REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 318 OF 2016

(AS CONSOLIDATED WITH PETITION NO. 627 OF 2014)

GRACE JESIRE LAGAT.....PETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

ELIJAH AWUONDO MUMBO.....1ST INTERESTED PARTY

CHARLES NYAUNCHO NYANYUKI.....2ND INTERESTED PARTY

JUDGMENT

1. The Petitioner herein, who describes herself as Kenyan citizen claims that she is the duly registered proprietor of all that parcel of land known as L.R. No. 209/14843 (hereinafter referred to as the **"suit property"**) having been issued with an allotment letter dated 7th December, 1998. She further contends that upon paying the requisite fees in accordance with the allotment letter, a grant was duly processed but that she was on 8th January 2002 erroneously issued with a title relating to L.R No. 209/14844 instead of L.R No. 209/14843. She further contends that she only discovered the error after the conclusion of HCCC No. 48 "A" of 2007 wherein one Mr. Shambi, who was at the time was the registered proprietor of L.R No. 209/14844 and acknowledging the Petitioner as the duly registered proprietor of L.R No. 209/14843 had filed a suit to rectify the error in the grant.

2. The petitioner states that she on 25th October 2012 requested the Commissioner of Lands to process the deed plan for LR No. 209/14843 and that she was thereafter issued with a Certificate of Title and lease dated 21st November, 2014. She further avers that in a surprising turn of events, the 1st Respondent vide its decision dated 23rd May, 2016 made a determination to the effect that the petitioner's title had been acquired in an unlawful manner and directed the Chief Registrar of Lands to cancel the certificate of title and that the same be reverted to the Housing Directorate for development of Civil Servants Housing.

3. The Petitioner contends that she did not receive any formal communication from the Respondents and that she was not invited to attend any meeting for review in respect to the suit property. She states that she later learnt that the decision to revoke the title to the suit property was precipitated by complaints emanating from the Directorate of Housing and from the Interested Parties herein. It is her contention that the 1st Respondent cannot purport to revoke a title without following due process and without regard to the principles of natural justice. She therefore filed the instant petition against the Respondents wherein she seeks the following reliefs:

> ***a) A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), (2) (a), (3) (b) (i), 47(1) and (2) of the Constitution of Kenya, 2010 have been contravened and infringed upon by the Respondent herein.***
>
> ***b) An order of CERTIORARI to remove into this Honorable Court and quash the decision dated 23rd May, 2016.***
>
> ***c) An order of CERTIORARI to remove into this Honourable Court and quash the decision dated 23rd May, 2016 declaring the allocation of L.R No. 209/14843 as illegal and unlawfully acquired.***

d) An order of CERTIORARI to remove into this Honourable Court and quash the decision and recommendation dated 23rd May, 2016 directed to the Land Registrar, 2nd Respondent herein to effect the cancellation of the Certificate of title registered as I.R No. 159268 in respect of L.R No. 209/14483.

e) A conservatory order in the nature of permanent injunction directed towards the Respondent restricting/prohibiting the Respondent, their agents, officers and any person acting under them from interfering in whatever nature with the quiet possession by the Petitioner of all land parcel known as L.R 209/14843 situated along Matumbato Road in Nairobi.

f) An order of CERTIORARI bringing into this court for the purposes of being quashed the proceedings leading to and determination and revocation of the Certificate of title registered as I.R No. 159268 in respect of L.R No. 209/14843.

g) An order of PROHIBITION to issue as against the Respondent restraining themselves their agents and appointees from evicting the Petitioner herein.

h) A DECLARATION that the Petitioner's rights under Article 47 of the Constitution have been infringed and threatened with violation by Respondent and that in the discharge of its statutory a mandate the Respondent cannot act in a manner that infringes, violates or denies the Petitioner her rights to fair administrative action.

