Kenya Veterinary Vaccines Production Institute (KEVEVAPI) v Attorney General & 15 others; Warsama & 90 others (Interested Party) (Environment & Land Petition 939 of 2014) [2023] KEELC 16912 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16912 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 939 OF 2014

OA ANGOTE, J

APRIL 20, 2023

IN THE MATTER OF ARTICLES 2, 3, 10, 22, 23, 40, 62

AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ENFORCEMENT OF THE

OWNERSHIP RIGHT OF THE KENYA VETERINARY

VACCINES PRODUCTION INSTITUTE (KEVEVAPI) OVER

ALL THAT PARCEL OF LAND KNOWN AS LR NO.

209/11969, MEASURING 77.67 HECTARES

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF THE

DECISION OF THE NATIONAL LAND COMMISSION

DATED 10.06.2014 IN RELATION TO A COMPLAINT

RELATING TO ALL THAT PARCEL OF LAND KNOWN AS

LR. NO. 209/11969 MEASURING 77.67 HECTARES

BETWEEN

BETWEEN

KENYA VETERINARY VACCINES PRODUCTION INSTITUTE (KEVEVAPI) ..... PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

THE NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

WORLD MISSION AGENCY (WINNERS CHAPEL INTERNATIONAL) .... 3RD RESPONDENT

DIAMOND PARK HOUSING COMPANY LTD ..... 4TH RESPONDENT

EXECUTIVE PROPERTIES LTD ..... 5TH RESPONDENT

JASPAL SINGH BIRDI ..... 6TH RESPONDENT

KENYA BANKERS SACCO LTD ..... 7TH RESPONDENT

MODERN VENTURE COMPANY LTD ..... 8TH RESPONDENT

KALSAN PARK LTD ..... 9TH RESPONDENT

SHARJAH TRADING COMPANY LTD ..... 10TH RESPONDENT

CHIONDA LIMITED ..... 11TH RESPONDENT

W. TILLEY (MUTHAIGA) LIMITED ..... 12TH RESPONDENT

RIELCO COMPANY LIMITED ..... 13TH RESPONDENT

ANNE NYAMBURA MBUGUA ..... 14TH RESPONDENT

SAMU LIMITED ..... 15TH RESPONDENT

REGNOL OIL LIMITED ..... 16TH RESPONDENT

AND

JAMAL DALAL WARSAMA & 90 OTHERS ..... INTERESTED PARTY

JUDGMENT

Background

1. Through a Petition filed on 12th July 2014, the Petitioner sought the following reliefs:

    a. A declaration that the process at the 2nd Respondent culminating into the decision of the 2nd Respondent dated 10.06.2014, to the extent that it denied the Petitioner an opportunity to confront the representations and the evidence by the respective purported holders of title violated the right of the Petitioner to fair administrative action as protected by article 47 of *the Constitution* of the Republic of Kenya.

    b. A declaration that the decision of the 2nd Respondent dated 10.06.2014, to the extent that it purported to order correction and or perfection of titles whose genesis is expressly found to be irregular hence unlawful, violated the provisions of Article 40 (6) of *the Constitution* and is therefore invalid.

    c. The said decision to the extent that it authorized correction of unlawful title to property over which the Petitioner had expressly laid lawful claim, without affording any remedy to the Petitioner violated the provisions of Article 40(1) and 40(3) of *the Constitution* of the Republic of Kenya and is therefore invalid.

d. An order in the nature of Judicial Review by way of certiorari bringing into this Honourable court and quash the decision of the 2nd Respondent dated 10.06.2014.

e. An order cancelling all titles purportedly issued out of all that parcel of land known as LR. No. 209/11969 measuring 77.67 hectares.

f. An order directing the Land Registrar and the Director of Survey to ensure compliance with the order (e) above in their respective records and registers.

g. An order of eviction does issue against the 3rd to 15th Respondents as well as their successors in title and/or assigns.

h. Costs of and or incidental to this petition.

i. Such other or further orders as this court may grant.

2. It is the Petitioner's case, as set out in the Petition and the Supporting Affidavit sworn by its Managing Director, that on 28th January 1994, through Grant No. I.R. 61702, the Petitioner was allotted L.R. No. 209/11969 measuring 77.67 hectares for a term of 99 years from 1992 (the suit land).

3. The Petitioner averred that the suit land was purportedly surrendered, subdivided and illegally allocated to private developers by the Petitioner's former Managing Director in connivance with the former Commissioner for Lands without reference or consent of the relevant authorities, being the Board of Directors of KEVEVAPI, the parent ministry and Treasury and that this left behind 43.66 hectares of the original land as L.R. No. 209/12345, which was further reduced to 29.05 hectares as L.R. 209/13409.

4. The Petitioner's Managing Director deponed that the purportedly surrendered land was subdivided into LR No. 209/13296, LR No. 209/13295, LR No. 209/13294/1&2, LR No. 209/12341, LR No. 209/12344, LR No. 209/12343, LR No. 209/12339, LR No. 12340, LR No. 209/12342 and LR No. 209/12501; that these parcels of land were allocated to private entities and that the illegal allocations of the suit land, measuring a total of 47.1105 ha, was to legal entities related to officials of the lands ministry and the Petitioner's former Managing Director.

5. According to the Petitioner's Managing Director, these allocations have been categorized as illegal and irregular by all previous inquiries into their allocation, including the Ndung'u Commission; that the said history and state of affairs was brought to the 2nd Respondent's attention, which summoned the parties to appear before it and that the 2nd Respondent called parties into its boardroom one after the other, without giving an opportunity to all parties to present their cases and confront the other parties' evidence, while asserting that it was conducting an inquiry, and not a hearing.

6. It was deposed that the 2nd Respondent thereafter rendered its verdict dated 10th June 2014, where it found that the impugned properties were irregularly acquired by the respective allottees and subsequently sold to third parties; that the respective owners of the properties were bona fide purchasers for value without notice of defect of title; that the titles held by the respective owners would not be revoked and that it directed the Chief Land Registrar to correct the irregularity in the title.

7. The Petitioner attested that the 2nd Respondent denied it an opportunity to hear and confront the evidence of the purported title holders, violating its right to fair administrative action; that the 2nd Respondent's decision violated the provisions of Article 40(6) of *the Constitution* by purporting to afford protection to property unlawfully acquired and that the 2nd Respondent's decision violated Article 40(1) and (3) of *the Constitution* by failing to afford a remedy to the Petitioner.

8. The 2nd, 3rd, 5th, 8th, 9th, 12th, 15th and 16th Respondents and the 91 Interested Parties responded to the Petition. The 2nd Respondent, through the Replying Affidavit sworn on 20th February 2015, averred that the Ministry of Agriculture, Livestock and Fisheries lodged a complaint with the Ministry of Lands, Housing and Urban Development over an alleged land grabbing of L.R. No. 209/8250 belonging to the Petitioner.

