



Republic v National Land Commission & 2 others; Gitau & 6 others (Interested Parties); Kipchoge Keino Trustees National Olympic Committee-Kenya & 2 others (Exparte) (Environment and Land Judicial Review Case 32 of 2018) [2023] KEELC 18374 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 32 OF 2018**

OA ANGOTE, J

JUNE 22, 2023

**IN THE MATTER OF AN APPLICATION BY THE TRUSTEES
NATIONAL OLYMPIC COMMITTEE KENYA FOR THE
JUDICIAL REVIEW ORDERS OF PROHIBITION,
CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF THE NATIONAL LAND COMMISSION
ACT NO 5 OF 2012**

AND

**IN THE MATTER OF THE LAW REFORM ACT CAP 261,
LAWS OF KENYA**

AND

**IN THE MATTER OF THE ENVIRONMENT AND LAND
COURT ACT, 2011**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, NO
4 OF 2015**

BETWEEN



REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

CHIEF LANDS REGISTRAR 3RD RESPONDENT

AND

MARION GITAU INTERESTED PARTY

AGNES KAGIRA INTERESTED PARTY

BEATRICE KANYURU INTERESTED PARTY

ROLAND KIOGORA INTERESTED PARTY

WANJIRU KIONGO INTERESTED PARTY

SYLVIA MUTHONI INTERESTED PARTY

LISA MWAKAZI INTERESTED PARTY

AND

KIPCHOGE KEINO TRUSTEES NATIONAL OLYMPIC COMMITTEE-
KENYA EXPARTE

TOM OMWOMBO EXPARTE

FRIDA SHIROYA EXPARTE

JUDGMENT

Background

1. Vide the Notice of Motion dated 25th June, 2018, the Ex-Parte Applicant (Applicant) is seeking for the following orders:
 - a. That an order of *Certiorari* do issue removing into this Court for purposes of being quashed the decision by the 1st Respondent, the National Land Commission made on the 20th March, 2018 declaring that the *Ex-parte* Applicant, the Registered Trustees National Olympic Committee-Kenya Title to L.R No 209/15290 (Original No 209/14151/2) Nairobi as illegal, fraudulent and hereby revoked and a new grant be prepared in the name of the Interested Parties herein, Marion Gitau, Agnes Kagira, Beatrice Kanyuru, Roland Kiogora, Wanjiru Kiongo, Sylvia Muthoni and Lisa Mwakazi(the Plaintiff in NBI ELC Case No 120 of 2008).
 - b. That an order of *Certiorari* do issue to quash the decision of the 1st Respondent to review the *Ex-parte* Applicant grant/title to the L.R No 209/15290(Original 209/14151/2) and directing that a new grant be prepared in the names of the Interested Parties Marion Gitau & Others yet the 1st Respondents mandate to review grants had come to an end by dint of the provisions of Section 14 of the [National Land Commission Act](#), 2012 and therefore the 1st Respondent was exercising non-existent powers or abuse of office and their determination of the 20th March, 2018 is for quashing vide a *Certiorari* order.



