



**Republic v National Land Commission & 6 others; Twei & 4 others (Interested Parties); James Finlays Kenya Ltd & 12 others (Exparte) (Being Members of Kenya Tea Growers Association & Kenya Tea Growers Association) (Judicial Review 3 of 2020 & Environment and Land Judicial Review Case 4 & 5 of 2020 (Consolidated)) [2023] KEELC 16903 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16903 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
JUDICIAL REVIEW 3 OF 2020 & ENVIRONMENT AND LAND  
JUDICIAL REVIEW CASE 4 & 5 OF 2020 (CONSOLIDATED)**

**OA ANGOTE, J**

**APRIL 20, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF SURVEY (UNDER THE MINISTRY OF  
LANDS) ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KERICHO ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BOMET ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**DAVID TWEI ..... INTERESTED PARTY**

**KIPSIGIS CLANS SELF HELP GROUP HELP GROUP & 19  
OTHERS ..... INTERESTED PARTY**

**AND**

**JAMES FINLAYS KENYA LTD ..... EXPARTE**

**SOTIK TEA COMPANY LIMITED ..... EXPARTE**

**SOTIK HIGHLANDS TEA CO. LTD ..... EXPARTE**

**CHANGOI/LELSA TEA ESTATE LTD ..... EXPARTE**

**TINDERET TEA ESTATE LTD ..... EXPARTE**



KAIMOSI TEA ESTATE LTD ..... EXPARTE  
KAPCHORUA TEA PLC ..... EXPARTE  
KIPKEBE LTD ..... EXPARTE  
NANDI TEA ESTATE LTD ..... EXPARTE  
KAISUGU LTD ..... EXPARTE  
EMROCK (EPZ) TEA FACTORY LTD ..... EXPARTE  
BEING MEMBERS OF KENYA TEA GROWERS ASSOCIATION & KENYA TEA  
GROWERS ASSOCIATION

AS CONSOLIDATED WITH  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 4 OF 2020

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT

THE MINISTRY OF LANDS & PHYSICAL PLANNING ..... 2<sup>ND</sup> RESPONDENT

COUNTY GOVERNMENT OF MURANGA ..... 3<sup>RD</sup> RESPONDENT

AND

KAKUZI DEVELOPMENT ASSOCIATION ..... INTERESTED PARTY

KITOTO COMMUNITY IDPS, GACHANGI MAKUYU IDPS, GAICHANJARU  
SELF HELP GROUP, KIHINGANDA SELF-HELP GROUP AND KINYANGI  
SQUATTERS ..... INTERESTED PARTY

AND

KAKUZI PLC ..... EXPARTE

AS CONSOLIDATED WITH  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 5 OF 2020

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT

AND

KIMASAS FARMERS CO-OPERATIVE SOCIETY ..... INTERESTED PARTY



**AND**  
**EASTERN PRODUCE KENYA LIMITED ..... EXPARTE**

**JUDGMENT**

**Background**

1. This judgement is in respect of three Judicial Review Applications being ELC JR 3, 4 & 5 of 2020.

**ELC JR No 3 of 2020**

2. Vide a Notice of Motion dated April 12, 2019, the ex-parte Applicants (herein after the Applicants) seek the following reliefs;
  - i. An order of certiorari to remove into the High Court for purposes of being quashed and quashing, quash the Gazette Notice published on the March 1, 2019 in so far as it relates to the National Land Commission recommendations dated February 18, 2019 in so far as it relates to the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.
  - ii. The High Court does issue an order of Prohibition, prohibiting the Director of Survey under the Ministry of Lands and the County Governments of Kericho and Bomet from implementing the recommendations published in the Kenya Gazette Notice of March 1, 2019 and dated February 18, 2019 in respect of the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.
  - iii. The High Court does issue a Declaratory Order that the National Land Commission proceedings and determinations dated the February 18, 2019 in respect of the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017 published in the Kenya Gazette of 1<sup>st</sup> March, 2019 are unlawful and tainted with illegality for contravening Section 4(3) and (4) of the Fair Administrative Action Act and Articles 47 and 50(1) of the Constitution and are consequently null and void.
  - iv. Any other or further consequential orders and/or directions that may be given.
  - v. Costs of the Application be awarded to the Applicant.
3. The application is premised on the grounds on the face of the Motion and supported by the Verifying Affidavit of Apollo Kiarie, the Chief Executive Officer of the Kenya Tea Growers Association (KTGA) comprising of the Applicants, sworn on April 1, 2019, and the Statutory Statement of an even date.
4. The Chief Executive Officer of the Kenya Tea Growers Association(KTGA) deposed that KTGA promotes the common interests of the tea plantation sub sector members in the manufacture of tea and accounts for 40% of the tea production in Kenya and that vide Gazette Notice Vol CXX1-No 27 in



- the Kenya Gazette of March 1, 2019, the 1<sup>st</sup> Respondent published recommendations dated February 18, 2019 arising from historical land injustice complaints in a complaint by Talai-Nandi.
5. The Chief Executive Officer of the Kenya Tea Growers Association(KTGA) deposed that the 1<sup>st</sup> Respondent made its determination on the complaint on March 28, 2019; that the Applicants were not notified of the aforesaid claims, nor invited to participate in any sittings and/or sessions between the Claimants, the County Governments of Kericho and Bomet and the 1<sup>st</sup> Respondent even though it was apparent that such recommendations would adversely affect their interests and that of other tea estates in the Kericho and Bomet Counties.
  6. It was deposed that the recommendations by the 1<sup>st</sup> Respondent were to wit: the claims are allowed; a resurvey be done on the lands being held by the tea estates to determine if there is any surplus land or residue to be held in trust for the community by the County Government for public purposes and the County Government and the multi-nationals sign an M.O.U to provide public utilities to the community.
  7. It was deposed that the other recommendations include the renewal of leases to the lands be withheld until an agreement is reached with the respective County Governments of Kericho and Bomet; that with regard to rates and rent on such lands, the same should be enhanced to benefit national and county governments and that all 999 year leases be converted to the constitutional requirement of 99 years.
  8. According to Mr Kiarie, as advised by Counsel, the decision of the 1<sup>st</sup> Respondent offends the principles of natural justice because the 1<sup>st</sup> Respondent did not notify the Applicants of the claims and as such, they were not afforded an opportunity to be heard and that issuing a decision without notice to the Applicants when it was apparent that such delivery would adversely affect their interests was a deliberate act of malice.
  9. It was deposed by the Chief Executive Officer of the Applicants that the 1<sup>st</sup> Respondent's failure to notify the Applicants was a direct contravention of Articles 47 and 50(1) of the Constitution and Section 4(3) and (4) and 5 of the Fair Administrative Action Act in respect of the requirement of a fair hearing and that the proceedings are a nullity as they were conducted in the absence of any regulations, the NLC (Historical Injustices) Regulations having been annulled on March 28, 2018.
  10. According to the Applicants, the 1<sup>st</sup> Respondent's directives, though couched as recommendations, are in reality determinations in direct contravention of Section 15(9) of the National Land Commission Act; that the 1<sup>st</sup> Respondent's recommendations are in excess of the jurisdiction of the 1<sup>st</sup> Respondent under Section 15(9) of the National Land Commission Act and that the Applicants have a constitutional right to enjoy their property.
  11. It was deposed by the Chief Executive Officer of the Kenya Tea Growers Association(KTGA) that the Applicants are significant contributors to the economy through their international export and employment of thousands of workers; that the 1<sup>st</sup> Respondent's actions were unreasonable and made in bad faith and that the Applicants are entitled to the orders sought.
  12. The 1<sup>st</sup> Respondent, through its Director of Legal Affairs and Enforcement, Edmond Gichuru, deposed that the 1<sup>st</sup> Respondent is an independent commission established under Article 67(1) of the Constitution and was operationalized by the NLC Act; that among the functions donated to it, is to investigate historical land injustices and recommend appropriate redress and that in exercise of this mandate, the 1<sup>st</sup> Respondent operates as a quasi- judicial body within the meaning of Article 159 of the Constitution.



13. It was deposed by the 1<sup>st</sup> Respondent's Director of Legal Affairs and Enforcement that the 1<sup>st</sup> Respondent's procedure while investigating claims of historical injustices is laid out in Section 15 of the [NLC Act](#); that pursuant to its mandate, the 1<sup>st</sup> Respondent admitted complaints from the County Governments of Kericho and Bomet, the Kipsigis and Talai Clans, and the Borowo and Kipsigis Self Help Group as Historical Land Injustice Ref No: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.
14. It was deposed that the complaints alleged that the Kipsigis and Talai Clans lost several thousands of acres of land to the British white settlers as a result of the British Colonial Government; that the claims met all the parameters set out in law and were duly admitted and processed; that the parties were invited to hearings on October 11, 2019 at Kericho Training Teachers College and that contrary to the Applicants' assertions, the proceedings were publicly announced through the public address system and the local radio stations and were well attended by several victims and the public in general.
15. It was deposed that the Applicants are based in Kericho and cannot purport to have been unaware of the proceedings; that all the parties duly participated in the proceedings where they made oral and written submissions; that the 1<sup>st</sup> Respondent has been given leeway to formulate its own model of investigation and is clothed with powers under Section 6 and 15(5) of its Act to gather information by any means it considers appropriate and that this provision should not be construed to mean that the 1<sup>st</sup> Respondent should conduct adversarial proceedings.
16. According to the 1<sup>st</sup> Respondent, it is not enough to seek orders quashing its decision merely because it was able to collect information without undertaking an adversarial mode of investigation and that in any event, the Applicants have not demonstrated what material input they would have brought to the 1<sup>st</sup> Respondent and how the same would have changed its recommendations.
17. The 1<sup>st</sup> Respondent's Director of Legal Affairs and Enforcement deposed that the 1<sup>st</sup> Respondent through its secretariat, further conducted its own independent investigation which entailed research, interviewing victims, reviewing and analyzing ownership documents among others with a view to determining the complaint; that after extensive investigations, consideration of the submissions by the parties and a scrutiny of documents, it delivered well-informed determination dated 7<sup>th</sup> February, 2019 which was gazzetted on 1<sup>st</sup> March, 2019 and that the 1<sup>st</sup> Respondent complied with the provisions of Articles 40, 47, 50, 60, 64 and 232 of the [Constitution](#).
18. It was deposed by the 1<sup>st</sup> Respondent's Director of Legal Affairs and Enforcement that the 1<sup>st</sup> Respondent made recommendations in accordance with the parameters set out in Section 15(9) of the [NLC Act](#); that the Motion herein is based on the misconception and wrong interpretation of Article 67 of the [Constitution](#) and that the right to protection of property conferred under Article 40(1) of the [Constitution](#) is not absolute and does not extend to property found to have been acquired illegally.
19. It is the 1<sup>st</sup> Respondent's case that Section 15 of the [NLC Act](#) clearly lays out the procedure to be followed while conducting investigations notwithstanding the absence of the [NLC \(Historical Land Injustice\) Regulations](#); that the Court in [Republic vs National Land Commission ex-parte Holborn Ltd \[2016\] eKLR](#) affirmed that the absence of regulations cannot be sufficient reason to stop a body from exercising its functions and that the allegations of ultra-vires and irrationality are unfounded and the application should be dismissed.
20. The 2<sup>nd</sup> Respondent did not file a response.
21. The 3<sup>rd</sup> Respondent, through Professor Paul Kiprono Chepkwony, deponed that the matter involves several parcels of land situate in Kericho and Bomet Counties; that the Applicants are opposed to