9. It was deposed by the 2nd Respondent's Assistant Director, Legal Affairs and Enforcement, that the 2nd Respondent conducted preliminary investigations on the same, which confirmed that L.R. No. 209/8260 measuring 93.02ha was previously public land reserved for Welcome Institute Foot and Mouth Disease Research Station, and that the said land had since been excised and allocated to individuals.

10. The 2nd Respondent's Director deponed that pursuant to Section 14(3) of the *National Land Commission Act*, it issued a public notice in the Daily Nation on 14th April 2014 informing parties of its decision to review the grants in respect to the suit land; that it invited parties to file submissions in respect of the titles that emanated from the suit and that the 2nd Respondent held hearings on 29th April 2014 and all interested parties made representations regarding the suit property, including the Petitioner.

11. Upon hearing all parties, it was deposed by the 2nd Respondent's Director, it was brought to the 2nd Respondent's attention that L.R. 209/8260 measuring 93.02ha was initially reserved for Wellcome Institute Foot and Mouth Disease Research Station and that in 1990, the institute offset its share in the joint venture, leading to the formation of the Petitioner.

12. It is the 2nd Respondent's case that upon formal allocation of the parcel of land to the Petitioner, a title was issued to it for 77.67 ha registered as LR No. 209/11969; that the title was thereafter surrendered by the Petitioner for sub division and that after sub division, the Petitioner was granted a title for land measuring 43.66 ha.

13. According to the 2nd Respondent, the official search revealed that the Petitioner surrendered its title itself to the government in exchange of a sub division scheme and that it is the result of the sub division that the Petitioner's acreage to the suit land reduced to 29.05 ha.

14. It was the deposition of the 2nd Respondent's Director that the resultant subdivisions gave rise to the properties which were put up for review; and that as the registered property owners were not the initial allottees, the 2nd Respondent was barred from directing the revocation of titles of bona fide purchasers of value, as provided for under Section 14(7) of the NLC Act.

15. According to the 2nd Respondent, from the hearings and investigations it conducted, the respective current owners of the suit properties acquired them legally after paying the full purchase price; that the Petitioner was represented throughout the transactions; that all the requisite approvals were granted and that the 2nd Respondent's decision was made after hearing all the parties in compliance with Article 47 of *the Constitution*.

16. The 2nd Respondent's Director annexed on his affidavit a letter dated 21st March 2014 from the Ministry of Agriculture, Livestock and Fisheries indicating the history of the Petitioner's land, including its referral to the then Kenya Anti-Corruption Authority and the Commission of Inquiry into Allocation of Public Land (Ndung'u Commission), a copy of the Certificate of Title IR 66395 LR No. 209/12345 for 43.66 ha dated 17th July 1995 and a Surrender in the Petitioner's name of IR 66395/1 dated 22nd September 1997.

17. The 3rd Respondent's Chairman, in the Replying Affidavit dated 12th October 2016, averred that it is the beneficial owner of L.R. Nos 209/12339 and L.R. No. 209/12342 and that it purchased the same from the National Social Security Fund (NSSF), who acquired the property from the 10th Respondent.

18. It was deposed by the 3rd Respondent's Chairman that the 3rd Respondent's titles to the two properties was free from encumbrances or claims by any other person; that this claim is time-barred as the 3rd Respondent has been in possession of the same since the year 2000 and that in the inquiry by the 2nd Respondent, all parties made presentations separately.

19. Alongside the Replying Affidavit by the 3rd Respondent was the Notice of Preliminary Objection, in which it was averred that this court does not have jurisdiction to determine the dispute; that the jurisdiction to hear and determine applications for redress of denial or infringement of a right or fundamental freedom in the Bill of Rights is exclusively reserved for the High Court and that the jurisdiction of this court is limited to disputes relating to the environment, use and occupation of land.

20. The 3rd Respondent averred that in any event, the decision by the 2nd Respondent can only be challenged by way of review and/or appeal and not by filing of a fresh action by way of a constitutional Petition; that the Petitioner did not challenge the decision either way and that the Petition is incompetent.

21. The 5th Respondent's Director deposed that it is the registered owner of L.R. No. 209/12343 which it purchased from the 12th Respondent for a consideration of Kshs. 85 million and that upon being registered as proprietor, it subdivided, developed and constructed one hundred and one (101) housing units which it sold to individual owners who were issued with titles.

22. According to the 5th Respondent, save for the commercial center registered as LR No. 209/20108, it has no further interest in the suit property that it purchased from the 12th Respondent.

23. The 5th Respondent's Director deponed that vide another Sale Agreement dated 13th April 2011, the 15th Respondent sold to it L.R. No. 209/13295 for a consideration of Kshs. 285 million; that the 5th Respondent is constructing 50 housing units on the latter property, some of which have been sold to third parties; that prior to purchasing the property, it conducted official searches at the registry which confirmed that the 12th and 15th Respondents were registered owners of the properties, and that there were no encumbrances or interests adverse to the said titles.

24. The 5th Respondent's Director deponed that while the Petitioner in an advertisement in the Daily Nation dated 8th November 2007, had claimed ownership of a large area, including that owned by the 5th Respondent, in a subsequent advertisement dated 10th July 2009, it limited its claim to an attached plan, which excluded the 5th Respondent's properties.

25. According to the 5th Respondent, it duly paid stamp duty in respect of the transfers, and upon registration, paid land rent and rates; that the findings by the Ndung'u Commission are not binding; that the mere fact of the allocation of land to the Petitioner for vaccine testing does not constitute a public interest allocation or for a public purpose and that on 21st May 2014, the Petitioner unlawfully demolished buildings and structures on the 5th Respondent's land.

26. The 6th Respondent deposed that he is the registered proprietor of LR No. 209/12501; that he is an innocent purchaser of the said land having purchased it from the 13th Respondent and that the decision of the 2nd Respondent not to revoke his title does not infringe on the Petitioner's constitutional right to property.

27. The 7th Respondent's Chief Executive Officer deposed that the 7th Respondent is the bona fide legal and beneficial owner of LR No. 209/1394/1 and 209/13294/2; that the 7th Respondent purchased the two properties from Leebarn Builders Limited in July, 2007 and that before purchasing the said two properties, the Petitioner informed the 7th Respondent in writing that the same did not form part of the land that it was claiming.

28. According to the 7th Respondent, the Petitioner does not have the locus standi to sue the Attorney General and the National Land Commission; that this court does not have jurisdiction to review the decisions of National Land Commission; that the 7th Respondent is an innocent purchaser for value and that it conducted due diligence before purchasing the land.

29. The 8th Respondent's Director deponed in his Replying Affidavit that the 8th Respondent has been the registered proprietor of LR No. 209/13296 for the last 18 years and has an indefeasible title and that the said land was allocated to it by the Ministry of Lands vide an allotment letter dated 30th October 1996, following its request for allocation to the Ministry of Agriculture, Livestock and Marketing.

30. According to the 8th Respondent, it made all the requisite payments; that a resurvey was done and the 8th Respondent was issued with Grant I.R. No. 75183 for L.R. No. 209/13296 and that the 8th Respondent has been in quiet possession of the said land and is putting up Soledo Estate II, which is a multi-million shillings housing project.

