



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 121 OF 2016

IN THE MATTER OF: ORDER 53 RULE 3 OF THE CIVIL PROCEDURES RULES

AND

IN THE MATTER OF: AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: CONSTITUTION OF KENYA 2010 AND THE KENYA ROADS ACT 2007

IN THE MATTER OF : AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI TO QUASH THE DECISION DATE 15TH SEPTEMBER 2015 BY KENYA URBAN ROADS AUTHORITY REFUSING GRANT OF AUTHORITY TO ATLAS COPCO EASTERN AFRICA TO CONSTRUCT A STANDARD EXIT TO LINK ITS PREMISES TO THE SERVICE ROAD FOR ACCESS TO AIRPORT NORTH ROAD.

IN THE MATTER OF : AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW TO APPLY FOR ORDERS OF MANDAMUS TO COMPEL KENYA URBAN ROADS AUTHORITY(KURA) TO GRANT THE APPLICANT AUTHORITY TO CONSTRUCT A STANDARD EXIT TO THE SERVICE ROAD TO LINK TO AIRPORT NORTH ROAD FOR ACCESS SAFETY AND REMOVE TEMPORARY RAMP PLACED AT THE EXIT.

IN THE MATTER OF: AN APPLICATION BY ATLAS COPCO EASTERN AFRICA LIMITED FOR JUDICIAL REVIEW TO APPLY FOR ORDERS OF PROHIBITION AGAINST KENYA URBAN ROADS AUTHORITY (KURA) FROM ERECTING RAMPS ON ITS EXIT GATE.

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

CHINA ROADS AND BRIDGE CORPORATION.....2ND RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED...

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KENYA POWER & LIGHTING COMPANY LIMITEDINTERESTED PARTY

ATLAS COPCO EASTERN AFRICA LIMITEDEX PARTE

JUDGMENT

1. This is the second judgment in this case. The first judgment was rendered on 10th October 2017 striking out the entire proceedings herein filed on account that the applicant had not paid court fees for the substantive Judicial Review application dated 5th April 2016.
2. Soon thereafter, the exparte applicant's counsel returned to court with an application dated 12th October 2017 seeking review/setting aside of the judgment dated 10th October 2017 and for reinstatement of the application dated 5th April 2016 for determination on its merits.
3. Despite service upon the respondents and interested parties they never appeared to challenge the application for reinstatement of the said judgment. Accordingly, on 30th November 2017 this court allowed the application setting aside the judgment that struck out the proceedings and reinstated the substantive notice of motion for determination on merit. This was after the court satisfied itself that court filing fees was paid for on 5th April 2016 amounting to Kshs 18,150 albeit the receipt was not in court. This was vide receipt No 7206494 issued on 5th April, 2016.
4. This judgment therefore determines the substantive notice of motion dated 15th March 2016 and filed in court on 5th April 2016 seeking orders:

1. An order of certiorari to remove into this court and quash the decision of Kenya Urban Road Authority the 1st respondent made on 15th September 2015 refusing/declining the application by the applicant to construct a standard exit from its premises on LR NO. 24809 for access to Airport North Road for the applicant's heavy vehicles and equipment in safety and convenience.

2. Mandamus to compel the 1st respondent Kenya Urban Road Authority to authorize and approve the construction of a standard exit objectively proposed by the applicant for exit and access to the service road leading to Airport North Road from its premises on LR No. 24809;

3. Prohibition against the 1st respondent prohibiting it from erecting or placing blockage ramps on the existing temporary exit of the applicant.

4. Costs of the application.

5. The application does not seek any orders from the 2nd respondent China Roads and Bridge Corporation and Kenya Power and Lighting Company Ltd, the interested party.

6. The said motion is supported by statutory statement and verifying affidavit sworn by Joseph Muchina and annexures thereto.

7. The exparte applicant's case is that it is a limited liability private company engaged in sales business of construction, electric generation mining and drilling equipment, serving customers in more than 180 countries.

8. It also employs many Kenyans and pays taxes and owns LR No. 24808 a rectangular plot along the Airport North Road. It is claimed that the applicant has the Airport North Road as the only road of ingress and egress into its premises.