- their ownership being transferred to Kericho and Bomet County Governments to hold in trust for the Kipsigis and Talai Communities and that the Motion is based on a mandate given to the 1<sup>st</sup> Respondent under Article 67 of the Constitution.
22. The 3<sup>rd</sup> Respondent's representative deposed that the Applicants have not demonstrated how the 1<sup>st</sup> Respondent failed in its investigative mandate; that further, being an investigative body, it was not necessary that the 1<sup>st</sup> Respondent hears all the parties and that the proceedings were publicly announced and attended by victims from remote areas and the Applicants who are based in Kericho cannot claim ignorance of the same.
  23. It is the 3<sup>rd</sup> Respondent's case that the 1<sup>st</sup> Respondent granted proper reliefs pursuant to Section 15(9) of the NLC Act; that the Applicants have not demonstrated what prejudice they will suffer as a result of the recommendations; that upon promulgation of the Constitution, all 999 year leases held by foreign companies were reduced to 99 years and that the Motion is unmerited and should be dismissed.
  24. The 3<sup>rd</sup> Respondent, through Professor Paul Kiprono Chepkwony, filed a Further Replying Affidavit in which he gave a brief overview of the history of alienation of the Kipsigis clans' land, stating that even without the recommendations of the 1<sup>st</sup> Respondent, the County Governments have the mandate of establishing the status of land ownership within their areas of jurisdiction and that the Applicants failed to furnish the 3<sup>rd</sup> Respondent with further and better particulars requested of them regarding their claims of ownership of the suit properties.
  25. It was deposed that that the Applicants have concealed material facts and as such are disentitled to the judicial review orders sought which are discretionary in nature; that the Applicants have failed to establish sufficient interest in the matter with respect to ownership and or leasehold interest in the land and that most of the grounds relied on by the Applicants are too general in nature and don't disclose the properties affected by the recommendations by the 1<sup>st</sup> Respondent.
  26. According to the 3<sup>rd</sup> Respondent, the Motion is fatal for having been initially instituted in a Court without jurisdiction and that the Applicants are already parties in Petition E0349 of 2021 which is seeking to have the Court declare that the 1<sup>st</sup> Respondent's decision should abate with the expiry of three years.
  27. In response to the Motion, the 4<sup>th</sup> Respondent, through its Governor, Dr Hillary K Barchok, deposed that the proceedings having been commenced in the High Court are a nullity notwithstanding the transfer to this Court because a court without jurisdiction has no authority to transfer a suit; that the Applicants have no locus before this Court having filed the suit in a representative capacity without following the provisions of Order 1 Rule 8 of the Civil Procedure Rules and that there is no resolution by the Applicants appointing anyone to represent them and as such the affidavit by Apollo Kiarie is a nullity.
  28. It was deposed by the 4<sup>th</sup> Respondent's Governor that pursuant to Article 67 (2) of the Constitution, the 1<sup>st</sup> Respondent is duly mandated to investigate historical land injustice claims pursuant to which it has the powers to order revocation and re-allocation of land as well as declaratory and preservative orders, which include injunctions and rehabilitation through provision of social infrastructure.
  29. The Governor deposed that the 1<sup>st</sup> Respondent has the mandate to review grants; that the 1<sup>st</sup> Respondent invited all Interested Parties for comments on the alleged complaints in accordance with the principles of natural justice and that the Applicants' allegations of having not been notified are unfounded.



30. The 4<sup>th</sup> Respondent's Governor deponed that Section 6 (1) of the [Community Land Act, 2016](#) provides that the County Governments shall hold all unregistered community land on behalf of the communities for which it is held; that the 1<sup>st</sup> Respondent's recommendations on the leasing arrangements, rates and rents are matters within the jurisdiction of the 1<sup>st</sup> Respondent pursuant to Article 67 (2) (g) of the [Constitution](#) and that the Applicants' right to property has not been infringed as they not only under-declared the acreage and value of their land but pay low agricultural wages.
31. It was deposed that even though the Applicants contribute to the economy, the Applicants have deprived the community of their land; that the 1<sup>st</sup> Respondent's recommendations that the Applicants' leases automatically lapsed on the promulgation of the new Constitution and fresh leases needed to be obtained is a constitutional requirement that cannot be subject to debate and that the 1<sup>st</sup> Respondent duly complied with the provisions of Articles 47, 50(1) and 67 of the [Constitution](#), Section 15 of the [National Land Commission Act](#) and Sections 4(3) and (4) and 5 of the [Fair Administrative Action Act](#).
32. The 1<sup>st</sup> -20<sup>th</sup> Interested Parties responded to the Motion vide Grounds of Opposition dated January 31, 2022. The Interested Parties averred that the 1<sup>st</sup> Respondent is duly established pursuant to Article 67 (1) of the [Constitution](#) whose functions include inter-alia investigations of historical land injustice claims pursuant to Section 15 (1) and (2) of the [National Land Commission Act, 2012](#).
33. It is the Interested Parties' case that the 1<sup>st</sup> Respondent received historical land injustice complaints from the 3<sup>rd</sup> and 4<sup>th</sup> Respondents acting on behalf of Kipsigis and Talai communities in the matters of Kipsigis Clans and Borowo and Kipsigis Clans Self Help Group Versus the Colonial Government and the Government of Kenya which was within its Constitutional mandate.
34. According to the Interested Parties, the 1<sup>st</sup> Respondent acted rationally, and judiciously with due regard to the applicable provisions of the law on leasing arrangements, rates and rent of the Applicants' properties in accordance with Article 67 (2), (g) of the [Constitution](#) which mandates the 1<sup>st</sup> Respondent to assess tax on land and premiums on immovable property in any area designated by law and that the 1<sup>st</sup> Respondent has not breached any provisions of the law as alleged.
35. The 21<sup>st</sup> Interested Party, through its Chairman, Willy Kipkiri Rono, deponed that the 21<sup>st</sup> Interested Party is one of the claimants who filed a complaint with the 1<sup>st</sup> Respondent claiming illegal and forceful eviction from their land; that they appeared before the 1<sup>st</sup> Respondent on September 14, 2018 and presented their case and that the 1<sup>st</sup> Respondent investigated the historical land injustice claims and made its findings vide Gazette Notice on the March 1, 2019.
36. According to the 21<sup>st</sup> Interested Party, the 1<sup>st</sup> Respondent is a constitutionally created commission with the mandate to hear disputes on historical injustice claims; that the procedure before the Commission was procedurally fair and no omission in that regard has been demonstrated by the Applicants and that after intensive investigations and examinations of the evidence by the complainant, the 1<sup>st</sup> Respondent rendered a well-informed determination.
37. It was deposed that the 1<sup>st</sup> Respondent has prescribed remedies within the ambit of the law; that the recommendations on leasing arrangements rates and rents are meant to benefit the whole community and are thus within the confines of the provided remedies; that the proceedings before the 1<sup>st</sup> Respondent are investigative and not adversarial in nature; that Section 15 of the [NLC Act](#) clearly sets out the parameters of historical injustices claim and that the application is devoid of merit and should be dismissed.



## Submissions

38. Counsel for the Applicants submitted that vide its Ruling of 16<sup>th</sup> December, March, 2021, this Court addressed the question of its jurisdiction to entertain the matter; that through the Ruling of January 20, 2020, the Court dealt with the question of timelines under Section 8 of the [Fair Administrative Action Act](#) and that the two issues are *res-judicata*
39. It was submitted that the decision by the 1<sup>st</sup> Respondent offends the principles of natural justice as the Applicants were never notified of the claims in respect of their property; that no Affidavit has been filed proving service of the notices to the Applicants and that the 1<sup>st</sup> Respondent has in this respect failed to discharge its burden in proving service.
40. Reliance was placed on the case of [Republic vs NLC & Others ex-parte Oyster Village Ltd](#) [2021] eKLR, where the Court found that failure to give the Applicants notice of the allegations against it violated its rights to fair administrative action and that the 1<sup>st</sup> Respondent's alleged use of use of radio stations and public address systems to notify the Applicants has first not been proven, and the same cannot be said to be sufficient.
41. Counsel for the Applicants submitted that the Court in [Sceneries vs National Land Commission](#)[2017]eKLR emphasized that all affected persons must be served with proper notices; that the 1<sup>st</sup> Respondent had no discretion in respect to ensuring proper service and that the assertion that the proceedings were investigatory hence the participation of the Applicants was not necessary does not hold water.
42. By holding the proceedings in the absence of the Applicants, it was submitted, the 1<sup>st</sup> Respondent acted in an arbitrary and discriminatory manner. Counsel cited the case of [Kenya Human Rights Commission & Another vs Non-Governmental Organization Co-ordination Board and Another](#) [2018] eKLR which expounded on the principles of fair administrative action under Article 47 of the [Constitution](#).
43. The Applicants' counsel submitted that the 1<sup>st</sup> Respondent's proceedings were a nullity for lack of regulations. Reliance in this regard was placed on the case of [Sceneries Limited](#)(*supra*); that the decision in [R vs National Land Commission ex-parte Holborn properties](#) is inapplicable having been decided in 2016 before the annulment of the NLC(Historical Injustice)Regulations in 2018 and that the 1<sup>st</sup> Respondent's recommendations were essentially determinations in excess of its jurisdiction as set out under Section 15(9)of the [NLC Act](#).
44. Counsel urged that in view of the fact that the 1<sup>st</sup> Respondent's decision was illegal, irrational and in breach of Articles 47 and 50 of the [Constitution](#) and Section 4(3) of the [Fair Administrative Action Act](#), the Applicants are entitled to the orders sought in the application; that Section 11 of the [Fair Administrative Action Act](#) provides that the Court can issue declaratory orders and that the doctrine of exhaustion is inapplicable as the 1<sup>st</sup> Respondent gave a final determination.
45. The 1<sup>st</sup> Respondent's counsel submitted that the 1<sup>st</sup> Respondent is an independent commission established under Article 67(1) of the [Constitution of Kenya, 2010](#) and was operationalized by the [National Land Commission Act](#) No 5 of 2012; that the 1<sup>st</sup> Respondent is mandated under Article 67(1) (e) of the [Constitution](#) to initiate investigations, on its own initiative or on a complaint on historical land injustices, and recommend appropriate redress and that in the exercise of this mandate, the 1<sup>st</sup> Respondent operates as a quasi-judicial body within the full meaning of Article 159(1)of the [Constitution](#).



46. It was submitted that the procedure for carrying out this mandate is well stipulated notwithstanding the absence of rules and regulations to guide the process. Reliance in this regard was placed on the case of *R vs ex-parte Holborn Properties Ltd* [2016] eKLR where the Court held that the absence of the rules was not sufficient reason to stop the 1<sup>st</sup> Respondent from exercising its functions pursuant to Section 14 of the *NLC Act*, considering that the Act is clear on how the exercise should be carried out.
47. Contrary to the Applicants' assertion, it was submitted, the 1<sup>st</sup> Respondent's recommendations were in line with Section 15 (9) of the *Act*, as it serves to reconstitute the property having been irregularly taken over by the Applicants at the expense of the 1<sup>st</sup> – 21<sup>st</sup> Interested Parties.
48. As to whether the Applicants were afforded an opportunity to be heard, Counsel responded in the affirmative stating that proceedings were publicly announced through the public address system and the local radio stations and was well attended by several victims and the public in general and that by the fact that the Applicants are based within Kericho County, it is untrue to allege that they were unaware of the proceedings.
49. Counsel submitted that the 1<sup>st</sup> Respondent has been given a leeway to formulate its own model of investigation and is clothed with powers under Section 6 and 15 (5) of the *NLC Act* to gather, by such means as it considers appropriate, any relevant information and that it is not enough to seek orders for quashing of its decision merely because the 1<sup>st</sup> Respondent was able to collect information without necessarily occasioning an adversarial mode of investigation directly involving the Applicants.
50. Counsel for the 1<sup>st</sup> Respondent cited the case of *Republic vs National Irrigation Board & 4 Others ex-parte Josphat Kariuki Mutuanjara* [2016] eKLR where the Court stated that there are no rigid rules on the right to be heard and that the audi alteram partem rule does not mean a full adversarial hearing or anything close to it like what happens in a Court of law.
51. Counsel also cited the case of *Union Insurance Co of Kenya Ltd vs Ramazan Abdul Dhangsi* Civil Application No 179 of 1998 where the Court stated that the law is not that a party must be heard in every litigation but that they must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.
52. Counsel for the 1<sup>st</sup> Respondent submitted that the Applicants have not proved the judicial review limbs of illegality, irrationality or procedural impropriety as set out in the Ugandan case of *Pastoli vs Kabali District Local Government Council & others* [2008] 2EA 300-301 and the Court of Appeal decision in *Kenya National Examination Council vs Republic ex-parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR; that the Applicants are not entitled to the equitable reliefs sought having come to Court with unclean hands and that the Applicants' rights to property under Article 40 of the *Constitution* do not extend to property found to have been acquired unlawfully thus occasioning a historical land injustice.
53. The 3<sup>rd</sup> Respondent's counsel submitted that the application is dead on arrival having been transferred by the High Court which admitted to having no jurisdiction to handle the matter in the first instance and that as affirmed by the Court of Appeal in *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR, a court without jurisdiction cannot purport to transfer a suit as this would be tantamount to a Court attempting to sanctify an incompetent suit;
54. Counsel for the 3<sup>rd</sup> Respondent submitted that the leave having been granted by the High Court is void and the Applicant ought to have regularized the position by seeking leave in this Court and that as espoused by the Supreme Court in *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 others* [2012] eKLR, jurisdiction cannot be created by judicial craftsmanship.



