REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ)

Reference No. 2 Of 2014

IN THE MATTER OF: AN APPLICATION BY THE NATIONAL LAND COMMISSION

FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF: CHAPTER FIVE OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2012 (ACT NO. 5 OF 2012)

-AND-

IN THE MATTER OF: THE LAND REGISTRATION, 2012 (ACT NO. 3 OF 2012)

-AND-

IN THE MATTER OF: THE LAND ACT, 2012 (ACT NO. 6 OF 2012)

-AND-

IN THE MATTER OF: THE URBAN AREAS AND CITIES ACT, 2011 (ACT NO. 3 OF 2011)

-AND-

IN THE MATTER OF: THE LAND ADJUDICATION ACT (CAP.284, LAWS OF KENYA)

-AND-

IN THE MATTER OF THE SURVEY ACT (CAP.299, (LAWS OF KENYA)

-AND-

IN THE MATTER OF: THE NATIONAL LAND POLICY SESSIONAL PAPER NO. 3 OF 2009

-BY-

NATIONAL LAND COMMISSION.....APPLICANT

-AND-

ATTORNEY GENERAL

MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT

CABINET SECRETARY FOR LANDS

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

THE INSTITUTION OF SURVEYORS OF KENYA

THE LAW SOCIETY OF KENYA.....INTERESTED PARTIES

-AND-

KITUO CHA SHERIA

KATIBA INSTITUTE.....*AMICI CURIAE*

RULING

A. ISSUES PROPOSED FOR THE SUPREME COURT'S ADVISORY OPINION

[1] The applicant is the National Land Commission, established under Article 67(1) of the Constitution to, *inter alia*, manage public land on behalf of the national and county governments. The Commission, by its Reference dated 1st April, 2014 (filed on 2nd April, 2014) seeks this Court's Advisory Opinion, pursuant to Article 163(6) of the Constitution. The Reference relates to the Commission's functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development, on the other hand. The range of issues raised by the applicant may be set out as follows:

a. "To manage and to administer public land, unregistered trust land and unregistered community land," is the phraseology in Articles 62(2), 62(3), 67(2)(a) and 67(3) of the Constitution, and in Section 5(1)(a) and (e) of the National Land Commission Act, 2012 (Act No.5 of 2012): but *what does it entail, in practical terms"*

b. Are Land Registrars (Recorders of Title) and Land Surveyors answerable to the National Land Commission, or the Cabinet Secretary of the Ministry of Land, Housing and Urban Development"

c. Which functions previously performed by the Ministry of Lands before the creation of the National Land Commission, have now been transferred to the said Commission"

d. From which officer of the national government should the National Land Commission obtain the "consent" envisaged in Section 5(2)(a) of the National Land Commission Act, before alienating public land vested in the national government"

e. From which officer of county government should the National Land Commission obtain the "consent" envisaged in Section 5(2)(a) of the National Land Commission Act, before alienating *public land vested in county government"*

f. When Article 62(2) and (3) of the Constitution of Kenya, and Section 5(2)(b) of the National Land Commission Act provide that the Commission administers public land "on behalf of" the national and county governments, *is a relationship envisaged in which the national or county governments can withdraw the authority of the National Land Commission to administer public land"*

g. What is the *constitutional status of the provisions of Executive Order No. 2 of 2013, in relation to the mandate of the National Land Commission"*

h. Should the Ministry of Land, Housing and Urban Development relinquish the land-tax function, roles, records and powers to the National Land Commission" If so, by what date"

i. Should the Ministry of Land, Housing and Urban Development account for and remit to the National Land Commission the rent (annual ground rent and stand premium), royalty and payments under any lease or licence, which the Ministry has collected, as well as the records for such collection since 27th February, 2013" If so, by what date"

j. Are the *monies received, earned or accruing to the National Land Commission,* and the balances at the close of each financial year, in the nature of money exempted from payment into the Consolidated Fund, under Article 206(1)(a) of the Constitution"

k. Is the National Land Commission entitled, under Article 206(1)(b) of the Constitution, to retain monies received, earned or accruing to the Commission, and the balances at the close of each financial year – for the purpose of defraying the expenses of the Commission"

- *Has the Ministry of Land, Housing and Urban Development, in failing to account and remit to the National Land Commission the funds due to it under Section 26(1) of the National Land Commission Act, hindered and obstructed the functions of the National Land Commission* within the meaning of Section 35(1)(a) of the National Land Commission Act"

m. What criterion should Parliament use in *allocating funds to the National Land Commission* under the provisions of Section 26(1)(a) of the National Land Commission Act"

- *Are officers who perform functions previously performed by the Ministry before the creation of the National Land Commission,* and which have now been transferred to the National Land Commission, answerable to the National Land Commission or to the Cabinet Secretary, Ministry of Land, Housing and Urban Development"

- Should the Ministry of Land, Housing and Urban Development *transfer to the National Land Commission part of the Ministry's staff,* or the entire staff that previously worked in the Ministry's departments, and whose functions have been transferred to the Commission"

p. Can the Ministry of Land, Housing and Urban Development rescind the *appointment of members of staff deployed to the National Land Commission"*

q. Is the Ministry of Land, Housing and Urban Development obliged to remit to the National Land Commission *money for the payment of salaries of the members of staff* that the Ministry deploys to the National Land Commission, and if so, within what time-frame"

r. Is the National Land Commission entitled to recover from the Ministry of Land, Housing and Urban Development *monies that the Commission has so far used to pay salaries of members of staff who had been deployed from the Ministry"*

s. The phrase *"to monitor the registration of all rights and interests in land"* is embodied in Section 5(2)(b) of the National Land Commission Act: but, what is its intent"

t. Are Land Registrars accountable to the National Land Commission or to the Ministry of Land, Housing and Urban Development"

u. Is land registration a function of the National Land Commission, or the Ministry of Land, Housing and Urban Development"

v. Is it practical that the National Land Commission be entrusted with the creation of registration units, registration sections, registration blocks, prescribing of nomenclature for land titling; overseeing the rectification of Land Registers by Registrars; and annually reporting to the President and Parliament on the progress made in the registration of land titles – when the Commission is not *the agency mandated to control the process of registration of land"*

w. Who should appoint Land Registrars"

10. Whose mandate is it to develop the National Land Information Management System"

y. Is the Ministry of Land, Housing and Urban Development obliged to transfer to the National Land Commission all *property and assets of the departments whose functions have now, by law, been transferred to the National Land Commission* – and if so, by when"

z. Who has the mandate to administer and manage dealings in Private Land"

f. Is the Ministry of Land, Housing and Urban Development obliged to transfer to the National Land Commission the *Land Settlement Fund* and if so, by when"

B. PRELIMINARY OBJECTION RAISED

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

i. the Court's jurisdiction to render an advisory opinion is restricted, and confined to "matters concerning county government";

ii. the Supreme Court has in previous decisions outlined what constitutes "matters concerning county government", and the instant matter is not included;

iii. at the heart of the controversy raised by the reference, is the proper constitutional and statutory demarcation-points between the powers and functions of the National Land Commission, on one hand, and the Ministry of Land, Housing and Urban Development, on the other;

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

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

vi. the advisory opinion jurisdiction is discretionary in nature, and is to be exercised judiciously, while the applicant has not made a case for such an opinion of the Supreme Court.

C. SUBMISSIONS BY THE PARTIES

(i) The 1st and 2nd Interested Parties

[3] Learned Senior Counsel, Mr. Paul Muite for the 1st and 2nd interested parties, submitted that the jurisdiction conferred upon this Court by Article 163(3), (4) and (6) of the Constitution did not apply to the instant matter. He urged that Article 163(6) was couched in clear terms, devoid of any ambiguity, and that it carried a *discretionary element,* as compared to Article 163(4), which made reference to *matters of right.*

[4] Article 163(6) of the Constitution provides that:

*"The Supreme Court **may** give an advisory opinion at the request of the **national government, any State organ, or any county government** with respect to any matter **concerning county government**"* [emphasis supplied].