- c. That an order of *Mandamus* do issue directed to the 1st , 2nd and 3rd Respondents to rescind, to remove and/or to vary the decision made on the 20th day of March, 2018 revoking the Registered Trustees National Olympic-Committee-Kenya Title to L.R No 209/15290(Original No 200/14151/2) in its place and reinstate the said deed in to the register of titles and the proceedings leading to the decision of the 20th March, 2018 be vacated, erased and deleted from the 1st, 2nd and 3rd Respondents records.
 - d. That the costs of the Application be granted to *ex-parte* Applicants.
2. The application is premised on the grounds on the face of the Motion and supported by the Statutory Statement and Verifying Affidavit of Francis K Paul, one of the office bearers of the 1st Respondent, duly authorized to swear the Affidavit on behalf of the Applicant.
 3. The Applicant's official deponed that the Applicant was issued with grant No I.R No 85089, for a term of 99 years from 1st December, 1998 on 13th December, 2000; that sometime in the year 2003, it was discovered that part of L.R No 209/14151-Langata was encroaching on the proposed by-pass and that a re-survey was done with the authority of the Commissioner of Lands.
 4. According to the Applicant, the issuance of a new title could not be undertaken as there were missing titles; that in the midst of the surrender and the re-survey, the grant registered as I.R 85089/1 was lost upon which a provisional title was issued by the Registrar of Titles and that a re-survey was completed and a new L.R No 209/15280 issued.
 5. It is the Applicant's case that on 15th December, 2015, the Registrar of Titles issued the Applicant with a provisional certificate the Grant registered as I.R 85089/1 having been lost; that the Applicant signed a surrender of the road reserve on 18th September, 2017 and that on 21st September, 2017, the Certificate of Title for I.R 189592 for a term of 99 years was processed and issued to the Applicants' Trustees pursuant to a sub-division of I.R 85089/1, L.R No 209/15290 (original title 209/14151/2) as delineated on land survey plan number 250993.
 6. It was deponed that sometime in the year 2008, the Interested Parties instituted a suit against the Applicant in ELC 120 of 2008 seeking inter-alia a declaration that they are the lawful owners of the suit property; that the matter was part heard having proceeded and the Interested Parties (the Plaintiffs in the suit) having been examined and awaiting cross-examination and that the Interested Parties filed an application to amend the suit which is pending.
 7. According to the Applicant, during the pendency of the proceedings, the Interested Parties filed for a review of the Applicants' grant, L.R No 209/15290, before the National Land Commission, the 1st Respondent; that the 1st Respondent delved into the matter and made a determination declaring the Applicant's title fraudulent without inviting the Applicant and/or notifying it of the proceedings and that it is apparent from the foregoing that the Applicant was not reviewing a grant of disposition in land but was investigating a dispute between two private parties over land ownership.
 8. In purporting to review the grant, it was deposed, the 1st Respondent acted ultra vires Section 14 of the *NLC Act* and Article 68 of the *Constitution*; that vide its decision, the Applicant purported to revoke the Applicant's title which power it does not have; that the 1st Respondent's determination of 20th March, 2018 was tainted with illegality and is hence void and that where a matter is pending before the Court, the 1st Respondent cannot undertake parallel proceedings as it purported to do.
 9. It was deposed that in any event, the 1st Respondent's mandate in reviewing grants had since expired; that at the time of making the determination, the 1st Respondent was acting in excess of its powers



- and that the revocation of the grant pursuant to the decision by the 1st Respondent has been gazetted causing the Applicant prejudice.
10. The 1st Respondent through its acting Director, Legal Affairs and Enforcement, deposed that the 1st Respondent is an independent commission established pursuant to Article 67 (1) of the [Constitution](#) and operationalized by the [National Land Commission Act](#) and that pursuant to Section 14 of the [National Land Commission Act](#), the 1st Respondent has the mandate to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint to establish its legality and propriety.
 11. It was deposed by the 1st Respondent's acting Director, Legal Affairs and Enforcement that this process entails investigating and analyzing the process through which the public land was converted to private; that vide a complaint from the Interested Parties, the 1st Respondent was asked to review the propriety of Land Reference No 209/15290 (Original No 209/14151/2) and that on the 10th August, 2016, all the parties were invited for hearings on 8th September, 9th September, 14th October, 1st December, 2nd December 2016 and January 2017 respectively at the 1st Respondents offices.
 12. According to the 1st Respondent's acting Director, Legal Affairs and Enforcement, despite adequate prior notice, the Applicant vide their letters of 16th August, 2016, 5th October, 2016 and 9th February, 2017 expressed their intention not to participate in the proceedings and indeed failed to participate and/or furnish any documents to assist the 1st Respondent make an informed decision and that on 20th March, 2018, the 1st Respondent after having reviewed the legality of the grant prepared a determination and vide gazette notice dated 29th May, 2018 revoked the Applicant's title deed for having been irregularly acquired.
 13. It is the 1st Respondent's case that its actions cannot be said to be unconstitutional because alongside the court, it has the mandate to determine the legality of grants of dispositions of public land and that it is apparent that the Applicant is forum shopping after a just determination by the 1st Respondent.
 14. The 1st Interested Party deposed that sometime in 1999, she, initially with the 2nd Interested Party but later on with the other Interested Parties, applied to the Minister of Lands for the allocation of a parcel of land situated in the Langata Area of Nairobi, then an un-surveyed Government Land and that after all due diligence and issuance of all relevant approvals, they were on 1st July, 1999 issued with a Letter of Allocation for the aforesaid parcel of land as an un-surveyed commercial plot in Langata under L.R No 79900/111/25 measuring approximately 2.18Ha.
 15. It was deposed by the 1st Interested Party that upon allocation of the suit property, the same was surveyed by the Survey Department in the Ministry of Lands and Settlement and a Deed Plan issued being Deed Plan No 233068 and given registration L.R No 209/14309 and that upon completion of all the necessary pre-requisites, they paid Kshs 965,000 to the Ministry of Lands to cover for survey, approvals, planning, stamp duty, rent and stamp premium.
 16. It was her deposition that despite numerous trips to the Ministry of Lands, they were not issued with the title; that sometime in 2000, they discovered that unknown persons were clandestinely scheming to cause a survey of their property with a view to obtaining titles thereto and that they informed the Commissioner of Lands of the same and investigations revealed that there had been attempts by the Applicant, in cahoots with corrupt officials at the Ministry of Lands, to resurvey the property with a view of generating illegal Deed Plans for the acquisition of fraudulent Title Deeds.
 17. According to the Interested Parties, whereas the title issued to the Applicant is purported to have been issued in 1998, its features suggest it was issued in 2000 as the signatory is the same as in the Interested