55. It was submitted by the 3<sup>rd</sup> Respondent's counsel that the 1<sup>st</sup> Respondent is duly mandated to carry out investigations into historical land injustices pursuant to Article 67 of the [Constitution](#) whose mandate is clearly investigative; that the Applicants' attempts to convince the Court that the 1<sup>st</sup> Respondent should conduct itself like a Court of law should fail and that the Applicants have not demonstrated that the 1<sup>st</sup> Respondent would have reached a different conclusion had they appeared before it.
56. It was submitted that the Applicants are not denying the allegations in the complaint; that the Applicants have not demonstrated the bias, irrationality and illegality of the decision by the 1<sup>st</sup> Respondent; that on the contrary, it is the Applicants who rejected a request for further and better particulars and that the decision by the 1<sup>st</sup> Respondent was apt and fair.
57. The 4<sup>th</sup> Respondent's counsel submitted that the 1<sup>st</sup> Respondent is mandated to pursue historical land injustice claims by Article 67 (1) of the [Constitution](#) and Section 15 of the [NLC Act](#); that the complaint lodged with the 1<sup>st</sup> Respondent was a historical land injustice claim prompting the 1<sup>st</sup> Respondent to invoke its authority thereunder and that as affirmed by the Court in [R vs Land Registrar, Mombasa & 2 Others ex-parte Bhangra Ltd](#) [2012] eKLR, the 1<sup>st</sup> Respondent has power to review grants and it cannot be said that the 1<sup>st</sup> Respondent abused its power in this regard.
58. It was submitted that the 1<sup>st</sup> Respondent did invite all the interested parties to give comments and responses to the complaints and the allegations in accordance with the principles of natural justice, right to a fair hearing and fair administrative action pursuant to Articles 40 and 50(1) of the [Constitution](#) and Section 4(3) and (4) of the [Fair Administration Action Action Act](#).
59. Counsel for the 4<sup>th</sup> Respondent submitted that the allegations that the Applicants were not given an opportunity to be heard is baseless; that the recommendation that any surplus land be held in trust for the community by the County Government is in line with Section 6(1) of the [Community Land Act](#) and that the 1<sup>st</sup> Respondent in conducting its investigations followed the criteria laid down in Section 15(1) and (2) of the [National Land Commission Act](#).
60. The 1<sup>st</sup> to 20<sup>th</sup> Interested Parties' counsel submitted that the purpose of Judicial Review is to interrogate the legality, rationality and procedural propriety of an administrative body; that the 1<sup>st</sup> Respondent is an independent constitutional commission mandated by Article 67(2)(e) of the [Constitution](#) and Section 15(1) and (2) of the [National Land Commission Act](#) to investigate historical claims and that Article 67 (2)(g) of the [Constitution](#) gives the 1<sup>st</sup> Respondent the authority to assess tax on land and premiums.
61. Counsel submitted that the 1<sup>st</sup> Respondent has power to revoke and re-allocate land pursuant to Section 15 of the [National Land Commission Act](#); that the principles of natural justice were not offended as all interested parties were invited for comments and responses as indicated in the impugned gazette notice and that Section 6(1) of the [Community Land Act, 2016](#) mandates the County Governments to hold all unregistered community land in trust for communities for which it is held.
62. According to the Interested Parties' counsel, Article 65 of the [Constitution](#) provides that a person who is not a citizen may hold land on the basis of a leasehold tenure not exceeding 99 years which applies to the Applicants; that notwithstanding the absence of rules, the 1<sup>st</sup> Respondent carried out its duty of investigating historical injustice claims as mandated by Section 15 of the National Land Commission and that Section 14(2) of the [National Land Commission Act](#) envisages a situation where no regulations have been provided for and whether or not the 1<sup>st</sup> Respondent has duly performed its mandate is assessed as per the rules of natural justice.



63. Counsel relied on the case of *Republic vs National Land Commission; Pacifica Mwangi & Another (Interested Parties); ex-parte Anil Ratilal Tailor* [2019] eKLR, where the court found that in the absence of rules guiding the NLC's process of reviewing grants and dispositions to land, the provisions of Section 4 of the *Fair Administrative Action Act* come into play and that the 1<sup>st</sup> Respondent duly complied with the principles of natural justice and the allegations of breach of Article 47(1) and 50 are unfounded.
64. The 21<sup>st</sup> Interested Party submitted that the 1<sup>st</sup> Respondent is a constitutional commission duly mandated to carry out investigations into historical land injustice claims pursuant to the provisions of Article 67(2)(e) of the *Constitution* and Section 15 of the *National Land Commission Act* and that the Applicants lodged a complaint claiming historical land injustices in the nature of forceful eviction from their land.
65. Counsel submitted that the 1<sup>st</sup> Respondent duly admitted and processed the claims; that contrary to the Applicants' assertions, the absence of regulations cannot stop the 1<sup>st</sup> Respondent from carrying out its constitutional mandate neither can it render proceedings a nullity and that the 1<sup>st</sup> Respondent acted fairly, judiciously and with due regard to the applicable law.
66. Counsel submitted that the recommendations by the 1<sup>st</sup> Respondent were within the threshold of Section 15(9) of the NLC Act; that the parties herein were duly invited to hearings; that the Applicants are based in Kericho and thus they are not candid when they state that they were unaware of the proceedings and that the Applicants deliberately avoided the proceedings squandering their opportunity to submit before the 1<sup>st</sup> Respondent.
67. Counsel for the 21<sup>st</sup> Interested Party submitted that the process before the 1<sup>st</sup> Respondent was procedurally fair and adhered to the provisions of Section 15 of the NLC Act; and that the Applicants are not entitled to the orders sought having not established any illegality, irrationality and/or procedural impropriety.

#### **ELC JR No 4 of 2020**

68. Vide a Notice of Motion dated April 12, 2019, the ex-parte Applicant (the Applicant) is seeking for the following reliefs;
  - i. An order of certiorari to remove into the High Court for purposes of being quashed and quashing, quash the Gazette Notice published on the March 1, 2019 in so far as it relates to the National Land Commission recommendations dated February 18, 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017/ NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC.HLI/052/2017.
  - ii. The High Court does issue an order of Prohibition, prohibiting the Director of Surveys under the Ministry of Lands and Physical Planning, the National Land Commission and the County Government of Muranga from implementing the recommendations in the Gazette Notice published on the March 1, 2019 in so far as it relates to the National Land Commission recommendations dated the February 18, 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017/ NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/2017.



- iii. The High Court does issue a Declaratory Order that the National Land Commission proceedings and determinations dated the February 18, 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017/ NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HL1/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/2017 are unlawful and tainted with illegality for contravening Section 4(3) and (4) of the Fair Administrative Action Act and Articles 47 and 50(1) of the Constitution and are subsequently null and void.
  - iv. Any other or further consequential orders and/or directions that may be given.
  - v. Costs of the Application be awarded to the Applicant.
69. The application is premised on the grounds set out on its face and supported by the Verifying Affidavit of David Gitaka sworn on the April 1, 2019 as well as a Statutory Statement of the same date.
  70. Mr Gitaka deponed that on various dated in 2018, several parties filed historical land injustice claims against the Applicant, and the same were admitted as NLC/HLI/530/2018(Gachagi Makuyu IDP), NLC/HLI/069/2017(Gaichanjiru Self-Help), NLC/HLI/006/2017(Kakuzi Divisions Development Association), NLC/HLI/049/2017 (Kihinganda Self Help Group), NLC/HL1/170/2018(Ndula Resource Centre-Kanyangi Squatters), NLC/HLI/176/2018(Kitoto Community IDPs) and NLC/HLI/052/2017(Makuyu Sisal IDPS).
  71. It was deposed by the Applicant's representative that the claims relate to the Applicant's properties registered as LR No's 11674 and LR No 10731 and LR Nos 3558, 3536/1, 3569/2, 6862,4741, 4883,1363/19, 1363/20, 10739/2, 3536, 3568, 3569/1 and 6871 under leasehold situate in Muranga county (the suit properties).
  72. It is the Applicant's case that it carries out intense agricultural activities on the suit properties and that on July 24, 2018, the Court in HCCC No 255 of 2018 granted an interim conservatory orders staying the proceedings before the 1<sup>st</sup> Respondent in respect of a historical land injustice claim filed by Kakuzi Division Development Association-NLC/HL1/006/2017.
  73. According to the Applicant, on October 15, 2018, the 1<sup>st</sup> Respondent served the Applicant with a hearing notice for 1<sup>st</sup> November, 2018 in respect of the historical land injustice claims relating to NLC/HL1/176/2018(Kitoto Community IDPs), NLC/HL1/170/2018(Ndula Resource Centre Kinyangi Squatters), NLC/HL1/168/2018(Kituamba Kaloleni IDPs), NLC/HL1/054/2017(Gathungururu), NLC/HL1/069/2017(Kihiganda Self Help Group) and other historical land injustice claims and proceedings in respect of the Applicants properties until December 3, 2018.
  74. According to the Applicant, on October 26, 2018, the Court in Petition No 369 of 2018 granted interim conservatory orders staying the land injustice proceedings being NLC/HL1/176/2018, NLC/HL1/170/2018/NLC/HL1/168/2018/, NLC/HL1/054/2017, NLC/HL1/069/2017, NLC/HL1/530/2018, NLC/HL1/049/2017 and any other land injustice claims in respect of the Applicant's property until 3<sup>rd</sup> December, 2018 and that when the matters came up for hearing on November 1, 2018, all the historical land injustice claims were stayed pending the hearing and determination of the suit.
  75. It was deponed that on November 7, 2018, the Court in Petition No 255 of 2018 made an order that the same be consolidated with Petition No 369 of 2018 and both matters be mentioned before the Court on 3<sup>rd</sup> December, 2018 for further directions; that on the aforesaid date, the Court noting that both petitions challenged the same sections of the law, found that it would be best for the parties to



- withdraw one petition and only proceed with one and that by consent, the parties withdrew Petition 369 of 2018.
76. Mr Gitaka deposed that the 1<sup>st</sup> Respondent, vide Kenya Gazette Notice Vol CXX1-No 27 in the Kenya Gazette of March 1, 2019 published recommendations arising from historical land injustice complaints in respect of NLC/HL1/530/2018, NLC/HL1/069/2017, NLC/HL1/063/2017, NLC/HL1/006/2017, NLC/HL1/049/2017, NLC/HL1/170/2018, NLC/HL1/176/2018 and NLC/HL1/052/2017.
  77. It was deposed that the full recommendations were to the effect that the matter being before the High Court, the Commission will pend the hearing of the historical injustice claims until final determination by the Court and that however, as the manager of public land, the 1<sup>st</sup> Respondent ordered the Applicant, Kakuzi Limited, to surrender all public utilities on their land including schools, markets, police stations, hospitals, public roads of access, wayleaves and easements to the national and county governments as appropriate.
  78. The Applicant's representative finally deposed that the 1<sup>st</sup> Respondent also directed that allotments and titles should be issued for public purpose only; that all leases for land held by the Applicant in Muranga County should not be renewed until the historical land injustice claim is heard and determined and that any 999 year leases to be converted to 99 years.
  79. According to Mr Gitaka, the aforesaid decisions offend the principles of natural justice as no hearings were held by the 1<sup>st</sup> Respondent in respect of the claims as they were pending in court as Petition No 255 of 2018; that no prior notification and documentation was issued by the 1<sup>st</sup> Respondent pertaining to the alleged public utilities so as to afford them an opportunity to file a response in this regard and that the proceedings of the 1<sup>st</sup> Respondent are a nullity having been conducted in the absence of any regulations, the NLC(Historical Injustices) Regulation, 2017 having been annulled by Parliament on March 28, 2018.
  80. It was deposed that the directives of the 1<sup>st</sup> Respondent although couched as recommendations were essentially determinations in direct contravention of Section 15(9) of the *NLC Act*; that in further contravention of Section 15(9) aforesaid, the 1<sup>st</sup> Respondent's decision was in excess of its jurisdiction in so far as it made reference to the Applicant's leasing arrangements and that the Applicant is listed in the Nairobi Securities exchange and is a major contributor to the economy through its export of agricultural product and employs thousands of workers whose livelihoods are at risk.
  81. The 1<sup>st</sup> Respondent, through its Deputy Director, Legal Affairs and Enforcement, filed a Replying Affidavit whose contents are similar to the reply in respect of ELC JR No 3 of 2020 which I have summarized above.
  82. According to the 1<sup>st</sup> Respondent's Deputy Director, Legal Affairs and Enforcement, the parties herein were invited to hearings which were to be held on 1<sup>st</sup> March, 2018 (Nairobi), 27<sup>th</sup> September (Thika) and November 1, 2018 (Nairobi); that the parties were duly served with the notices of the investigative hearings with all the necessary documentations and that on November 1, 2018, the proceedings before the commission were stopped temporarily by the court in HCCC No 225 of 2018 and Petition No 369 of 2018.
  83. It was deposed that as at November 1, 2018, the proceedings with regards to the historical land injustices against the Applicant were at an advanced stage and the Applicant had participated in the process before securing the orders; that the temporary conservatory orders granted by the Court lapsed on December 3, 2018 and that the Applicant did not bother to file any documents thereafter indicative of their disinterest in the proceedings.