9. That in the construction of the Eastern by pass which connects the Airport North Road to Mombasa Road, the applicant superintends the works while the 2nd respondent China Roads and Bridge Corporation is the main contractor of works. It is alleged that during the period of construction of the said Eastern by pass it was necessary for the applicant to relocate its exit gate to give way for the road construction and place it at the end of its plot.

10. The applicant claims that it engaged in lengthy negotiations and consultation with the respondents with a view to ascertaining the best position for the exit gate and provide an acceleration lane to give a smooth and uninterrupted ease into the Airport North Road from the applicant's premises. In the process, it is claimed that the 1st respondent (KURA) granted an elaborate written authority to the applicant setting out the terms and conditions that the applicant was to adhere to during the works, chief of which the respondents were to take control of and superintend over the works including is engineers taking charge thereof.

11. It is asserted that the applicant agreed to the terms and paid all the costs of the project totaling Kshs 6,000,000 and went to lengths at its own cost to obtain the necessary licenses/approvals from the Nairobi City County Department of inspectorate.

12. That it was after the completion of the construction of the said temporary exit that the 1st respondent issued notice on 1st October 2014 of intention to block the frontage access.

13. That the applicant protested the move which came barely 2 years after the 1st respondent had granted approval and costing of the project and the exit gate and cabro works were completed.

14. That negotiations were held whereupon it was agreed that the exit would not be blocked and that the pedestrian overpasses would be slightly relocated.

15. The applicant then applied for the construction approval but that the 1st respondent declined permission on the grounds that the applicant's premises on LR No, 24808 is on a power way leave.

16. It is therefore claimed that the change of mind by the 1st respondent has frustrated the applicant's legitimate expectations of the applicant as construction of a standard exit is very necessary for the applicant's operations safety and access to the main road.

17. The exparte applicant's motion is opposed by the 1st respondent and the interested parties.

18. The 1st respondent filed a replying affidavit on 28th July 2016 sworn by Adbikadir Ibrahim Jatani the Manager of Surveys (KURA) conceding that on 15th September 2016 the Authority refused to grant to the exparte applicant permission to erect an access to the Eastern by pass on, and from properly LR No. 24809 and further revoked the earlier permission granted on 12th July 2012 and that reasons for refusal were contained in the said letter of 15th September 2015 namely, that the property in issue was established on a public utility as it lay squarely inside a power line way leave established vide a PDP No. 13/1988 thus granting the permission sought would be minimal to the property's public character and contrary to its governing PDP as annexed.

19. That there was successful challenge to the National Land Commission of the validity of a title to property along the same stretch of electric power line way leave, a decision which was later affirmed by the **High Court in Petition No. 311 of 2014 Compar Investments Ltd vs National Land Commission & Others** (annexed).

20. It is claimed that the High Court in the above Petition set out principles and applicable law hence this court should adopt the same as it is on all fours with this matter.

21. It was contended that as per the authority of the PDP, and from the Physical Planning Perspective, good order and safety, all the properties, including the legitimate ones on that stretch of the Eastern by pass have their legitimate access at their backs hence the 1st respondent could not allow the applicant erect access to its otherwise irregular property over the power line way leave contrary to the applicable PDP as to do so would be in violation of the law and to grant an imprimatur of legitimacy over the culture of impunity and land grabbing.

22. The 2nd respondent did not respond to the application.

23. The interested party KPLC filed a replying affidavit sworn by its legal officer Jude Ochieng, on 3rd June 2016 contending that its joinder to these proceedings is misguided as there is no complaint against the interested party hence the applicant's claim does not raise any cause of action against it hence it has been wrongly enjoined to these proceedings. They however state that the applicant paid for translocation costs of the power line to the underground.

24. In a further affidavit sworn by Joseph Muchina the Business controller of the applicant on 3rd October 2016, it was deposed that the claim by the 1st respondent that the plot is on a power line way leave is unfounded and that the interested party concedes that the applicant paid for a translocation of the power line to the underground thereby safeguarding the public interest.

25. That the legality of title is not in the jurisdiction of the 1st respondent to determine but in the preserve National Land Commission where the 1st respondent can complain.