- Parties' Letter of Allotment dated 6th December, 2000; that the Applicant has two conflicting receipts being E6808 and E680875 among other examples of fraud and that they filed ELC No 120 of 2008 after their Counsel withdrew Case No 1370 of 2005 that had been lodged at the High Court.
18. It is the Interested Parties' case that due to numerous adjournments in the ELC Case, the parties on the advice of Counsel moved the National Land Commission in 2016 to review the grant of L.R 209/15290 which was initially their parcel L.R No 209/14309; that the Commission duly gave a notice of the hearing to all the parties; that the pendency of ELC 120 of 2008 was disclosed to the Commission and the same was raised as a Preliminary Objection by Counsel for the Applicant which objection was dismissed and that flowing from the foregoing, their Counsel sought for a stay of proceedings in ELC 120 of 2008.
 19. It was deposed by the 1st Interested Party that the Commission noted that the Applicant's objection to stay proceedings was a ploy to further delay resolution of the matter and directed that its findings would be filed at the ELC Court and further that there was no danger of conflicting decisions as not only had the matter not been heard but nothing would prevent the 1st Respondent from making a finding that would later be filed in Court.
 20. According to the Interested Parties, despite numerous notices and service of pleadings, the Applicant's Advocate declined to appear and file any pleadings before the Commission; that the Commission duly adjudicated upon the complaint and made a finding in their favour finding that L.R No 209/15290 was illegal and ordered that it be revoked and a new grant prepared in their names, which decision was published in a special issue of the Kenya Gazette dated 9th November, 2018 and that while ELC 120 of 2008 and the complaint before the Commission were ongoing and a prohibition registered against the title, the Applicant proceeded to process title L.R No 209/15290 which is one and the same as L.R No 209/14309.
 21. It was deposed that the Commissioner of Lands, the National Land Commission, the Directorate of Criminal Investigations and the Director of Surveys all found the Applicant's title to have been irregularly acquired; that the 1st Respondent was duly vested with the mandate to determine the dispute pursuant to Section 14 (1) of the NLC Act which it exercised in conformity with Article 50 of the Constitution and that there has been no demonstration to the contrary.
 22. According to the Interested Party, they have reliable information that the Applicant has embarked on selling the suit property to third parties who have conspired to charge the suit property with Sidian Bank; that the Applicant has borrowed the sum of Kshs 400,000,000/= from Sidian Bank to construct a building on the suit property and that the Applicant was terminated from Kenya Athletics Council for disputes regarding its financial integrity.
 23. The Interested Parties also filed a Notice of Preliminary Objection dated the 21st June, 2021 based on the grounds that;
 - i. The Applicant has illegally and wrongfully joined parties to these proceedings who were never parties to the proceedings and the pleadings before the National Land Commission.
 - ii. The Pleadings by the Applicant are defective and highly prejudicial to the Interested Parties on account of the irregular inclusion and unlawful joinder of the Registrar of Titles and the Chief Land Registrar.
 - iii. The inclusion of the parties has been done by the Applicant un-procedurally without seeking leave of the Honourable Court.