i) A DECLARATION that the Respondent conduct of the review process and proceedings of 29th September, 2015 in respect of revocation of the certificate of title registered as I.R No. 159268 in respect of L.R No. 209/14843 did not meet the constitutional and administrative threshold of fairness.

j) An order be and hereby issued restraining the Respondent, its agents from harassing or interfering with the Petitioner in any manner whatsoever.

k) A DECALARTION that the Petitioner's right to fair administrative action were violated by the Respondents.

l) An order do issue declaring the entire process of review be declared null and void for being discriminative and not adhering to the well-known principles of natural justice.

m) Costs be borne by the Respondent.

n) General, exemplary and aggravated damages under Article 23(3)(e) of the Constitution of Keya 2010 for the unconstitutional conduct of the Respondent.

o) Any other orders and directions that this Honorable Court may consider appropriate in the circumstances.

p) Costs of this Petition be borne by the 1st and 3rd Respondents.

The 1st Respondent's Case

4. The 1st Respondent opposed the petition through the Replying affidavit sworn by **Brian Ikol** who deposes that in addition to the functions donated to the 1st respondent by the constitution, the 1st Respondent is mandated under Section 14 of the National Land Commission Act to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establishing their legality or propriety. He states that the 1st Respondent therefore operates as quasi-judicial body within the full meaning of Article 169(1) of Constitution and that the review of grants and disposition of public land requires the 1st Respondent to analyze the process under which public land was converted to private land and making findings as to the legality of grants in question.

5. He further deposes that the 1st Respondent, had by way of complaints emanating from the Directorate of Housing and the Interested Parties herein been informed that a parcel of land being L.R No. 209/14843 reserved for Government Housing, had been allocated to the Petitioner herein under unclear circumstances thereby prompting it to issue a public notice in the local dailies with nationwide circulation inviting all interested parties for a hearing on 29th September, 2015 at the 1st Respondent's offices with a view of establishing the legality of the title documents over parcels of land published in the said dailies.

6. Mr. Ikol further deposes that the petitioner, having disregarded the notices published by the 1st Respondent inviting interested parties to their hearings, the petitioner could not claim that the provisions of Article 50 of the Constitution had not been complied with in arriving at the impugned decision of 23rd May, 2016.

The 1st & 2nd Interested Parties' Case

7. The Interested Parties opposed the petition through the replying affidavit of one Elijah Mumbo who avers that they occupy House Nos. 320 and 321 which stand on the suit property and which are part of original four semi-detached maisonette units contained in one single block of the Government quarters standing on L.R No. 65/955/CSO, Mawenzi Gardens, Upper Hill Nairobi. He further states that the four semi-detached maisionette units were resurveyed and subdivided into two portions out of which one undeveloped portion (L.R No 209/13298) was allocated to a private developer and the other (L.R No. 209/12352) on which the maisonettes stand, was further subdivided into L.R No. 209/14843 containing House Nos. 320 and 321 and L.R No. 209/14844 containing House Nos. 318 and 319.

8. Mr. Mumbo further avers that L.R No. 14844 is presently under the private ownership of one Mr. Manuel Mwawazi Shanzi, a former civil servant and that pursuant to a court order in HCCC No. 48 "A" of 2007. L.R No. 14843 was allegedly under the ownership of the Petitioner herein, which ownership they contested on the basis that the same had been acquired fraudulently. He further claims that contrary to the petitioner's assertions, the court, in HCCC No. 48 of 2007, held that the processing and issuance of title to L.R No. 209/14844 to the Petitioner was unlawful and a nullity and ordered for the rectification of the title.

9. The interested parties' case is that the 1st Respondent exercised its constitutional mandate by inviting all affected parties and conducting a public hearing before making its recommendations and decision and urged the court to dismiss the petition.