31. The 8th Respondent's Director deponed that following a letter from the Petitioner dated 31st January 2014 and lodging of a complaint with the 2nd Respondent, it was summoned by the 2nd Respondent to appear before it for a hearing on the legality of its title and that following the said hearing in which the Petitioner and other Respondents fully participated, the 2nd Respondent entered its verdict on the legality of its title.

32. It is the 8th Respondent's case that on 21st May 2014, the Petitioner instructed hooligans to engage in the destruction of its property resulting in the demolition of its perimeter wall without a valid court order or notice; that due to the said demolition, the 8th Respondent has suffered both general and special damages of Kshs. 20 million, which is the cost of the demolished wall, and that its housing project, valued at Kshs. 1.2 billion, has been exposed to failure.

33. The 9th Respondent's Director deponed that the 9th Respondent lawfully purchased LR No. 209/17656 from Regnoil Oil Kenya Limited and that its Advocate conducted due diligence by confirming the legitimacy of the title and obtained all the necessary clearances before the title was registered.

34. It was deposed that LR No. 209/17656 is a sub-division of L.R. No. 209/12340, made by the previous owner of the property; that it purchased a clean title and was neither aware nor privy to the action that took place before registration of transfer in favour of the 9th Respondent; that the 9th Respondent proceeded to further subdivide the said land and sold it to 80 new owners, and that it is thus not in possession of the land in question.

35. Through a Replying Affidavit sworn on 24th October 2014, the 12th Respondent's Director deponed that it was not the original allottee of L.R. No. 209/12343, having purchased the same from the first allottee, Chionda Limited, the 11th Respondent, through Fidelity Commercial Bank Ltd at a sum of Kshs. 16,500,000; that the 12th Respondent sold the property to the 5th Respondent, Executive Properties Ltd, on 9th August 2007 and that it no longer has an interest in the suit property.

36. The 12th Respondent's Director deponed that it took all reasonable steps to verify the title and found no indication of any claim registered against the title; that it was not party to any fraud or wrongdoing and that though it was not involved in the hearings by the 2nd Respondent, the 2nd Respondent found that the current title holders were bona fide purchasers for value without notice of any defect in the title.

37. The 13th Respondent opposed the Petition vide Grounds of Opposition dated 7th October 2014, in which they averred that they do not own any parcel of land among those in contention; that it had been wrongly enjoined in this suit, and that there had been a delay in instituting this suit.

38. The 14th Respondent deposed that the Petitioner having represented to her that it had no claim over the suit land, and having placed reliance on the Petitioner's representation while dealing with the suit land, the Petitioner is estopped from laying a claim over the suit land.

39. According to the 14th Respondent, the Petitioner lawfully surrendered the suit property to the government to pave way for the sub division of the same; that the land was sub divided and allocated to individuals, including herself and that the Petitioner was issued with a title for a portion of land which it accepted.

40. The 14th Respondent deposed that she applied for allotment of the property in 1997; that she was issued with a letter of allotment for a portion of the suit property; that after accepting the terms in the letter of allotment, she transferred the land to Leebarn in March, 2007 and that she acquired an indefeasible title in the suit property before transferring it.

41. On his part, the 15th Respondent's Director deposed that this whole Petition is without foundation as the Government is both the claimant and Defendant in the same proceedings; that the 15th Respondent was an allottee from the Government of L.R. No. 209/13295; that the 15th Respondent duly paid the relevant standard premiums and other charges totaling Kshs. 2,323,910 and that it was duly issued with the Grant number 74262 for 6.071hectares, which was amended through a deed of variation dated 10th December 2002.

42. It is the 15th Respondent's case that L.R. No. 209/13295 did not form part of L.R. No. 209/13409, the Petitioner's land; that the Government duly received relevant rates and land ground rent for L.R. No. 209/13295 and that the Commissioner of Land's office vide letters dated 31st August 2009 and 14th October 2009 confirmed that the 15th Respondent's Grant was authentic.

43. The 91 Interested Parties averred in their Replying Affidavit sworn on 8th December 2014, that they are individual owners of houses developed on L.R. No. 209/12343 by the 5th Respondent; that they are bona fide purchasers for value without notice of any defect in their titles; that the Petition is time-barred and that their rights are protected under Article 40 of *the Constitution*.

44. According to the Interested Parties, the Petitioner presented its claim to the National Land Commission which upheld the validity of title of the interested parties; that they are not aware of any appeal against the determination of the Commission and that the Petition does not show that the Petitioner has locus standi to make any claim on the Interested Parties' properties.

45. The Petitioner filed a Supplementary Affidavit in which its Managing Director deponed that the 2nd Respondent had an obligation to take into account the transformative nature of *the Constitution* of Kenya 2010, which has a retrospective reach in its prescriptions for redress of historical land injustices and that the 2nd Respondent ought to have taken into consideration the collusive nature of land grabbing in Kenya resulting in public land being allocated to private developers.

46. The Petitioner's Managing Director deposed that Section 14(7) of the *National Land Commission Act* could not override the Petitioner's right to property and could not oust the NLC's jurisdiction to redress historical land injustices and that as a legal person with power to acquire and hold property, its property rights can be violated and is entitled to recourse against whoever violates such rights.

47. It is the Petitioner's case that it holds the suit property as a trustee for the general public and is entitled to take measures to protect such property, including court action; that there is no time limitation for claims of violations of fundamental rights and freedoms and that the Petitioner, as a lawful owner of the suit property, has always been entitled to the common law remedies of self-help, which include the right to evict trespassers.

Submissions

48. The Petition was canvassed by way of written submissions, which were later highlighted orally. Counsel for the Petitioner submitted that contrary to the averments by the 7th Respondent, the Petitioner has legal capacity to institute this Petition. It was submitted that L.R. No. 209/11969 was in the name of the Petitioner, which held it in trust for the public for a public purpose and that the said land could not have been alienated as purported

49. The Petitioner's counsel submitted that as the dispositions in the land were unlawful, the Respondents could not pass legal title to third parties and that *the Constitution* protects a higher value of integrity and the rule of law, which they assert, the Respondents have failed to meet.

50. Counsel submitted that the Petitioner can seek to enforce rights and fundamental freedoms against another agency of state and that the Petitioner cannot be estopped from enforcing its duty of trust to protect public property from illegal acquisition.

51. Counsel reiterated the history of allocation of the suit land and asserted that the allocation of the land to third parties was done without the consent of the parent ministry under Section 13 of the State Corporation Act. The Petitioner's counsel relied on numerous authorities which I have considered.

52. Through written and oral submissions, counsel for the 1st Respondent submitted that the decision of the National Land Commission was in tandem with Section 14 (7) of the *National Land Commission Act*. Counsel relied on the case of Fletcher vs Peck 10 us 87 (1810) where the court considered the interests of an innocent third-party purchaser, as well as the case of Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & Another [2013] eKLR.

53. In his oral submission, counsel for the 1st Defendant submitted that the 2nd Respondent failed to give reasons for the decision it reached; that the affidavit by Brian Ikol fails to state how public land was converted into private land and that the decision by the 2nd Respondent failed to consider the due diligence measures that were undertaken by the purchasers.