- iv. The Applicant has irregularly and mischievously omitted to include the office of the Honourable Attorney General in these proceedings which office was at all material times a party and ably represented by a State Counsel in the proceedings conducted before the National Land Commission.
 - v. The Application is both premature and fatally defective as the *ex-parte* Applicant has failed to comply with Sections 12,13 and 13A of the [Government Proceedings Act](#)(Cap 40) in that;
 - a. Failure to join the Attorney General as a co-Respondent herein in contravention of the provisions of Section 12 as read with Section 2(3) of the [Government Proceedings Act](#), both of which are couched in mandatory terms.
 - b. There is no evidence of due service of the documents herein upon the Honourable Attorney General which is also mandatory under Section 13 of the [Government Proceedings Act](#); and
 - c. The Application has been instituted without the mandatory notice to the Honourable Attorney General, contrary to the mandatory requirements of Section 13A of the [Government Proceedings Act](#).
 - vi. That the Judicial Review Application is defective in this regard and ought to be struck out with costs.
24. In response to the Affidavit of the Interested Party, the Applicant's official filed a Supplementary Affidavit in which he deposed that the Affidavit by the Interested Parties alludes to matters outside the realm of judicial review jurisdiction of this Court which is primarily concerned with the 1st Respondent's decision making process and that the Interested Parties rushed to the 1st Respondent notwithstanding the pendency of proceedings before the ELC Court and after their application for stay of proceedings in the ELC Court was declined.
25. It was deposed that there is no affidavit of service proving service of the notice of hearings to the Applicant; that the application for stay having been dismissed by the Court, the 1st Respondent could not superintend the same; that no evidence has been rendered showing how the 1st Respondent conducted hearings, took testimonies and evidence leading up to its determination and that issues regarding the fiscal integrity of the Applicant are unfounded defamatory allegations.
26. The 1st Respondent and the Interested Parties filed Further Affidavits which I have considered.

Submissions

27. The Applicant's advocate submitted that the decision by the 1st Respondent was tainted with illegality and hence void; that as expressed by the Court in Robert Mutiso Lelli(supra), [Republic v National Land Commission and 2 Others Ex-parte Magnate Ventures](#), the 1st Respondent cannot revoke titles where an inquiry establishes that such titles are unlawfully or illegally acquired and that the 1st Respondent had no jurisdiction to entertain a complaint where the matter was pending before Court.
28. According to counsel, having been made aware of the proceedings and the Court having declined to stay the same, the 1st Respondent ought to have downed its tools; that the Interested Parties only withdrew the case after they received their "title" from the 1st Respondent; that it is clear that there was



procedural impropriety as there is no evidence of service of the hearing notices which were indeed not served and that the Applicant was unaware of the proceedings.

29. Counsel for the Applicant submitted that there was no evidence of how the hearings were conducted, testimonies received, submissions and analysis leading to the determination of the 1st Respondent contrary to Articles 47, 48 and 50(1) of the Constitution and Section 19 Schedule 4(Section 5) of the National Land Commission Act and that the Applicant was not afforded a fair hearing. Counsel relied on numerous authorities which I have considered.
30. The 1st Respondent's counsel submitted that the 1st Respondent is established by Article 67 (1) of the Constitution; that Article 67(3) provides that the 1st Respondent may perform any functions as prescribed by national legislation and that Section 14 of the Act provides that subject to Article 68 (c) (v) of the Constitution, the Commission shall, within five years of the commencement of the Act, on its own motion or upon a complaint by the national or county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
31. It was submitted that contrary to the allegations by the Applicant, it is clear that the 1st Respondent was seized of the mandate to review all grants and dispositions of public land with the aim of establishing their propriety or legality within the five (5) years granted in the Constitution and where land has been registered as private, this can only be done by investigating the process by which the public land was converted to private land.
32. It was submitted by Counsel that the administrative decision that the 1st Respondent rendered was in conformity with the rules of natural justice and should therefore not be interfered with. Counsel relied on several authorities which I have considered.
33. The Interested Parties' advocate submitted that his clients sought for a stay of proceedings in the ELC Court; that the Court declined to grant the stay but stated that the Applicant was at liberty to pursue the forum best suited for their interests; that in so doing, the Court did not impugn the 1st Respondents jurisdiction to adjudicate over the matter and that the Applicant filed a Preliminary Objection before the 1st Respondent challenging its jurisdiction due to the pendency of ELC 120 of 2008 but the same was dismissed.
34. It was submitted that it is not for the Court to stand in the way of a quasi-judicial body lawfully discharging its function; that noting that the matter had not been conclusively determined, the Interested Parties wholly withdrew the ELC suit on 13th May, 2021 and that the 1st Respondent has explained the erroneous discrepancy between the determination of 20th March, 2018 and 28th April, 2017, which error has since been corrected.
35. The Applicant filed supplementary submissions in response to the 1st Respondent's submissions and the Interested Parties' submissions which the court has considered. Counsel submitted that by the time the Commission rendered its determination, its mandate had since expired and any determination was void ab initio. Counsel relied on the case of Macfoy v United Africa Co Ltd (1961)3ALL 1169 where the Court emphasized that if an act is void, it is in law a nullity.
36. It was submitted that the Interested parties' arguments are best suited for a civil case which has the jurisdiction to determine issues of fraud and that it is apparent that the determination by the Commission was backdated which constitutes a serious issue that cannot be said to be a procedural technicality and cannot be said to constitute a mistake by Counsel as alleged.