[5] Counsel urged that Article 163(6) cited two main issues to be considered by the Court, in exercise of its advisory-opinion jurisdiction. He submitted that Article 163(6) provides that a request for an advisory opinion "may" be made by the national government, a State organ, or any county government. It was his submission that the use of the word "may" introduced an element of discretion on the part of the Court. Counsel urged that the second vital element was that the subject of an opinion ought to be any "matter concerning county government." He submitted that even where the advisory opinion had been requested by the national government, a State organ or county government, and even when the opinion revolves around matters concerning county government, the Court *still retained the discretion* to determine the same. Counsel relied on ***In Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011; [2011] eKLR **(*Re IIEC*)**, in which the following passage (paragraph 34) appears:

"Insofar as the jurisdiction reposed in the Supreme Court, under Article 163(6) of the Constitution employs the directory term "may", it is, in our opinion, purely discretionary, at the instance of this Court. None of the parties appearing before this Court has contended otherwise."

[6] Learned counsel submitted that this matter remained within the discretionary bounds of the Court, and urged the Court to have a view of the country's constitutional history, in determining the jurisdictional question. He invoked this Court's earlier decision in ***The Speaker of the Senate & Another v. Attorney-General & 4 Others***, Sup Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, urging the position that the Court's advisory opinion jurisdiction was limited to matters concerning county government, revolving around *devolution,* which is a key aspect of Kenya's socio-economic and political progression signalled in the Constitution of 2010. Counsel urged that the applicant was under duty to demonstrate that the opinion-reference was, indeed, on *an issue bearing upon county governance.*

[7] Counsel urged that only matters bearing a significant impact on the conduct of county government, ought to be considered in an advisory opinion, because not every matter merits this Court's ultimate determination. He cited the holding of this Court in ***Re IIEC,*** to reinforce his submission (para.40):

"There is, therefore, in reality, a close connectivity between the functioning of national government and county government: even though the** amicus curiae **Professor Ghai urged that the term 'county government' is not defined in the Constitution; and that the expression 'county government' should not be too broadly interpreted. We consider that the expression 'any matters touching on county government' should be so interpreted as to incorporate** any national-level process bearing a significant impact on the conduct of county government. **However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court's Advisory-Opinion jurisdiction."

[8] Counsel urged that even where the matters under consideration related to county governance, only cardinal issues of law, or of jurisprudential moment, deserved this Court's further input, as held in the case of ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others***, Sup Ct. Petition No. 2 of 2012; [2012] eKLR (para. 30):

*"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"*** [emphasis supplied].

[9] Counsel's argument was that the issues raised by the applicant did not fall within the scope of this Court's advisory-opinion jurisdiction, and that they did not raise any substantial questions of law. Counsel urged that the dispute entailed did not have anything to do with county governments, but rather, was one that only involved the National Land Commission and the national government. He urged the Court to disallow the request, on the basis that the issues which were being raised for advisory opinion, essentially revolved *around "turf wars" between the National Land Commission and the Ministry of Land, Housing and Urban Development.*

[10] Learned counsel, however, acknowledged that the land question in Kenya remained sensitive, as it had a historical background in the struggle for political freedom, decades in the past.

[11] Counsel urged that the constitutional mandate of the Commission under Article 67 of the Constitution was to "update the National Land Policy and recommend it to the national government." He submitted that the proper course for the Commission, with regard to its mandate, was to propose amendments to Parliament, rather than to seek an advisory opinion from this Court.

[12] As regards the detailed issues raised by the applicant, counsel urged that the proper forum for adjudication was the Constitutional Division of the High Court, and that the cause must be lodged by normal petition, rather than as a request for advisory opinion. Counsel referred to the content of ***The National Land Commission v. The Ministry of Land, Housing and Urban Development & 2 Others, High Court*** Constitutional Petition No. 219 of 2014, a cause duly lodged but subsequently withdrawn, urging that the issues raised in the opinion-request were similar to the earlier ones. He submitted that the applicants had been well aware that the High Court was the right forum to entertain their grievances. Counsel submitted that the real issues in the request for advisory opinion related to *the constitutional demarcation of powers between the Commission and the Ministry, and that these were contested issues of interpretation of a statute related to the implementation of Chapter Five of the Constitution*, hence falling for adjudication before the High Court. Counsel invoked the ***Peter Ngoge*** *Case* (paras. 28 and 29), on the jurisdictional constraints bearing upon this Court:

"Although this Court has in the past pronounced itself on the jurisdictional limits within which it operates, the instant matter, thanks to the persuasive authority which it brings along, has given occasion for us to further explicate this Court's appellate jurisdiction.

"We draw analogies with the plurality of autonomous structures created by the Constitution of Kenya, 2010, which represents a progressive new trend of governance. 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 instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted."

[13] Counsel submitted that the determination of the *constitutionality of Acts of Parliament* was the preserve of the High Court in the first instance, rather than of this Court. He urged that Article 165(3)(d)(ii) of the Constitution empowered the High Court to determine the validity of any acts done under the authority of the Constitution; and thus, contests such as in this matter, regarding the acts of the Cabinet Secretary for the Ministry of Lands, would be a matter for resolution before the High Court, in the first place. Counsel relied on this Court's decision in ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others,*** Sup Ct. Civil Application No. 2 of 2011; [2012] eKLR (para. 68):

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. ***Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."***

[14] Counsel submitted that there was no ambiguity as to the jurisdiction of this Court under Article 163(6), or that of the High Court under Article 165(3) of the Constitution. He urged the Court to view the matter presented by the applicant as it had done in an earlier case, ***In the Matter of the Kenya National Commission on Human Rights,*** Sup. Ct. Reference No. 1 of 2012; [2014] eKLR, in which we remarked that the mere mention of "county government" did not determine the real nature of the application (para. 18):

"Is the applicant really seeking an advisory opinion" In our view, the applicant is not seeking an advisory opinion within the meaning of Article 163(6) of the Constitution. Where is the matter concerning county government in the two paragraphs as framed by the applicant" On the face of the application it is clear to us that, what the applicant seeks is not an advisory opinion, but a declaration that Rule 41(1) of the Supreme Court Rules of 2012 is unconstitutional. This 'reference for an advisory opinion' is actually a constitutional reference in disguise. The main objective of the applicant is to elicit a declaration from this Court regarding the constitutionality or otherwise of Rule 41 (1). This is the true nature of the application, notwithstanding the

contention by counsel for the applicant, Mr. Kitonga in his written submissions, to the effect that 'this application….squarely relates to county governments'."

[15] For greater effect, learned counsel went on to cite paragraph 19 of the ***Kenya National Commission on Human Rights*** case:

"We agree with counsel for the interested parties in their contention that this application ought to have been filed at the High Court. The High Court is seized with original jurisdiction to determine whether a piece of legislation or subsidiary legislation is unconstitutional. Mr. Kitonga submits that it would be ridiculous to file a petition in the High Court to challenge rules made by the Supreme Court which is superior to the High Court. We, however, see no hierarchical impropriety if a party were to challenge a Supreme Court Rule in the High Court. What would be at stake in such circumstances is not the reputation of the Supreme Court, but the constitutionality of the rule in question. Moreover, it should be clear that Rules and Regulations are only subsidiary legislation; and, more emphatically than in the case of an enactment, they are subject to annulment by the High Court in exercise of its unlimited jurisdiction."

[16] Counsel submitted that the applicant was asking the Court to interpret various provisions of the Constitution; and in this regard, he urged that the National Land Commission was under the mistaken impression that its role under Chapter Five of the Constitution was broader than it actually was. He submitted that the cause duly fell for consideration by the High Court.

(ii) The Applicant

[17] Learned Senior Counsel, Prof. Tom Ojienda for the applicant, contested the preliminary objection, relying upon a Ruling by *Ojwang, SCJ* delivered on 26th June, 2014, recognising the need for an urgent resolution to the issues raised in the Reference. Counsel contended that the said Ruling had upheld the competence of the Reference and acknowledged the Court's jurisdiction, so that it was no longer open to counsel for the 1st and 2nd interested parties to question the Court's jurisdiction.

[18] Counsel submitted that the preliminary objection rested on the mere fact that the applicant had filed a case in the High Court, *Constitutional Petition No. 219 of 2014* – a petition that was not prosecuted. He submitted that none of the issues raised in the High Court petition included the interpretation of the mandate of the National Land Commission. He questioned the legality of the preliminary objection, on the basis that the objection introduced issues of fact, and did not confine itself to "pure issues of law", in contravention of the precedent in ***Mukisa Biscuit Manufacturing Ltd v. West End Distributors Ltd*** [1969] EA 696 (affirmed by this Court in ***Raila Odinga v. IEBC and 3 Others*** Sup Ct. Petition No. 5 of 2013; [2013] eKLR).