84. According to the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent rendered its decision on February 7, 2019; that the 1<sup>st</sup> Respondent stopped its proceedings with respect to the historical land injustices claim subject to the court orders; that the Court order was limited to the ongoing historical land injustice claim and did not stop the 1<sup>st</sup> Respondent from undertaking its other mandate with regard to management of public land and that the conservatory orders having lapsed on 3<sup>rd</sup> December, 2018, nothing stopped the commission from making further inquiries with regard to any aspect of its mandate.
85. It was submitted that all the decisions made with regard to the subject property were in line with the roles of the National Land Commission as provided for in Section 5 of the Act; that pursuant to Section 6(3) of the *NLC Act*, the Commission is not bound by rules of evidence and may inform itself in any manner it deems fit and that the right to protection of property conferred under Article 40(1) of the *Constitution* is not an absolute right in itself as this protection does not extend to property that is found to have been illegally and irregularly acquired thus occasioning a historical injustice.
86. Mr Gichuru deponed that the Applicant has not approached the Court with clean hands having refused to file a response even after having been given an opportunity to do so and that Article 26 of the *United Nations Declaration on the Rights to Indigenous and Tribal Peoples in Independent Countries* defines historical land injustices in terms of safeguarding the rights of indigenous people over their ancestral land as in this instance.
87. The 2<sup>nd</sup> Respondent did not file a response.
88. The 3<sup>rd</sup> Respondent, through its Deputy secretary, JM Muthama deponed that the recommendations vide the impugned gazette notice were well within the mandate of the 1<sup>st</sup> Respondent; and that the recommendations essentially staying the determination apart from the issue of public land, should not be held in abeyance, neither should the public be deprived of its rights thereto.
89. According to the 3<sup>rd</sup> Respondent, it is only fair that public utilities within the Applicant's property be surrendered as the issue is neither debatable nor disputed and that the recommendations as to rates and rent constitutes a general declaration as the operative Act is the Murang'a Finance Act.
90. The 1<sup>st</sup> Interested Party, through its Secretary General, Stephen Kuria Mbugua, deponed that the 1<sup>st</sup> Interested Party comprises of members of a majority of the local community historically settled within Kakuzi Area, carrying out farming and living in their communal lands now known as LR 10731 and LR No 11674(21211) and that the colonial government took over this property and gave it to its people until 1962 when the same reverted to the Government.
91. According to the 1<sup>st</sup> Interested Party, instead of reverting the property to them after independence, the Government amalgamated all the ancestral lands and issued a grant of lease to Kakuzi Fibrelands Limited; that in 1996, the President issued another grant of 12,705 acres to Sisal Limited and issued it with a lease of 941 years under LR No 11674 (21211) and that by the foregoing actions, the Government ratified the historical injustices perpetuated by the Colonial Government.
92. It was deposed that the 1<sup>st</sup> Interested Party filed a claim with the 1<sup>st</sup> Respondent which was admitted as NLC/HL1/006/2017; that the Applicant was invited to file a response; that parties went through pre-trial and the matter was set down for hearing; that on March 1, 2019, the 1<sup>st</sup> Respondent made the impugned recommendations and that contrary to the Applicant's assertion, it was duly notified of the complaint and invited to respond to the same.
93. The 1<sup>st</sup> Interested Party deposed that anticipating the outcome, the Applicant filed a Petition in the High Court and halted the proceedings; that the 1<sup>st</sup> Respondent is aware that the Applicant holds a lease on the properties and there are public utilities thereon and that they filed documents which were



sufficient for the recommendations that were made by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Interested Parties did not file a response.

### Submissions

94. The submissions by the Applicant's counsel are similar in all respect to the submissions that were made in ELC JR No 3 of 2020 which I have already summarized above. I will therefore not repeat them here. The same case applies to the submissions of the 1<sup>st</sup> Respondent.
95. On his part, the 3<sup>rd</sup> Respondent's counsel submitted that contrary to the Applicant's assertion, the directives by the 1<sup>st</sup> Respondent were recommendations and were not final orders capable of execution; that nonetheless, the decision to gazette the recommendations was in bad faith; that the NLC grossly exceeded its jurisdiction and its proceedings were a sham there having been no hearing and that the same should be set aside.
96. Vide further submissions, the 3<sup>rd</sup> Respondent through Counsel submitted that there are thousands of registered squatters within the County who have laid claim to the same parcel of land and who equally filed a complaint before the 1<sup>st</sup> Respondent; that chaos would reign if some squatters are granted the land without due process and that it is on this basis that the 3<sup>rd</sup> Respondent challenges the gazettment of the recommendations by the 1<sup>st</sup> Respondent.
97. The 1<sup>st</sup> Interested Party submitted that the 1<sup>st</sup> Respondent is a constitutionally established Commission pursuant to the provisions of Article 67 which outlines its mandate; that Section 15 of the *NLC Act* gives the commission the mandate to inquire into historical land injustices and that in order to succeed in an application for judicial review, an Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
98. Counsel relied on the decision of *Republic vs Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya* [2019] eKLR, where the court held that in evaluating whether a decision is illegal, it has to look at the scope of the instrument conferring the power to the decision maker and that in this case, having regard to Article 67 of the *Constitution* and Section 15 of the *NLC Act*, and being guided by the history of land in Kenya, the 1<sup>st</sup> Respondent was duly mandated to carry out investigations on historical land injustices.
99. Counsel for the 1<sup>st</sup> Interested Party submitted that there was no irrationality as alleged because the 1<sup>st</sup> Respondent did not make any final findings but only asked for the surrender of the public utilities and the stoppage of the renewal of leases pending the full hearing by the 1<sup>st</sup> Respondent.
100. It was submitted that there was no procedural impropriety as the Applicant was duly notified of the complaint and invited to respond but instead opted to file proceedings in the High Court. Counsel submitted that having failed to prove any illegality, irrationality and procedural impropriety, it follows that the Motion must fail.

### ELC JR No 5 of 2020

101. Vide the Notice of Motion dated April 18, 2019, the ex-parte Applicant (Applicant), Eastern Kenya Limited, seeks the following orders;
  - i. An order of certiorari to remove into the High Court for purposes of being quashed and quashing, quash the Gazette Notice published on March 1, 2019 in so far as it relates to the National Land Commission recommendations



dated February 18, 2019 in so far as it relates to a complaint by Kimasas Farmers' Co-operative Society under Ref: NLC/HLI/255/2018.

- ii. The High Court does issue an order of Prohibition, prohibiting the National Land Commission and Chief Land Registrar from implementing the recommendations in the Gazette Notice published on March 1, 2019 in so far as it relates to the National Land Commission recommendations dated the February 18, 2019 in so far as it relates to a complaint by Kimasas Farmers' Co-operative Society under REF: NLC/HL1/255/2018.
  - iii. The High Court does issue a Declaratory Order that the National Land Commission proceedings and determinations dated the February 18, 2019 in so far as it relates to a complaint by Kimasas Farmers' Co-operative Society under Ref: NLC/HL1/255/2018 are unlawful and tainted with illegality for contravening Section 4(3) and (4) of the *Fair Administrative Action Act* and Articles 47 and 50(1) of the *Constitution* and are consequently null and void.
  - iv. Any or further and consequential orders and/or directions that may be given.
  - v. Costs of the Application be awarded to the Applicant.
102. The application is based on the grounds set out on the face of the Motion and supported by the Verifying Affidavit of David Gitaka, the Legal Manager of the Applicant and a Statutory Statement of an even date.
103. The Legal Manager of the Applicant deponed that vide a Gazzette Notice dated March 1, 2019 in the Kenya Gazzette Vol CXX1-No 27, the 1<sup>st</sup> Respondent published recommendations arising from a historical land injustice complaint by Kimasas Farmers Co-operative Society (the society) against the Applicant.
104. He deposed that the decision was to the effect that: the claim is allowed; all resultant sub-divisions were done illegally and should be cancelled; LR No 9285/2 be given to Kimasas Farmers Co-operative Society Limited; and the Chief Lands Registrar, Ministry of Lands and Settlement, to implement the decision.
105. The Legal Manager of the Applicant deponed that vide an invite dated the June 5, 2018 and served on them on June 7, 2019, the Applicant was invited to attend a session relating to the complaint on July 11, 2018; that enclosed with the invite was a complaint by the society dated February 21, 2018 and that apart from the complaint, no other documents were enclosed including documents referred to in the complaint.
106. It was deposed that Simon Kipketer Sawe, the owner of LR 9285/4, was not one of the parties mentioned in the letter of June 5, 2018; that during the mentions on 10<sup>th</sup> and July 11, 2018, he queried the lack of service of any documents supporting the claim to assist in filing a response, noting that the Applicant had only transferred 81.6 Ha to the society vide a transfer registered in 1995 and that in response, Mr Biwott on behalf of the society clarified that the society's members had paid for 550 acres at the value of Kshs 214,000 and had supporting documents.
107. According to the Legal Manager of the Applicant, the decision by the 1<sup>st</sup> Respondent offends the principles of natural justice as the Applicant was not afforded a fair opportunity to be heard; that no hearing was conducted by the 1<sup>st</sup> Respondent in respect of the matter, there only being a mention on July 11, 2018 and that the 1<sup>st</sup> Respondent never served the Applicant with supporting documentation in respect of the claim depriving it of an opportunity to file its Defence.



108. It is the Applicant's case that the 1<sup>st</sup> Respondent's actions were a deliberate attempt to disenfranchise the Applicant's ownership of the property - LR 9285/3, contrary to Article 40 of the Constitution; that in view of the aforesaid breaches, the decision by the 1<sup>st</sup> Respondent contravenes Articles 47 and 50(1) of the Constitution, Section 4(3) &(4) and 5 of the Fair Administrative Action Act and Section 15(9) of the National Land Commission Act.
109. In response to the Motion, the 1<sup>st</sup> Respondent, through its Deputy Director, Legal Affairs and Enforcement filed a response which is similar to the response he gave in ELC JR No 3 of 2020 which I have already summarized above, with a few alterations on matters of fact.
110. The 1<sup>st</sup> Respondent, through its Deputy Director, Legal Affairs and Enforcement, deposed that the 1<sup>st</sup> Respondent received a complaint under Ref: NLC/HLI/255/2018 from the Interested Party against the Applicant and that it was the complainants' assertion that sometime in November, 1986, the then area superintendent Mr P.G Scott allocated to them 550 acres of land as a gift but the Applicant only transferred 210 acres and retained 340 which they sought.
111. It was deposed that before undertaking any investigations, the 1<sup>st</sup> Respondent vide a letter dated June 5, 2018 invited all the interested parties to a hearing on 10<sup>th</sup> and July 11, 2018 at the NLC County Co-ordinators office, Nandi; that on the said dates, both the Applicant and the Interested Party appeared before the 1<sup>st</sup> Respondent and gave their representations and filed submissions and that counsel for the Applicant admitted to having received the complaint and the claim filed therewith.
112. According to the deponent, after hearing both parties, the Applicant was granted 21 days to file its response and to issue the 1<sup>st</sup> Respondent with all its ownership documents including lease documents, PDPs, current searches, stamp duty receipts and a current copy of the CR-12 and that the Applicant failed and/or neglected to file any response and consequently, the 1<sup>st</sup> Respondent prepared its determination.
113. The 2<sup>nd</sup> Respondent did not file a response.
114. The 1<sup>st</sup> Interested Party, through its Chairman, David Biwott, deposed that the 1<sup>st</sup> Interested Party was registered sometime in 1980 to facilitate the realization of the promise of a tea farm from an undertaking given by Mr P.G Scot, a white settler and the area superintendent and that in 1986, Mr P.G Scott decided to settle the 1<sup>st</sup> Interested Party on land parcels number LR No 9282/2, 9283/2, and 9285/2 all within the Applicant's company which measured approximately 550 acres.
115. According to the 1<sup>st</sup> Interested Party, the Applicant was to transfer to the 1<sup>st</sup> Interested Party the said land; that the Applicant only transferred 81.6 Ha(210 acres) after the 1<sup>st</sup> Interested Party paid Kshs 247,000 and that the Applicant has since refused to transfer the remaining 340 acres to the 1<sup>st</sup> Interested Party despite the 1<sup>st</sup> Interested Party being the one paying the land rates.
116. It is the Interested Party's case that vide its complaint dated February 21, 2018, it petitioned the 1<sup>st</sup> Respondent in an attempt to reclaim its ancestral land; that acting on the complaint, the 1<sup>st</sup> Respondent sent a letter dated June 5, 2018 to the 1<sup>st</sup> Interested Party and the Applicant inviting them to its hearing scheduled on July 11, 2018 and that the 1<sup>st</sup> Respondent conducted its hearings on July 11, 2018 where both parties attended and presented their cases.
117. According to the 1<sup>st</sup> Interested Party, the Applicant's representative sought time to put in a response and was granted 21 days; that in its determination of February 7, 2019, the 1<sup>st</sup> Respondent indicated that it had received no response from the Applicant; that the Applicant having failed to put in its response cannot now allege to have been denied an opportunity to be heard and that the 1<sup>st</sup> Respondent



through its decision published in Kenya Gazette of 1<sup>st</sup> March, 2019 found in favour of the 1<sup>st</sup> Interested Party by revoking the sub-divisions of LR 9285 and recommending the return of LR 9285 to the 1<sup>st</sup> Interested Party.