Analysis and Determination

37. Having considered the application, the Affidavits in support and against and the submissions thereto, the issues that arise for determination are;
- i. Whether the Preliminary Objection is competent.
 - ii. Whether the *Ex-Parte* Applicant has met the grounds or threshold for granting of Judicial Review Orders of Certiorari and Mandamus.
38. The threshold of a Preliminary Objection was set out by the Court of Appeal in the *locus classicus* case of *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that:
- “...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
39. Newbold, P further held as follows:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
40. The Supreme Court in the case of [*Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others*](#), Petition No. 10 OF 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa case stating as follows:
- “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
41. The Interested Parties’ objection concerns the issue of joinder or lack thereof of parties. The Interested Parties contend that, first, the 2nd and 3rd Respondents herein are not proper parties not having been parties in the proceedings before the 1st Respondent and second, that the Attorney General who ought to have been a party was omitted and such omission contravenes Sections 12, 13 and 13A of the [*Government Proceedings Act*](#).
42. It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks



jurisdiction to hear the suit, and, where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment, will amount to a nullity no matter how well reasoned.

43. While the importance of parties to a suit is critical, a question raised as to the non-joinder or misjoinder of parties will ordinarily call for probing of evidence as it is necessary to understand why a party has decided to join one party at the expense of another and vice versa and prove as to why a party who is alleged to have been wrongfully joined is a necessary party. It is not, as a matter of legal principle, a true preliminary objection.
44. Even if the Court were to take the position that the questions of non-joinder and misjoinder constitute pure questions of law, it is noted that as a general principle, a suit ought not to be defeated on account of joinder or misjoinder of parties if the omission does not cause any prejudice. This was the position adopted in *Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers v Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another* Civil Appeal (Application) No. Nai. 281 of 2005 in which the Court of Appeal stated as follows:
- “Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...”
45. The Interested Parties assert that the 2nd and 3rd Respondents were not parties before the 1st Respondent and that the Attorney General who was a party therein is not a party herein.
46. What is before me is a judicial review application in which the Applicant is seeking to impugn the process leading up to the determination by the 1st Respondent. What is before this court is not an appeal against the decision of the 1st Respondent so as to invite arguments that a party herein was not a party before the 1st Respondent.
47. In any event, looking at the pleadings, it is apparent that the 3rd Respondent, the Chief Land Registrar, was a party, albeit represented by the Attorney General. The fact that it is the Chief Land Registrar who is now named as a party and not the Attorney General does not cause any prejudice. As regards the 2nd Respondent, whereas it was not a party before the Commission, it is pursuant to the Registration of Titles Act, an administrative arm responsible for the registration of titles. Its presence in these proceedings causes no prejudice.
48. Having found that the failure to enjoin the Attorney General in these proceedings is not fatal, the issue of the requirement for notice and service of documents on the AG is moot. In any event, the requirement for notice under Section 13A of the *Government Proceedings Act* has since been declared unconstitutional. The Court of Appeal in *Council of Governors & 5 Others v The Senate & Another* [2019] eKLR confirmed the above position when it held as follows:
- “Next, we turn to whether failure to serve a 30 days notice as required by Section 13A of the *Government Proceedings Act* rendered the suit incompetent. Our view in respect of counsels’ assertion that the declaration by Majanja, J in the case of *Kenya Bus Service Ltd & Another Minister for Transport & 2 Others (Supra)*, that the provision was unconstitutional is that, much as this may have been the case, the decision has not been overturned on appeal. It therefore remains a valid decision, and courts are at liberty to cite it with approval, as was in the case of *Joseph Nyamamba versus ILR* [2015]eKLR where this court endorsed the reasoning and holding in that case. This being a decision of this court, though differently constituted, we see no reasons to depart from that decision, and therefore we find that the failure to comply with Section 13 A did not render the suit incompetent.”
49. In the end, the Preliminary Objection fails.