Petitioner's Submissions

10. **Mr. Cohen,** learned counsel for the Petitioner, submitted that Section 14 of the National Land Act grants the 1st Respondent power to review grants and dispositions of land and that such review may be initiated by the 1st Respondent, *suo moto,* or the national or county government or by an individual but added that in the exercise of its mandate, the 1st respondent needed to adhere to the provisions of the Constitution especially Article 47 thereof which requires it to hear the petitioner before taking/recommending any adverse action against her. For this argument, the petitioner relied on the decision by the Constitutional Court of South Africa in the case of **President of the Republic of South Africa & Others –vs- South African Rugby Football Union & Others (CCT16/98) 2000 (1) SA 1**, wherein the court discussed what constitutes fair administrative action. Counsel submitted that the notice, purportedly issued to the Petitioner, was defective as it indicated that the matter was set for hearing on 2nd October, 2015 when in fact, the matter was heard on 29th September, 2015 and a decision rendered on 23rd May, 2016. Counsel further relied on the case of **Central Organization of Trade Unions –vs- Benjamin K. Nzioka & Others** Appeal No. 166 of 1993 where the Court of Appeal reaffirmed the rules of natural justice and the obligation to hear the other party. Counsel therefore argued that the 1st Respondent did not issue the Petitioner with sufficient and reasonable notice neither did they prove service of the same before this court.

11. On whether the 1st respondent had powers to review a matter pending in court, counsel submitted that the 1st Respondent had no such powers in view of the pendency of Petition No. 627 of 2014 filed by the Interested Parties who were the same complainants in the matter filed before the 1st respondent.

1st Respondent's Submissions

12. Mr. Mbuthia, learned counsel for the 1st Respondent submitted that the 1st Respondent had authority, pursuant to Section 14(1) of the National Land Commission Act and Article 68 of the Constitution to review the legality of grants and disposition of public land. It was the 1st respondent's case that anyone with a complaint regarding legality of a title may elect to seek redress before either the Environment and Land Court or the 1st Respondent. For this argument counsel relied on the decision of Korir J. in the case of **Muktar Saman Olow –vs- National Land Commission JR 376 of 2014** wherein it was held that the 1st Respondent can only fulfil its mandate by probing the process under which public land was converted to private land. Accordingly, he argued that the 1st Respondent had jurisdiction to review the title that was the subject of these proceedings.

13. Counsel further submitted that the proceedings in Petition No. 627 of 2014 having been stayed by Lenaola J. (as he then was) then the 1st Respondent could validly carry out the review proceedings and that in any event, it had jurisdiction to do the same. He further explained that Petition No. 627 of 2014 did not relate to the legality of the grant held by the Petitioner and urged the court to find that the 1st Respondent had jurisdiction to entertain the proceedings that culminated into the impugned determination of 26th May, 2016.

14. On fair administrative action, counsel submitted that in exercise of its mandate as a quasi-judicial body within the full meaning of Article 169(1) of the Constitution the 1st Respondent duly notified the Petitioner of the hearing as provided for under Section 14(3) of the National Land Commission Act through a public notice published in the Daily Nation as published of 16th September, 2015 inviting interested parties for hearing on 29th September, 2015. To buttress this argument, counsel relied on the decision in the case of **Joseph Mbalu Mutava –vs- Attorney General & Anor (2014) eKLR** wherein the court held that what constitutes procedural fairness in any hearing depends on the circumstances of each particular case. He further cited the decision in the case of **Kenya Revenue Authority –vs- Menginya Salim Murgani Civil Appeal No. 108 of 2009** where the Court of Appeal stated 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. Counsel urged the court to find that the 1st Respondent complied with the provisions of Article 47(1) and (2) of the Constitution as read with Section 4 of the Fair Administrative Actions Act.

Interested Parties' Submissions

15. The Interested Parties submitted that the petitioner was issued with title to parcel no. L.R. No. 209/14844 through an illegal process as was upheld in HCCC No. 48 "A" OF 2007 and added that Section 26 of the Land Registration Act provides that an illegal title is subject to revocation. They relied on the decision in the case of **Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Anor (2013) eKLR** wherein the court held that title in the hands of an innocent third party can be impugned if it is proved that the said title was obtained illegally, unprocedurally or through corrupt scheme.