54. On his part, counsel for the 2nd Respondent submitted that in accordance with Section 14(2) of the *National Land Commission Act*, the Petitioner was given a notice for review of grants and an opportunity to appear before the National Land Commission and inspect the relevant documents and that the 2nd Respondent, in exercising the discretion granted to it under Section 6(3)(a) of the NLC Act, conducted inquiry proceedings in reviewing the grants in issue.

55. It was submitted on behalf of the 2nd Respondent that in inquiry proceedings, the National Land Commission is only required to request for information from the persons interested in the grants under review, which it did and that the 2nd Respondent met the standards of fairness as set out in Article 47 of *the Constitution* when it published the notice to review grants in the Daily Nation newspaper and

gave the Petitioner an opportunity to present written submissions and to make oral presentation of the submissions.

56. Counsel relied on the case of Compar Investments Ltd vs National Land Commission & 3 Others [2016] eKLR where the court held that proceedings before the NLC are not required to be akin to litigation proceedings before a court of law. Counsel also relied on the Court of Appeal's decision in Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR where it was held that denial of an opportunity to cross-examine summoned witnesses was not a violation of one's rights to fair administrative action.

57. Counsel submitted that the 2nd Respondent found that the titles were irregularly acquired and that irregularly acquired rights in land are not similar to rights unlawfully/ illegally acquired. Counsel relied on the definition of the word 'irregularly' in Section 2 of the *National Land Commission Act* and 'unlawful' in the Black's Law Dictionary.

58. It was submitted that the constitutionality of Section 14 (6) of the NLC Act has not been challenged by the Petitioner and that unless proved otherwise, legislation is presumed to be constitutional. Counsel relied on the decision of this Court in Republic vs National Land Commission Ex-parte Holborn Properties Ltd [2016] eKLR where the court held that the Registrar does not have jurisdiction to revoke a title transferred to a bona fide purchaser for value without notice of defect in the title.

59. Counsel also relied on the Court of Appeal case of Bruce Joseph Bockle vs Coquero Limited [2014] eKLR where the court stated that parties have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue of fraud in respect of a title deed. Lastly, counsel submitted that the referenced Ndung'u Commission report is not binding on the 2nd Respondent and this court. It was submitted that that the issue of the 2nd Respondent's failure to give reasons for its decisions was not pleaded and was raised from the bar.

60. Counsel for the 3rd Respondent submitted that the Petition was filed out of time as the cause of action arose sometime in the year 2000; that this suit was filed in 2014; that the foundation of the suit is ownership of land, and not infringement of rights and that Section 7 of the *Limitation of Actions Act* limits actions to recover land after twelve years from the date on which the right of action accrued.

61. Counsel for the 3rd Respondent argued that this suit should have been filed as a Plaint to enable the court investigate each and every title to determine whether the parties participated in or knew about the fraud.

62. Counsel submitted that the 3rd Respondent is the beneficial owner of L.R. No. 209/12339 and L.R. No. 209/12342 having purchased the same from NSSF. On whether the Ndung'u commission Report can be relied on by the court, counsel cited the case of John Peter Mureithi & 2 Others vs Attorney General & 4 Others [2006] eKLR where the court held that the Ndung'u commission Report on its own cannot constitute a cause of action and that evidence has to be adduced on a case-by-case basis.

63. The 5th Respondent's counsel submitted that the certificates of title issued to it for L.R. No. 209/12343 and L.R. No. 209/13295 are absolute and indefeasible and that the 5th Respondent was not the first allottee nor was it aware or privy to any irregularity affecting the allocation of the properties.

64. On the impugned surrender, counsel urged that the Petitioner's claim lies against its former Managing Director and the Commissioner of Lands and not the 5th Respondent. Counsel submitted that the court should infer that there was voluntary surrender of properties in the first and second titles by the Petitioner's Managing Director.

65. The 5th Respondent's counsel further submitted that the 5th Respondent having acted to its detriment on the basis of the said surrender by the Petitioner, the Petitioner is estopped from asserting that the surrender and the subsequent allocation and sale of the suit land was illegal. Counsel submitted that as the Petitioner is challenging allocations made in 1995 and 1997, its challenge is time barred by virtue of Section 7 of the Limitations of Actions Act.

66. The 5th Respondent's counsel submitted that it was the Petitioner's choice to institute a complaint before the National Land Commission rather than to approach the court; that the NLC undertakes an inquisitorial approach rather than an adversarial approach and that the *Evidence Act* does not apply to the NLC. Counsel relied on numerous authorities which I have considered.

67. The 7th Respondent's counsel submitted that as the Petitioner is a state organ, it has no locus to claim infringement or enforcement of Article 47 and 20 of *the Constitution* as it is not a person within the meaning of Article 22 of *the Constitution*.

68. 7th Respondent counsel submitted that his client was a bona fide purchaser for value; that this court cannot substitute the findings of the National Land Commission (NLC); that the Petitioner never raised any complaint in the manner that the NLC conducted itself and it is too late in the day and that this Petition dos not raise constitutional questions.

69. It was submitted that the prayers for orders of certiorari have wrongly been sought as the Petitioner has not approached this court as a Judicial Review Court and that the Petitioner is attempting to have a second bite at the cherry. Counsel relied on numerous cases which I have considered.

70. Counsel for the 8th Respondent submitted that the orders sought in the Petition are incapable of being granted because the 2nd Respondent's decision was in accordance with the relevant provisions of the law and that the Petitioner has not met the threshold for seeking judicial review orders. Counsel relied on the cases of Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR, Elizabeth Nditi Njoroge vs National Land Commission [2013] eKLR.

71. Counsel submitted that the Petitioner has not appealed against the decision of the 2nd Respondent and is seeking to circumvent the statute of limitations. It was submitted that the Petitioner is estopped from laying a claim over the 8th Respondent's parcel of land as it was not included in the plan published in the Daily Nation newspaper of 10th July 2005.

72. It was the submission of counsel that the Petitioner has failed to prove the allegation of fraud against the 8th Respondent. Counsel relied on the case of Prafulla Enterprises Limited vs Norlake Investments Limited & Another (2014) eKLR amongst others, which I have considered.

73. Counsel for the 12th to 16th Respondents submitted that the Respondents are the absolute and indefeasible owners of the suit property and that under Section 14(7) of the NLC Act, the 2nd Respondent had the mandate to investigate grants and dispositions. Counsel submitted that following issuance of title to the Respondents, the suit property could only be taken away through compulsory acquisition as per the procedure laid out in Commissioner of Lands & Another vs Coastal Aquaculture Ltd KLR (E&L) 1 264.

74. Counsel for the 12th to 16th Respondents also submitted that the Petitioners are guilty of laches as they engaged in inordinate delay to stake their claim; that the Respondents had a legitimate expectation that the law was duly followed in acquisition of the titles; that the remedies sought by the Petitioners would do more harm than good as it would mean dispossessing thousands of families and that there is a distinction between irregular acquisition and unlawful acquisition of land.

