



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 396 OF 2016

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, INCLUDING SECTIONS 7, 8, 11, 12, AND ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE NATIONAL LAND COMMISSION AND UNLAWFUL INTERFERENCE WITH THE REGISTRATION OF PLOT L.R. NO. 209/193, PANGANI, NAIROBI BY FURTHER ALLOTMENT THEREOF

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FAIR ADMINISTRATIVE ACTION, NO. 4 OF 2015, ARTICLE 47, CONSTITUTION OF KENYA, AND OF THE RIGHT TO FAIR ADMINISTRATION ACTION, AND THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA INCLUDING ARTICLES 47, 10, 159, 50, 25, 40.

BETWEEN

ABDUL WAHEED SHEIKH AND ABDUL HAMEED SHEIKH AS TRUSTEES OF THE SHEIKH FAZAL ILAHI NOORDIN CHARITABLE TRUST.....PETITIONER

AND

NATIONAL LAND COMMISSION.....RESPONDENT

JUDGEMENT

By a petition dated 26th September 2016, Abdul Waheed Sheikh and Abdul Hameed Sheikh as Trustees of the Sheikh Fazal Ilahi Noordin Charitable Trust (hereinafter referred to as the petitioners) instituted these proceedings against National Land Commission (hereinafter referred to as the Respondent) seeking several reliefs.

Briefly, the Trust purchased L.R. No. 209/193, Pangani, Nairobi, in 1943 and was the registered proprietor as the said Grant subject to the provisions of the Government Lands Act[1] (Repealed). The leasehold expired in 2001 and prior to the expiry of the leasehold, the Trust applied for its extension and a fresh lease was offered for a term of 99 Years with effect from 16th July 2002. The trust was issued with a letter of Allotment dated 23rd March 2003.

Notwithstanding the fact that the Trust was issued with a letter of Allotment as aforesaid, the registration of the grant in favour of the Trust was not processed but instead the land was unlawfully registered under the Registered Land Act^[2](Repealed) under a new Land Reference Number being Block 37/63 registered in the name of the Permanent Secretary to the Treasury. The petitioners were not afforded an opportunity to be heard before the said decision was made.

Aggrieved by the aforesaid decision, the petitioners filed High Court J.R. Misc. App No. 1531 of 2005 (O.S)- Abdul Waheed and Abdul Hameed Sheikh as Trustees of the Sheikh Fazal Ilahi Noordin Charitable Trust vs the Commissioner of Lands, The Minister of Lands and Housing, The Minister of Finance, The Registrar of Titles and Hon. the Attorney General challenging the decision and judgment was rendered in favour of the trust on 18th May 2012 decreeing inter alia:-

i. A declaration be and is hereby issued that the plaintiff's fundamental rights as protected and guaranteed by sections 70 (c) and 75 (1) of the constitution of the Republic of Kenya have been or are likely to be contravened in relation to the leasehold interest in the property known as L.R. N. 209/193, Pangani, Nairobi.

ii. A declaration be and is hereby made that there is no lawful basis upon which the defendants and each of them should or could deprive the plaintiffs of the right to the ownership and or proprietorship over the leasehold interest in the property known as L.R No. 209/193, Pangani, Nairobi.

iii. A declaration be and is hereby made that the defendants and each of them are not entitled to deprive the plaintiffs of their rights over the leasehold interest in the property known as L.R. No. 209/193, Pangani, Nairobi otherwise than by compliance with the law, due process of law and upon prompt and full payment of such compensation as the plaintiffs would be entitled to under the provisions of the applicable law. The compensation shall be agreed with the Respondents failure which this court may assess the same.

iv. **That** the plaintiffs/applicants be and are hereby granted a conservatory order by way of an order restraining the defendants by themselves, their officers, servants, gents or otherwise howsoever from attempting to obtain possession, disposing or in any manner whatsoever interfering with the plaintiffs proprietorship, possession, custody and control of the property known as L.R. No. 209/193, Pangani, Nairobi.

v. An order be and is hereby issued directing the 4th Defendant to register the plaintiffs as the proprietors of the leasehold interest in the property known as L.R. No. 209/193, Pangani, Nairobi for the term of ninety-nine (99) years from 16th July 2002 in terms of the Letters of Allotment dated 23rd March 2003