50. The Applicant seeks the judicial review orders of Certiorari and Mandamus. Before venturing into a discussion as to whether the Applicant has established valid grounds for the grant of the orders sought, a brief discussion on Judicial Review is necessary.
51. Judicial Review has its foundation in Sections 8 and 9 of the [Law Reform Act](#) which constituted the substantive basis for judicial review of administrative actions on the one hand, and, Order 53 of the [Civil Procedure Rules](#) which was the procedural basis of judicial review of administrative actions on the other hand. Upon the promulgation of the [Constitution](#) of Kenya in 2010, Article 47 of the [Constitution](#) introduced the provisions of fair administration of justice and later on the Fair Administration of Actions Act of 2015, which is the statutory framework governing Judicial Review and the Administrative law.
52. Section 4 of the Fair Administrative Actions Act 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.
53. At the outset, it must be appreciated that Judicial review is concerned with the decision making process and not with the merit of the decision. This position was expressed by the Supreme Court in [Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy](#) [2014] eKLR as follows:
- “(161) 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.”
54. Similarly, the Court of Appeal in [OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited \(Consortium\) v 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”.
55. 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.



56. The Applicants’ claim arises from the determination by the 1st Respondent in reviewing the legality of the grant of the subject property. As such, the Court will undertake a brief discussion on the 1st Respondent’s role in this regard.
57. The 1st 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-
.....
 - (3) The National Land Commission may perform any other functions prescribed by national legislation.
58. Article 68 c(v) of the Constitution provides that Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.
59. Pursuant to Article 68 aforesaid, Parliament enacted the National Land Commission Act. Section 14(1) of the Act tasks the 1st Respondent with the mandate of reviewing all grants and dispositions of public land. The said Section states as follows:
- “ 14. Review of grants and dispositions:
- (1) Subject to Article 68 (c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
 - (2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).
 - (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
 - (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
 - (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.
 - (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.



(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

60. The Applicant herein is seeking to impugn the determination by the 1st Respondent in finding that its title was illegally and unprocedurally acquired and calling for the revocation of the same. The Applicant claims that the decision of the 1st Respondent is tainted with illegality and procedural impropriety.
61. The Applicant asserts that the decision of the 1st Respondent was ultra vires because, first, it was made outside the 1st Respondent’s statutory mandated timelines, second, it was made during the pendency of proceedings in court and lastly, that through the determination, the 1st Respondent have waded into a dispute over private land and have purported to revoke the Applicant’s title to the property which exceeds the jurisdiction donated to it under Section 14 of the NLC Act.
62. Pursuant to Section 14 of the National Land Commission Act, the 1st Respondent’s mandate to review grants and dispositions in land was for a period of 5 years. This position is admitted by the 1st Respondent. As the date of commencement of the Act was 2nd May, 2012, it follows that the 1st Respondent’s mandate in this respect ended on 1st May, 2017.
63. The determination relied on by the Applicant is dated 20th March, 2018, clearly outside the stipulated timelines. However, it has been argued by the 1st Respondent and the Interested Parties that the determination was actually made on 28th April, 2017 and that the date of 20th March, 2018 is erroneous. The Applicant maintains that the determination was rendered in 2018 and that the 1st Respondent is up to mischief in alleging otherwise.
64. The Court has keenly considered the evidence in this respect. The Court has been shown the determination of 20th March, 2018 and a letter communicating the same to the parties of an even date. If the date indicated in the decision was erroneous as alleged, what of the letter dated 23rd January, 2018 by the 1st Respondent to the Chief Lands Registrar, directing that a restriction be placed on L.R 209/15290 because the Commission is still investigating the propriety of the title?
65. And further, why is it that the amended complaint was filed by the Interested Parties on 12th January, 2018? Is this possible in light of the 1st Respondent’s assertions that the decision had already been made in 2017? Further the gazette notice is dated 9th November, 2018.
66. The Court is not convinced that the determination the subject of this suit was rendered in 2017. Rather, there is an unfortunate attempt to hoodwink the Court in this regard. The determination herein was rendered on 20th March, 2018, which was not a valid determination as the 1st Respondent’s mandate in this respect had lapsed.
67. It is not in doubt that prior to the filing of the complaint before the 1st Respondent in 2016, the Interested Parties had instituted ELC 120 of 2008. It also not in dispute that the claim in court revolved around the legitimacy of the title held by the Applicant. The question that lends itself is whether the 1st Respondent could in the circumstances entertain the matter as it purported to do.
68. The question of the legitimacy of parallel proceedings in Court vis a vis the Commission has been the subject of discourse. In the case of Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR, the court persuasively held thus;