[19] Counsel submitted that the applicant's High Court case, *Constitutional Petition No. 219 of 2014* had been withdrawn through consent, and that its sole purpose had been to challenge the Cabinet Secretary's directive, published in the *Daily Nation* Newspaper of 2nd May, 2014, for the closure of the Central Land Registry, the National Land Registry, the Land Records Registry and the Land Banking Hall Registry as from 5th May, 2014 to 16th May, 2014 for the purpose of conducting an audit of the Registries, and which had the effect of paralyzing the operations of the applicant.

[20] Learned counsel submitted that the issues raised in the Reference were not justiciable, and the High Court could not adjudicate upon them. He submitted that the High Court could not deal with matters such as the issuing of orders regulating administrative duties; the deployment or control of staff; and the proper interpretation of Executive Order No. 2 of 2013, which was political in nature.

[21] Counsel submitted that, by Article 260 of the Constitution the National Land Commission is a State organ and, therefore, entitled to seek an advisory opinion in terms of Article 163(6) of the Constitution.

[22] Counsel submitted that the Reference contained matters "concerning county government", as it *involved issues of public land*, and the *constitutional and statutory demarcation of the functions of the Commission in relation to those of the national and county government.* In support of these arguments, counsel cited this Court's decision in ***The Speaker of the Senate*** Case, in which the Court set guidelines for ascertaining the scope of "matters concerning county government."

[23] Counsel urged that each of the questions raised in the Reference lent itself to appropriate answer by way of an advisory opinion. He submitted that according to Article 62(2) of the Constitution, public land is vested in county governments, and is to be "administered by National Land Commission"; and therefore, issues regarding the management of public land,"concerned county

governments." According to counsel, the source of conflict between the Commission and the Ministry was the "administration of public land."

[24] Counsel submitted that the issue before the Court related to the Ministry's action by virtue of the National Land Policy, Sessional Paper No. 3 of 2009, and that this was not a matter that was justiciable, and so could only be answered through an advisory opinion. He submitted that the Commission is required to receive rents and forward to county governments, yet this function is still being carried out by the Ministry. Counsel submitted that the Reference was concerned with the functions, mandate and resources of the Commission, the question of tax collection, and the renewal of leases – which concerned county governments. Counsel also cited this Court's decision in ***Re IIEC,*** and urged that the applicant had met the guidelines for opinion-reference matters before this Court. He urged that: *public land is a "matter concerning county government"; the Commission is a State organ; there are no proceedings pending in any Court on the subject matter of the Reference; the issues raised in the Reference dealt with the history and management of public land – issues which could only be addressed by this Court through an advisory opinion*.

[25] Learned counsel submitted that the issue of land-access, use and management is one of public interest, as land is a major aspect of the social-political reality of the Kenyan State. He invoked the content of the ***Report of the Commission of Inquiry into the Illegal or Irregular Allocation of Public Land*** (the Ndungu Commission Report), and the ***Report of the Commission of Inquiry into the Land Law System of Kenya*** (the Njonjo Commission Report), which recommended the elevation of the people's voice on land issues, in place of sheer executive preferences in land policy formulation and statutory development. Counsel urged the Court to respond to the juristic purpose set out under Section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), "to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth". Counsel urged that this Court's special standing in the resolution of constitutional disputes, especially in relation to governance issues, spoke in favour of rendering due guidance to parties.

[26] Counsel submitted that while the issues raised in the Reference had been placed before the Attorney-General, for advice in accordance with the guidelines of this Court, as well as the terms of Rule 41(4)(c) of the Supreme Court Rules, 2012, the Attorney-General returned partisan advice, depicting the applicant as an institution subservient to the Ministry, rather than as an independent Commission with distinct constitutional and statutory functions; and such advice had only sharpened the conflict between the two State organs.

[27] Counsel further urged that the preliminary objection was only an attempt to delay the determination of the Reference, the object being to allow Parliament to amend the National Land Commission Act, 2012; the Land Registration Act, 2012; and the Land Act, 2012 before an opinion has been rendered.

(iii) The 1st amicus curiae

[28] Learned Senior Counsel, Dr. John Khaminwa for the 1st *amicus curiae*, indicated that this *amicus* had not filed any written submissions in response to the preliminary objection, but would contest the objection. It was submitted that any opinion such as could be given by the Attorney-General on the question in dispute would have limitations regarding the incidence of responsibility among public institutions; and thus, the Court's direction would become essential. And it is to be recognized that not every matter in contention could undergo the normal process of litigation. Learned counsel submitted that the motion of a State organ approaching the Court for advice, ought to be accorded due weight; and this Court ought to accommodate the request. Counsel submitted that the issue of land, which arises in this instance, has historically been a sensitive one, and its continuing importance makes a case for a considered opinion of this Court. Counsel urged, however, that *this Court should re-define the issues meriting its advisory opinion.*

(iv) The 2nd amicus curiae

[29] Learned counsel, Mr. Wanyoike for the 2nd *amicus curiae*, indicated that this *amicus* had also not filed written submissions regarding the preliminary objection, though he would address the full span of the issues raised in the Reference. Counsel submitted that *the National Land Commission had raised too many questions in the Reference that call for specific facts being laid before the Court.* In this regard, counsel submitted that such questions were most appropriate for the traditional motions of adjudication, beginning from the High Court. However, two issues, as counsel urged, were appropriate for this Court's advisory opinion, namely: *the status of independent commissions and, specifically, the National Land Commission*; and *the constitutional relationship between the National Land Commission and the Executive*. As for other intended issues, counsel urged that this Court has inherent power to isolate appropriate ones for determination by way of an advisory opinion.

[30] On the question whether the matter concerns county governments, counsel submitted that by Article 62(2) of the Constitution, *public land vests in and is held in trust by county governments, and administered by the National Land Commission.* Further, Article 63(3) of the Constitution provides that any unregistered community land shall be held in trust by the Commission. Therefore, counsel urged, under the Constitution, *land belongs to both the county and the national governments.* Counsel submitted that within the constitutional framework, there are *certain shared institutions which operate both at the county and the national level.* He contested the Ministry's classification of the National Land Commission as part of national government in terms of *Executive Order No. 2 of 2013.* He submitted that the National Land Commission cannot be classified as being wholly part of the Ministry.

[31] With regard to the merits of the Attorney-General's submissions, counsel urged that Article 156(4) of the Constitution provides for the functions and powers of the Attorney-General, setting these essentially within the scheme of *national government*. He submitted that *Commissions are State organs, rather than government bodies.* Counsel urged this distinction to be important; for if the Attorney-General was acting as the principal advisor to the national government, then by the general concept of representation, he could not be seen to protect the Commission. Counsel further urged that, by the terms of Article 156(6) of the Constitution, the *Attorney-General was obligated to promote, protect and uphold the rule of law, and defend the public interest* – ends which were conspicuously negated by the preliminary objection herein.

[32] Learned counsel, in concluding his submissions, urged this Court to take judicial notice of the *current crisis in the Ministry and the Commission*. He urged the Court to invoke its mandate under Section 3 of the Supreme Court Act, to rectify the state of dysfunction, to uphold constitutionalism, and to protect the sovereignty of the people.

(v) The 1st and 2nd Interested Parties' response

[33] Learned Senior Counsel, Mr. Muite returned to his earlier argument, that this Court lacks jurisdiction to interpret the Constitution in the course of an advisory opinion, such jurisdiction being reserved to the High Court. He submitted that the conflict between the Ministry and the Commission arose on issues of the interpretation of the Constitution, and consequently, the High Court bore the primary mandate to hear and determine the question. He submitted that although the opinion of the Attorney-General had been sought in line with Rule 41(4)(c) of the Supreme Court Rules, the same could not solve the dispute, as the Attorney-General's advice was not binding on the parties. Counsel submitted that even if the Court had the inherent power to re-frame the issues, the participation of the parties was critical and at this advanced stage, that was not possible. Counsel submitted that in any event, the selection of only one or two issues for determination would not resolve the conflict; and hence, the requisite recourse in this matter is the High Court, in a normal process of constitutional-cum-civil litigation.