It is averred that the said decree was served on all the defendants and subsequently, amid delays, the process of registration of the Grant in favour of the Trust commenced, and the process was ongoing as at 3rd August 2016 when the Respondent wrote to the first petitioner stating inter alia that there was an unsuccessful attempt to renew the lease and cited breach of conditions of the letter of allotment, among them, failure to develop the property, a position the petitioners maintain was erroneous because the lease was actually renewed by a letter of allotment dated 23rd March 2003, 13 years before the letter complained of was written, hence there is no justification by the Respondent to deal with property already allocated, and that the reasons cited in the said letter are misplaced, that the letter was ultra vires, nor does the Respondent refer to the above court decree or the above cited letter of allotment. Also, the letter did not specify or enclose the alleged complaint, the alleged competing interests were not disclosed, and that the letter cites "public utility" totally ignoring the above decree.

On 18th August 2016, the first petitioner responded to the above allegations and enclosed a copy of the court decree. It is also averred that the Respondents chairman had full knowledge of the above cited letter of allotment and the decree but ignored them while writing the alleged letter. Also in January 2016

and 8th July 2016, the advocates for the applicants wrote to the Respondent and enclosed copies of the decree and letter of allotment.

The petitioners aver that the letter dated 3rd August 2016 emanating from the chairman of the Respondent gave rise to the grounds relied upon in this petition, which are inter alia that:-

a. That the Respondent has no powers to make any allocation in circumstances as in this case and that the land in question has already been allocated to the petitioners a fact which is within the knowledge of the Respondent and that the Respondent has not offered any reasons to warrant its actions and that their actions are ultra vires section 7 (a) (ii) of the Fair Administrative Action Act[3] and that the Respondent is acting in excess of its jurisdiction and that the decision complained of was influenced by an error of the law;

b. That the Respondent failed to take into account relevant considerations such as the existence of the court decree and that it acted in bad faith and an abuse of its discretion, and that its decision is totally unreasonable and not proportionate;

c. That the decision complained of threatens or violates the petitioners legitimate expectations, it is unfair, biased and an abuse of power and taken with an ulterior motive.

The petitioners maintain that in view of the foregoing, their constitutional rights have been violated, hence the reliefs sought in the petition.

The Respondents filed grounds of objection on 11th October 2016 stating that the petition is premature, frivolous and does not raise constitutional violations to warrant invoking this court's jurisdiction, that it lacks clarity of facts or issues of law and that the actions complained of were mere recommendations.

No Response was filed to the petitioners application dated 26th September 2016 nor did the Respondent appear in court for the hearing of the said application despite being served, hence on 13th October 2016, Lenaola J. allowed the said application. The learned judge also directed that submissions to the petition be filed within 45 days and directed that the Respondents be served with mention notice. There is on record an affidavit of service filed on 21st December 2016 showing that the Respondents were served as directed by the court but despite being served, they did not attend court. Further, no submissions or Response to the petition was filed by the Respondents.

Counsel for the petitioners filed their submissions on 13th December 2016 in which they inter alia reiterated this court's powers to review the decision complained of and also cited the relevant provisions of the Fair Administrative Action Act[4] and reiterated the petitioners right to a legitimate expectation were violated. Counsel also cited the Supreme Court Advisory opinion rendered in *The National Land Commission vs A.G & Others*[5] and submitted that the Respondent lacked the jurisdiction and mandate to make the decision complained of to deal with an issue that had already been determined by a court, hence the Respondent acted unreasonably and unlawfully and that the chairman of the Respondent breached his duties as a state officer and insisted that any steps taken in contempt of a court order is a nullity and cited the decision in *Clarke vs Chadburn*[6] and also submitted that an administrative action must be lawful as contemplated under Article 47 of the constitution and the Fair Administrative Action Act.[7]

Counsel also submitted that the decision in question is unreasonable and ought to be quashed and relied on the decision in *Associated Provincial Picture House Limited vs Wednesbury Corp*[8] and urged the court to apply the objective standard laid down in *R vs Boundary Commission ex parte Foot*. [9] He also submitted that the decision in question is irrational. [10]

I am fully aware in exercising judicial review powers, I am not sitting on appeal and my role is to examine the legality or propriety of the challenged decision. Talking about legality or propriety, there exists a valid court judgement rendered in Hccc No. 1531 of 2005 (O.S) in which the Respondent was a

party and there is no evidence that it was not aware of the existence of the said decision. In fact, notwithstanding the fact the Respondent was a party to the said case, it is also clear that a copy of the decree was served upon them on numerous occasions. There is evidence to show that by the time the letter complained of was written, the Respondent was at all material times aware of the court decision and the letter of allotment had been issued and the process of registration was ongoing.