“Once there is a suit pending before a competent court and the NLC or its predecessor is a party, and the proceedings are either pending determination or have been fully determined



by that court, the NLC cannot purport to hear and determine an inquiry touching on the same dispute.

Therefore, whereas I need not over emphasize that the National Land Commission has power under Section 14 of the *National Land Commission Act* derived from Article 68 of the *Constitution* to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute.

It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court's jurisdiction by taking upon itself the mandate of hearing and determining the dispute.”

69. The Court concurs with this position. It is noted that an application for stay of proceedings before the Court was declined, with the Court directing the Interested Party to select a forum best suited for its needs and pursue the same to its end.
70. Instead, the Interested Parties proceeded with the complaint at the Commission while the case in court remained alive, only withdrawing the case long after the 1st Respondent had rendered its decision. After the Court declined to stay its proceedings, it was not open to the 1st Respondent to proceed with the same, before the matter was withdrawn from the court.
71. The 1st Respondent cannot in taking up a dispute seized by the Court claim to be doing so in an attempt to aid the Court reach a just determination. The Court agrees that the 1st Respondents action in this regard was illegal.
72. The Applicant also claims that the 1st Respondent, rather than determine the propriety of the grant and disposition of land, ventured into a land dispute and in so doing purported to revoke the title held by the Applicant, which jurisdiction it does not have. As aforesaid, the 1st Respondents mandate to review grants is found in Section 14 of the *NLC Act*. Subsection 14(5) provides that where the Commission finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.
73. The determination of 20th March, 2018 reads as follows; The Grant for L.R No 209/15290 held by the Trustees of NOCK is illegal and fraudulent and is hereby revoked. A new grant should be prepared in the name of Marian Gitau and Others The Chief Land Registrar is directed to implement this determination.
74. The gazette notice equally reads; “The Grant for L.R No 209/15290 held by the Trustees of NOCK is illegal and fraudulent and is hereby revoked.”
75. It appears from the foregoing that the 1st Respondent, rather than recommend for the revocation of the title, purported to revoke the same and directed the Chief Land Registrar to implement its decision. This was improper and tainted with illegality.
76. The next issue is whether the investigations leading to the determination by the 1st Respondent was irrational and/or tainted with procedural irregularity. According to the Applicant, the investigations violated its rights to a fair hearing as they were not notified of any proceedings and subsequently not given an opportunity to participate therein and that there is no evidence of the manner in which the review hearings were conducted.



77. In contrast, the 1st Respondent and the Interested Parties assert that all the Interested Parties were duly notified of the proceedings vide the letter dated 10th August, 2016; that despite prior adequate notice, the Applicant failed to attend or in any manner participate in the proceedings and that the proceedings were above board and the Applicant's rights were not violated in this regard.

78. One of the pillars of the right to fair administrative action is the concept of natural justice, which was surmised by the Court of Appeal in *The Judicial Service Commission v Hon. Mr. Justice Mbalu Mutava & another* Civil Appeal No. 52 of 2014 as follows:

“... 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.”