D. THE ISSUE FOR DETERMINATION

[34] *The paramount issue for determination is whether this Court has the jurisdiction to render an Advisory Opinion, in the terms of Article 163(6) of the Constitution.*

E. ANALYSIS

[35] Learned counsel raised a first question as to the competence of the preliminary objection, in form and substance. Counsel for the applicant submitted that the preliminary objection was predicated upon facts as opposed to "pure issues of law" – and was on that account an inadmissible objection. This is a trite point of forensic import considered by the ultimate Court, some four decades ago, in ***Mukisa Biscuit Manufacturing Co. Ltd. v. East End Distributors Ltd*** [1969] E.A. 696. *Sir Charles Newbold, P* in that case, explicated the basis of a "preliminary objection" at the commencement of Court process:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

[36] However, despite the annexures accompanying the preliminary objection herein, it is clear to us that the objectors' contention goes to the exercise of *this Court's jurisdiction as prescribed by Article 163(6) of the Constitution.* That is not only a "pure issue of law", but one the determination of which ought to be rendered at the outset. Even though the objection as lodged, bore annexures of an evidentiary nature, such annexures introduce no factual complexity into the elemental question raised, nor modify the preliminary character of the legal issue raised. On this account we hold, especially in the context of Article 159(2)(d) of the Constitution, that

the preliminary objection was properly raised, and the Court may proceed to consider it on merits.

[37] Article 163(6) of the Constitution sets out the advisory-opinion jurisdiction of this Court. It thus provides:

"The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

[38] Section 13 of the Supreme Court Act follows up with a facilitative provision in the following terms:

"***An advisory opinion by the Supreme Court under Article 163(6) of the Constitution shall contain the reasons for the opinion and any judges who differ with the opinion of the majority shall give their opinions and their respective reasons***".

[39] On the same operational path, Rule 41 of the Supreme Court Rules provides as follows:

"***The National Government, a State organ or County Government may apply to the Court by way of reference for an advisory opinion under Article 163(3) of the Constitution***".

[40] In such a context, our first question is: d*oes the applicant have the capacity to request this Court for an Advisory Opinion"*

[41] The answer is in the affirmative. There is no contention among the parties, as to the status and standing of the applicant, as far as the request for an advisory opinion is concerned. The National Land Commission is a Commission established under Article 67(1) of the Constitution, and recognized under Article 248(2)(b), and by virtue of Article 260, as a *State Organ*.

[42] We have on several occasions delivered advisory opinions to State organs. In the first of such instances, ***Re IIEC***, we set out guidelines for the exercise of this jurisdiction in the following terms (para. 83):

"[We] are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.

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."

[43] From these guidelines, counsel have made extensive submissions on *whether the subject matter of the Reference is one "concerning county government"*. Counsel for the applicant and the *amici curiae* submitted that the Reference dealt with issues concerning county government, on two main grounds: first, based upon the question of public land; and secondly, based upon the *related functions of the applicant to both the national and county governments.*

[44] In ***Re IIEC***, we laid out the parameters of "matters concerning county government", spelling out the points of symbiosis therein (para.40):

"There is…, in reality, a close connectivity between the functioning of national government and county government ….We consider that the expression 'any matters touching on county government' should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis."

[45] Our more focussed perception on "matters concerning county government" was enumerated in ***Speaker of the Senate,*** as follows (para. 34):

"It emerges that a matter qualifies to be regarded as one of county government only where: that is the case in *the terms of the Constitution;* ***it is the case*** *in the terms of statute law****; it is the case in*** *the perception of the Court****, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations, on the other."***

[46] As submitted by counsel, clear openings into the issues in this matter are to be found in Articles 62(2) and 67(2)(a) of the Constitution, which provide that *public land vests in the people and is to be administered by county governments.* Article 62(2) thus provides:

"Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under…"

Article 67(2) (a) then provides:

"The functions of the National Land Commission are—

a. to manage public land on behalf of the national and county governments;…"

[47] We take note of relevant law of implementation, in the form of the *National Land Commission Act, 2012 (Act No. 5 of 2012),* Section 5(2)(b) which provides that land *vests in the people and is to be administered by the National Land Commission.* It is clear to us that as a State organ entrusted with the function of managing public land *on behalf of both the national and county governments,* the Commission's mandate *cuts across both spectra of government.* In ***Re IIEC***, we had observed that there were instances in which the functions of the national government would overlap with those of county government, in these terms (para. 39):

"Many offices established by the Constitution are shared by the two levels of government, as is clear from the terms of the Fourth Schedule which makes a *"distribution of functions between the national government and county governments*"*…."*

[48] It is quite plain to us that this Reference is one involving *matters concerning county government;* in particular, as the relevant issues involve the administration and management of public land, at *both* the national and the county level, precisely as contemplated under Articles 62(2) and 67(2) of the Constitution. We are in agreement with the 2nd *amicus curiae*, that from the terms of the Constitution, the applicant is *a shared institution* at the two levels of government, and does not fall within the exclusive sphere of the national government.

[49] On that premise, we come to the main question before the Court: *Are the issues raised ordinarily justiciable and, on that account, more appropriate for the High Court's jurisdiction"*

[50] A related question is: *Does the design of an advisory opinion bear such ingredients as would address the fundamental questions embodied in the applicant's request"*

[51] This Court's approach on advisory-opinion references has already been signalled in past decisions. In ***Re IIEC*** the Court thus remarked (para. 44):

"It follows that the Supreme Court may, indeed, while rendering an Advisory Opinion under Article 163(6) of the Constitution, undertake any necessary interpretation of the Constitution."

[52] But in the instance above-cited, the Court was clear that the opinion-request must be one seeking a plain opinion statement, and not necessarily the correct interpretation of particular provisions of law that are being cited. The Court thus held (para.46):

"As the applicant apprehends conflict in the said provisions, it is to be taken to be seeking the "correct" *interpretation* ***of the said provisions: it is not seeking a plain opinion-statement on the date of the next election. We find, therefore, that the question placed before us is not a normal one, within the Advisory-Opinion jurisdiction as envisaged under Article 163(6) of the Constitution."***

[53] We are dealing with interlocking issues at this preliminary stage, namely: the *request for an advisory opinion*; the *constitutional dimensions* of the subject of such opinion; and the *pertinence of the High Court's jurisdiction* in relation to controversial constitutional matters.

[54] Such a scenario is depicted in this Court's Ruling in ***Re IIEC;*** firstly as follows (para. 33):

"…Building on this general sense of 'advisory opinion,' we consider that such an opinion, in the context of Article 163(6) of the Constitution, means ***legal advice*** *rendered by the Court to the public body or bodies seeking the same, by virtue of scope created by law. Since such an opinion* ***does not flow from any contest of rights or claims disposed of by regular process,*** *it does not fall in the class of judgment, or ruling, or order, or decree…."*

And secondly, as follows (para. 43):

"….Indeed, interpretation of the Constitution stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs: so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the Constitution as may be necessary; and the several independent Commissions under the Constitution are similarly entitled to interpret the Constitution as part of the performance of their respective mandates."

[55] In a new constitutional dispensation that is founded on broad and progressive values and principles, the crystallization of firm content must take time; but the creative and regulatory mandate of the Supreme Court in such a process, is not open to doubt. Consequently, the scope of this Court's jurisdiction has to be seen in the correct light, as adumbrated in our decision in ***Lemanken Armat v. Harun Lempaka and Others,*** Sup. Ct. Petition No. 5 of 2014 (para.107):

"The Supreme Court's special jurisdiction merits express recognition. The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms…."

[56] The reality is that this Supreme Court has been entrusted with the mandate of ensuring that the strands of constitutional governance are woven together, as guided by the dictates of a transforming Constitution. The Constitution has reconfigured the scheme of governance, infusing it with values and principles to be given effect under the watchful eye of the Judiciary. Such a special context of judicial commitment, in our perception, dictates that this Court is not to retreat when its advisory opinion is sought, and it appears as an opportunity to avert a looming constitutional disengagement.

[57] The path of advisory opinions, which runs several removes from that of the contests of justiciable litigation, can be seen as placing this Court in a *mediator's role*, where there is both good faith, and a recognition of the supremacy of the Constitution as a governing charter.

[58] It is evident to us, that inappropriate handling of property rights and in particular, of issues relating to the management of land, would manifest a sense of social, economic and political injustice, with the potential to undermine the stabilizing tenets of the new constitutional order. Learned Senior Counsel, Mr. Muite did acknowledge in his submissions that the sensitivity of land matters in Kenya was a foremost factor in the nation's Independence strife of the 1950's. Land, as the most critical socio-economic pillar in a dominantly agrarian economy, remains the backbone to the governance set-up under the new Constitution.