No appeal was lodged against the said decision, the effect is that the orders enumerated above issued in HCC No. 1531 of 2005 (O.S.) are still in force and were in force when the decision in question was taken. It follows that the issue of the petitioners rights to the said land is *re judicata* having been determined by a court of competent jurisdiction. In fact, the High court decree still remains in force. I find no difficulty in finding that the Respondent is obliged to comply with the said decision. **It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.**[\[11\]](#)

It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.[\[12\]](#)

The Court does not, and ought not to be seen to make orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.[\[13\]](#)

A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law.

Musinga, J in *Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another*[\[14\]](#) was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. Willful and flagrant disobedience of court orders undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute.

On jurisdiction **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers 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** which also touches on jurisdiction of the High court provides that; "23. (1) *The High Court has jurisdiction, in accordance with Article 165, 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.*" It would also follow that the High Court has jurisdiction to

discharge functions falling under **Article 165** of the Constitution.

Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." Article 165 (7) provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

On the scope of the jurisdiction of this court under Article 165 (6) & (7) of the Constitution I strongly opine that one of the fundamental principles in this regard is the issuing of prerogative orders in the form of writs of *certiorari*, *mandamus* and *prohibition*. Such writs can be availed only to stop, quash, remove, adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of *quasi-judicial* functions by administrative bodies or other authorities or persons obliged to exercise such functions. Atkin, L.J. thus summed up the law on this point in *Rex v. Electricity Commissioners*^[15]

"Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Broadly speaking, the grounds upon which the courts grant judicial review were stated in the case of *Pastoli vs Kabale District Local Government Council and Others*^[16] where it was held as follows:-

*"in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with **illegality, irrationality** and **procedural impropriety**. . . illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality.irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards.procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice.It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument."*

Judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and become the most powerful enforcement of constitutionalism, one of the greatest promoters of rule of law and perhaps one of the greatest and most powerful tools against abuse of power and arbitrariness. ^[17] Judicial review is primarily concerned with controlling the exercise by public bodies and statutory bodies on powers conferred upon them. The role of the court is to ensure that those bodies do not exercise those powers unlawfully. It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.

In *Minerva Mills Ltd. vs. Union of India*,^[18] the court held that *"the power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality."* I am of the view that if there is one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review, and it is un-questionably, to my mind, part of the basic structure of the constitution. The High Court's supervisory jurisdiction in relation to lower judicial agencies, is a recognized practice in Kenya; one indeed founded on the express terms of the Constitution of Kenya, 2010, Article 165(6) of which thus provides: "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or

quasi-judicial function, but not over a superior court.”

Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.^[19] Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.^[20] Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

In *Local Government Board v. Arlidge*,^[21] Viscount Haldane observed, that those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice. As early 1906, the Judicial Committee^[22] observed that the principle should apply to every tribunal having authority to adjudicate upon matters involving civil consequences.

In India the principle is prevalent from the ancient times.^[23] In this context, para 43 of the judgment of the Supreme Court in the case of *Mohinder Singh Gill v. Chief Election Commissioner*,^[24] may be usefully quoted:-

“Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.”

Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.^[25] The process adopted by the Respondent was abuse of the law, unfair and oppressive.

It is evident that prior to the challenged decision, the petitioners were not given a chance to explain their case. Failure to give notice is itself a denial of natural justice and of fairness. Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case/complaint against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case/complaint against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. I find that the above constitutional provisions were violated, and again, on this ground, the applicants case succeeds.

The right to fair administrative action in Kenya is now enshrined as a fundamental right under **Article 47** of the Constitution, which provides as follows:

“47(1) Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

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

Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it^[26] and further the person is entitled to a procedure that is procedurally fair and just.

Our 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*,^[27] **Nyarangi, JA** asserted at page 459 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."*

Section 4 of the Fair Administrative Act^[28] re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 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. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

Subsection 4^[29] 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.