16. They further submitted that according to the Public Service Housing Policy, the suit property is within Government land and is intended for civil servants. They therefore contended that the reversal of the earlier plan to earmark the suit property for re-development and allocating it to the Petitioner herein without informing them was a contravention of the provisions of Article 47(2) of the Constitution.

17. They maintained that the Petitioner had failed to present the instruments of conveyance that would establish that she is *bonafide*

purchaser for the suit property and argued that the petitioner's rights under Article 40 had not been infringed by the 1st Respondent. It was the interested parties' case that the revocation of the title by the Registrar of Lands on the recommendation of the 1st Respondent was lawful, fair and procedural pursuant to Article 67 of the Constitution. To buttress this argument, they relied on the decision in the case of **Registered Trustee of Arya Pratinidhi Sabha, East Africa –vs- National Land Commission & Anor (2016) eKLR** where the role of the 1st respondent in dealing with public and private land was discussed.

18. On whether the 1st Respondent violated the Petitioner's rights under Article 47 of the Constitution it was submitted that the 1st Respondent ensured that the review proceedings were procedurally fair and relied on the decision in the case of **Kenya Revenue authority – vs- Menginya Salim Murgani (2010) eKLR** wherein it was held that what constitutes adequate notice will depend upon the complexity of the matter and whether an urgent decision is essential.

19. While relying on the provisions of Section 6(3) of the Nationals Land Commission (NLC) Act, they submitted that the 1st Respondent is not bound by the strict rules of evidence and that the publication of a notice in the newspaper was therefore sufficient notice that satisfied the requirements of Article 47 of the Constitution.

Analysis and Determination

20. I have considered the instant petition, the responses filed thereto and the submissions by counsel for the parties together with the authorities that they cited. I find that the main issue for determination is whether or not the manner in which the 1st Respondents conducted the challenged proceedings violated the petitioner's constitutional rights and resulted in a breach of the rules of natural justice. An issue was also raised by the interested parties regarding the validity of the title held by the petitioner in respect to the suit property.

21. From my own assessment of the facts of this case, it is apparent that the dispute before the 1st respondent revolved around the validity of the title held by the petitioner. I wish to make it clear, from the outset, that even though the parties to this suit appeared to have invited this court to determine the issue of the validity of the petitioner's title to the suit land, that is not an issue that is within the jurisdiction of this court as the same falls within the exclusive mandate of the Environment and Land Court (ELC). My humble view is that even though the issue of the jurisdiction of this court to deal with the matter was not raised by any of the parties during the hearing of this petition, I still find that it is an issue that this court cannot ignore and must address in this judgment. Article 162(2) of the Constitution stipulates as follows on jurisdiction:

> ***(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—***
>
> > ***(a) employment and labour relations; and***
> >
> > ***(b) the environment and the use and occupation of, and title to, land.***
>
> ***(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).***

22. Article **165 (5)** of the Constitution on the other hand provides as follows:-

> (5) ***The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162***

23. From the above provisions of the Constitution, it is clear that this court has no jurisdiction to determine matters falling under Article **165 (2)** of the Constitution**.** The question which then arises is; what are the matters that fall under the jurisdiction of the ELC? My view is that the answer to the above question can be found in the provisions of section **13** of the Environment and Land Court Act, which is an Act of Parliament enacted to give effect to Article **162(2) (b)** of the Constitution; ***to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.***

Section **13** of the ELC Act provides for the Jurisdiction of the Court as follows:-

> ***(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***
>
> ***(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—***
>
> > ***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
> >
> > ***(b) relating to compulsory acquisition of land;***
> >
> > ***(c) relating to land administration and management;***
> >
> > ***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

24. In the oft cited case of **Samuel Kamau Macharia Vs. Kenya Commercial Bank Limited And 2 Others [2012] eKLR** it was held:

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

25. Having regard to the dictum in the above cited case and the provisions of Article 162(2) of the Constitution, I find that the issue of the validity of the petitioners title or the interested parties claim to be entitled to the suit land are issues that are not within the purview of this court and will be better handled before the ELC that is mandated, by the Constitution, to handle such matters.