75. Counsel relied on the case of Evelyn College of Design Ltd vs Director of Children's Department & Another [2013] eKLR where the court expounded on the meaning of unlawful acquisition of land under Article 40(6) of *the Constitution*.

76. Counsel submitted that the Respondents, as outsiders dealing with the Petitioner in the initial allocation, were entitled to assume that it had complied with all internal rules of management. They relied on the rule in Royal British Bank vs Turquand (1856) 6 E&B 327.

77. Counsel submitted that the 15th Respondent never appeared before the NLC and had at that time sold its land to third parties; that the prayer of cancellation cannot be executed against them as they do not hold the title; that the disputed titles were issued in the 1990s and the Petitioner did not act promptly and that although the Petitioner has accused its former Managing Director and the Commissioner of Lands, it failed to enjoin them in this suit.

78. Counsel for the 1st and 91st Interested Parties submitted that this Petition is an abuse of court process as the cause of action arose in 1997 and is hopelessly time barred; that this claim is disguised as a Constitutional Petition and yet it is a claim for recovery of land and that in accordance with the Speaker Nakuru County Assembly & 46 Others vs Commission on Revenue Allocation & 3 Others [2015] eKLR, the Petitioner does not enjoy the fundamental rights protected under Chapter 4 of *the Constitution*.

79. It was counsel's submission that the Respondents in this suit, who are private persons, cannot violate the Bill of Rights of the Petitioner; that the State is the one that guarantees rights under the Bill of Rights and is the one capable of violating them and that enforcement can only be against the State. Counsel relied on the cases of Kenya Bus Services Ltd & 2 Others vs Attorney General & 2 Others (2005) eKLR, Karuri & Another vs Dawa Pharmaceuticals Co. Ltd & Others [2007] eKLR and Piedmont Investments Ltd vs Standard Assurance Kenya Ltd [2010] eKLR.

80. Counsel submitted that the titles held by the 91 Interested Parties cannot be impugned as they are protected under Section 23(1) of the repealed Registration of Titles Act; that the Petitioner has not made any allegations of fraud or misrepresentation against them and that the allegations of illegal acquisition have not been substantiated. Counsel relied on the Court of Appeal decisions in Mbothu & 9 Others vs Waitimu & 11 Others [1986] eKLR and Nairobi Permanent Markets Society and Others vs Salima Enterprises and Others [1997] eKLR and Henry Masaku vs Gatha Farmers Co. Ltd Nairobi.

81. It was counsel's submission that this Petition is a violation of the principle of the right to confront the evidence of a claimant. Counsel urged the court to take judicial notice that the number of people on the suit land are close to a thousand who would be affected by this Petition and that it is not practicable that evidence could be presented against each party and they be cross-examined on the same.

Analysis and Determination

82. Having considered the Petition, the replies thereto and the submissions by the parties, the issues that arise for determination are:

    a. Whether this matter is properly filed as a Petition

    b. Whether the Petitioner has locus standi to institute this Petition.

c. Whether the Petitioner has demonstrated a violation of its constitutional rights.

d. Whether the Petitioner is entitled to the reliefs sought in the Petition.

e. Who shall bear the costs of the Petition.

83. As a precursor, it is prudent to mention that the principles of natural justice dictates that parties ought to fully present their case through their pleadings, and once they do so, they are bound by such pleadings. The Court of Appeal in David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR aptly stated that:

> " It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.
>
> The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

84. Guided by this decision, this court shall not consider the arguments by the 5th and 8th Respondents who asserted that the Petitioner hired hooligans to cause damage to their property. This is so because these parties did not seek a remedy for the alleged damages by way of a cross-Petition.

85. The Petitioner's claim is against the decision of the 2nd Respondent (the National Land Commission) dated 10th June 2014. The evidence before this court shows that the Petitioner lodged a complaint with the 2nd Respondent through the Ministry of Agriculture, Livestock and Fisheries, concerning the alleged illegal allocation of its land to private parties. On this basis, the 2nd Respondent issued a public notice inviting affected persons to present written submissions and oral presentations in respect to the complaint.

86. The Petitioner claims that the 2nd Respondent deprived the parties an opportunity to hear and confront the other parties' representations and evidence, contrary to the Fair Administrative Actions Act. The Petitioner submits that the third parties acquired the suit property unlawfully, and therefore the 2nd Respondent should have directed the Registrar to cancel their titles.

87. The Petitioner is seeking for a declaration that the decision of the 2nd Respondent dated 10.06.2014, to the extent that it purported to order correction and or perfection of titles whose genesis it expressly found to be irregular hence unlawful, violated the provisions of Article 40(1), (3) and (6) of *the Constitution* and is therefore invalid.

88. The Petitioner is also seeking for an order cancelling all titles purportedly issued out of all that parcel of land known as LR. No. 209/11969 measuring 77.67 hectares; an order directing the Land Registrar and the Director of Survey to ensure compliance with the order of cancellation of titles in their respective records and registers; and an order of eviction to issue against the 3rd to 15th Respondents as well as their successors in title and/or assigns

89. The Respondents, on their part, have challenged whether this dispute has been properly filed as a Petition on three grounds: first, that this suit seeks judicial review orders but it does not meet the threshold for seeking judicial review orders; Second, that this is a claim for recovery of land that is disguised as a Constitutional Petition to circumvent the statute of limitations; and third, that on the basis of the allegations of fraud, this suit should have been filed as a Plaint to enable the court to investigate each and every title to determine whether each party participated or knew of the alleged fraud.

90. The Respondents' counsel have argued that this court cannot sit on appeal of a decision by the 2nd Respondent by way of a Petition and that Regulation 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 stipulates that a person aggrieved by the decision of the Commission may, within fourteen days of the Commission's decision, appeal to the Court.

91. On the first issue, it is important to note that judicial review developed as a common law remedy to check the use of administrative authority. The Court in Felix Kiprono Matagei vs Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR laid out the origin and history of judicial review in Kenya as follows:

> "Judicial review in Kenya originated as a common law remedy for checking administrative action. The practice of the courts exercising judicial review powers was largely borrowed from the United Kingdom as can be clearly seen from the impugned provisions of the LR Act. Prior to the promulgation of the current Constitution, the judicial review jurisdiction of the Kenyan courts was firmly grounded on the provisions of sections 8 and 9 of the *Law Reform Act* with the procedural aspects provided in order 53 of the CPR. Judicial review mandated the High Court to superintend the actions of the executive arm of government through the writs of certiorari, prohibition and mandamus."

92. The Respondents have made reference to the case of Commissioner of Lands vs Kunste Hotel Ltd [1997] eKLR, where the court expounded on the nature of judicial review based on the English case of Chief Constable of the North Wales Police vs Evans [1982] 1 WLR 1155, where it was held that judicial review is concerned with the decision-making process, not with the merits of the decision itself.