The manner in which the decision complained of was undertaken is a clear breach of the well established rules of natural justice, totally unfair, illegal, oppressive and an infringement on the rights of the petitioners who are constitutionally entitled to a decision that is procedurally fair and just. The decision is likely to affect the petitioners adversely and as such it is entitled to a fair process.

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 relevant constitutional provisions 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.^[30]

Article 67 (2) (e) of the constitution and section 5 of the National Land Commission Act^[31] 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."

From the above provision, it is clear that the Respondent is mandated to investigate and recommend appropriate redress. First, there is a court judgment in favour of the petitioners which has never been

appealed against. The Respondent cannot rely of the above provisions purport to take the decision it took because the matter had been determined by a court of competent jurisdiction. Secondly, the Respondent had already issued a letter of allotment. It has never denied issuing the said letter, hence, it was not open for the Respondent to take the challenged decision. It's action is clear abuse of its statutory powers, and it is unreasonable and above all, it amounts to contempt of court.

Clearly, the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.[32] Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its where there are instances of illegality. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision and unfair procedure is adopted. The unfairness may be in non-observance of the Rules of Natural Justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. I find that the decision complained of illegal, irrational and arrived at through an improper procedure.

*As observed above, a decision arrived at in total breach of a court decision is out rightly illegal. Further, a decision that offends the provisions of Article 47 of the constitution and Fair Administrative Action Act[33] is illegal and cannot be allowed to stand. A decision or action that has been taken 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it or which is unreasonable is illegal. The benchmark decision on this principle was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[34]:-*

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere....."

I emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "**illegal**". The challenged decision is in my view illegal for lack of legal basis. The decision offends an existing court decree, hence a nullity.

b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached. The decision complained of lacks fairness and violates both natural justice and Article 47 of the constitution, hence it is illegal.

c. **Irrationality and proportionality**-The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute "**irrationality**" or "**perversity**" on the part of the decision maker. The onus is on the applicant to establish irrationality or perversity. From the material presented before me, this onus has been discharged.

Human rights enjoy a *prima facie*, presumptive inviolability, and will often 'trump' other public goods,' Louis Henkin wrote in *The Age of Rights*:-[35]

"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular

circumstances, for limited times and purposes, to the extent strictly necessary."

A common way of determining whether a decision that limits rights is justified is by asking whether the decision in question is proportionate. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as *'the set of rules determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected'*. [36]

Leading Authors G. Huscroft, B Miller and G Webber (eds) have authoritatively stated the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:--

i. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?

ii. Are the means in service of the objective rationally connected (suitable) to the objective?

iii. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?

iv. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[37]

Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[38] and 'the orienting idea in contemporary human rights law and scholarship.' A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*[39] where Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

a) First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be *'of sufficient importance to warrant overriding a constitutionally protected right or freedom'*. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. I find that the decision by the Respondent does not meet this test.

b) Secondly, the means chosen must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. I find that the decision complained of does not meet this test.

In each case, Dickson CJ said, courts will be *'required to balance the interests of society with those of individuals and groups'*. [40]

Article 23 (1) of the constitution specifically sets out the remedies that the High Court can issue in cases of violation of fundamental rights and these include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of the law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights, an orders of compensation and an order of judicial review.

As for the compensation, I note that there is a prayer for damages in the petition. However, the evidence tendered did not place any material before me to highlight the loss if any suffered as a basis for me to award compensation.

I have carefully evaluated the material before the court and I am persuaded that the applicant has demonstrated sound grounds for the court to grant the reliefs sought. I also find that the decision complained of is illegal and flouted all the known principles of natural justice. The impugned decision is in my view unreasonable and is tainted with illegality in that it was purportedly rendered in total breach of a court order and further against the constitutional and statutory provision which guarantee a fair administrative action to the petitioners. I therefore find that the applicant has proved its case to the

required standard. Consequently, I find for the applicant and make the following declarations/orders:-

a) *That* an order be and is hereby issued restraining and prohibiting the National Land Commission, its chairman, officers, servants and agents or any of them or otherwise howsoever from directly or indirectly in any manner whatsoever offering and or issuing and or processing or further processing any letter of allotment or allotment of plot L.R. No. 209/193, Pangani, Nairobi or any part thereof or in any manner directly or indirectly dealing with the said plot in defeasance of the judgement, decree and orders of the High Court of Kenya Misc. Civil Application No. 1531 of 2005 (O.S.)

