

**Opening Remarks, Vice Chair, National Land Commission
ELC AJS Training, Sarova Hotels, Nakuru,
13th to 15th December 2022**

Ladies and Gentlemen

I am proud and privileged to work with a judiciary that has taken the first step in securing and protecting the civic space of the rule of law, due process, governance and access to justice. As I honor each one of you for coming up with innovative ways of securing and protecting that space, I first want to single out some special people with whom I have had the privilege to work with.

First I thank my friend and sister Husna for listening to state organs and community initiatives to identify what mostly needs support by development partners and for working very hard to ensure successful strategic funding and multi-stakeholder implementation of projects to address those needs. You continue to teach of the need of fiscal justice to accomplish land, environmental and socio-economic justice.

Unless resources are availed directly for the state organ projects that ensure fair and sustainable use of our natural resources to generate income for livelihoods and government operations, we shall continue to wonder why thousands are affected by hunger and chronic poverty in a country blessed with modern digital infrastructure, ambitious hardworking professionals including the ELC Judges here today and active community initiatives everywhere; in our churches, mosques, chamas, sacco, farmers groups, women groups, youth groups and traditional groups. The list of the initiatives for preventing and solving land disputes are abundant and we just need to identify, support and work with those we find in the counties of our duty stations.

I also wish to thank, the Jurist of the year, my Chairman in the Judiciary Committee for Implementation of AJS policy, Prof Judge Joe Ngugi for championing the dignity of individuals, promotion of social justice and realization of the potential of all human beings. You continue to inspire and remind us that success of our work depends on the reason we do it. Whether it is during commission inquiries or in rendering court decisions, we must identify the procedural and substantive crucial land and natural resource needs of Wanjiku. Then we shall enhance delivery that contributes to orders and policy infrastructure for the socio-economic, environmental and fiscal justice that best serves Wanjiku.

I wish to thank ELC Presiding Judge Agote and Lady Justice Bor . Despite their very busy schedules, they find time to join other experts during our commission workshops and draw from their rich experiences in investigation to guide our legal officers to work with other multi-technical officers and stakeholders for

effective litigation which is the foundation of effective ELC decisions. As NLC and AG lawyers appear before you to correct the anomalies in management and administration of land and natural resources they recognize that the huge mandate of the commission is for the people of Kenya as an empowered commission is an empowered litigator for the county and national governments.

He reminds me that changing an entrenched culture requires commitment and leading by action. The quality, integrity, legitimacy and the success of the decisions we make is not only determined by the documentary and oral evidence adduced in court and during commission inquiries but above all by what is happening on the ground and the complex history of what has transpired. What has happened on the ground and the history exist in the memories of Wanjiku everywhere and is accessible from community initiative. It can be used as envisaged under Article 60 (2) (g) of the Constitution to finalize disputes through AJS or to inform our policies and expand our remedies in the land sector.

Lastly, I wish to thank each one of you for decisions that have become the catalyst of change that effectively corrects the past land anomalies and advocates for innovative policy and procedural infrastructure that propels us to equitable and sustainable production of our land and natural resources. A lot of ELC Judges are teaching us that we can enhance the quality, enforceability of commission recommendations, investigation findings and court decisions through restorative and innovative remedies available in AJS.

Justice Kullo has been using elders to adduce evidence in court in Narok; Lady Justice Odenny in Malindi has been working with the county in innovative remedies to settle complex old disputes in Kilifi; Lady Justice Matheka is liaising with stakeholders in Mombasa to unravel sustainable solutions of the squatter issue in Mombasa. The list is endless.

I am hoping we can find time during this training to share best practices, identify the roles of different actors in realizing those practices and create regional projects that will take best advantage of emerging issues.

The values and principles of the constitution that ELC and the Commission have been setup to promote under Articles 159 and 249 respectively existed long before the Arabs docked at the coast and negotiated the expropriation of the land rights of the Mijikenda with the British; They continue to exist today during the displacement of the Kibos settlers in Kisumu; They continue to exist today during the violent evictions of the Ogiek and other victims of 50 years irregular allocations of land on the Mau escarpments; They continue to exist today during the death of hunger by thousands as the Galana Kulalu project becomes another 5 billion worth of a white elephant brought to its knees by powerful land grabbers and food import curtails.

Ladies and Gentlemen

All is not lost. We are all here awake to the need of being informed by what is good in our history through the AJS mechanisms. We are also inspired by the vision of the justice that will bring us to a future prosperity. Your jurisprudence is creating new pathways for communities, state organs and the commission to find innovative remedies for land disputes that are effective, sufficient and enforceable.

I am looking forward to sharing those innovations demonstrated by ground breaking cases such as the Mitu-Bell Welfare Society case in which the commission is a party as it has inherited all the duties and responsibilities of the commission of lands.

In the Mitu-Bell case, the Supreme court recognizes the non-exhaustive list of remedies which displaced community initiatives, the commission in its inquiries, and trial courts can use to vindicate violation of land rights. They include international law which Kenya has ratified and its assisting documents such as UN Guidelines, General Comments or foreign case law which can be applied by Kenyan courts as long as it is consistent with the Constitution. The Supreme court found that it would be appropriate for courts to consider those guidelines to inform supervisory orders and declaratory relief because the guidelines provide instruction on the right to dignity and the right to housing which are protected by international law.

The Supreme court discussed the place of “structural interdicts” (supervisory orders) as forms of relief in human rights matters under the Constitution. The Court held that under Article 23(3) of the Constitution, courts have the power to create orders that protect a right and prescribe appropriate rules and damages related to that right.

Appropriate reliefs priorities needs. Like in Mitu-Bell case, the poor informal settler who had fully relied on public land has the right to be settled by his government. Appropriate reliefs must be effective, sufficient and available to address the human rights violations.

In this room are gifted and experienced Judges that are exploring forms of reliefs that are appropriate and enforceable. I believe we shall share best practices of identifying the roles of different AJs mechanisms, ways to ensure they are constitutionally compliant and various linkages to use them to enhance the quality of reliefs and to find new reliefs through engaging with these mechanisms.

Thank you and may God bless our discussions.