93. However, following the promulgation of *the Constitution* of Kenya 2010, the nature of judicial review was transformed as it obtained a constitutional foundation under Article 47 on fair administrative action, and under Article 23, which provides that an order of judicial review is one of the remedies for correcting constitutional violations. The Court of Appeal in Judicial Service Commission vs Mbalu Mutava & Another [2014] eKLR considered the transformation of administrative justice under *the Constitution* as follows:

> "Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected to article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

94. This Court is persuaded by the case of Kenya Human Rights Commission vs Non-governmental Organizations Co-ordination Board [2016] eKLR, where it was held that:

> " It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light."

95. Notwithstanding the fact that the Fair Administrative Act was enacted in 2015, a year after this suit had been filed, this court is obligated to recognize the transformed constitutional nature of judicial review and fair administrative action under Article 47 of *the Constitution*.

96. It is on this basis that the courts have held that a Petitioner may seek judicial review remedies through a Petition. In the case of Peter Muchai Muhura vs Teachers Service Commission [2015] eKLR, it was held that:

> " Thus, under the cited provisions, it is possible for a litigant to apply for and pray for both compensatory relief and orders of judicial review in the same pleading. Thus in judicial review proceedings under the current constitutional dispensation, other substantive remedies as provided for in *the Constitution* are available under the same proceedings and the court in such proceedings, which appears to have been the case in the said Judicial Review Application No 53 of 2010, is entitled to delve into both procedural and substantive or merit issues. It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by *the Constitution* of Kenya, 2010. *The Constitution* has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of *the Constitution* shall be protected and promoted."

97. The second issue is whether this is a land claim disguised as a Constitutional Petition. The 5th Respondent's counsel submitted that the Petitioner is challenging allocations made in 1995 and 1997, and that this matter is time barred by virtue of Section 7 of the Limitations of Actions. In any event, it was submitted by the Respondents, this suit should have been filed as a Plaint to enable the court investigate each and every title.

98. The arguments by the Respondents are based on the Constitutional principal of avoidance, which was defined by the Supreme Court in Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others [2014] eKLR, to mean that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

99. The Court of Appeal in Speaker of the National Assembly vs James Njenga Karume [1992] eKLR held as follows:

> " In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

100. Similarly, the Kenya Bus Service Ltd & 2 Others vs Attorney General [2005] 1KLR 787 Nyamu J (as he then was) held, inter alia, that:

> " In addition, although there is no direct local authority on the point, the holding No. 3 in the Trinidad and Tobago Constitutional case of Re-Application by Bahader [1986] LRC (Const) 297 at page 298 represents our position as well;
>
> "*The Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under *the Constitution*." See Harrikson Vs Attorney General of Trinidad and Tobago [1979] 3 WLR 62 applied".

101. The Respondents' claim is that this Petition is a land dispute filed as a Petition to circumvent the statute of limitations, and that it raises allegations of fraud, which ought to have been raised in Plaint to enable the evidence to be tested through cross-examination.

102. Contrary to the Respondents' assertion that the allegations of fraud ought to have been brought by way of a Plaint to enable the evidence to be interrogated through viva voce evidence, under Rule 20 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 a Petition may be heard by way of oral evidence, in addition to affidavits and written submissions. Therefore, claims of fraud can rightly be instituted by way of Petitions.

103. The Petitioner's claim has raised multiple issues, the central one being the constitutionality of the decision of the 2nd Respondent, made in 2014, including the allegation that it does not comply with the rules of natural justice contrary to the provisions of Article 47 of *the Constitution*. As to whether the Petition is merited or not, I will discuss the same in a short while.

104. The 15th Respondent submitted that the whole Petition is without foundation as the Government is both the Claimant and Defendant in the same proceedings. They argue that the Petitioner is a state organ, and has no locus to claim infringement or enforcement of Article 47 and 20 of *the Constitution* as it is not a person within the meaning of Article 22 of *the Constitution*.

105. The Respondents placed their reliance on the County Government of Meru vs Ethics and Anti-Corruption Commission (2014) eKLR case, in which Majanja J was of the view that a state organ, particularly a county government, cannot lodge a claim under Article 22 of *the Constitution* against another State organ to enforce fundamental rights and freedoms because the County Governments is not a person for purposes of *the Constitution* and more particularly the Bill of Rights.

106. Aligning itself to the above decision, the court in Speaker, Nakuru County Assembly & 46 Others vs Commission on Revenue Allocation & 3 Others [2015] eKLR held that the Petitioners are not private individuals but officers serving in a public office as defined in Article 260 of *the Constitution*. The court held that the Respondents are also officers and offices in the same public office and it is inconceivable how one can violate the other's rights in the context of the Bill of rights.

107. A contrary view was adopted by the court in Judicial Service Commission vs Speaker of the National Assembly & 8 Others [2014] eKLR where it found that under the current constitutional dispensation, a party with a legitimate claim cannot be barred from recourse simply because of the technical doctrine of legal personality.

108. The question of whether a state entity may file a suit on the basis of the Bill of Rights has been settled by the Court of Appeal in Meru County Government vs Ethics & Anti-Corruption Commission

[2018] eKLR, which was an appeal from County Government of Meru vs Ethics and Anti-Corruption Commission (2014) eKLR.

109. In the said decision, the Court of Appeal held that while only individual persons bear rights and can be victims of violation of such rights, when it comes to enforcing the Bill of Rights, the litigant need not be a person directly affected, and that such a litigant may include a state organ. The court stated as follows:

> " Our understanding of this provision is that whereas only individual persons bear rights and can be victims of violation of such rights, either in singular or in plurality, say as a group or a class of persons, when it comes to enforcing the Bill of Rights, the litigant need not be a person directly affected. Thus one may sue on behalf of a person unable to act in their own name, such as a child, and one may also sue in representative capacity or in the public interest. Moreover, an association may move the Court on behalf and in the interest of its members.
>
> For purposes of enforcement, therefore, all one needs establish is that he or she is a person capable of suing and Article 21 must, consistently and in conformity with the contextual command of Article 260, be so construed as to include persons other than individual human persons in the construction of the persons who can enforce rights even though, against contextually, such non-individuals may not be themselves holders or wielders of rights and fundamental freedoms under the Bill of Rights."

110. This court is bound by this decision. In this matter, the Petitioner is a state organ which was established in 1990 under the *State Corporations Act*. It is not disputed that the Petitioner has the legal capacity to sue and be sued. That being the case, the Petitioner has the capacity to institute this claim.

111. This court therefore finds that state organs can sue for the infringement of the right to a fair hearing and the right to own property. The rights of state organs to a fair hearing, fear administrative actions and the right to own property is paramount considering the history of an all-powerful Kenyan Executive which would corruptly and illegally deal with land reserved for state organs.

112. Indeed, state organs hold land as trustees and in the interest of the public. As such, state organs have the right to assert and enforce the right to property, and other rights that appertains to ownership of property.

113. The Petition herein concerns the manner in which the 2nd Respondent (NLC) exercised its powers of carrying out inquiries into disposition of the Petitioner's land. It is the Petitioner's case that the 2nd Respondent deprived the parties an opportunity to hear and confront the other parties' representations and evidence, contrary to the Fair Administrative Actions Act.