[59] Against such a background, although it is clear to us that a number of the issues in the Reference are proper justiciable causes for adjudication in the High Court, issues relating to institutional mandates assigned by the Constitution, and now the subject of contests between two State organs – contests touching on the population at large, on the lawful county-units, and on national

government – *properly fall to the advisory-opinion jurisdiction of the Supreme Court.*

[60] In determining whether to exercise its advisory-opinion jurisdiction, this Court proceeds on a case-by-case basis, analyzing the subject-matter of the reference, as dictated by the public interest. In ***Re the Principle of Gender Representation,*** we determined that the reference related to a matter of general public interest, as it attracted a good number of persons and organizations seeking joinder. Similarly, this matter has generated general public interest, with five interested parties and two *amici curiae*. Furthermore, the gravamen of the reference is the issue of *land administration and management* which in Kenya is, in every respect, a *matter of general public interest*. It is not our perception, however, that this Court should deal with all the 27 issues raised in the Reference. This Court may exercise a discretion as to whether to render an advisory opinion, and as to whether it will give an opinion on all the issues proposed. We will not deal with all the issues, in this instance, as some of them can be dealt with before the High Court, in a normal process of litigation.

[61] Of issues of general public importance meriting the Supreme Court's advisory opinion, we had thus observed in ***Re the Principle of Gender Representation***, (para.19):

*"The Court recognizes**, however, that its Advisory Opinion is an important avenue for settling matters of great public importance** which **may not be suitable for conventional mechanisms of justiciability...** The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory-Opinion jurisdiction will be most propitious; and where such **is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution"*** [emphasis supplied].

[62] In the case of ***The Speaker of the Senate***, this Court had to give an opinion on a sensitive matter of public interest, namely the powers to regulate the sharing of revenue between the central government and the devolved territorial units; and it duly took note of the necessity as well as real importance of reconciliation, mediation, co-operation and engagement between the different governance-units established under the Constitution.

[63] With that background, it is clear to us that some of the issues raised in this matter, even though they would meet the admissibility requirements for the Supreme Court's opinion – for instance, the administration and management of public land, or the registration of public land held in trust – certainly lend themselves in the first place to a genuine commitment on the part of the relevant organs to good-faith engagement aimed at co-operation and mutual accommodation.

[64] Our perception of the matter before us is informed by the elaborate principles and values proclaimed in the Constitution, which though affirming independence on the part of separate governance entities, require common purpose in public service. In this context, the Judiciary as an organ of dispute resolution is to be guided (Article 159(2)(c)) by the principle of promoting "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution."

[65] We find that the instant Reference meets the admissibility requirement as set out in Article 163(6) of the Constitution; provided that the Court shall adopt a re-framed set of issues for consideration. This element is incorporated in our Orders.

F. THE CONCURRING OPINION OF IBRAHIM, SCJ

[66] I have read the majority Ruling of the Court and I agree with the rendition of the facts and submissions of the parties. I also agree with my brothers and sisters in the majority that indeed the instant Reference meets the admissibility requirement as set out in Article 163(6) of the Constitution. However, there are some fundamental issues that, while I concur, I would like to buttress.

[67] In opposing the preliminary objection, Learned Senior Counsel, Prof. Tom Ojienda, for the applicant sought to rely on the ruling by *Ojwang, SCJ* delivered on 26th June, 2014. He urged that the Ruling had upheld the competence of the Reference and acknowledged the Court's jurisdiction; hence it was no longer open to counsel for the 1st and 2nd interested parties to question the Court's jurisdiction.

[68] With due respect to Counsel Prof. Tom Ojienda, such a contention cannot be affirmed. I have read the Ruling delivered by the Honourable Justice *Ojwang, SCJ* and it is clear to my mind that at no time did the Court mention or addresses the question of jurisdiction. I would like to cite a substantial part of the Ruling where before giving the specific orders the Court stated:

"The matter before the Court is a request for an Advisory Opinion on a matter that is important, in terms of the due conduct of the processes of governance under the Constitution, and in terms of the fundamental rights guarantees of the Constitution which have a bearing on the property rights in general, and land rights in particular.

From this background, it is clear that contested issues in this case are for urgent resolution by this Court. Moreover, as the relevant issues touch on essentials of good governance, good sense dictates that no public agency should proceed to crystallize normative positions in respect of the relevant land issues, until the matter has been duly considered by the Judicial Authority of the State, and proper guidance, founded on proper hearings and evaluations, has been solemnly given by the Judiciary."

[69] Clearly, the Court recognized the need for the expeditious disposal of this matter as it bordered on the good governance of the country. This can in no way be interpreted to be that the Court had disposed of the issue of jurisdiction and that parties were now precluded from raising a contest on jurisdiction. If a contrary position were to be adopted as argued by the learned senior counsel for the applicant that will defeat the essence of a Certificate of Urgency.

[70] It is worth noting that a court when faced with a Certificate of Urgency application, what is at stake is the time frame within which the matter should be heard and determined. Ordinarily, it is counsel as an officer of the Court who swears an affidavit on why the matter at hand should be expedited. The advocate gives reasons based on his value judgement and appraisal of facts and circumstances of the matter. Hence, a ruling on certification borders on the urgency of hearing the matter and not on its merit. No single issue is considered on the merit.

[71] This position is further fortified by the nature of the orders given at this *ex parte* hearing of a certification application. Ordinarily, the orders are *ex parte* and only lasts until the *inter parte* hearing of the matter or application. Hence, a party cannot argue that a question of jurisdiction may not be raised once a Court has made a ruling at the initial stage like during *ex parte* proceedings for certification.

[72] The law recognises that a jurisdiction question can be raised at any time before judgement, even by the court itself. An interlocutory ruling does not preclude a party raising a jurisdictional challenge. Even the Court itself may raise a jurisdictional question despite having made a ruling in the matter earlier own. **See**: ***Ferdinard Ndung'u Waititu v. The Independent Electoral and Boundaries& 8 others,*** *Civil Appeal No. 324 of 2013,* where the Court of Appeal raised the question of jurisdiction *suo motto*.

[73] Hence, suffice it to say that a certification upon an application of urgency is only meant to determine whether the matter could be determined urgently. Urgency does not as a matter of fact even go to the approval of the matter being one of general public importance or one that involves the interpretation and/or application of the Constitution. It does not go to the jurisdiction of the court and there is no determination of any issue. The directions given by the court are pre-hearing preparatory guidelines and such directions cannot be construed as being orders of the court determining an issue framed in the suit before the Court.

[74] Secondly, by Prof. Tom Ojienda submitted that the preliminary objection was not correctly raised. Counsel urged that the same was premised on facts and hence contrary to the jurisprudence in ***Mukisa Biscuit Manufacturing Co. Ltd. V. East and Distributors Ltd*** *[1969] 696*. The majority decision of this Court which I agree with has rightfully found that the preliminary objection was properly raised and the law in ***Mukisa Biscuits*** Case was not violated. Though the preliminary objection was backed with annextures, it is my considered opinion that the annextures do not in any way cloud the trajectory the preliminary objection takes. It remains clear that the preliminary objection is anchored on the dictum in the ***Re IIEC*** matter: *that a reference for an advisory opinion must fall within the four corners of Article 163(6) of the Constitution*. It is my opinion that the annexures were meant to demonstrate to the Court that indeed in the 1st and 2nd interested parties' assessment, the requirements of Article 163(6) were not meant. The annextures were not meant to bring to Court any contested facts. As a matter of fact, the applicant has not even alluded to the fact that the information contained in the annextures is contested.

[75] Lastly, I also agree with the majority that in a new constitutional dispensation that is founded on broad and progressive value and principles, the crystallization of firm content must take time, but the creative and regulatory mandate of the Supreme Court in such a process, is not open to doubt. However, the majority observes that *the scope of this Court's jurisdiction has to be seen in the correct light, as adumbrated in Court's decision in* ***Lemanken Aramat v. Harun Lempaka and others,*** *Sup. Ct. Petition No. 5 of 2014 (****Aramat*** case*).*

[76] I would like to reiterate that in the ***Aramat*** case I dissented and disengaged from the majority particularly when they held: [paragraphs 107]

"[107] The Supreme Court's special jurisdiction merits express recognition. The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms…"

The majority then proceeded to hold, [paragraph 112-113]:

"[112] Against the foregoing background the question may be asked whether, within the *special jurisdictional competence of this Supreme Court* beyond the *"Lillian S"* case – a decision of the last quarter-century – it is open to the Court to consider such issues of merit as may have come up before lower Courts that lacked jurisdiction" The language of the Constitution of Kenya, 2010, the purpose and principles of that Constitution, and the broad terms in which the Supreme Court's jurisdiction has been conferred by both the Constitution and the organic law made under it, give the clear message that such issues of merit are not beyond this Court's jurisdiction.