118. It was deposed that the 1<sup>st</sup> Interested Party's claim was with respect to LR 9282/2, 9283/2 and 9285/2; that nowhere did it refer to LR 9285/4 which allegedly belongs to Mr Simeon Kipketer Sawe and that LR 9285/3 which is claimed by Mr Sawe was grabbed from the 1<sup>st</sup> Interested Party and that the mischief can be seen from the certificate of lease issued on the May 27, 1999 to Simeon Sawe where the term lease is backdated to 953 years from December 1, 1956.
119. It was deposed that all the procedures were followed and rules of natural Justice adhered to; that the parties were given a fair hearing and the decision by the 1<sup>st</sup> Respondent was given in accordance to the law; that it is a principle of law that he who comes to equity must come with clean hands and that the Applicant having come before the Court with unclean hands is not entitled to the orders sought.
120. The Applicant, through its Legal Manager, filed a Further Affidavit in which he deposed that the present review is limited to due process and the rights of the Applicant and not the substantive merits of the complaint which can only be addressed through witness testimony; that there was no hearing on July 11, 2018, the notice of July 5, 2018 having indicated that it was a commission's session and that the fact that the Applicant had yet to be served with the documents by July 11, 2018 affirms that there could not have been a hearing on that date.

### Submissions

121. It was submitted by the Applicant's counsel that whereas the Applicant was invited to a session relating to the complaint by the society, none of the documents indicated in the complaint were included and that despite having sought the same and the 1<sup>st</sup> Respondent directing that the Applicant would be issued with the documents, none was forthcoming by either the 1<sup>st</sup> Respondent or 1<sup>st</sup> Interested Party constituting a breach of the Applicants rights under Section 4(3) (g) of the [Fair Administrative Action Act](#).
122. It was submitted that the proceedings of July 11, 2018 did not constitute a hearing as the Applicant had not been availed with all the information; that there was no cross-examination of the 1<sup>st</sup> Interested Party by the Applicant, and the Applicant did not tender any evidence and that neither the 1<sup>st</sup> Respondent nor the 1<sup>st</sup> Interested Party has adduced evidence of having provided the Applicant with information related to the complaint.
123. Counsel for the Applicant submitted that as the 1<sup>st</sup> Respondent's recommendations directly affected the Applicant's proprietary rights, they had no choice but to comply with Articles 47 and 50(1) of the [Constitution](#) and that the 1<sup>st</sup> Respondent has no discretion when it comes to fair administrative action. Reliance in this regard was placed on the cases of [Sceneries vs National Land Commission](#) [2017] eKLR, [Kenya Human Rights Commission & Another v Non-Governmental Organizations Co-ordination Board and Anor](#) [2018] eKLR and [Judicial Service Commission vs Mbalu Mutava & another](#)[2014]eKLR.
124. According to Counsel, the [NLC \(Historical Injustices\) Regulations, 2017](#) which set out the procedures in respect of admission of historical land injustice claims were annulled on the March 28, 2018 with Parliament directing the 1<sup>st</sup> Respondent to submit fresh regulations which are yet to be submitted and that it was therefore unlawful for the 1<sup>st</sup> Respondent to conduct hearings relating to historical land injustice claims in the absence of regulations when Parliament made it clear that it was crucial to have the regulations in place.



125. The 1<sup>st</sup> Respondent filed submissions on the March 1, 2021 which are similar to the submissions that were filed in ELCJR No 3 of 2022 which I have already summarized above, with a variation on matters of fact, which are captured in the 1<sup>st</sup> Respondent's Replying Affidavit. The Applicant filed further submissions which I have considered.
126. The 1<sup>st</sup> Interested Party submitted that the Applicant has no locus to institute this suit as the party before the 1<sup>st</sup> Respondent was Eastern Produce Africa Ltd and not the Applicant herein, Eastern Produce Kenya Limited and that the Applicant was duly afforded an opportunity to be heard in terms of Article 47 and 50(1) of the Constitution, Section 14 of the NLC Act and Section 4 of the Fair Administrative Action Act as evinced by the Hansard proceedings.
127. According to Counsel, the Applicant is not entitled to the orders sought as it has not come to equity with clean hands, alleging non-service of documents whereas the Hansard shows otherwise and that its Advocate disregarded the 1<sup>st</sup> Respondent's directions. Reliance was placed on the case of Republic vs National Land Commission & another: Kenya National Highways Authority (Interested Party) ex-parte George Kimani t/a Capri Construction[2019]eKLR where misrepresentation of facts by a party was held to be a relevant consideration by the Court while exercising its discretion in granting orders. That the Applicant agreed to get all the relevant documentation and its failure to do so could not prevent the 1<sup>st</sup> Respondent from rendering its decision and that the Applicant does not deserve the orders sought and the application should be dismissed.
128. The 2<sup>nd</sup> Interested Party submitted that the orders of prohibition do not lie as the Applicant was well aware of the proceedings before the 1<sup>st</sup> Respondent in which they were duly represented but deliberately chose not to respond to the complaint.
129. Counsel urged the Court to be guided by the cases of Pastoli vs Kabale Local District Government Council and Others[2008]2 EA 300 in which the Court cited with approval the case of Council of Civil Servants Union vs Minister for the Civil Service[1985] AC 2 and An Application by Bukoba Gymkhana Club[1963] EA 478 & 479 which expressed that in order to succeed in an application for Judicial Review, an Applicant must show that the decision complained of is tainted with illegality, irrationality and procedural impropriety.
130. Counsel also relied on the case of Dry Associates Limited vs Capital Markets Authority & Others[2012]eKLR which expounded on the principles of fair administrative action under Article 47 of the Constitution. It was submitted that the Hansard proceedings make it apparent that the Applicant was afforded an opportunity to be heard and chose to waive it; that as expressed by the Court in R vs NLC ex-parte Krystalline Salt Limited[2015]eKLR, the law only protects lawfully acquired property; that the Court in R vs National Transport and Safety Authority & 10 others ex-parte James Maina Mugo outlined the considerations on whether or not to grant the quashing orders and that the Applicants are not entitled to the orders sought having proven no wrong on the part of the 1<sup>st</sup> Respondent.
131. The parties highlighted their submissions on October 4, 2022, which I have considered. I have also considered the bulky lists of authorities that were filed by counsel in support of their respective cases.



## Analysis & Determination

132. Having considered the Motions, Affidavits in support and against and the submissions thereto, the issues that arise for determination are;
- i. Whether the Judicial Review Applications Nos. 3, 4 & 5 of 2020 are competent?
  - ii. Whether the ex-parte Applicants in JR Nos. 3, 4 & 5 of 2020 have met the threshold for the grant of the Judicial Review Orders of certiorari and Prohibition?
  - iii. What are the appropriate orders to issue?
133. A common thread running through the three Judicial Review Motions are the objections with respect to their competency. The objections touching on jurisdiction and locus are potentially dispositive issues and the Court will determine them first.
134. Jurisdiction is the cornerstone of any suit, without which a court cannot entertain any matter before it. As expressed by the Court in the *locus classicus* case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR;
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
135. It is trite that where a question is raised as to the court’s jurisdiction, it should be determined at the first instance. Nyarangi JA in *Owners of Motor Vessel "Lillian S"* (*supra*) stated as follows:
- “...A question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

## ELC JR No 3 of 2020

136. It is contended that this court has no jurisdiction to handle the case. According to the 4<sup>th</sup> Respondent, the proceedings having been commenced in the High Court, the same are a nullity notwithstanding the transfer to this court because a court without jurisdiction has no authority to transfer a matter.
137. The record shows that vide its Ruling delivered on December 16, 2021, this Court in dealing with the application of May 19, 2020 dealt with this objection. The court found that the question of whether it was vested with jurisdiction to entertain the matter having been transferred from the High Court was



substantively dealt with by the previous Court when the matters were transferred. This Court found the question to be *res-judicata* stating as follows:

“It is clear from the foregoing that the Judge did not divest herself of jurisdiction to determine the matter. On the contrary, the Judge stated that she was transferring the suits to this court by virtue of the concurrent jurisdiction held by this court and the High Court with regard to the three matters. That being the case, to purport to hold that the High court had no jurisdiction to transfer the three suits to this court, and that the three suits are void for having been transferred by a court without jurisdiction would be tantamount to sitting on appeal of the decision of a court of equal status, an invitation which this court must decline. Indeed, as the High Court’s jurisdiction has not been impeached, it follows that the leave granted therein to commence judicial review proceedings remains valid.”

138. It is noted that no review or appeal has been sought with respect to this court’s finding above. The issue is therefore clearly *res-judicata* The Court will not belabor this issue. This objection fails.
139. Still on matters jurisdiction, the 3<sup>rd</sup> Respondent avers that the ELC Court at Kericho, and not this court, has jurisdiction to entertain the matter. It is noted that a similar objection was raised by the 4<sup>th</sup> Respondent vide the Preliminary Objection of June 23, 2020. That objection was not successful and the same is *res-judicata*
140. Nonetheless, vide its Ruling of December 16, 2021, the present matters were consolidated to be heard by this Court. No appeal has been filed against the said order of consolidation. In that respect, the parties have subjected themselves to the jurisdiction of this Court. Indeed, acceding to this objection this late in the proceedings militates against the provisions of Article 159 of the Constitution and Section 3 of the ELC Act which provides that the principal objective of the Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act. The objection therefore fails.
141. According to the 4<sup>th</sup> Respondent, the present suit is fatally defective having been instituted contrary to the rules governing representative suits; and that there is no resolution by the Applicants appointing anyone to represent them and as such, the Affidavit by Apollo Kiarie is a nullity. According to the 4<sup>th</sup> Respondent, this runs contra to Order 1 Rule 8 of the Civil Procedure Rules which is to the effect that;
  - “(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
  - (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.
  - (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to be made a party to such suit.”
142. In the present case, the impugned affidavit was signed by Apollo Kiarie, the Chairman of the Kenya Tea Growers Association, one of the applicants on behalf of its membership, who are also Applicants.



Looking at the pleadings, it is apparent that the suit is not a representative suit, rather, it is a scenario where one party pleads on behalf of the others, albeit without written authority. Is this omission fatal?

143. This being a judicial review proceeding, the first question is whether the provisions of Order 1 Rule 8 of the *Civil Procedure Rules* is applicable. The Court in *Republic vs Musanka Ole Runkes Tarakwa & 5 Others ex-parte Joseph Lesalol Lekition & others* [2015] eKLR held that although the rule pertained to cases commenced by way of Plaints hence the use of the terminologies Plaintiff and Defendant, the principle was applicable to other processes including matters of judicial review. The court held as follows:

“Where there are more litigants than one, one of them may be authorized by others to appear, plead or act on their behalf. Such authority must be in writing and must be signed by the parties giving it and must be filed. That is the only way the court will know that the parties have given the one before court, the authority to act for them... Authority in a case where there are several litigants is critical, for it is the only way that others can be bound by what one person files. It is not a matter to be taken casually. One cannot purport to bind others unless with their authority.”

144. On the other hand, the Court in *Republic vs Law Society of Kenya & 2 Others ex-parte Paul Wainaina Kimani & Another* [2014] eKLR stated as follows:

“Fourthly, the Interested Party contends that the 1<sup>st</sup> Applicant has purported to swear affidavits and file pleadings on behalf of the 2<sup>nd</sup> applicant without any written authority contrary to law. These are judicial review proceedings and the *Civil Procedure Rules* do not strictly apply. The 2<sup>nd</sup> Applicant has not complained to the Court and it is assumed that these proceedings were filed with her permission.”