26. It was further deposed that in JR 48/2011 the 1st respondent acknowledged the applicant's title leading to withdrawal of the proceedings.

27. That the applicant was never given an opportunity to prove that it was the proprietor of the LR No. 24809 having legally acquired it from the government.

28. That the power line takes little of the property as vast of the said power line is not on the property. That JR 311/2014 was appealed against vide Civil Application Nairobi 36/2016 where the Court of Appeal found the applicant had a prima facie case and stayed the decision pointing out that the applicant therein had heavily invested in the land which could not be compensated by the Government out of tax payer's funds without hearing the matter hence this court should follow the Court of Appeal decision.

29. That in the cited case, parties had been heard before National Land Commission which was a party but in this case National Land Commission was only copied a letter yet National Land Commission has never determined on the legality of the title in issue.

30. That in Petition 302/2013 the High Court held that Kenya Urban Roads Authority must use the relevant body to determine the alleged illegalities of the petitioner's title to property and that the petitioner is entitled to protection of the laws and that lawful means must be used to acquire the suit property. It was also deposed that paragraph 9 of the 1st respondent replying affidavit is contradictory and that the applicant spent huge sums constructing the exit gate and cabro works all done by a company introduced to the applicant by the 1st respondent.

31. That the investment on the plot is worth billions which is threatened to closure due to losses as the applicant has been in possession of the suit property since 1996.

32. The parties' advocates filed written submissions which they adopted as canvassing the notice of motion.

33. According to the ex parte applicant in its detailed submissions filed on 4th October 2016, the applicant's counsel raised the following issues for determination:

1. Whether the 1st respondent's decision is tainted with illegality. It was submitted that the question of whether the suit property was regularly acquired by the ex parte applicant is the preserve of the National Land Commission pursuant to Section 14 of National Land Commission Act and Article 67 of the Constitution.

Secondly, that the question of power way leave is the preserve of Kenya Power and Lighting Company who have not complained. It was further submitted that the statutory mandate of Kenya Urban Roads Authority is management, rehabilitation and maintenance of all public roads in cities and municipalities in the County, except National roads and therefore it acted without jurisdiction and so its conduct is substantially ultra vires in excess of its mandate, null and void.

2. The second issue raised by the applicant is whether the 1st respondent's decision is based on irrelevant and extraneous considerations. On this aspect, it was submitted that only the interested party Kenya Power and Lighting Company could claim that the suit property fell on a power line way leave and that only the National Land Commission could establish the legality of acquisition of the suit property. Reliance was placed on **Peter Kaluma's book "Judicial Review procedure and practice citing Weinberger vs Inglis & Another [1919] A.C. 606** where it was held that a body to whom the performance of a duty is delegated, when given power to exercise a discretion, must exercise a discretion without taking into account any matters which are irrelevant to the subject matters in respect of which the duty is imposed upon them and if they take into account such irrelevant matters the court will hold that they have not exercised their discretion, and will give consequential relief. The case of **Robert vs Hopwod & Others [1925] A.C. 578** was referred to as the locus classicus on "**relevant consideration**" principle.

3. The other issue for determination as framed by the ex parte applicant is whether the conduct of the 1st respondent in arriving at the decision is in breach of the ex parte applicant's constitutional rights. It was submitted that

a. The applicant was denied the opportunity to be heard before the decision to reject the application was made which violated the principle of audi alterum partem as espoused in Article 50 of the Constitution, Genesis 3 verse 3-11 and in the Dr Bentley's case.

b. That the applicant was denied the right to fair administrative action under Article 47(1) of the Constitution because the decision was unlawful and was tainted with unreasonableness as espoused in the *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* [1948] 1KB 223.

c. It was further submitted that the 1st respondent did not follow the proper procedure in arriving at its decision. Reliance was placed on **Isaac Gathungu Wanjohi vs Attorney General & 6 Others**[2012] e KLR and **Kuria Greens Ltd vs The Registrar of Titles & Another** [2011]e KLR for the proposition that acquisition of land could only be through a legally established mechanism. Further, that courts have awarded damages for breach of fair administrative action.

d. It was further submitted that the applicant's right to its registered property was violated contrary to Article 40 of the Constitution in that the 1st respondent was arbitrarily depriving it of the property without regard to the law.

4. On the issue of whether the 1st respondent is estopped from challenging the legality of title, it was submitted that the 1st respondent having consented in JR 48/2011 to withdraw a challenge to the legality of the applicant's property it could not turn round and approbate and reprobate. Section 120 of the Evidence Act was cited. It was further submitted that the decision by Kenya Urban Roads Authority thwarted the applicant's legitimate expectation that it would get similar treatment in requesting to construct a standard exit which is necessary for its operations, safety and access to the main road. Reliance was placed on **Council for Civil Service Union vs Minister for Civil Service** [1984] 3 ALL ER 935 where Lord Diplock stated that a legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Further reliance was placed on **Diana Kethi Kilonzo & Another vs IEBC & 10 Others** [2013] e KLR where the court held, inter alia, that once made, the promise or practice creates an estoppel against a public body or official so that the person benefitting from the promise or practice would continue to so benefit, and that the promise of practice would not be withdrawn without the due process or consultation.

It was submitted that the 1st respondent should have withheld its adverse decision until National Land Commission had determined the alleged illegality of the title in which event the applicant would be entitled to due process.

5. On the issue of public interest versus private interest it was submitted that the applicant had not interfered with public interest as it paid translocation costs of the power line from its boundary to the underground after it supplied a legitimate reason that the same was hampering an easy access to its premises, a fact that is not disputed by Kenya Power & Lighting Company. Further, that if the land was public land, the 1st respondent should have notified the Minister that such land was required for the purposes of the Authority (KURA) as stipulated in Section 23(1) (d) of the Kenya roads Act, 2007. Relying on **Multiple Haulers EA Ltd vs Attorney General & 10 Others** [2013] e KLR it was submitted that public interests are crucial considerations for the court to take into account but that public interest is better served if the state and all organs of state and public authorities scrupulously act in accordance with the dictates of the Constitution hence it is in public interest that the rule of law prevails, as was espoused in **Republic vs Kenya Urban Roads Authority & 2 Others Ex parte Tamarind Village Ltd** [2015] e KLR. That the Rule of law calls for the due process in acquisition of the private property and that in this case the 1st respondent should have followed due process of reporting to Kenya Urban Roads Authority to investigate the legality of the applicants title and that if there was fraud, only the interested party could have complained.

6. On whether this court should adopt the reasoning in petitions No. 311/2014 cited above, it was submitted that the decision was appealed against and stay orders issued by the Court of Appeal. Further, that the parties involved and circumstances are different since in that matter it had been heard before the National Land Commission which latter was a party and that the applicant has never been summoned to explain how it acquired the title to the suit property. Finally, it was submitted that the court in **Compar Investments Ltd vs Kenya Urban Roads Authority** [2014] e KLR made it clear that if the respondent wished to use the suit property for public good it must find a lawful way of acquiring it. The applicant urged the court to grant it the orders sought.

34. The 1st respondent filed written submissions dated 7th November 2016 which were adopted as opposing the substantive motion, relying in the replying affidavit sworn by Adbulkadir Ibrahim Jatani. It was submitted, replying on several authorities that Judicial Review is concerned with the process of decision making and not on the correctness of the decision. The cases relied on include **Re Bivac Int'l SA (Bureau Veritas)** [2005] 2 EA 43; **Pastoli vs Kabale District Local Government Council and Others**[2008] 2 EA 300; **Municipal Council of Mombasa vs Republic & Umoja Constants Ltd** [2002] e KLR

35. On when certiorari, prohibition and mandamus lies, reliance was placed on **Halsbury's Laws of England, 4th Edition, Reissue Volume 1 page 137 paragraph 128** and **KNEC vs Republic Ex parte Geoffrey Gathenji Njoroge & Others**[1997]e KLR; and **Mureithi & 2 Others(For Mbari Ya Murathimi Clan) vs Attorney General & 5 others Nairobi HC Miscellaneous Application 158/2005**.

36. It was submitted that prohibition must be preemptive in nature, directed at preventing what has not been done, to close the stable before the horse bolts (see **Republic vs UON CA Nairobi 73/2001** [2002] 2 EA 572; **Republic vs Kenya Revenue Authority & Another Ex parte Bear Africa (K) Ltd**).

37. It was submitted that Judicial Review remedies are discretionary in nature and are not guaranteed as stipulated in **Republic vs Kenya Revenue Authority Ex parte Yaya Towers Ltd & SDA (EA)Ltd vs Permanent Secretary Ministry of Nairobi Metropolitan Development & Another** [2014] e KLR .

38. On mandamus, it was submitted that there is nothing the 1st respondents have failed to do as a matter of statute or legal duty hence the order cannot issue. The 1st respondent urged the court to dismiss the application with costs.

39. The interested party filed written submissions on 2nd December 2016. They are dated 30th November contending that the applicant's motion does not disclose any actionable cause of action against it and that it has been improperly enjoined to these proceedings. That the interested party was approached by the applicant with a request to relocate the power line from its boundary at the applicant's costs to the underground to enable the construction of a front access road to its premises as the power line was hampering easy access to its premises.

40. That an agreement was reached and requisite costs were settled by the applicant upon which the power line was relocated and that the applicant and interested party have a legal power supply agreement.

41. That the interested party has not therefore interfered with the normal operations of the applicant hence no cause of action is disclosed against it since it is not directly involved in the denial of the applicant of the authority to construct the exit from its premises.

42. On who necessary parties are, reliance was placed on **Mary Wangai Gachichi & Another vs Principal Magistrate Mukurweini Court & 2 Others [2016] e KLR** where it was stated that necessary parties are those who ought to be joined in proceedings and are necessary to the Constitution of the suit without whom no decree at all can be passed.

43. It was therefore submitted that the presence of the interested party to these proceedings was not necessary and therefore these proceedings against it should be dismissed and struck out.

DETERMINATION

44. I have considered the foregoing and in my humble view, the main issues for determination in this matter are:

1. Whether the interested party KENYA POWER & LIGHTING COMPANY LIMITED was a necessary party to these proceedings.
2. Whether the orders sought against the 1st respondent are available to the applicant.
3. What orders should bear the costs of these Judicial Review proceedings.

45. On whether the interested party KENYA POWER & LIGHTING COMPANY LIMITED is a necessary party to these proceedings, the interested party claimed that there is no order sought against it therefore no cause of action is disclosed against it since it has not been party to the decision by the 1st respondent denying permission to the applicant to construct an exit and access to and from its premises, having agreed to relocate its power line to the underground from the boundary with the applicant because the power line had been obstructing access to the applicant's premises.

46. However, I must mention that Order 1 Rule 10(2) of the Civil Procedure Rules is inapplicable to this case. Order 53 of the Civil Procedure Rules does not talk about joinder of parties but service of the application upon all parties directly affected.

47. In this case, the 1st respondent on being requested to grant permission to the applicant to enable the latter to construct an exit and access to its premises declined the request under the excuse that the subject property was public land and that the exit/access area sought to be developed is a power line way leave owned by Kenya Power and Lighting Company the interested party herein. With that statement alone, I have no hesitation in finding and holding that the interested party is a party who would be directly affected by any orders that this court may make, whether made a party or not in the first instance.

48. It was therefore necessary that KENYA POWER & LIGHTING COMPANY LIMITED is either served with the motion or it is enjoined as an interested party to have a say in the excuses and contentions by the 1st respondent. More so, already, the interested party has spoken and made the court know its position in this matter, that indeed it had a power line way leave on the suit property but that it had agreed with the applicant who paid for the relocation of the power line to the underground at the applicant's cost and expense to pave way for the construction of the said exit/access to the main road by the exparte applicant herein.

49. Accordingly, I find and hold that the interested party was and is necessary party as it would be directly affected by the orders to be issued by this court. The objection by the interested party to being a party to these proceedings is therefore declined and rejected.

50. On the second issue of whether the orders sought by the exparte applicant against the 1st respondent (KURA) are available to the exparte applicant, the exparte applicant made several allegations against the 1st respondent for refusing to permit the applicant to construct a standard exit/access to the main road. It is alleged that the decision and conduct of the 1st respondent is without jurisdiction and is tainted with bad faith, illegality and unreasonableness; premised on irrelevant consideration and was and that it was arrived at on presumed jurisdiction and by an error, and in breach of the applicant's legitimate expectation to be granted authority to construct a standard exit which is very necessary for its operations, safety and access to the main road.

51. To address the above concerns it is important to examine the impugned decision. On 15th September Kenya Urban Road Authority wrote to the exparte applicant's General Manager of Atlas Copco Eastern Africa Ltd on the subject of authority to construct a standard exit from Atlas Copco Eastern Africa Ltd along Airport North Road and referring to the applicant's letter dated 28th January 2015 seeking the said authority.

52. The 1st respondent was categorical that the land in question LR No. 24809 after change of use, was reserved as a power line way leave and therefore a public utility and any allocation and subsequent survey of the same for private use is irregular hence no authority

could be granted to construct access on the same.

53. In addition, the 1st respondent revoked with immediate effect the earlier approval vide letter of Ref: KURA/TECH/9/6/VOL 5(89) of 23rd July 2012.

54. Commencing with revocation of the earlier approval, the court notes that the applicant was never accorded an opportunity to be heard on the reasons for revocation. It was never required to present evidence challenging the intended revocation. Section 4(1) of the Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution is clear that 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 them. 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administration shall give that person affected by the decision:

- a. Prior adequate notice of the nature and reasons for the proposed administrative action;
 - b. An opportunity to be heard and to make representation in that regard.
 - c. Notice of a right to a review or internal appeal against an administrative decision, where applicable.
 - d. 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 where applicable.
 - 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 this choice.
 - b. Be heard.
 - c. Cross examine persons who give adverse evidence against him and request an adjournment of the proceedings, where necessary to ensure a fair hearing

55. The above provisions of the law are self-explanatory that before an administrative action or decision which is likely to adversely affect rights or fundamental freedoms of any person is taken, the person must, among others, be accorded an opportunity to be heard and therefore challenge the intended decision or action before action is taken.

56. Where action or a decision is taken by an administrator without complying with the above provisions of the law, the decision/action is arbitrary and unlawful and therefore amenable for judicial review. I am in agreement with the writing by Peter Kaluma in his Book Judicial Review, Law, Procedure and Practice that:

“ So ancient and noble is this rule (of audi alterum partem) that it has been accorded moral and divine connotations, with its roots being traced to the Garden of Eden episode narrated in the Bible (Genesis 3:9-111)” And citing Justice Fortescue in the Dr Bentley’s case that:

“ The Laws of God and man both give the party an opportunity to make his defence, if he has any ...even” God himself did not pass sentence upon Adam before he was called upon to make his defence.....”

57. In the *Pastoli V Kabale District Local Government Council and others [2008] EA* the court made it clear that the court would interfere with a decision which is made contrary to the law.

58. In this case, the applicant claims that it owns the property adjacent to the exit in question is not controverted by any evidence and therefore a decision made by the 1st respondent which is not authorized by law to determine the legality of title to land is a decision made contrary to law. This is so because Section 14 of the National Land Commission Act and Article 67 of the Constitution give power to the National Land Commission to inquire into and determine whether public land was acquired illegally or irregularly. No other institution or body can purport to make such a determination and where it does so, then it acts illegally and outside the law and its powers.

59. Furthermore, the 1st respondent was not claiming that the land belongs to it, or that the exparte applicant had encroached on the subject portion. It was alleging that the land belongs to Kenya Power and Lighting Company by way of way leaves rights.

60. On the other hand, Kenya Power and Lighting Company have letters of agreement with the applicant relinquishing those way leaves rights for reasons that the applicant had successfully and at its own costs been granted permission to translocate the power line to the underground which works had been completed prior to seeking for permission to construct a standard exit/access and entry points to the

main road joining the Eastern by-pass.