[113] For it is a logical premise that any matter coming up before this Court by proper motion, or proper invocation of jurisdiction, and all that such matter may entail – such as the submissions of counsel; matters of judicial notice; or any issue of relevance and of significance to this Court – will squarely fall within the principle elaborated by Mutunga, C.J. & P. in the *Jasbir Singh Rai* case [paragraph 81]:

"[I]t will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it."

[77] In making the above finding, this Court by a majority held that the Supreme Court could depart from the jurisprudence in ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd*** *[1989] KLR 1* on jurisdiction. Just as I held when I dissented in ***Aramat***, it is still my conviction that that ***"Lillian S"*** case is still the *locus classica* on jurisdiction, particularly in Kenya and it is still good law. Hence while I concur with the majority herein that the Supreme Court mandate in shaping the broad and progressive values and principles cannot be open to doubt, I again disengage from their assertion that the Supreme Court has to go the path they proposed in the ***Aramat*** case.

[78] In conclusion, I reiterate that notwithstanding the foregoing sentiments that I have made. I agree with the majority in holding that this Court should indeed exercise its discretion and admit this matter and render an advisory opinion. It cannot be gainsaid that the matter meets the minimum threshold. The National Land Commission has the constitutional capacity to seek an advisory opinion and the subject matter indeed concerns county governments. This is a matter with a significant impact on county governments and any doubts on this can be well settled by a reading of Article 62 of the Constitution on public land.

G. THE DISSENTING OPINION OF NJOKI, SCJ

[79] I have considered the majority-opinion in the Reference before this Court and, with respect, I am unable to agree with the rationale and the consequential conclusion of the Court for the reasons that I will expound. I shall directly proceed to the grounds that lead to my conclusion without reiterating most of the submissions of counsel on the considered issues since these are elaborately captured in the majority-opinion. My opinion is two-folds with one limb on jurisdiction and the other addressing the discretion of the Court to exercise that jurisdiction.

i. Jurisdiction

[80] The Reference brought before this Court has been depicted as a request for Advisory Opinion on matters concerning county government, and therefore falling within the purview of Article 163(6) of the Constitution. However, a closer look at the questions posed for consideration by this court, by the applicant, shows that this is in fact a matter concerning the synergy between the National Land Commission (the Commission) and the Ministry of Land, Housing and Urban Development (the Ministry of Land) and the internal setups of the Commission as opposed to a matter precisely concerning county government.

[81] The questions posed to this Court have no direct correlation with county government. Rather, they merely have a remote nexus with county government by virtue of the fact that the operations of the Commission and the Ministry of Land ultimately impact on both public and private land physically located within the boundaries of each county.

[82] This Court, in ***Re The Matter of the Interim Independent Electoral Commission, (Re IIEC)*** Supreme Court Constitutional Application No. 2 of 2011, [2011] eKLR [at paragraph 40], this Court stated as follows:

"We consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court's Advisory-Opinion jurisdiction." *[Emphasis added]*

[83] At paragraph 83(i), this Court further observed that:

"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."

[84] The majority, in their decision, have indeed cited ***Re IIEC,*** stating that *there is a close connectivity between the functioning of national government and county government and the expression 'any matter touching on county government' should be interpreted so as to incorporate any national-level process bearing a significant impact on the conduct of county government.* I agree with this concept as set out in ***Re IIEC***. However, I hasten to add that it is imperative to give gravity to the cautionary remarks made by this Court in that respect – that the interpretation in that category is to be made cautiously, and on a case-by-case basis.

[85] I perceive that the majority have, in their decision, treated the Reference before this Court as concerning the operations of two constitutional institutions that are clearly within the national government, but consider their functions as impacting on the county government hence qualifying the subject of the Reference before this Court for Advisory Opinion. I differ with this view since all operations at the national level will ultimately impact upon the county government, no matter how remotely. To uphold such a notion would mean that any matter relating to the operations of the national government automatically qualifies as subject for Advisory Opinion. This would create an absurdity and would clearly go against the spirit and the letter of Article 163(6) of the Constitution.

[86] In setting the bounds of the subject of Advisory Opinions the drafters of the Constitution, including the committee of experts of which I was a member, were conscious that all functions of the national government eventually impact on the county government, yet they restricted the subject to matters concerning county government. This signals that not all matters that impact on county government, irrespective of how tenuously, will qualify as subject for advisory opinion.

[87] A good exemplar is a Reference whose subject matter concerns a road which is within the category of roads managed by the national government. That road cuts across the relevant county hence inevitably impacting on the county government. The mere fact that the road cuts across a county does not, and will not by itself transform that national-level matter into a matter concerning county government. There must be more than a peripheral nexus between the subject matter and the operations and functions of the county government, otherwise this Court will have extended the Advisory-Opinion jurisdiction to cover all matters concerning national government over and above the matters concerning county government, which jurisdiction is not countenanced by Article 163(6).

[88] This Court aptly held in ***Re the Speaker of the Senate & Another v Attorney General & 4 Others, (Re the Speaker of the Senate),*** Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR, at paragraph 34, that a matter qualifies to be regarded as one of county government only where: that is the case in the terms of the Constitution; it is the case in the terms of statute law; it is the case in the perception of the Court, *in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county government, on the other*. This Court must therefore consider how the matter in issue relates to the operations and functions of the County before finding that the matter concerns county government.

[89] A closer look at some of the References in which this Court elected to exercise its Advisory-Opinion jurisdiction reveals a common thread that ran through them – they directly and fundamentally impacted county governments – which is lacking in the current Reference. For instance: ***Re the Speaker of the Senate,*** the Division of Revenue Bill which was at the core of the Reference impacted on the portion of funds allocated to the county governments while in **Re *the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Re the Matter of the Principle of Gender Representation),*** Supreme Court Application No. 2 of 2012, the representation of the county governments and the election process were the central issues which both directly and fundamentally impacted on the county government.

[90] In ***Re IIEC*** this Court stated that it shall consider whether a matter concerns county government on a case-by-case basis. This statement creates a wide scope of aspects to be considered when determining what matter would be deemed to concern county government. It is my considered view that for a matter to qualify as one concerning county government, hence qualifying to be the subject of advisory opinion, *its subject matter must be* ***significant****; that is to say that it must be one that has some effect, impact, consequence on, or one affecting the role, the structure, management or running of county government.*

[91] Applying this test to the current Reference, I am persuaded that none of the questions posed to this Court meet the precondition of Article 163(6) requiring the matter to relate to county government. It is imperative for this Court to look into the substance of the questions referred to it and determine whether the gist of those questions indeed concern county government. In the instant Reference, the applicant has cited Articles 62(2) and 67(2)(a) of the Constitution which provide that public land vests in the county government, and it is to be managed by the National Land Commission on behalf of the national and county governments, respectively. The applicant wishes to persuade us that these provisions provide a nexus that forms a basis to give rise to 'a matter concerning county government'.

[92] However, the fact that public land vests in county government and the National Land Commission is charged with the mandate to administer and manage that public land by the Constitution does not by itself elevate the subject of the Reference before this Court to one that qualifies for advisory opinion. None of the questions for consideration by this court relate to a challenge to, or change of, title of public land held by the County. No party is suggesting that land should vest in an authority other than county government. None of the counsel has purported to suggest, for example that the public land which vests in the County should be transferred to the National Government or that private land should be vested in the county. The role of the county government as to the ownership, management and administration of public or private land, therefore, is not a question raised in this request for an advisory opinion. The subject matter of the Reference therefore is not significant to the country government and does not in any way have any *effect, impact, consequence on, or affect the role, the structure, management or running of county government.*

[93] It is my considered opinion is that the Reference before this Court seeks the delineation of the roles of two constitutional institutions in the National Government, since the relevant issues involve the operations of the two bodies in the administration and management of land at both the national and county level. This in no way concerns county government except that public land vests in the county government – a remote link to the questions posed to this Court. It is instructive that some of the questions touch on the operations of the Land Ministry that will inevitably affect management of private land which is not vested in county Government and therefore outside of the scope of this Courts Advisory-Opinion jurisdiction. The instant matter therefore, is one in which this Court has no jurisdiction under the advisory opinion provisions of the Constitution.

ii. Discretionary Nature of Advisory-Opinion Jurisdiction

[94] Although the majority position is that this Court has jurisdiction in this matter, with respect, I am of the opinion that the Court should decline to exercise that jurisdiction. Article 163(6) of the Constitution provides that the *"Supreme Court* ***may*** *give an advisory opinion …"* The use of the word "may" implies that this jurisdiction is discretionary. This Court held as much in ***Re IIEC*** in which it stated, at paragraph 34, that:

"In so far as the jurisdiction reposed in the Supreme Court, under Article 163(6) of the Constitution, employs the directory term "may", it is, in our opinion, purely discretionary, at the instance of this Court…"

[95] Further, at paragraph 82 this Court held that:

"…It must be emphasized that the advisory jurisdiction of the Supreme Court under Article 163(6) is discretionary in nature. This being the case, and further, given the fact that the advisory jurisdiction is a novel phenomenon in Kenya, it is expedient that this Court should progressively develop guidelines for the exercise of this discretion."

