31(1) of the Court of Appeal Rules, 2022), such as in this case, entails independently re-appraising/re-evaluating the evidence on record and drawing its own independent conclusions. In doing so, the first appellate court is required to bear in mind that firstly, it has neither seen nor heard the witnesses and make due allowance in that respect. Secondly that, its responsibility is to rule on the evidence and pleadings on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See ***Kenya Ports Authority Vs Kuston (Kenya) Limited*** (2009) 2EA 212

[57] The Court of Appeal, more recently pronounced itself on the parameters of its jurisdiction as the first appellate court as follows:

> ***"A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and***

> ***therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of Section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."***

See ***Paramount Bank Limited Vs First National Bank Limited & 2 others*** [2023] KECA 1424 (KLR). Additionally, we are convinced that the approach we have taken will ensure the suit which was instituted in 1998 does not delay in the court system further.

[58] It is notable that the related matter, **Malindi ELC No. 47 of 2006**, was heard and determined by *Odeny, J*., who, through a judgment dated 4th October 2023, awarded the respondent Kshs. 709,828,966. This sum covered reconstruction costs, general damages for loss of income, and professional fees incurred by the respondent. Accordingly, in assessing damages in the present matter, should the appellant be found liable, the award already made to the respondent against the Kilifi County Government would be brought to bear. We also recognize this issue was taken into account by the dissenting opinion of *Gatembu, JA* wherein he indicated that he would have allowed the appeal and remitted the matter back to ELC for retrial and consolidation with **Malindi ELC No. 47 of 2006**. Unfortunately, that train has left the station as the case against the Kilifi County Government has since been determined. We also do not know whether the two matters are likely to find convergence before the Court of Appeal. Whatever the case, the approach we have taken is still cautious of a possibility of the respondent receiving double compensation for the same loss.

[59] Therefore, we find that the suit against the appellant, the subject of this appeal, should be remitted back to the Court of Appeal for re-appraisal/re-evaluation of the evidence on record to determine the question of liability and other consequential issues. In addition, taking into account that the matter was first instituted in court in 1998, we further direct that the same be heard on a priority basis.

E. COSTS

[60] Given that this matter is being remitted to the Court of Appeal for re-appraisal of the evidence, and guided by the principles on costs articulated in ***Rai & 3 Others Vs Rai & 4 Others*** [2014] KESC 31 (KLR), we are of the view that, in the unique circumstances of this case, justice will be best served by directing that each party shall bear their own costs.

F. ORDERS

[61] In the premise, we issue the following orders:

i. The appeal dated 24th May, 2024 and filed on 10th June, 2024 is hereby allowed in the following terms:

a) The judgment of the Court of Appeal dated 12th April, 2024 is accordingly set aside.

b) The matter is remitted to the Court of Appeal for re-appraisal/re-evaluation of the evidence on record to determine the question of liability and other consequential orders on a priority basis.

ii. Each party shall bear its own costs.

iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs herein be refunded to the appellant.

It is so ordered

DATED and **DELIVERED** at **NAIROBI** this **27th** day of **June**, 2025.

.....

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

.....	.....
P.M. MWILU	**S. C. WANJALA**
DEPUTY CHIEF JUSTICE &	**JUSTICE OF THE SUPREME COURT**
VICE PRESIDENT OF THE	
SUPREME COURT	
.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA