



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APP NO. 172 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE BY KARAINI INVESTMENTS LIMITED TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI & PROHIBITION AND

IN THE MATTER OF THE REVIEW OF TITLE FOR LAND REFERENCE NUMBER 36/1/14-14-EASTLEIGH AND

IN THE MATTER OF ARTICLES 40, 62, 64 AND 67 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

KARAINI INVESTMENTS.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

THE ESTATE OF NJERU MUNGE.....INTERESTED PARTY

**JUDGMENT**

***Ex parte applicant's case.***

1. The *ex parte* applicant's substantive application filed on 5<sup>th</sup> June 2017 seeks orders:-

a. ***An order*** of Certiorari to quash the decision of the National Land Commission to conduct a review in respect of property known as **L.R. No. 36/1/14-Eastleigh, Nairobi**, belonging to Karaini Investments Limited, the *ex parte* applicant herein, communicated to the applicant by a letter dated 21<sup>st</sup> June 2016.

b. ***An order*** of certiorari to quash the decision of the National Land Commission to conduct a hearing in respect of property known as **L.R. No. 36/1/14-** belonging to Karaini Investments Limited, the *ex parte* applicant herein, communicated to the applicant by a letter dated 6<sup>th</sup> June 2016.

c. ***An order*** of prohibition to forbid the National Land Commission from conducting any hearing or review over the complaint in regard to the property known as **L.R. No. 36/1/14- Eastleigh, Nairobi**, on 11<sup>th</sup> April 2017 or on any other date.

d. **That** a declaration do issue that the National Land Commission has no jurisdiction to hear or adjudicate and determine any proceedings touching on the property known as **L.R. No. 36/1/14- Eastleigh, Nairobi**, either in the manner suggested by the Commission or at all.

e. That the applicant be awarded costs.

2. The grounds relied upon are:-

a. That the Respondent received a complaint from the Interested Party in writing dated **10<sup>th</sup> June 2016** requesting the Respondent to revoke two transfers of the property known as **L.R. No. 36/1/14- Eastleigh, Nairobi**, on allegations that they were fraudulently procured. The two Transfers complained of were transfer dated **15<sup>th</sup> December 1978- Disposition from one Njeru Munge to Njeru Munge (himself) and seven other individuals, and, Transfer of 15<sup>th</sup> April 1986- Disposition from eight individuals to Karaini Investments Limited;**

b. That the Respondent decided to review the title for the suit property to determine its legality or propriety which decision was communicated to the applicant by way of a letter dated **21<sup>st</sup> June 2016;**

c. that on **23<sup>rd</sup> January 2017**, the applicant's advocates raised a point of preliminary objection to the proceedings before the Respondent on grounds that the Respondent lacked jurisdiction to conduct any proceedings in respect of the suit property which is private property and that the complaint pertained to disposition of the suit property between private entities;

d. that on **20<sup>th</sup> April 2017** the Respondent delivered a ruling on the preliminary objection wherein it found that it had jurisdiction to undertake a review of the grant to the suit property on grounds that the title to the suit property is a grant issued under the Registration of Titles Act and thereby falls within the definition of grants of public land, and is within the meaning of section **14(1)** of the National Land Commission Act and fixed the matter for hearing on **14<sup>th</sup> June 2017;**

e. that the Respondent acted in excess of its powers in conducting a review of the title to the suit property and that its mandate does not extend to review of grants where the complaint is disposition of the property between private entities.

f. that the Respondent erred in its finding that it had jurisdiction on the suit property which does not pertain to conversion of the suit property to private land and that it lacks jurisdiction to entertain the proceedings.

3. In support of the application is the Statutory Statement and verifying affidavit of **Kabiru Njogu** annexed the application seeking leave and the documents annexed thereto highlighting the above grounds.

#### **Respondent's Replying Affidavit.**

4. **Mr. Brian Ikol**, an Advocate of the High of Kenya and the Respondent's Deputy Director, Legal and Enforcement, who is also a member of the Review of Grants and Dispositions Committee, (a Committee established within the National Land Commission to oversee the review of grants and dispositions process) swore the Replying Affidavit dated **15<sup>th</sup> September 2017**. He averred that the Respondent is mandated under Section **14** of the National Land Commission Act<sup>[1]</sup> (herein after referred to as the 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 establish their legality or propriety, and that, in the exercise of this mandate it operates as a quasi-judicial body within the meaning of Article **169 (1)** of the Constitution. He also averred that the procedure for undertaking its mandate is provided under Section **14** of the Act, which entails analyzing the process under which the public land was converted to private land and making findings on the legality of the grants in question.

5. **Mr. Ikol** averred that the Respondent received a complaint from the Interested Party through a letter dated June **10<sup>th</sup>, 2016** requesting that it looks into the propriety of the transfers of the suit property, prompting the Respondent to invoke its jurisdiction in line with Section **14 (1)** of the act.

6. He further averred that the *ex parte* applicant's Advocate raised a preliminary objection on the Respondents' jurisdiction on **23<sup>rd</sup> January 2017**, which was heard and a ruling rendered on **20<sup>th</sup> April 2017** upholding its jurisdiction since the grant was public land which emanated from a grant issued under the Registration of Titles Act<sup>[2]</sup> (Repealed). He also averred that once a complaint made, there exists a statutory obligation upon the Respondent under Section **14** of the act to look into the complaint.

#### **Interested Party's Replying Affidavit.**

7. **Richard Muthee Njeru**, the administrator and a beneficiary of the Interested Party's Estate swore the Replying Affidavit dated **10<sup>th</sup> October 2017** admitting the existence of the conveyance dated **21<sup>st</sup> December 1970** for the purchase of plot number **14, Section 1, Eastleigh** now **36/1/14** between **Abdul Khaliq** as vendor and **Njeru Munge** as the purchaser duly executed by them, and that **Njeru Munge** died on **14<sup>th</sup> October 1978** by which time he was the registered owner of the said property.

8. He disputed the conveyance made on **30<sup>th</sup> November 1978** allegedly executed by the said **Njeru Munge** who was by then was deceased, having died **8** years before the purported signature, hence, the alleged transfer was fraudulent.

#### **Issues for determination.**

9. From the facts of this case, I find that the following issues distil themselves for determination:-

- a. *Whether this Court has the jurisdiction to hear and determine this matter.*
- b. *The jurisdiction of the National Land Commission.*
- c. *Whether or not there are grounds for this Court to review the decision of the National Land Commission.*

**Whether this Court has the jurisdiction to hear and determine this matter.**

10. Interestingly, the *ex parte* applicant's advocate did not address this highly dispositive and pertinent issue at all. Instead, he dedicated a lot of energy addressing the jurisdiction of the National Land Commission over the land in question. On his part, the Respondent's counsel submitted that this Court lacks jurisdiction to entertain this case. He argued that the *ex parte* applicant ought to have filed this case at the Environment and Land Court.<sup>[3]</sup>

11. It seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court*<sup>[4]</sup> had this to say:-

*"Jurisdiction is determined on the basis of the pleadings,<sup>[5]</sup>... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."*

12. *From the pleadings filed in this case, it is clear that this Judicial Review application raises a fundamental question of jurisdiction.* Jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to the Court; *afortiori* the Court *can suo motu* raise it. By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

13. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist.

14. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.<sup>[6]</sup> A Court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.<sup>[7]</sup>

15. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*<sup>[8]</sup> where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

*".... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

16. The *ex-parte* applicant seeks to quash proceedings before the Respondent and to prohibit the Respondent from hearing the dispute. Even though the *ex parte* applicant has invoked the Judicial Review jurisdiction of this Court, *a close examination of the crux of the applicant's case reveals that the behind this Judicial Review application is a live question of validity of title to land, hence a land dispute.*

17. Its trite that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. <sup>[9]</sup> **Article 165(1)** of the Constitution vests vast powers in the High Court including the power to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction 'to hear any question respecting the interpretation of the Constitution. Article 23 (1) provides that the High Court has jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*

18. The limitation of this courts vast powers conferred under Article 165 is to be found in Sub-Article (5) which states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:- **(a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).** Clearly, this court has no jurisdiction to determine matters falling under Article 162 (2) (2) (a) & (b). But what are these matters? The answer to this question is found in the provisions of Section 13 of the Environment and Court Act,<sup>[10]</sup>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.

19. The use of the word *shall* in the above Article is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.<sup>[11]</sup> There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.<sup>[12]</sup> The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

20. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

21. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.<sup>[13]</sup>

22. The word "*shall*" when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.<sup>[14]</sup> The Longman Dictionary of the English Language states that "*shall*" is used to express a command or exhortation or what is legally mandatory.<sup>[15]</sup> Ordinarily the words '*shall*' and '*must*' are mandatory and the word '*may*' is directory. The word "*shall*" used in the provision under consideration is mandatory.

23. Section 13 of the Environment and Land Court Act<sup>[16]</sup> provides that:-

(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. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act.<sup>[17]</sup> In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction.

25. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters which fall within the ambit of the Environment and Land Court. This is clearly provided for under **Section 13 (3)** of the Act. Sub-section **7 (b)** above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the decision of the Respondent revoking its title to land and grant the prerogative reliefs sought.

26. Comparison can be drawn from the case of *United States International University (USIU) vs. Attorney General*.<sup>[18]</sup> Although the said case related to labour issues one of the issues in contention was whether or not the Employment and Labour Relations Court as created under **Article 162 (2)** of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under **Article 23** of the Constitution which remedies are clearly stated to be a sole preserve of the High Court. The court expressed himself on the said issues as follows:-

*"45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011."* (emphasis added).

27. It is instructive to note that the Court of Appeal has also had occasion to address itself on the issue in the case of *Daniel N. Mugendi vs. Kenyatta University & 3 others*<sup>[19]</sup> where allowing an appeal and setting aside an order dismissing a suit on the finding that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under **Article 23** of the Constitution settled the issue *in toto* in respect to such matters within the jurisdiction of both the Employment and Labour Relations Court as well as those before the Environment and Land Court. The Court of Appeal expressed itself in the following words:-

*"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."* (emphasis added).

28. **Odunga J.** in *Republic vs National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*<sup>[20]</sup> eloquently rendered as follows:-

62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Justice Mohammed Ibrahim** in *Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others* <sup>[2014] eKLR</sup>:

64. Whereas this Court had in the past entertained disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in *Petition No. 5 of 2015- Republic vs. Karisa Chengo & 2 Others* it has become clear that such matters ought to be dealt with by the specialized courts, when the Court expressed itself *inter alia* as hereunder:-

*"it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation...Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."*

65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant's contended right to be heard stem from their yet to be determined interest in the suit land.

66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in *Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012*, [para. 29-30] where it was held:

*"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the*

*guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework”.*

67. Similar sentiments were expressed in *Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others* in which it was held that:

*“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”*

29. A High court may not determine matters falling squarely under the jurisdiction of the ‘status courts’ namely the Employment and Labour Relations Court (read Industrial Court) and the Land and Environment Court. But even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court.

30. It is important to bear in mind that exercise of judicial authority is now entrenched in the Constitution. Article 159 commands Courts to be guided by the principles stated therein among them the purposes and principles of the Constitution are to be protected and promoted. The drafters of the Constitution were very clear on the limits of this Court's jurisdiction and the jurisdiction of the Courts of equal status.

31. While the Constitution guarantees right to access courts, the same Constitution neither operates in a vacuum nor does it automatically oust other constitutional and statutory provisions brought to life by the legislative arm of government such as the Environment and Land Court Act.<sup>[21]</sup> As such, where the constitution and legislation expressly confers jurisdiction to a Court as in the present case invoking this courts vast jurisdiction would be inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. Consequently, I find and hold that the jurisdiction of this Court in this matter has been improperly invoked. The *ex parte* applicant ought to have filed this Judicial Review application in the Environment and Land Court. On this ground alone I proceed to dismiss this Judicial Review application.

#### **The jurisdiction of the National Land Commission.**

32. Notwithstanding my finding on jurisdiction, I proceed to address what I consider to be the core issues in the application. First is the *Jurisdiction of the National Land Commission*.

33. Counsel for the *ex parte* applicant cited Article 67 of the Constitution and Section 14 (8) of the Act and submitted that the Respondent lacks jurisdiction over the land in question which is private land within the meaning of section Article 64 of the Constitution.<sup>[22]</sup> On his part, the Respondent's counsel argued that the Respondent has the jurisdiction to hear the complaint under Article 67 (1) of the Constitution and section 14 of the Act<sup>[23]</sup>while counsel for the Interested Party submitted that the Respondent has the mandate to review the grant.

34. The functions of the National Land Commission under Article 67 (2) (e) of the Constitution include *(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.* Article 61 (2) of the constitution classifies land in Kenya as Public, Community or Private. Article 62 of the Constitution defines Public land consists of:-

*“62. (1) Public land is—*

*(a)land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;*

*(b)land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;*

*(c)land transferred to the State by way of sale, reversion or surrender;*

*(d) land in respect of which no individual or community ownership can be established by any legal process;*

*(e)land in respect of which no heir can be identified by any legal process;*

*(f)all minerals and mineral oils as defined by law;*

*(g)government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment*

areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.”

35. Article 64 of the Constitution defines private land as:-

“64. Private land consists of —

(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.”

36. Section 14 of the National Land Commission Act<sup>[24]</sup> provides that:-

(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**.

37. Counsel for the *ex parte* applicant in his further submissions filed on 4<sup>th</sup> October 2017 argued that once a person is lawfully granted a leasehold tenure over public land, the land becomes private land,<sup>[25]</sup> hence the Respondent lacks jurisdiction over the suit premises.<sup>[26]</sup> He submitted that the issue in contention is not the process by which public land was transferred to private land, but transfer of private property between two private individuals.<sup>[27]</sup>

38. In my view, by dint of the constitutional and statutory provisions cited above, for the Respondent to invoke its jurisdiction, the land must be public land within the above definition, or the land must have been public land that was converted to private land. If the land was originally public land which was converted to private land, then it falls within the constitutional and statutory mandate of the National Land Commission. Section 14 of the Act provides for review of grants and disposition of public land as per Article 68(c)(v) of the Constitution.

39. Under Section 14 of the Act the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of **public land to establish their propriety or legality**. In my view, the Respondent can only fulfill this responsibility by querying the process under which public land was converted to private land, if there is evidence that the land was once public land. In this regard, so long as the land was once public land, the Respondent has the constitutional and statutory mandate of investigating the process under which it was converted into private land.

40. Tied to this issue is the question of jurisdiction determined above. If the *ex parte* applicants case is that it holds a valid title, and that what is before the Court is an ownership touching on private land, then the dispute is purely a matter for the Environment and Land Court and not for this Court to determine.

**Whether or not there are grounds for this Court to review the decision of the National Land Commission.**

41. The *ex parte* applicant's counsel argued that the Respondent's actions are tainted with illegality, irrationality, and procedural impropriety. In his further submissions, the *ex parte* applicant's counsel argued that the Respondent was obligated to observe the principles of Natural Justice.<sup>[28]</sup>

42. The Respondent's counsel argued that Judicial Review deals with the process as opposed to the merits of a decision<sup>[29]</sup> and submitted that the Respondent observed the rules of natural justice.

43. Counsel for the Interested Party argued that the Respondent did not in any manner violate the *ex parte* applicant's rights under Article 47 of the Constitution, but conducted a fair process and insisted that the *ex parte* applicant is not entitled to the orders sought.

44. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

45. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [30]:-

*"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

46. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

a. *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or*

b. *a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

47. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the Respondent. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The context in which the decision was rendered leaves me with no doubt that the Respondent's decision was reasonable and that it acted within the law in determining a preliminary objection that was raised before it while exercising its functions as a quasi-judicial body. Judicial Review is not an appeal and the Court is not concerned with the merits of the decision.

48. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

49. Perhaps I should add that the Respondent is vested with powers to entertain the proceedings. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided for under the law. It has not been proved or even alleged that the Respondent acted outside its powers. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

50. The applicant also seeks an order of prohibition. The writ of prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

51. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the applicant ought to have instituted a suit in the Land Court or raise their objection before the Respondent.

52. The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that there is an ownership dispute on the property in question, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership of the property. These questions call for the need for this Court to exercise caution, care and circumspection. *First*, there is the question of jurisdiction discussed earlier. *Second*, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed property. I decline the invitation to venture into this forbidden territory.

53. The upshot is that I dismiss the Notice of Motion dated 2<sup>nd</sup> June 2017 and filed on 5<sup>th</sup> June 2017 with costs to the Respondent and the Interested Party.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 26<sup>th</sup> day of July 2018

**John M. Mativo**

**Judge.**

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[1] Act No. 5 of 2012.

[2] Cap 281, Laws of Kenya- (Repealed).

[3] Counsel cited Section 13 (1) of the Environment and Land Court Act.

[4] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[5] *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[6] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

[7] The Supreme Court in *the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 (unreported).

[8] {1989} KLR 1.

[9] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[10] Act No. 19 of 2011.

[11] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2 ).

[12] Ibid.

[13] *Subrata vs Union of India* AIR 1986 Cal 198.

[14] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[15] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[16] Ibid.

[17] Act No. 19 of 2012.

[18] {2012} eKLR.

[19] {2013} eKLR.

[20] {2018} eKLR.

[21] Act No.19 of 2011.

[22] Counsel cited *Republic vs National Land Commission ex parte Krystalline Salt Limited* {2015} eKLR.

[23] Counsel also cited *Republic vs National Land Commission ex parte Krystalline Salt* and *Republic vs National Land Commission ex parte Holborn Properties Limited* {2016} eKLR

[24] Act No. 5 of 2012.

[25] Citing *Re Public vs National Land Commission & Tropical Treasure Limited ex parte Krystalline Salt Limited* {2015} eKLR.

[26] Citing *Samuel K. Macharia & Another vs Kenya Commercial Bnk Limited & 2 Others* {2012} eKLR.

[27] Counsel cited *Republic vs National Land Commission ex parte Chepkoech Leting & 3 Others* {2016}eKLR.

[28] Citing *Ernst & Young LLP vs Capital Markets Authority & Another* {2017} eKLR.

[29] Counsel cited *Commissioner of Lands vs Kunste Hotel Limited* {1995- 1998} 1 EA.

[30] {2014} eKLR.