26. Turning to the main issue for determination, which I have already found to be whether the manner in which the 1st Respondents conducted the challenged proceedings violated the petitioner's constitutional rights, I find it was not disputed that the petitioner held a certificate of title to the suit property even though the Interested Parties alleged that the said title was acquired ***irregularly, fraudulently*** or ***unlawfully***. The 1st Respondent contended that it acted upon the Interested Parties' complaint by publishing a notice in the newspaper of wide circulation inviting all the interested parties for a hearing on 29th September, 2015 pursuant to Section 14 of the National Land Commission Act. The 1st respondent added that it determined the complaint and recommended that the Petitioner's title be revoked and that the land reverts to the Housing Directorate. The petitioner, on the other hand, stated that she was not notified to appear before the 1st respondent for the said hearing and added that even though the alleged notice published by the 1st respondent indicated that the hearing would take place on 2nd October 2015 (see annexure **"B1"** to the 1st respondent's replying affidavit), the hearing was instead conducted on an earlier date on 29th September 2015 on which date the petitioner was similarly not notified to attend. It was not disputed by the 1st respondent that the impugned hearing was indeed conducted on 29th September 2015 (see annexure **"GJL9"** to the petitioner's supplementary affidavit).

27. Article 47(1) and (2) of the Constitution grants every person a right to fair administrative action. The said Article stipulates as follows:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right of fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action".

28. In addition, Article 50 guarantees a right to a fair hearing. The said Article 50(1) provides that:

> ***"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".***

29. Section 4 of the Fair Administrative Act echoes and reinforces the provisions of Article 47 of the Constitution by reiterating the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It is now trite law that in all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.

30. Subsection 4 of the said Act further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

31. On the service of the notice of the hearing, I find that the right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. The notice must be communicated to the interested party, preferably in writing. (See **Ridge v. Baldwin [1964] A.C. 40**). Apart from specifying the date and place of the hearing, the notice must be sent in a timely manner which means that the affected party must receive the notice (sufficiently in advance of the hearing), adequately describing the relevant facts and allegations so that a party may respond to them and outlining who will be present at the hearing, what the hearing will entail and the possible effects the decision may have on the rights and interests of the person. (See **Wong v. University of Saskatchewan, (2006) SKQB 405**). Needless to say, what constitutes adequate notice will also depend upon the complexity of the matter and whether an urgent decision is essential.

32. In the present case, it was not disputed that impugned hearing was conducted on 29th September 2015 even though the notice published in the newspapers indicated that the hearing would take place on 2nd October 2015, clearly therefore, one cannot say that the petitioner was notified of the said hearing. To my mind therefore, the mode of service employed by the 1st respondent does not constitute sufficient service of notice and does not in my view qualify to be "adequate notice" that complies with the principles of natural justice. In **R. v. Ontario Racing Commissioners (1969) 8 D.L.R. (3d) 624 at 628 (Ont. H.C.)** the court stated as follows: -

> *"a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing."*

33. In the instant case, it did not escape the attention of this court that the notice issued by the 1st respondent inviting interested parties to its hearings was more or less like a moving target as while the newspaper advertisement indicated that the hearing was to take place on 2nd October 2015, the said hearing was actually conducted on 29th September 2015. In my humble view, the advertisement published in the newspaper did not constitute proper service with the notice

34. It was not disputed that even though the petitioner was the holder of the title to the suit land that was the subject of the proceedings before the 1st respondent, she was never served with a notice or supplied with details of the complaint or afforded an opportunity to face the complainants and cross-examine them on the complaints and adduce evidence to rebut their allegations. I therefore have not difficulty in finding that the manner in which the proceedings were undertaken was a clear breach of the well-established rules of natural justice and were an infringement on the rights of the petitioner who is constitutionally entitled to a decision that is procedurally fair and just.