b) *That* an order be and is hereby issued restraining and prohibiting the National Land Commission by its chairman, officers, servants and agents or independent contractors or any of them or otherwise howsoever from directly or indirectly or in any manner whatsoever preventing, depriving, and or interfering with the petitioner's leasehold interest in the property or any part thereof known as L.R. No. 20/193, Pangani, Nairobi.

c) *That* an order be and is hereby issued restraining and prohibiting the National Land Commission by its chairman, officers, servants and agents or independent contractors or any of them or otherwise howsoever from or directly or indirectly or in any manner whatsoever preventing, depriving, and or interfering with the registration of the petitioners leasehold interest in the property or any part thereof known a L.R. No. 209/193, Pangani, Nairobi or any part thereof.

d) *That* an order be and is hereby issued restraining and prohibiting the National Land Commission by its chairman, officers, servants and agents or independent contractors or any of them or otherwise howsoever from directly or indirectly or in any manner whatsoever preventing, depriving, and or interfering with the implementation and or enforcement of and obedience to the Judgement, Decree and Orders of the High Court of Kenya Misc. Civil Application No. 1531 of 2005 {O.S.} and or acting or continuing to act in any manner that is prejudicial to the legal rights of the petitioners as set out in the said judgement and decree.

e) *That* a declaration be and is hereby issued that the judgement and decree dated the 18th day of May 2012 of the High Court of Kenya in Misc. Civil Application No. 1531 of 2005 {O.S.} at Nairobi, has determined the rights of the petitioners over the leasehold interest in the property known as L.R. No. 209/193, Pangani, Nairobi.

f) *That* the Respondent do pay the costs of these proceedings to the applicant/petitioner.

Orders accordingly. Right of appeal 30 days

Dated at Nairobi this 28th day of February 2017

John M. Mativo

Judge

[1] Cap 280, Laws of Kenya (Repealed)

[2] Cap 300, Laws of Kenya (Repealed)

[3] Act No. 4 of 2015

[4] Ibid

- [5] *Advisory Opinion Reference No. 2 of 2014, {2015} eKLR*
- [6] {1985}1ALL ER 211
- [7] *Supra*
- [8] {1947}
- [9] {1983}QB 600
- [10] Counsel cited M. Ssekaana, *Public Law in East Africa*, 183
- [11] See **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was)
- [12] See **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458,**
- [13] See **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431**
- [14] **Nakuru HCCC No. 247 “A” of 2004**
- [15] 1924-1 KB 171 at p.205 (C)
- [16] {2008} 2EA 300
- [17] See Ondunga J in J R 112 of 2011 cited above in note 3
- [18] (1980) 3 S.C.C. 625. For a critical account see Upcndia Baxi, "A Pilgrim^ Progress : The Basic Structure Revised**", in *Courage, Craft and Contention : The Supreme Court in the Eighties* 64-110 (1985).
- [19] Article 47(1) of the Constitution of Kenya, 2010
- [20] Article 47(2) of the Constitution of Kenya, 2010
- [21] {1915} AC 120 (138) HL
- [22] {1906} AC 535 (539), *Lapointe v. L'Association*
- [23] We find it Invoked in Kautllya's *Arthashastra*.
- [24] AIR 1978 SC 851
- [25] David Phillip JONES and Anne S. de VILLARS, *Principles of Administrative Law* (4th edition), Thomson Carswell, 2004, p. 251.
- [26] *Kioa v West* (1985), Mason J
- [27] {1986-1989} EA 456
- [28] Act No. 4 of 2015
- [29] *Ibid*
- [30] *Chaskalson, J in Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others(CCT) 31/99 [2000] ZACC 1; 2000 (2) ZA 674*

[31] Act No. 5 of 2012

[32] *Pastoli v. Kabale District Local Government Council and Others* {2008} 2 EA 300

[33] *Supra*

[34] {1948} 1 K. B. 223, H.L.

[35] Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

[36] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

[37] G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[38] Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

[39] *R v Oakes* [1986] 1 SCR 103 [69]–[70].

[40] *Ibid*