145. This was the position in *Republic vs Public Procurement Administrative Review Board & 2 others* [2013] eKLR where the court stated as follows:

“First and foremost, it must be made clear that the provisions of the *Civil Procedure Act* as well as the Rules made thereunder do not ordinarily apply to Judicial Review proceedings since the *Civil Procedure Act* is expressed to be

“An Act of Parliament to make provision for procedure in civil courts” yet Judicial Review proceedings are neither civil nor criminal proceedings.”

146. This Court is persuaded by the school of thought that the *Civil Procedure Rules* save for Order 53 are not ordinarily applicable to judicial review proceedings. In any event, it is clear that the mischief sought to be addressed by Order 1 Rule 13 is that a party should be aware of any proceedings at its instance and be ready to be bound to the same.

147. Looking at the Gazette notice, it is clear that the Applicants being tea estates within the Bomet and Kericho Counties were the affected parties. None has come to assert that they did not grant any authority to the deponent to swear an affidavit on their behalf. The Court therefore disregards this objection.



## ELC JR No 5 of 2020

148. It has been submitted in this matter that the Applicant has no locus to file the Application. *Locus standi* is defined by the [Black's Law Dictionary](#) as-

“The right to bring an action or to be heard in a given forum.”

149. The Court in the case of [Alfred Njau and Others vs City Council of Nairobi](#) (1982) KAR 229, defined *Locus standi* thus;

“The term *Locus standi* means a right to appear in Court and conversely to say that a person has no *Locus standi* means that he has no right to appear or be heard in such and such proceedings”.

150. According to the 1<sup>st</sup> Interested Party, the Applicant has no locus to institute this suit as the party before the 1<sup>st</sup> Respondent was Eastern Produce Africa Ltd and not the Applicant herein, Eastern Produce Kenya Limited. The Applicant maintains that it is the same entity that was before the 1<sup>st</sup> Respondent.

151. The Court has considered the pleadings. It is noted that there appears to be a mis-description of the Applicant, with the 1<sup>st</sup> Respondent referring to it as Eastern Product Africa Ltd in the letter of June 5, 2018 and thereafter Eastern Produce Kenya Limited. The Applicant herein describes itself as Eastern Produce Kenya Limited, while the 1<sup>st</sup> Respondent's determination refers to Eastern Produce Kenya Limited. The impugned Gazette notice refers to the Applicant as Eastern Produce Kenya Limited.

152. That being the case, it is the finding of this court the Applicant herein is the same body whose titled was impugned by the 1<sup>st</sup> Respondent. Therefore, the court finds that the Applicant has *Locus standi* in this matter.

153. I will now determine the issue of whether the ex-parte Applicants in ELC JR Nos. 3, 4 & 5 of 2020 have met the threshold for granting of Judicial Review Orders of certiorari and Prohibition.

154. Vide their respective Applications, the ex-parte Applicants (hereinafter the Applicants) seek inter-alia, the Judicial Review orders of certiorari and Prohibition as well as declaratory orders. Judicial Review has its foundation in Sections 8 and 9 of the [Law Reform Act](#), which constitutes the substantive law for judicial review of administrative actions and Order 53 of the [Civil Procedure Rules](#) which deals with the procedural aspects thereof.

155. Article 47 of the [Constitution of Kenya](#) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and fair. Section 4 of the [Fair Administrative Action Act](#), 2015 re-echoes Article 47 of the [Constitution](#) and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

156. At the onset, it must be appreciated that Judicial Review is primarily concerned with the decision making process and not with the merit of the decision. This was expressed by the Supreme Court in [Judges and Magistrates Vetting Board vs Centre for Human Rights and Democracy](#) [2014] eKLR where it was stated that:

“when Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not



above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.”

157. Similarly, the Court of Appeal in *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) vs Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR, stated thus;

“The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect;

That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters.”

158. The parameters of judicial review were set out by the Court of Appeal in the case of *Republic vs Kenya National Examinations Council Ex parte Gathenji & Others* Civil Appeal No 266 of 1996 where the court stated as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party



on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...

Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

159. In the Ugandan case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA, the court gave an in depth analysis of the parameters to be met in order to be successful in a judicial review application as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decisionmaking authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

160. What resonates from the above case law is that the scope of judicial review proceedings is limited to the decision making process in relation to the decision which is being challenged. The role of the court is therefore supervisory and the court should not attempt to delve into the “forbidden appellate approach.” Thus, the court can neither hear the merits of the dispute nor re-hear the same.



161. As aforesaid, the Applicants are seeking the orders certiorari and Prohibition. The learned authors of HW Wade and CF Forsyth, *Administrative Law*, 10th Edition, have stated as follows at page 509 on the remedies of certiorari and Prohibition;

“The quashing order and prohibiting order are complementing remedies, based upon common law principles....A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future.”

162. The Applicants’ claims in all the three Motions arise from the recommendations of the 1<sup>st</sup> Respondent’s investigations of historical land injustice claims. As such, a brief on the 1<sup>st</sup> Respondent and its role in this respect will suffice.

163. The 1<sup>st</sup> Respondent is an independent constitutional commission established under Article 67 of the *Constitution* which provides as follows:

- “(1) There is established the National Land Commission.
- (2) The functions of the National Land Commission are-
  - (a) to manage public land on behalf of the national and county governments;
  - (b) to recommend a national land policy to the national government;
  - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
  - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
  - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
  - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
  - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
  - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (3) The National Land Commission may perform any other functions prescribed by national legislation.”



164. The 1<sup>st</sup> Respondent is further guided in its mandate and functions by the [National Land Commission Act, 2012](#) (hereinafter the NLC Act). Section 15 of the [NLC Act](#) defines historical land injustice claims. It provides as follows;

- “(1) Pursuant to Article 67 (3) of the [Constitution](#), the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.
- (2) For the purposes of this section, a historical land injustice means a grievance which-
- (a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
  - (b) resulted in displacement from their habitual place of residence;
  - (c) occurred between June 15, 1895 when Kenya became a protectorate under the British East African Protectorate and August 27, 2010 when the [Constitution of Kenya](#) was promulgated;
  - (d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and
  - (e) meets the criteria set out under subsection 3 of this section.”

165. The criteria to be met before a claim can be considered a historical land injustice is set out in Section 15(3) of the [NLC Act](#) which states;

- “(3) A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria-
- (a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;
  - (b) the claim has not or is not capable of being addressed through the ordinary court system on the basis that-
    - (i) the claim contradicts a law that was in force at the time when the injustice began; or
    - (ii) the claim is debarred under section 7 of the [Limitation of Actions Act](#), (Cap 22) or any other law;
  - (c) the claimant was either a proprietor or occupant of the land upon which the claim is based;
  - (d) no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and
  - (e) it is brought within five years from the date of commencement of this Act.”



166. The 1<sup>st</sup> Respondent’s mandate when handling a historical land injustice claim includes not only the power to recommend appropriate redress but also the power to conduct investigations prior to making its determination. In this regard, Section 15 (5) and (6) of the Act provide as follows:

- “(5) When conducting investigations under subsection (1) into historical land injustices the Commission may—
- (a) request from any person including any government department such particulars, documents and information regarding any investigation, as may be necessary; or(b) by notice in writing, addressed and delivered by a staff of the Commission to any person, direct such person, in relation to any investigation, to appear before the Commission at such time and place as may be specified in the notice, and to produce such documents or objects in the possession, custody or under the control of such person and which are relevant to that investigation.
- (6) Where a complainant is unable to provide all the information necessary for the adequate submission or investigation of a complaint, the Commission shall take reasonable steps to have this information made available.”

167. Section 15(9) of the [NLC Act](#) lists the remedies the 1<sup>st</sup> Respondent may issue after the investigations. It states;

- “The Commission, after investigating any case of historical land injustice referred to it, shall recommend any of the following remedies-
- (a) restitution;
  - (b) compensation, if it is impossible to restore the land;
  - (c) resettlement on an alternative land; (d) rehabilitation through provision of social infrastructure;
  - (e) affirmative action programmes for marginalized groups and communities;
  - (f) creation of wayleaves and easements;
  - (g) order for revocation and reallocation of the land;
  - (h) order for revocation of an official declaration in respect of any public land and reallocation;
  - (i) sale and sharing of the proceeds;
  - (j) refund to bona fide, third party purchasers after valuation; or
  - (k) declaratory and preservation orders including injunctions.”

168. Section 15(10) of the [NLC Act](#) provides as follows:

“Upon determination of a historical land injustice claim by the Commission, any authority mandated to act under the redress recommended shall be required to do so within three years.”



169. Having laid down the law governing the 1<sup>st</sup> Respondent’s mandate with respect to historical land injustice claims, the Court will proceed on a short discourse on the tenets of fair administrative action and the right to a fair hearing, the alleged breaches of which form the primary basis for the present motions.

170. The right to fair administrative action in Kenya has a constitutional underpinning. Article 47 of the Constitution, provides as follows:

“ 47.

- (1) Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, that person has the right to be given written reasons for the action.”

171. In discussing the import of Article 47 of the Constitution, the Court of Appeal in the case of Benson Wekesa Milimo vs National Land Commission & 2 others [2021] eKLR stated thus;

“In addition, Article 47 of the Constitution provides a right to fair administrative action. This right includes, amongst others, the right to administrative action that is lawful, reasonable and procedurally fair, and the right to have prior adequate notice of the nature and reason for the proposed administrative action, and an opportunity to be heard.”

172. This right is further secured through the Fair Administrative Action Act, 2015. Section 2 thereof defines “administrative action” as including the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates and defines “administrator” as meaning a person who takes an administrative action or who makes an administrative decision.

173. Section 4 (3) and (4) of the Act provide as follows:

- “(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.



- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

174. The foregoing provisions sum up what is commonly referred to as natural justice. The Court of Appeal summarized the rule as follows in the *Judicial Service Commission vs Hon. Mr. Justice Mbalu Mutava & Another* Civil Appeal No 52 of 2014 where the court relied on the decision of the House of Lords in *Ridge vs Baldwin* thus:

“... The landmark decision of the House of Lords in *Ridge v. Baldwin* [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

1. the right to be heard by an unbiased tribunal.
2. the right to have notice of charges of misconduct
3. the right to be heard in answer to those charges.

On his part, Lord Reid when dealing with class of cases of dismissal from office “where there must be something against a man to warrant his dismissal” said at page 66:

“There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”

[20] The right to fair hearing as a rule of natural justice, a part of the common law, has in modern times been variously described as “fair play in action”, justice of the common law”; “common fairness” “fairness of procedure” or simply as “duty to act fairly.”

As an example, in *Wiseman v Borneman* [1969] 3 All ER 275 in determining, inter alia, the question whether the principles of natural justice (right to fair hearing) had been followed Lord Morris of Borth-y-Gest denominated the issue as to one of whether the tribunal had “acted unfairly”.

So did Lord Denning MR in *Selvarajan v Race Relations Board* [1976] 1 All ER 12 when dealing with the procedure of bodies required to make investigation where he said at page 19:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends



on the nature of the investigations and the consequence which it may have on the person affected by it.”

175. One of the core pillars of natural justice is the right to fair hearing. This is provided for under Article 50(1) of the Constitution which provides;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

176. This right was extensively discussed by the Supreme Court in Evans Odhiambo Kidero & 4 others vs Ferdinand Ndungu Waititu & 4 others [2014] eKLR, where the court held;

“Article 50(1) refers to the right to a fair hearing for all persons, while article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms ‘fair hearing’ and ‘fair trial’ are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that Article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas Article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect.”

177. The twin rules of natural Justice that no man shall be a judge in his own cause (Nemo Judex in causa sua) and that no man shall be condemned unheard (audi alteram partem) are cardinal principles of law which are fundamental in our justice system and embody the duty imposed on administrative bodies to act fairly.

178. As to what constitutes procedural fairness, there is no set standard and each case must be decided on its own merits. The Canadian Supreme Court in Baker vs Canada (Minister of Citizenship & Immigration) 2 SCR 817 6 stated thus:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

179. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given 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.

The Court will be guided by the foregoing principles.