61. In my humble view, therefore, I concur with the applicant that the decision by the 1st respondent to revoke the earlier approval granted to the applicant, and which approval had already been acted upon was arbitrary, unlawful and made without jurisdiction of the 1st respondent. The said revocation was also unreasonable and illogical because no authority, having authorized the applicant to construct an exit and entry in 2012 and which authority had been acted upon, could turn around and purport to revoke it after the fact. Such revocation would have no effect and therefore it is null and void.

62. In **Halsbury's Laws of England Fourth Edition 2001 Reissue Volume 1(1) paragraph 74** on jurisdictional control, it is stated:

“ The courts will intervene to ensure that the powers of public decision making bodies i.e. such as inferior courts, administrative tribunals and bodies exercising statutory powers or otherwise carrying out public functions) are exercised lawfully. Such a body will not act lawfully if it acts ultra-vires or outside the limits of its jurisdiction. The term ‘jurisdiction’ has been used by the courts in different senses. A body will lack jurisdiction in the narrow sense, if it has no power to adjudicate upon the dispute, or to make the kind of decision or order in question; it will lack jurisdiction in the wider sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a manner which is procedurally irregular, or in a Wednesbury sense, unreasonable, or commits any other error of law. In certain exceptional cases, the distinction between errors of law which go to jurisdiction in the narrow sense and other errors of law remains important”

63. In this case, I have no doubt that the 1st respondent in purporting to revoke the earlier authority given to the applicant in 2012 which authority had already been acted upon, was made without jurisdiction as there was nothing to be revoked. The revocation was therefore a legal nullity.

64. On the question of the refusal to grant authority to the applicant to construct a standard exit/access to its premises through the Eastern By pass, I note that the reason for refusal to do so was that “because the 1st respondent believed that the applicant had acquired its title irregularly because the land was public utility land with a power line way leave right given to the interested party KPLC.”

65. On the other hand, the interested party has, by affidavit and exhibit evidence in writing disowned those contentions by the 1st respondent.

66. The interested party acknowledges that albeit it had power line way leave rights on the said exit/access road, it waived the same when it gave authority to the exparte applicant for translocation of the same to the underground, at the cost of the applicant, in order to allow the applicant to gain access/exit from its plot to the main road.

67. The 1st respondent has not claimed that it owns the suit property. That would be a matter to be determined by the Environment and Land Court with the competent jurisdiction. It is merely claiming that no exit should be granted to the applicant because the exit is on a power line wayleave and that the applicant acquired a public utility plot irregularly because it is reserved for power line way leave. The body that is constitutionally and statutorily mandated to inquire into and determine the illegality or irregularity of public land acquisitions is the National Land Commission, under Article 67 of the Constitution and Section 14 of the National Land Commission Act.

68. The National Land Commission Act has not claimed that the applicant's land was illegally or irregularly acquired; and no such inquiry proceedings are pending. It therefore follows that the 1st respondent was usurping powers of the National Land Commission in purporting to determine, without an inquiry being carried out in the manner stipulated in Article 67 of the Constitution and Section 14 of National Land Commission Act to determine the legality/regularity of the grant or title to the exparte applicant's land. A body which acts without jurisdiction acts outside its powers. It acts ultra vires.

69. In addition the 1st respondent having declared in JR 48 of 2011 at Nairobi that the applicant's title had no issues and having consented to a matter which was pending before court in that matter, could not turn around without giving reasons for change of circumstances, and claim that the title was irregularly acquired. What that amounts to is bad faith. A decision made in bad faith is amenable to being interfered with by the court.

70. In my humble view, the 1st respondent's exercise of discretion in bad faith is unlawful and will be quashed by the court. A decision is taken in bad faith it is taken dishonestly or maliciously and with improper purpose namely, to vex the applicant.

71. A public body or authority which makes decisions for improper purpose commits an unlawful act and in this case, the 1st respondent having openly declared that the applicant's title had no issues leading to termination of legal proceedings in JR 48/ 2011, the 1st respondent could not turn around and impose a condition purely creating a reason for revoking the authority to allow the applicant to construct an exit/entry to its business premises and rejecting the application for permission to construct a standard exit/access to its business on account that the land in issue was irregularly acquired and that it had a power line way leave which the interested party had disowned on the allegation by the 1st respondent that it was acting in public interest to protect public property from land grabbers.