114. The substance of the Petitioner's claim before the 2nd Respondent was that it inherited L.R. No. 209/8260 measuring 93.02ha from a joint venture between the Government and the Welcome Trust Institute Foot and Mouth Disease Research Station, and that the said land had since been excised and allocated to individuals.

115. According to the Petitioner, on 28th January 1994, through Grant No. I.R. 61702, it was allotted L.R. No. 209/11969 measuring 77.67 hectares for a term of 99 years from 1992 (the suit land); that the suit land was subdivided and illegally allocated to private developers by the its former Managing Director in connivance with the former Commissioner for Lands without reference or consent of the relevant authorities, being the Board of Directors of the Petitioner, the parent ministry and Treasury.

116. According to the Petitioner, the initial allocation left behind 43.66 hectares of the original land as L.R. No. 209/12345, which was thereafter reduced to 29.05 hectares as L.R. 209/13409 and that the illegal allocations of the suit land, measuring a total of 47.1105ha, was to legal entities which are related to officials of the Lands Ministry and the Petitioner's former Managing Director.

117. The Petitioner lodged a complaint with the 2nd Respondent in respect to the said illegal allocation of its land pursuant to the provisions of the *National Land Commission Act*, who, vide a public notice dated 14th April 2014, informed parties of its decision to review the grant of the impugned titles.

118. It is not in dispute that the 2nd Respondent invited submissions from all interested parties, including the Petitioner. It is also not in dispute that the 2nd Respondent conducted an inquiry by calling the concerned parties into its boardroom one after the other. According to the Petitioner, the inquiry was conducted without giving an opportunity for either party to hear and confront the other parties' evidence. The Petitioner asserts that this violated its right to fair administrative action.

119. The Petitioner is also aggrieved by the 2nd Respondent's decision whereby, despite finding that the titles were irregularly acquired by the respective allottees and subsequently sold to third parties, the 2nd Respondent held that the impugned titles should not be revoked and that it directed the Registrar to correct the irregularity in the titles, on the basis that the respective owners of the properties were bona fide purchasers for value without notice of defect of title.

120. This, the Petitioner avers, violated the provisions of Article 40 (6) and 47 (1) of *the Constitution* and is therefore invalid. Article 47(1) of *the Constitution* prescribes that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

121. Article 47(2) of *the Constitution* provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. According to the Petitioner, the 2nd Respondent infringed this right when it denied it an opportunity to confront the evidence of the Respondents.

122. According to the Respondents, the Petitioner's right to fair administrative action was not infringed as the 2nd Respondent issued and published the notice to review grants in the Daily Nation newspaper and gave the Petitioner an opportunity to present written submissions and to make oral presentation of the submissions.

123. It is the Respondents' case that the 2nd Respondent has discretion under Section 6 (3) (a) of the *National Land Commission Act*, which they exercised in deciding on how to conduct inquiry proceedings in reviewing the grants and that in such inquiry proceedings, the 2nd Respondent is only required to request for information from the persons interested in the grants under review, which it did.

124. As stated by the Court of Appeal in Judicial Service Commission vs Mbalu Mutava & Another [2014] eKLR, Article 47 has transformed the principle of fair administrative action by entrenching the right to fair administrative action in the Bill of Rights and by laying a constitutional foundation for control of the powers of state organs and other administrative bodies.

125. The court in Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR clarified that while this right is now entrenched in the law, its substance is still informed by common law principles:

> " As to what constitutes fair administrative action, the court in President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, stated thus:

> "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades."

126. It is trite that the right to fair administrative action is based on the principles of natural justice as well as procedural fairness. The Court in Republic vs National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR ably articulated the ingredients of fairness or natural justice as follows:

> " The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material."

127. In addition, it is also trite that a person ought to be issued with a prior and adequate notice of the administrative action. Adequate notice was defined in Republic vs Kenyatta University Ex parte Martha Waihuini Ndungu [2019] eKLR as constituting enough time to respond to the planned administrative action, enough information about the proposed administrative action to be able to work out how to respond to the proposed action, the nature of the action and its purpose.

128. The court in Republic vs National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR further elucidated on the flexible nature of procedural fairness. While relying on the decision of Supreme Court in Baker vs Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6, the court outlined the following factors to be considered in determining the degree of procedural fairness owed:

> " In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker."

129. This court will consider whether there was adequate notice to the parties; whether the parties were given an opportunity to present their cases; whether the decision of the 2nd Respondent was unbiased; and whether its decision was based on logical proof.

130. In this matter, it is not disputed that the administrative action by the 2nd Respondent was initiated by the Petitioner, through a letter by the Permanent Secretary of the Ministry of Agriculture, Livestock and Fisheries on 21st March 2014.

131. The 2nd Respondent thereafter conducted a preliminary investigation where after it published a notice in the Daily Nation on 14th April 2014 informing parties of its decision to review the grant of the impugned titles and invited submissions from Interested Parties between 23rd and 30th April 2014. The adequacy of this notice has not been challenged.

132. It is an accepted fact that all the interested parties in the suit land appeared before the 2nd Respondent on 29th April 2014 and made representations regarding the suit property, including the Petitioner. The 2nd Respondent has averred that it adopted an inquiry procedure, where it called the parties into the boardroom one after the other, without giving an opportunity for either party to hear and confront the other parties' evidence. The constitutionality of this mode of investigation is what the Petitioner has challenged.

133. At this point, it is relevant to consider the legal mandate and procedures of the 2nd Respondent. The National Land Commission is established under Article 67 of *the Constitution* and its mandate includes management of public land on behalf of the national and county governments. The other mandate of the 2nd Respondent is to investigate present or historical land injustices and recommend appropriate redress.

134. The 2nd Respondent also has the mandate to review all grants or dispositions of public land to establish their propriety or legality. It is this mandate that the 2nd Respondent exercised in the matter herein. In conducting its proceedings, the 2nd Respondent has discretion under Section 6 (3) of the NLC Act to inform itself in such manner as it may consider necessary and may receive written or oral statements. The 2nd Respondent is not bound by the strict rules of evidence.

135. The procedure for review of grants and proceedings is set out in Section 14 of the NLC Act. Sub-section (3) provides that every person that appears before the Commission ought to be given notice of the review and an opportunity to appear before it and to inspect any relevant documents. The 2nd Respondent thereafter makes a determination after such hearing.

136. Section 14 (5) of the Act provides that where the Commission finds that the title was acquired in an unlawful manner, the Commission shall recommend to the Registrar to revoke the title. However, where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

137. Lastly, under Section 14(7), the Commission is barred from revoking a title against a bona fide purchaser for value without notice of a defect in the title. It is instructive to note that during the period that the 2nd Respondent conducted hearings herein for review, the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017 had not been enacted.

138. This court interprets these provisions to mean that the 2nd Respondent is not bound to conduct a full adversarial hearing in the conduct of its mandate or reviewing of grants. Were that to be the case, the Commission would be bound by the rigid rules of the court which would not result in substantive justice for long-pending complicated land disputes that impact a large cross-section of the public.