### **ELC JR No 3 of 2020**

180. By way of brief background, the 1<sup>st</sup> Respondent received complaints from the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and Borowo and Kipsigis Clans Self Help Groups against the Colonial Government and the County Government of Kenya in which it was alleged that the British Colonial white settlers took away thousands of acres of their land. The complaints were duly admitted as historical land injustices.
181. On March 1, 2019, the 1<sup>st</sup> Respondent vide the Kenya Gazette Vol CXXI-No 27 published recommendations arising from the aforesaid claims which were to the effect that: the claims are allowed; a re-survey be done on the land being held by the tea estates to determine if there is any surplus land or residue to be held in trust for the community by the County Government for public purposes and that the County Government and the multi-nationals sign an MOU (Memorandum of Understanding) for the multi-nationals to provide public utilities to the community.
182. The 1<sup>st</sup> Respondent further recommended that the renewal of the leases to these lands be withheld until an agreement is reached with the respective County Governments of Kericho and Bomet; the rates and rent on such lands should be enhanced to benefit the National and County Governments and that all 999-year leases be converted to the constitutional requirement of 99 years.
183. The Applicants assert that the above decision offends the principles of natural justice as they were never notified of the claims nor afforded an opportunity to be heard; that the decision was issued without notice to the Applicants despite them being apparent that the same would adversely affect their interests; that the proceedings were a nullity having been conducted in the absence of the [NLC \(Historical Injustices\) Regulations](#), and that the 1<sup>st</sup> Respondent's recommendations are essentially directives and in excess of the 1<sup>st</sup> Respondent's jurisdiction under Section 15 (9) of the [NLC Act](#).
184. The 1<sup>st</sup> Respondent maintains that the investigations were procedurally fair and above board in all aspects and that the recommendations were valid. The 1<sup>st</sup> Respondent is in this respect supported by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the Interested Parties.
185. Beginning with the challenge on the legality of the 1<sup>st</sup> Respondent's actions, the Applicants maintain that the proceedings before the 1<sup>st</sup> Respondent were a nullity having been conducted in the absence of any regulations governing their proceedings.
186. In 2017, the 1<sup>st</sup> Respondent promulgated the [National Land Commission \(Investigation of Historical Land Injustices\) Regulations, 2017](#) ("Regulations"), which provided the procedure for conducting an investigation on historical land injustices.
187. On March 26, 2018, the aforesaid regulations were annulled by Parliament. The annulment was informed by the fact that the 1<sup>st</sup> Respondent failed to comply with the public scrutiny requirement by failing to ensure that the regulations are tabled before Parliament. Looking at the timelines for the hearings herein and eventual recommendation, there can be no dispute that at the time thereof, the regulations were no longer operative. Did this, as alleged by the Applicants, render the proceedings fatally defective?



188. This Court in the case of *R vs NLC ex-parte Holborn Properties* (*supra*) dealing with the question of whether the failure by the 1<sup>st</sup> Respondent to make rules, for the better carrying out of its functions of reviewing grants or dispositions of public land to establish their propriety or legality negated the proceedings in that regard found in the negative stating thus;

“Although the Respondent, in addition to the provisions of the Act, is required to make rules for the better carrying out of its functions of reviewing grants or dispositions of public land, the absence of the rules cannot be sufficient reason to stop it from exercising those functions considering that the Act is clear on how the exercise should be carried out.”

189. Indeed, the 1<sup>st</sup> Respondent is constitutionally mandated to investigate historical land injustice claims. Section 15 of the Act succinctly sets out the parameters thereof. The aim of the regulations was to streamline the 1<sup>st</sup> Respondent’s mandate in this regard and their absence cannot be said to upheave the 1<sup>st</sup> Respondent’s constitutional mandate to investigate historical land injustices.

190. The rationale in the case of *R vs ex-parte Holborn* (*supra*) which was decided by this court remains solid. It is the court’s findings that the lack of regulations on historical land injustices did not render the proceedings a nullity. The provisions of section 15 of the *NLC Act* on historical land injustice is sufficient in guiding the 1<sup>st</sup> Respondent in conducting its proceedings.

191. The next issue to deal with is whether the investigations leading to the findings and recommendations by the 1<sup>st</sup> Respondent were irrational and/or tainted with procedural irregularity. The Applicants have alleged breach of fair administrative actions by the 1<sup>st</sup> Respondent for failure to notify them of the claims against them and the issuance of the decision without notice to them.

192. The 1<sup>st</sup> Respondent in contrast states that all affected parties were duly notified through the public address system and the local radio stations and participated in the proceedings; that the 1<sup>st</sup> Respondent means of investigation is not adversarial in nature and that it is at liberty to adopt any model it considers appropriate.

193. The Court has considered the Hansard with respect to proceedings conducted by the 1<sup>st</sup> Respondent on October 11, 2018. There was no representation on behalf of the Applicants. A look at the determination equally reveals that there was no representation by and/or for the Applicants. This begs the question whether they were notified of the proceedings.

194. The Court has keenly analyzed the evidence. Whereas the 1<sup>st</sup> Respondent asserts that it publicly notified all the relevant parties of the hearings, there is no evidence of the same. It is not acceptable nor indeed sufficient for the 1<sup>st</sup> Respondent to allege that the Applicants by virtue of residing in Kericho and Bomet Counties ought to have been aware of the proceedings.

195. Even if the Court were to presume that the notices were issued in the manner alleged, was that sufficient? The Court thinks not. In *Geothermal Development Company Limited vs Attorney General & 3 others* [2013] eKLR, the concept of notice before administrative action is undertaken was discussed as follows:

“In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See *Charkaoui v Canada* [2007] SCC 9, *Alberta Workers’ Compensation Board v*



Alberta Appeals Commission (2005) 258 DLR (4<sup>th</sup>), 29, 55 and Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4<sup>th</sup>) 750.”

196. In the circumstances, the Court finds that no notice was given to the Applicants contrary to Article 47 of the *Constitution* and Section 4(3) of the *Fair Administrative Action Act*. Apart from the element of notice, Section 4(3) of the *Fair Administrative Action Act* mandates a tribunal such as the 1<sup>st</sup> Respondent herein to afford a party an opportunity to be heard and to make representations before making an administrative action that is likely to affect the party.

197. In this regard, the Court associates with the sentiments of the court in *Republic vs the Honourable the Chief Justice of Kenya & Others Ex Parte Justice Moiyo Mataiya Ole Keiwua* Nairobi HCMCA No 1298 of 2004 in which the court held that:

“The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”

198. The right of a party to be afforded a hearing, and how that should be done, is further provided for in the *Fair Administrative Action Act* under section 4 as follows:

- “(1) (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard.”

199. While appreciating that the 1<sup>st</sup> Respondent’s manner of investigation into historical land injustices claims is more “investigative” than “adversarial,” it does not take away the need to notify any party that may be affected of a complaint about it and giving it an opportunity to be heard. Failure to do so is a grave violation of fair administrative action and renders any resultant decision a nullity.

200. As held by the Court of Appeal in *Evans Thiga Gaturu & another vs Naiposha Company Ltd & 13 Others* [2017] eKLR, a decision arrived at without affording a party a fair opportunity to be heard



cannot be allowed to stand and it matters not that the court or tribunal would have come to the same conclusion had it afforded the party a fair hearing.

201. If indeed the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.
202. In conclusion, the Court is persuaded that the investigations that culminated in the recommendations set out in the gazette notice of March 1, 2019 were vitiated by procedural impropriety and consequently constitute a nullity. In view of the foregoing, the question of whether the decision by the 1<sup>st</sup> Respondent constituted directives rather than determinations is moot.
203. From the circumstances of the case and the material placed before this court it, I am satisfied that the application in ELC JR No 3 of 2020 meets the threshold for granting of the Judicial Review Orders of certiorari and Prohibition.
204. As to the declaratory orders sought, the Court is not convinced that the same are available to the Applicants. The remedies available in judicial review proceedings are certiorari, *mandamus* and prohibition. The Court is in this respect persuaded by the position by the Court in *Republic vs Commissioner of Mines & another ex-parte Basu Mining Limited & Cortec Mining Kenya Limited & 5 others* [2015] eKLR, where the Court stated;

“Under judicial review the court’s jurisdiction is restricted to issue orders of *mandamus*, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question. As earlier stated judicial review is about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about the merit or the demerits of the decision. Accordingly, it is my holding and finding that the applicant’s application for declaratory orders within the present judicial review proceedings is misconceived and incompetent and cannot be granted.”
205. The remedy of declaration although available in judicial review reforms of 1977 in the United Kingdom is not available in Kenya where there is no similar reform expanding the traditional prerogative orders available in judicial review procedure by an order of declaration.
206. Declaration orders remains the preserve of regular civil and constitutional procedures and not judicial review procedure. Order 53 Rule 1 (1) of the *Civil Procedure Rules* still retains as available only order of *mandamus*, prohibition or certiorari.

#### **ELC JR No 4 of 2020**

207. By way of brief background, the 1<sup>st</sup> Respondent on various dates in 2018 received complaints from several groups being Gachagi Makuyu IDP, Gaichanjiru Self Help Group, Kakuzi Division Development Association, Kihinganda Self Help Group, Kituamba Kaloleni IDPs’, Gathungururu Village Ndula Resource Centre-Kanyangi Squatters, Kitoto Community IDPS and Makuyu Sisal IDPs as against Kakuzi Limited which were admitted as historical land injustice claims.
208. The complainants alleged various historical land injustices such as eviction from their ancestral land and failure to honour land exchange programmes and settlement processes.
209. On March 1, 2019, the 1<sup>st</sup> Respondent vide a notice in the Kenya Gazette published recommendations arising from historical land injustice claims which were to wit: the matter being before the High Court, the commission will pend the hearing of the historical land injustice claim until final determination is reached by the Court; that Kakuzi Limited should surrender all public utilities on their land including



schools, markets, police stations, hospitals, public roads of access, wayleaves and easements to the national and county governments as appropriate; allotments and titles to be issued for public purpose only; all leases for land held by Kakuzi Limited in Murang'a County should not be renewed until the historical land injustice claim is heard and determined; and any 999 year old leases should be converted to 99 years.

210. According to the Applicant, the aforesaid decisions offend the principles of natural justice as there were no hearings held by the 1<sup>st</sup> Respondent in respect of the claims since there were pending constitutional Petitions and that the 1<sup>st</sup> Respondent ought not to have issued any recommendations until the matters were determined by the High Court.
211. The Applicant asserted that no prior notification and documentation was issued by the 1<sup>st</sup> Respondent pertaining to the alleged public utilities and conversion of leases and that it did not have an opportunity to file its Defence in this regard; that the 1<sup>st</sup> Respondent purported to issue final recommendations before the claims were substantively heard and that the proceedings are a nullity having been conducted in the absence of any regulations.
212. In response, the 1<sup>st</sup> Respondent states that all the parties were duly invited for hearing with respect to the historical land injustice claims and the parties were duly served with the notices and all relevant documentations; that indeed on November 1, 2018, the proceedings before the commission were temporarily stopped pursuant to HCC 225 of 2018 and Petition 369 of 2018 and that the 1<sup>st</sup> Respondent ceased its proceedings.
213. According to the 1<sup>st</sup> Respondent, the orders of the court lapsed on December 3, 2018 and nothing stopped the 1<sup>st</sup> Respondent from making further inquiries with respect to the property and that the other decisions made by the 1<sup>st</sup> Respondent is in line with its roles pursuant to Section 5 of the [NLC Act](#).
214. The 3<sup>rd</sup> Respondent vide the Replying Affidavit supported the 1<sup>st</sup> Respondent's assertions that the recommendations were above board, but took a contrary stance in the submissions indicating that all the relevant parties were not afforded an opportunity to be heard. The 1<sup>st</sup> Interested Party supports the 1<sup>st</sup> Respondent's assertions that everything was above board.
215. It is asserted that the 1<sup>st</sup> Respondent had no jurisdiction to entertain the matter as stay orders had been granted against the proceedings by the High Court, whose proceedings were pending over the same issue. The Court has considered the evidence. On the October 29, 2018, the High Court in Petition No 369 of 2018 granted orders arising from an application of October 26, 2018. Of relevance is order 7 which stated;

“That pending the hearing of this Application inter-partes and determination thereof, conservatory orders be and are hereby granted staying the proceedings before the 2<sup>nd</sup> Respondent in Nairobi NLC/HLI/176/2017(Kitoto Community IDPs), NLC/HLI/170/2018(Ndula resource centre on behalf of Kinyangi Squatters & Others), NLC/HLI/168/2018(Kituamba Kaloleni IDPs), NLC/HLI/054/2017(Gathungururu Village), NLC/HLI/069/2017(Gaichanjiru Self Help Group), NLC/HLI/530/2018(Gaichagi Makuyu IDPs), NLC/HLI/049/2017(Kihinginda Self Help Group) and any other historical land injustice claims and proceedings in respect of the Applicants properties until 3<sup>rd</sup> December, 2018.”



216. The 1<sup>st</sup> Respondent admits to having received the foregoing orders and states that it ceased its proceedings in this regard. The Hansard of the November 1, 2018 indicates that the aforesaid order was the subject of the proceedings with Commissioner Tororei commenting as follows:

“Right, I think I need to bring this matter to a close; the Commission as it were is now barred from proceeding.”