72. It is important to note that the applicant was issued with title to the property it occupies and there are no proceedings pending against it claiming that it had irregularly or illegally obtained the title. The right to own property and to be protected from arbitrary deprivation is safely protected by Article 40(3) of the Constitution.

73. As was held in **Multiple Hauliers Eastern Africa Ltd vs Attorney General & 10 Others[2013] e KLR** whereas this court agrees

that public interest considerations are critical factors for a court to take into account, and in the circumstances the construction of a public road is for public good, however, there is absolutely no claim lodged against the applicant on account that it had grabbed the plot it occupies or that it had unlawfully or illegally acquired it. It follows, therefore that public interest will be better served if the state and all organs of the state and public authorities scrupulously act in accordance with the dictates of the law and the Constitution.

74. The 1st respondent like any other person has a right to lodge a complaint with the National Land Commission to carry out investigations into the manner in which the applicant's plot was acquired. The 1st respondent has not claimed that the applicant's construction of the standard access/exit road from/into the plot will in any way obstruct the road or maintenance or management of the road in issue. That would be a matter for the Environment and Land Court to deal.

75. In the absence of any evidence of the applicant's breach of any law, it would be unreasonable for the 1st respondent to claim that it was protecting public property from grabbing by private individuals.

76. A.V. Dicey in introduction to the study of the law of the Constitution makes it crystal clear that *"no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary court of the land. In the sense the rule of law is contracted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretion powers of constraint."*

77. In the instant case, the applicant by its letter of 28th July 2015 clearly stated the reasons why it was seeking authority to construct a standard exit from Atlas Copco EA Ltd along Airport North Road. It explained that despite the earlier approval in 2012 to facilitate a suitable exit, the contractor working on the service road interfered with the applicant's ability to exit and so, only left a temporary ramp which was not the case in the prior approval. That the applicant deals with selling of hearing equipment (specially mining and construction equipment) and therefore its low loaders get very limited radius to negotiate to join the service road which raises safety concerns. The applicant therefore sought to be allowed to construct a standard exit that conforms to the design of the current infrastructure to avoid interfering with other road users and also avoid accidents. It also subjected the proposes designs for approval.

78. From the applicant's affidavit evidence, it is clear that such construction would be closely monitored by the 1st respondent, and at the applicant's own cost. And since the only excuse that the 1st respondent was using to deny the authority has been discounted by Kenya Power and Lighting Company, the 1st respondent's refusal is unjustified, unreasonable, is in bad faith, arbitrary and smacks of malice, intended to ground the applicant's business operations.

79. This country needs genuine investors who can create employment for our youth because the public sector opportunities are shrinking day by day. To deny a genuine investor permission to construct an exit/access road when there are no compelling reasons to do so is totally unreasonable and unacceptable and amounts to fiscal sabotage of this country's economic growth and economic development.

80. The applicant's request was not meant to alienate to itself any piece of land and neither has it been demonstrated that the construction works would interfere with the enjoyment of the adjacent properties in a manner that would attract damages or loss.

81. Albeit this court does not entirely agree with the applicant that there was a legitimate expectation that the 1st respondent having given an earlier approval in 2012 would give a similar approval as circumstances change, there is no material placed before the court to demonstrate that the circumstances for approval had changed warranting a rejection of the request.

82. For the above reasons, I find and hold that the applicant's motion is merited and allowed as prayed in prayers 1,2, and 3 of the notice of motion dated 5th April 2016. I would however decline costs as the authority sought was not a matter of right. It was a discretionary power sought to be exercised by the 1st respondent in favour of the applicant only that the discretion to reject the application for approval by the 1st respondent was wrongly exercised. Accordingly, I order that each party do bear their own costs of these judicial review proceedings.

Dated, signed and delivered in open court at Nairobi this 20th day of February, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Gatuhi Advocate h/b for Mr Njagi Advocate for the exparte applicant

Mr. Munene Litigation Counsel for the respondents

Mr. Kiptum Advocate h/b for Mr Sigei Advocate for the Interested Party

CA: Kombo