35. To any reasonable observer, it would be clear that the Respondent acted in a manner that demonstrated failure to adhere to the principles of natural justice. In the South African Case **Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, (CCT) 31/99) [2000] ZACC 1** it was held:

> *"Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution."*

36. My further finding is that the impugned decision by the 1st respondent not only violated the petitioner's aforesaid constitutional rights but was also unreasonable and contrary to its legitimate expectation. Referring to a party's legitimate expectation, Lord Simon Brown in ***R vs Devon County Council ex parte P. Baker, [1995] 1 ALL ER***, stated:

> ***"…it is the interest rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision".***

37. Similarly, in ***Council of Civil Service –vs- Minister for Civil Service [1984] 3 ALL ER 935*** at page 949, Lord Diplock stated that for a legitimate expectation to be thwarted, the impugned decision:

> ***"…must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".***

38. It is therefore clear that a benefit/right cannot be withdrawn until the reason for its withdrawal has been given and the person concerned has been given an opportunity to comment on the reason.

39. Article 67 (2) (e) of the constitution and section 5 of the Act stipulates the functions of the National Land Commission which included *inter alia* to *"to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."* I however find that in the execution of its constitutional mandate the 1st Respondent is duty bound to observe the due process and must not only observe the rules of natural justice but also the provisions of the Fair Administrative Action Act 2015. The landmark decision of the **House of Lords** in **Ridge v. Baldwin** (supra) which was quoted, with approval, in the case of **Judicial Service Commission v Mbalu Mutava & Another [2012] eKLR** 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:

a) the right to be heard by an unbiased tribunal.

b) the right to have notice of charges of misconduct

c) the right to be heard in answer to those charges.

40. Courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In **Onyango v. Attorney General (1986-1989) EA 456** wherein it was held that:-

> ***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."*** **At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

41. And in **Mbaki & others v. Macharia & Another (2005) 2 EA 206** the Court stated as follows:-

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

42. In the circumstances of this case, the evidence has revealed that the Petitioner's rights to fair administrative action were violated. The 1st Respondent purportedly notified the Petitioner through a notice published in the newspaper. In my view this does not suffice as reasonable notice considering its determination on the matter would have far reaching ramifications on the Petitioner. I find that the mere fact that the Interested Parties had been living on the suit property and had expressed an interest in purchasing the same, subject to a government circular dated 18th August, 2004 (Ref Bo. CON/LH/A/2/7/ (13) and the letter dated 30th September, 2004 (Ref No. CON/LS/A/2/7 Vol. II/71 that they would be given first priority as civil servants did not suffice to revoke the Petitioner's title without according her a fair hearing.

Conclusion

43. Having regard to the findings and observations that I have made in this judgment, I find that the instant petition is merited and I allow it in the following terms:

> ***a) A declaration is hereby issued that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), (2) (a), (3) (b) (i), 47(1) and (2) of the Constitution of Kenya, 2010 were contravened and infringed upon by the Respondent herein.***
>
> ***b) An order of CERTIORARI is hereby issued to remove into this Honourable Court and quash the decision and recommendation dated 23rd May, 2016 directed to the Land Registrar, 2nd Respondent herein to effect the cancellation of the Certificate of title registered as I.R No. 159268 in respect of L.R No. 209/14483.***
>
> ***c) An order of PROHIBITION is hereby issued as against the Respondents restraining them by themselves their agents and appointees from evicting the Petitioner herein.***
>
> ***d) Each party shall bear its/her own costs of the petition.***

Dated, signed and delivered in open court at Nairobi this 15th day of March 2019.

W. A. OKWANY

JUDGE

In the presence of:

Petitioner present in person.

No appearance for respondents

Court Assistant - Ali