217. The above notwithstanding, on February 7, 2019, the 1<sup>st</sup> Respondent issued the impugned recommendations instigating the present Motion. The 1<sup>st</sup> Respondent states that the stay was limited to historical land injustice proceedings and second, that the stay orders lapsed on 3<sup>rd</sup> December, 2018 and it was thereafter at liberty to continue with its investigations.

218. So, what are stay proceedings? The same was discussed by the Court in *R (H) vs Ashworth Special Hospital Authority* (2003) 1WLR 127, as cited by the Court in the case of *Sun Africa Hotels Limited & Another v Kenya Revenue Authority & 2 others* (2018) eKLR, where it was held that;

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

219. Looking at the orders of October 29, 2018, can it be said, as alleged, that the same were limited to the 1<sup>st</sup> Respondent’s mandate in investigating historical land injustices and as such the 1<sup>st</sup> Respondent was at liberty to make other recommendations? To answer this question, the proceedings before the 1<sup>st</sup> Respondent must be contextualized.

220. Whereas the 1<sup>st</sup> Respondent’s mandate as set out in the *NLC Act* is far reaching, the proceedings, the subject of this motion were carried out within its jurisdiction to entertain historical land injustices. In the court’s opinion, the stay order was a blanket stay on the proceedings by the 1<sup>st</sup> Respondent in respect to the complaints that were before it, and specifically for land registered in favour of the Applicant.

221. It is therefore far-fetched for the 1<sup>st</sup> Respondent to import its jurisdiction to deal with public land into proceedings on historical land injustices and claim that their mandate in this regard was unaffected by the orders. The Court opines that the 1<sup>st</sup> Respondent ought to have downed its tools with respect to the entirety of the proceedings. Having failed to do so, the court is convinced that the recommendations were ultra-vires

222. Even if the court was to accept the contention that the 1<sup>st</sup> Respondent’s recommendations were issued pursuant to its mandate with regard to the management of public land, which mandate was not stopped by the Court, it remains alive to the principle that before an administrative action is made which is likely to affect a party, the party ought to be afforded an opportunity to make representations in that regard.

223. The claim before the 1<sup>st</sup> Respondent was a historical land injustice claim in which the complainants were seeking, inter-alia, ownership of the suit properties and to be resettled thereon. If the 1<sup>st</sup>



Respondent was invoking its jurisdiction to handle public land or any other matter, the Applicant ought to have been duly notified to make representations in this respect.

224. Indeed, the fact of whether the property is public land and has utilities therein is disputed. As was held in the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14, an individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved.”
225. The same argument applies to the 1<sup>st</sup> Respondent’s contention that the stay proceedings had ceased on December 3, 2018. Upon the lapse of the same, the 1<sup>st</sup> Respondent should have set new hearing dates, and notified the Applicant of the same especially noting that the Applicant had objected to the proceedings on account of the pending High Court matters.
226. Further, even though the stay had lapsed, the matter was still sub judice as admitted in the determination. In view of the foregoing, it is the finding of the Court that the proceedings and the resulting recommendations were vitiated by illegality and procedural impropriety and are subsequently void.
227. In view of the foregoing, the questions of whether the decision by the 1<sup>st</sup> Respondent constituted directives rather than determinations are moot. The Court is satisfied that the Applicant has made a case for the grant of the Judicial Review Orders of certiorari and Prohibition.
228. As to the declaratory orders sought, the Court is not convinced that the same are available to the Applicants for the same reasons I have given in ELC JR No 3 of 2020.

#### **ELC JR No 5 of 2020**

229. In this case, the 1<sup>st</sup> Respondent received a complaint from Kimasas Farmers’ Co-operative Society against Eastern Produce Africa Limited alleging that the Area Superintendent, Mr P.G Scott, allocated them land measuring 560 acres as a gift in 1986 but the Applicant only transferred 210 acres to them and retained 340 acres. The Complaint was admitted as a historical land injustice claim.
230. On March 1, 2019, the 1<sup>st</sup> Respondent published recommendations in the Kenya Gazette Vol CXXI-No 27 to the effect that: all resultant subdivisions were done illegally and should be cancelled; LR No 9285/2 (the property) to be given to Kimasas Co-operative Society Limited; and that the Chief Land Registrar, Ministry of Lands and Settlement to implement the decision.
231. The Applicant alleges that the decision by the 1<sup>st</sup> Respondent offends the principles of natural justice because it was not afforded a fair opportunity to be heard; that no hearing was conducted by the 1<sup>st</sup> Respondent in respect of the matter, there only being a mention on July 11, 2018 and that the 1<sup>st</sup> Respondent never served the Applicant with supporting documentation in respect of the claim depriving it of an opportunity to file its Defence, all of which contravened Articles 47, 50(1) of the *Constitution* and Section 4(3) &(4) and 5 of the *Fair Administrative Action Act*.
232. The court has considered the Hansard proceedings of July 10, 2018. They indicate the presence of Mr Gitaka for the Applicant who stated inter-alia,

“...We were served with the petition documents last week on Friday and it is part of the reason why the Advocate on record could not attend. With your kind indulgence if we could get 21 days to give our written submissions in regards to the documents that have been served. But I would also like to get clarification on what has been submitted”



233. It was decided during this session that the 1<sup>st</sup> Respondent would have another session on Thursday at 10:00am. Counsel Gitaka indicated that he may have difficulty attending on the aforesaid Thursday and requested a prior date stating that..... “if they can serve the statements we can file a response prior to the attendance”
234. The matter next proceeded on July 11, 2018. Counsel Gitaka was present and indicated that he was yet to receive all the relevant documents and supporting documents to enable him file his responses. In response, Commissioner Tororei stated as follows;
- “...this is how we shall proceed, we will give eastern produce an opportunity of 21 days like we did yesterday for other issues and companies to do their response. Please so have a bit of aggressiveness to get the documents to get the documents you require in order to respond, do give us the write ups, serve the County and serve the complaints. We will give the Complaints 7 days to respond and then will advise you if you will require further information or further clarification.”
235. The Applicant was also asked to provide all the relevant information, including titles and leases. On February 7, 2019, the 1<sup>st</sup> Respondent gave its recommendation, in which it was noted that the hearing took place on 1 July 1, 2018. Under the head response, it was indicated that counsel for the Applicant was requested time to file a response but no response had been received as at the time of the report.
236. The Applicant admits to having been served with the complaint and having been invited to the hearing thereof. Indeed, the Hansard affirms the presence of counsel Gitaka for the Applicant on 10<sup>th</sup> and July 11, 2018. The main points of contention, as the Court understand them are first, that the applicant was not provided with any other documents apart from the complaint, depriving it of an opportunity to file its Defence and secondly, that no hearing was conducted by the 1<sup>st</sup> Respondent in respect of the matter, there only being a mention on July 11, 2018.
237. Beginning with the assertion that the Applicant did not have sufficient information to prepare a Defence, it is noted that counsel brought up this issue before the 1<sup>st</sup> Respondent. In response, he was asked to seek the documents he needed and was granted 21 days to file a response. While appreciating the Applicant’s rights to fair administrative action, of necessity includes the right to have the necessary information. Does it then mean that the Applicant as in this case has no part to play in getting this information?
238. The court thinks not. A reading of the proceedings makes it clear that counsel was not completely oblivious to the claims against the Applicant. If indeed, as alleged, the Applicant was not issued with the relevant documents despite the 1<sup>st</sup> Respondent’s directions to that effect, it should have written to the 1<sup>st</sup> Respondent asserting the same. No evidence in that respect has been adduced.
239. Further, apart from the documents to be served upon it, the Applicant was apart from its Defence asked to provide documents in its custody which it did not do. This lapse cannot in the court’s opinion be equated to the 1<sup>st</sup> Respondent having failed to give the Applicant a fair opportunity to be heard.
240. In determining whether or not a hearing was conducted, the Court remains alive to the fact that the 1<sup>st</sup> Respondent is a tribunal whose process is not fully adversarial. In *Kenya Revenue Authority vs Menginya Salim Murgani* Civil Appeal No 108 of 2009, the Court of Appeal delivered itself as follows:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they



achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”

241. The Courts have held that the rule of fair hearing does not mean an adversarial hearing akin to what happens in a court room. When one is invited to a meeting where a decision is made where his/her interest is likely to be affected, his presence during such meeting is sufficient evidence that he/she was afforded a hearing under the rules of natural justice.
242. In the case of *Josphat Kariuki Mutuanjara vs National Irrigation Board & 4 others* (2016) eKLR, the Court cited the case of *Union Insurance Co. of Kenya Ltd vs Ramazan Abdul Dhangi*, Civil Application No 179 of 1998 where it was held as follows:
- “The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”.
243. This position was fortified by the Court in *Republic vs National Irrigation Board & 4 others ex-parte Josphat Kariuki Mutuanjara* [2016] eKLR where the court while dealing with the National Irrigation Board proceedings stated as follows:
- “It must be appreciated that there are no rigid rules and neither does the audi alteram partem rule mean a full adversarial hearing or anything close to it like what happens in a Court of law”
244. From the above decisions, it follows that fairness does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards, nothing could be done simply, cheaply and quickly. Administrative or executive efficiency and economy should not be too easily sacrificed.
245. In the premises, the court is of the opinion that the Applicant was granted an adequate opportunity to be heard which was not utilized. As such, the Applicant cannot be heard to say otherwise. The Court finds that the Applicant herein has not proved that its constitutional rights to a fair administrative action under Article 47 and 50 of the *Constitution* and Section 4(3) and 4 of the *Fair Administrative Action Act* have been infringed, violated and/or threatened.
246. The next issue is whether the decision by the 1<sup>st</sup> Respondent was a recommendation pursuant to the Act or a determination. The Black’s Law Dictionary defines “determination” as “a final decision by a court or administrative agency.” A recommendation on the other hand is defined as a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body.
247. *In The Matter of the National Land Commission* Advisory Opinion Reference No 2 of 2014 [2015] eKLR, the Supreme Court stated as follows:
- “The words ‘recommend, advise, research, investigate, encourage, assess, monitor and oversight’ – are all actions that provide a facilitative role rather than a primary one. The context in which those words are used, presumes that there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented.”
248. In the present case, it is clear that the directives by the 1<sup>st</sup> Respondent can only be implemented by other bodies and to that end, notwithstanding the absence of the word recommend, they remain



recommendations. As such, the Court is not convinced that the decision herein was in excess of the 1<sup>st</sup> Respondents jurisdiction so as to constitute an illegality.

249. In the end, the Court finds that the Applicant has not met the threshold for the grant of the orders of certiorari and Prohibition sought.

250. In conclusion, the court makes the following final orders in respect of ELC JR Nos 3, 4 and 5 of 2020:

ELC No JR 3 of 2020:

- i. An order of certiorari be and is hereby issued to remove into this Court for purposes of being quashed and quashing, quash the Gazette notice published on the March 1, 2019 in so far as it relates to the National Land Commission recommendations dated 18<sup>th</sup> February, 2019 in so far as it relates to the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai clans, Kipsigis clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.
- ii. An order of Prohibition be and is hereby issued, prohibiting the Director of Surveys under the Ministry of Land and the County Governments of Kericho and Bomet from implementing the recommendations published in the Kenya Gazette Notice of 1<sup>st</sup> March, 2019 and dated 18<sup>th</sup> February, 2019 in respect of the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai clans, Kipsigis clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.
- iii. The 1<sup>st</sup> Respondent will pay the Applicant the costs of the application.

ELC JR No 4 of 2020:

- i. An order of certiorari is hereby issued quashing, the Gazette Notice published on the 1<sup>st</sup> March, 2019 in so far as it relates to the National Land Commission recommendations dated 18<sup>th</sup> February, 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017/ NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC.HLI/052/2017.
- ii. An order of prohibition does hereby issue, prohibiting the Director of Surveys under the Ministry of Lands and Physical Planning, the National Land Commission and the County Government of Muranga from implementing the recommendations in the Gazette Notice published on the 1<sup>st</sup> March, 2019 in so far as it relates to the National Land Commission recommendations dated the 18<sup>th</sup> February, 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017/ NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HL1/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/2017.
- iii. The 1<sup>st</sup> Respondent will pay the costs of the application



ELC No JR 5 of 2020:

- i. The Notice of Motion dated April 18, 2019 is dismissed.
- ii. the ex parte Applicant to pay the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Opiyo for the Applicant

Ms Kerubo for the Attorney General

Ms Nderitu for 1<sup>st</sup> Interested Party

Ms Kyalo h/b for peter Wanyama for 1<sup>st</sup> -20<sup>th</sup> Interested Party

Ms Chepkoriri h/b for Langat for 21<sup>st</sup> Interested party.

Mrs Kithu for Bosek for 3<sup>rd</sup> Respondent

Court Assistant - June