139. In Compar Investments Ltd vs National Land Commission & 3 others [2016] eKLR, the Court made a similar finding as follows:

> " The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per Section 77 of *the Constitution*. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection of law. There are no rigid or universal rules as to what

is needed in order to be procedurally fair. What is needed is what the Court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation."

140. Similarly, in the Court of Appeal's decision in Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR, it was held that denial of an opportunity to cross-examine summoned witnesses was not a violation of one's rights to fair administrative action.

141. The failure to accord the Petitioner an opportunity to confront and cross-examine the other parties therefore does not infringe on its right to fair administrative action. Indeed, there is no requirement in the *National Land Commission Act* requiring the 2nd Respondent to allow parties to conduct a hearing pursuant to the stringent rules provided for in the *Evidence Act*.

142. The consideration of the submissions made by each party, and inspection of the available documents by all the interested parties, including the Petitioner was enough. The argument by the Petitioner that it was not afforded a fair hearing by the 2nd Respondent contrary to the provisions of Article 47 of *the Constitution* therefore fails.

143. I will now consider whether the 2nd Respondent's decision violated the provisions of Article 40(6) of *the Constitution*. In its decision, the 2nd Respondent held that the impugned properties were irregularly acquired by the respective allottees and subsequently sold to third parties and that the respective owners of the properties were bona fide purchasers for value without notice of defect of title.

144. In the penultimate paragraph, the 2nd Respondent found that the titles held by the Respondents and the Interested Parties should not be revoked and directed the Registrar to correct the irregularity in the title. The Petitioner's claim is that this decision violates Article 40(6) of *the Constitution*, which provides that the right to property does not extend to any property that has been found to have been unlawfully acquired.

145. In refuting the Petitioner's case, the Respondents have asserted that the 2nd Respondent's decision was in line with Section 14(6) and 7 of the NLC Act which provides as follows:

> "(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
>
> (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title."

146. As correctly submitted by the Respondents, there is a distinction between titles that have been irregularly acquired and those that have been illegally acquired. Under Section 2 of the *National Land Commission Act*, the term 'irregularly' is defined as meaning 'in a manner that does not conform to standards, procedures or the criteria prescribed under this Act or any other written law'.

147. The 2nd Respondent has relied on the Indian case of Harbans Lal & Others vs Charanjit Singh and Others delivered on 6th March, 1992, where the court drew a distinction between irregularities and illegalities:

> "There is a difference between irregularity and illegality. Irregularity contemplates defect in procedure and non-compliance of a prescribed formality which may not be of substantial nature. On the contrary, illegality connotes contravention of statute which can have the

consequence of making action void. The distinction is based on degree than kind as held in AIR 1947 PC 67 : (1947 (48) Cri LJ 533). The test is the degree of compliance with the requirement prescribed. If there is substantial compliance of procedure prescribed, the defect, if any, would be irregularity. But if there is total non-compliance of mandatory provision of law, it would result in illegality."

148. There is a presumption that all acts done by a public official have lawfully been done and that all procedures have been duly followed. The onus is thus upon the opposing party to prove otherwise. This position was propounded by the Supreme Court in the 2013 Presidential Election case, Raila Odinga & 5 Others vs Independent Electoral and Boundaries commission & 3 Others [2013] eKLR:

> " Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections ...This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

149. Taking all the above into consideration, this court resorts to a plain reading of Section 14(5) and (6) of the NLC Act. A plain reading of Section 14(5) and (6) shows that the Commission is to distinguish between titles that are irregularly acquired and those that are unlawfully acquired.

150. Unlawfully acquired titles attract the steep consequence of revocation by the Registrar while those deemed irregularly acquired may be corrected. This interpretation aligns with the definitions adopted in the 2013 Presidential election case and the Indian case of Harbans Lal (supra).

151. The Petitioner has averred that the suit land was wrongfully surrendered by it's then Managing Director without the necessary consent from the parent Ministry and the Petitioner's Board. The Petitioner has not refuted that there was indeed such a surrender which was registered with the Ministry of Lands. It is the surrender of the suit land by the Petitioner's Managing Director that gave rise to the allocation of a portion of the land to individuals, who in turn sub divided the land further and sold the same to third parties.

152. In alleging that this surrender was fraudulently processed, it was incumbent upon the Petitioner to enjoin its former Managing Director and the Commissioner of Lands to this suit. Further, with respect to the allegation that the suit land was allotted to companies related to these persons, the Petitioner ought to have presented evidence as to the shareholding and directorship of these companies.

153. This would have enabled this court to draw a nexus between the alleged illegalities by the Petitioner's former Managing Director and the allottees of the suit land. Having failed to prove such nexus, this court cannot conclude that the surrender of the Petitioner's land was unlawful.

154. Indeed, allegations of fraud ought to be proved to the required standard. In Republic vs Land Registrar Taita Taveta District & Another [2015] eKLR, the court held as follows:

> " Before any order may be made in terms of Article 40 (6) of *the Constitution* of Kenya 2010 and section 26 (1) (a) of the *Land Registration Act* 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by *the Constitution*, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property

herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court."

155. The Petitioner herein neither particularized fraud as against the Respondents and the Interested Parties nor proved the said fraud to the required standard. Indeed, as correctly submitted by the Respondents' counsel, the Petitioner should have called viva voce evidence, which would have been tested on cross-examination, to show that the surrender of the suit property by its former Managing Director was done unlawfully.

156. As pleaded by the 2nd Respondent, the Petitioner in this matter has not challenged the constitutionality of Section 14 (6) and (7) of the NLC Act which prohibits the NLC from revoking title of bona fide purchasers for value without notice of defect in the titles. As litigants are bound by their pleadings, this court shall at this juncture refrain from addressing the constitutionality of these provisions.

157. For those reasons, it is the finding of this court that no evidence was placed before it to show that the acquisition of the suit property by the Respondents and the Interested Parties was unlawful.

158. In addition, it is clear that the impugned titles are currently held by innocent purchasers for value without notice of defect. The Respondents have fastidiously presented evidence that they are not the original allottees of the impugned titles and that they undertook due diligence before purchasing the properties. These properties also contain developments valued at billions of Kenya shillings and are home to hundreds of families.

159. Having found that there is no evidence to show that the suit property was acquired by the Respondents fraudulently or unlawfully, it is the finding of this court that the 2nd Respondent was well within its mandate to recommend for regularization of the impugned titles.

160. In conclusion, this court finds that the 2nd Respondent's decision dated 10th June 2014 was in accordance with the principle of fair administrative action and that the Petitioner's right to property was not infringed.

161. For those reasons, the Petition filed herein is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Mbabu for Petitioner

Mr. Motari for the 1st Respondent

Mr. Lutte for 3rd Respondent

Ms Odari for 5th Respondent

Mr. Odhiambo for 7th and 14th Respondent

Ms Ngure for 8th Respondent

No appearance for 4th, 9th, 10th,11th and 13th Respondents

Mr. Odero for 12th and 16th Respondent

Mr. Mogaka for 15th Repondent

Mr. Kyule for interested Party.

Court Assistant June