79. One of the core pillars of natural justice is the right to fair hearing. This is provided for under Article 50 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.”



80. This right was extensively discussed by the Supreme Court in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, where the court held as follows:

“ 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”

81. 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.

82. 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 v Canada (Minister of Citizenship & Immigration)* 2 S.C.R. 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.”

83. The Court has considered the evidence in this regard. The 1st Respondent has adduced the letter dated 10th August, 2016 inviting the parties for a hearing before it. On the 16th August, 2016, Counsel for the Applicant wrote a letter in response indicating that they would require time to seek comprehensive instructions.

84. Vide another letter dated 5th October, 2016, the Applicant wrote to the 1st Respondent stating that it had yet to obtain instructions. It is apparent from the foregoing that the Applicant was well aware of the intended proceedings and cannot be heard to say that that it had no notice of the same.

85. The next question is whether indeed the 1st Respondent conducted any hearing before making its determination. In determining whether or not a hearing was conducted, the Court remains alive to the fact that the 1st Respondent is a quasi-judicial body whose process is not fully adversarial. In *Kenya Revenue Authority v 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.”

86. The Applicant states that no evidence has been adduced regarding the manner in which the 1st Respondent conducted its proceedings, the evidence and testimonies adduced and the considerations that informed the 1st Respondent in reaching its determination.
87. Whereas the Court has rejected the Applicant’s contention that it was not given notice of the hearing, the Court cannot say with certainty whether any such hearing took place. This is so because no minutes or proceedings of the 1st Respondent have been availed with respect to the subject inquiry. While stating that the 1st Respondent’s proceedings are captured in the Hansard, a copy of the same was not adduced.
88. In exercising its judicial review jurisdiction, this Court is concerned not with the merits of the decision, but the process by which that decision was arrived at. Where a party claims that it was not accorded an opportunity to be heard, it is upon the party who claims that sufficient opportunity was accorded to the other party, to demonstrate that indeed due process was followed in arriving at the impugned decision.
89. In this case, in the absence of proceedings of the 1st Respondent showing how the decision to revoke the Applicant’s title was arrived at, the Court has no option but to find and hold that there was no hearing. That being the case, the Applicant cannot be faulted in claiming that they were not accorded a fair hearing.
90. In conclusion, the Court is persuaded that the proceedings that culminated in the determination of 20th March, 2018 were vitiated by illegality and procedural impropriety. To this end, the Court finds that the Applicant has made out a case for the grant of Judicial Review orders sought and proceeds to grant the same as follows:
 - a. An order of *Certiorari* does hereby issue removing into this Court for purposes of being quashed the decision by the 1st Respondent, the National Land Commission, made on 20th March, 2018 declaring that the *Ex-parte* Applicant, the Registered Trustees National Olympic Committee-Kenya Title to the L.R No 209/15290(Original No 209/14151/2) Nairobi as illegal, fraudulent and hereby revoked and a new grant be prepared in the name of the Interested parties herein, Marion Gitau, Agnes Kagira, Beatrice Kanyuru, Roland Kiogora, Wanjiru Kiongo, Sylvia Muthoni and Lisa Mwakazi(the Plaintiff in NBI ELC Case No 120 of 2008).
 - b. An order of *Certiorari* does hereby issue quashing the decision of the 1st Respondent to review the *Ex-parte* Applicant grant/title to the L.R No 209/15290(Original 209/14151/2) and directing that a new grant be prepared in the names of the Interested Parties Marion Gitau & Others.
 - c. An order of *Mandamus* does hereby issue directed to the 1st, 2nd and 3rd Respondents to rescind the decision made on 20th day of March, 2018 revoking the Registered Trustees National Olympic-Committee-Kenya Title to L.R No 209/15290(Original No 200/14151/2) and in its place reinstate the said deed in to the register of titles and the proceedings leading to the decision of 20th March, 2018 be vacated, erased and deleted from the 1st, 2nd and 3rd Respondents’ records.
 - d. The costs of the Application shall be borne by the 1st Respondent and the Interested Parties.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF JUNE, 2023.



O. A. ANGOTE

JUDGE

In the presence of;

Mr. Allan Kamau for Attorney General

Mr. Martin for Arusei for Applicants.

Court Assistant - Tracy