[96] In the same matter this Court observed, at paragraph 84, that *"applications seeking Advisory Opinion shall be resolved as necessitated by the merits of each case."* I am not persuaded that the current Reference is meritorious particularly because its motivation is the resolution of the existing conflict between the Commission and the Ministry of Land concerning their respective functions. It is not in doubt that the current Reference seeks to resolve a matter amenable to the ordinary process of litigation to one genuinely seeking an opinion-statement of this Court. The same bears justiciable elements that can be properly determined by the High Court as a forum of first instance with the possibility of appeal all the way to this Court.

iii. The Supreme Court as the Court of final resort

[97] Before a party invokes the Advisory-Opinion jurisdiction of this Court he/she ought to have sought recourse through other available avenues. It is vital for this Court to allow other institutions created under the Constitution to exercise their constitutional mandate to resolve issues relating to interpretation and application of the Constitution and statutes. Such is the approach of cooperation and consultation required by Article 6 of the Constitution.

[98] Interpretation and application of the Constitution is, patently, not a preserve of the Courts. Other constitutional institutions and offices have been mandated to interpret and apply the Constitution albeit, in processes that differ from those engaged by the Courts. For instance Parliament, the Attorney General and Commissions mandated with the implementation of the Constitution play an invaluable role in the interpretation of the Constitution and resolution of disputes that may arise during the implementation process. These Commissions and Independent Offices, in the context of Chapter Fifteen of the Constitution have a direct mandate to promote constitutionalism and to secure the observance of the democratic values and principles. They are the equivalent of Institutions Supporting Democracy (ISDs) as conceptualized under Section 181 of the Constitution of the Republic of South Africa. This mandate empowers the Commissions to engage other constitutional Organs of the State in dialogue, consultation, conciliation, mediation and negotiation. This power is drawn directly from the provisions of Article 252 (1)(b) of the Constitution and encompasses their socio-political foundation of functional adjudication. This elaborate scheme of the Constitution not only empowers the National Land Commission to call for negotiation and mediation in any dispute touching on its mandate, it also mandates any other organ of the State concerned to heed to the interwoven aspect of functional democratic institutionalism ordained by the Constitution. As such, Commissions and Independent Offices as well as other Organs of the State must be allowed to appreciate this scheme through internal maturity (enhanced through internal disagreements and agreements) and cooperative governance (as a mandatory constitutional requirement that can be enforced by the High Court at the first instance).

[99] In the current matter the Commission had various resolution options open to it. It had the option to seek negotiation or mediation as an alternative mechanism for dispute resolution. It could have referred the issue to Parliament for deliberation under Article 254 or sought the advice of the Attorney General, the national executive, the legislature and the judiciary (through the forum of constitutional adjudication and interpretation stemming from the High Court and as a measure of last resort.)

[100] It is important to consider whether the Commission sought to resolve the issues through other available avenues before coming to this Court for an Advisory Opinion and whether such mechanisms were effective.

[101] It was averred by the Commission in its Reference that recourse to the alternative avenues available to it have been futile hence the resolve to approach this Court. The Commission avowed that a meeting between representatives of the Ministry of Land, the Presidency, the Commission for the Implementation of the Constitution and itself was held with the object of resolving the issues between the Commission and the Ministry of Land, but it did not yield any benefits. Abdulkadir Khalif in his affidavit sworn on 1st April, 2014 deposed that the said meeting was held on 11th February, 2014 at Harambee House; minutes of which are attached to his affidavit.

[102] According to those minutes, in attendance were: the Cabinet Secretary for the Ministry of Land; the Head of the Public Service; Senior Advisor, Constitution and Legislative affairs; the Solicitor General; Legal Advisor, Deputy President's Office; CEO, National Land Commission; Vice Chairperson, Commission for the Implementation of the Constitution among other persons from the Ministry of Land, the National Land Commission; and the Office of the President. It would be accurate to say that it is apparent from the minutes that all the stakeholders were well represented in that meeting.

[103] According to the minutes of the meeting *the critical questions posed in the Reference before this Court did not arise nor were they deliberated upon* during the meeting of 11th February, 2014 despite the Commission's averments to the contrary.

[104] The Commission averred that the legal advice of the Attorney General was also sought which did not in any way resolve the issues between the Commission and the Ministry of Land. Mr. Khalif annexed to his affidavit the letter from the Commission, dated 31st March, 2014 addressed to the Attorney General seeking legal advice on the mandate of the Commission, the mandate of the Ministry of Land and the areas of co-operation and synergies between the two. I find that the legal opinion sought from the Attorney General was predominately on the mandate of the two institutions and how the two were expected to collaborate in order to avoid conflict.

[105] The Attorney General responded by a letter dated 31st March, 2014 which enclosed a legal opinion dated 2nd September,

2013 and a further opinion dated 25th November, 2013 both of which had previously been addressed to the Ministry of Land. These legal opinions intricately set out the mandate of the Commission and that of the Ministry of Land.

[106] Considering the elaborate nature of the legal opinion of the Attorney General to both the Commission and the Ministry of Land, I am persuaded that the actual issue between these two institutions is not the inadequacy of interpretation, or lack of precision of the laws that prescribe the character of their mandate, but the *enforcement* of those laws.

[107] This means that the issue sought to be addressed by the Reference before this Court is in fact, a contestation on the demarcation of the functions and powers of these two institutions. These are actual issues in contestation between the Commission and the Ministry of Land which are amenable to the jurisdiction of the High Court in the first instance. Issues of this nature ought not to be resolved by way of Advisory Opinion because of the existence of live issues of controversy concerning the constitutional powers of the Commission and the Ministry of Land and the constitutional relationship between those two institutions, the mandate of whose determination lies with the High Court in tandem with the provisions of Article 165(3)(d)(iii).

[108] Article 165(3) of the Constitution states that:

Subject to clause (5), the High Court shall have —

(a) unlimited original jurisdiction in criminal and civil matters;

(b) …

(c) …

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) …

(ii) …

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; …

[109] In light of this provision, the proper forum of resolving the issues between the Commission and the Ministry of Land is the High Court which is empowered not only to interpret the constitutional and statutory provisions that confer mandate to these two institutions but also resolve the justiciable issues that exist between these two institutions.

iv. The existence of actual controversy between parties

[110] In relation to issues that would most suitably qualify for resolution through the ordinary course of litigation, this Court held, in ***Re the Matter of the Principle of Gender Representation,*** at paragraph 18 and 19, that:

"***The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of the Constitution, in particular, a principle such as the separation of powers, by assuming the role of general advisor to Government.***

[19] The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability."

[111] The existence of a live controversy between these institutions can be discerned from the Constitutional Petition No. 219 of 2014 dated 7th May, 2014 filed by the Commission before the High Court at Nairobi revolving around the same issues flagged for resolution in the current Reference.

[112] In that petition the applicant (the Commission) averred that subsequent to their filing of a Reference before this Court for an Advisory Opinion a meeting was held between the Commission, the Parliamentary Committee on the Implementation of the Constitution , the Commission for the Implementation of the Constitution and the Ministry of Land among other stakeholders.

[113] The Commission averred that during that meeting issues relating to the functions of the Commission and the Ministry of Land were discussed with a view of demarcating the distinct mandate of each of these two institutions. Further, the Commission avowed that it was agreed during the meeting that an audit of the Land Registry be conducted which was intended to be consultative process but the Cabinet Secretary of the Ministry of Land subverted this arrangement and issued a notice for the closure of the Central Registry among others, through the local dailies of 2nd and 4th of May, 2014.

[114] Therefore, the commission was apprehensive that the Cabinet Secretary would close the remaining Land Registries in the Republic which action would be blatant violation of the Constitution. The Commission further highlighted the services that the Cabinet Secretary had hindered and which were within the province of the Commission.

[115] In light of the said conduct by the Ministry of Land and its agents the Commission sought the following (summarized) reliefs:

1. A declaration that the Public Notices issued suspending the services at Ardhi House are unconstitutional.

2. A conservatory order restraining the Ministry of Land and the Cabinet Secretary from interfering with the petitioners exercise of mandate.

3. A conservatory order suspending or staying the said notices and reinstating all the services suspended by the notices until final determination of the matter.

4. A conservatory order allowing unfettered access to Ardhi House until full determination of the matter.

5. The costs of the petition be provided for.

[116] The issues of Reference before this Court and the subject of the Constitutional Petition filed at the High Court by the Commission bring to fore the true character of the existing dispute between these two institutions. The outlined sequential occurrence of certain events also shows the shortcomings of the Commission's approach to have this dispute resolved.

[117] On 15th May, 2014 counsel for the petitioner (the Commission) requested the High Court to withdraw the matter. The High Court (Lenaola, J), granted the request and marked the petition as withdrawn. In the alternative, the Commission opted to pursue the current Reference which they had filed on 2nd of April, 2014.

[118] On 12th August, 2014 while the current Reference before us was still pending, the Commission filed at the High Court a Chamber Summons under a Certificate of Urgency, Constitutional and Human Rights Division, Petition No. 402 of 2014 seeking conservatory orders pending the conclusion of the Advisory Opinion before this Court. That application was triggered by the publication by the Cabinet Secretary in the Ministry of Land in the Kenya gazette of the Land Registration (Forms) Regulations, 2014 vide Legal Notice No. 104, on 1st August, 2014.

[119] The actions of the Commission constituting: first, filing a petition revolving around the same subject matter and involving the same parties in the High Court and later withdrawing it to pave way for the Reference at this Court; secondly, sneaking back to the High Court to get conservatory Orders when no interim Orders has been granted by this Court, is indicative of the Commission's attempt to have this controversy multifariously considered. This approach is not only a dangerous precedent if accepted, but an undermining of the clear jurisdictional distinctions of the various judicial agencies. As such, this Court ought to unequivocally condemn such an approach to safeguard the dignity and legitimate operational mechanisms of Kenya's judicial system.

[120] This Court has in the past been confronted with situations undermining the hierarchical ordering and the functional operation of the judicial system**.** In ***Re IIEC*** this Court declined to render an Advisory Opinion because there were other matters pending before the High Court that related to the same issue. It held, at paragraph 45:

"In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits" *[Emphasis added].*

[121] This Court further observed that though the applicant (the Commission) avowedly sought an Advisory Opinion it was in fact seeking a Constitutional interpretation of the various provisions it had cited. This Court, in declining to render the Advisory Opinion, observed that the applicant was indeed apprehensive of conflict in the cited provisions and was not seeking a plain opinion-statement but an interpretation of the cited provisions, therefore the Reference before the Court at the time was not a *"normal-one within the Court's Advisory-Opinion jurisdiction."*

[122] This Court in holding that it would be hesitant in rendering an opinion in circumstances in which a justiciable matter was pending before a lower Court, in ***Re IIEC*** stated at paragraph 83 (iv), that:

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.

[123] In view of the fact that the applicant had indeed filed a constitutional Reference before the High Court the proffered principle should be applied to require the Commission to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process. The Commission has not in any way demonstrated this.

[124] In my dissenting opinion in ***Re the Speaker of the Senate,*** I enunciated on the exercise of discretion in Advisory-Opinion jurisdiction and stated, at paragraph 236, that:

"This discretion, to my mind, then is to be exercised in a manner that ascribes to the institutional architecture of the Constitution while protecting the authority of this Court and, effectively utilizing the principle of judicial restraint whenever necessary."

[125] This matter is similarly situated because the greater utility of internal State Organ collaboration and growth within the fabric of our constitutional institutional scheme would be greatly undermined by the acceptance by this Court to exercise its Advisory-Opinion jurisdiction. The growth of our Republic depends on our institutions' conscious zeal to homogenize State operations for the benefit of the people. The mechanisms of operation are clear in the Constitution which gives these institutions independence. This independence must however not be interpreted to mean autonomy and disengagement from the wholesome operation of the State. This Court must recognize the hesitation by most institutions to engage dialogically for the effective running of the State. While the Judiciary is the primary forum of Constitutional interpretation, the Constitution binds every person and all State Organs with the obligation to respect, uphold and defend the Constitution. Ours is not only a scheme of horizontal operation, it is also vertical and in a peculiar non conventional way, diagonal. Each State Organ must consult, negotiate and work with others. The power exercised emanates from neither of these institutions but the people. As such, where such cordial engagements fail, a legitimate, justiciable action of constitutional enforcement, whose point of activation is the High Court emerges. Such is the case in the instant matter.

[126] The current Reference is one in which this Court should exercise restraint and decline to render an Advisory Opinion but rather allow the constitutional institutions to gradually work out their own internal operational mechanisms and exhaust the alternative avenues available to them for interpretation of the Constitution as well as dispute resolution before approaching this Court. I reiterate that of the 27 questions referred to this Court for an Advisory Opinion, none falls within the ambit of Article 163(6) of the Constitution. All the questions are focused on resolving real issues in contestation between the Commission and the Ministry of Land. To render an Advisory Opinion in this matter would be tantamount to endorsement of the actions of the applicant of seeking resolution of justiciable disputes through the channel of Advisory Opinion.

v. Conclusion

[127] It cannot be gainsaid that the immediate constitutional institutions are at their infancy stages, which will inevitably be marred with copious challenges relating to their internal workings, as well as their synergy with other constitutional institutions. The implementation of constitutional imperatives is not a smooth exercise. Constitutions grow in turbulent periods characterized by a surge of constitutional claims. While litigation is an aspect of constitutional dispute resolution, other avenues also bear legitimacy to ensure that the functioning of the State through Constitutional efficiency is guaranteed. As such, it should be taken as an evasion of constitutional duty to hinder the operation of any institution ordained by the Constitution to execute a certain function. Any conduct of this nature warrants any authorized and legitimate forum of resolution or correction, such as institutional restructuring, parliamentary intervention, administrative resolution, mediation, negotiation and conciliation to be engaged and ultimately, judicial intervention. The majority decision in this matter also reflects this position.

[128] It cannot be overemphasized that this Court ought to allow sufficient time for these constitutional institutions to beat their own path through the challenges attendant to the new order birthed by the current Constitution, and identify the parameters of their mandate before it delves into the concerns of those institutions to render Advisory Opinions. Only when these institutions are given the latitude to define their own course will they grow to attain the level of efficacy contemplated by the Constitution. Conflicts and divergences often followed with dialogue and consultations with the Attorney General alongside other actors in the constitutional implementation process, such as is the case between the Commission and the Ministry of Land, are part of the growth process. Eventually, these institutions will be able to distinctly delineate the bounds of their mandate and synergies with other constitutional institutions so as to avoid overstepping the constitutional and statutory commands.

[129] I am of the view, therefore, that the intervention of this Court at such an early stage in the life of the infantile Constitutional institutions will interfere with the developmental milestones of the institutions which is likely to result in hitches within these institutions likely to result in setbacks in the internal workings of these institutions and their relations with each other. Therefore even if the majority decision is that we have jurisdiction to give an advisory opinion in this matter; in my opinion, it is premature for this Court to grant an Advisory Opinion on the basis of the Reference presented before it.

H. COURT ORDERS

[130] We make specific Orders in the following terms:

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

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

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

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

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

v. There shall be no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 30th day of October, 2014.

…..……..…… **….……**

W. M. MUTUNGA **K.H. RAWAL**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE & VICE-PRESIDENT**

OF THE SUPREME COURT **OF THE SUPREME COURT**

…….. **……**

P. K. TUNOI **M. K. IBRAHIM**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……..…… **……..……**

J.B. OJWANG **S. C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……..…….

S. N. NJOKI

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA