



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NOS. 298 AND 363 OF 2014**

**IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF REGISTRATION OF TITLES ACT (REPEALED)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**ROBERT MUTISO LELLI.....APPLICANTS**

**AND CABIN CREW INVESTMENTS LTD**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR OF TITLES.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**KENYA MEDICAL TRAINING COLLEGE.....INTERESTED PARTY**

**JUDGMENT**

1. This judgment determines two cases. This file-JR 298/2014 where the exparte applicant is **Robert Mutiso Lelli** is closely related to JR 363/2014 wherein the exparte applicant is **Cabin Crew Investments Ltd**. The respondents and interested parties are, the **National Land Commission [NLC]**, the **Chief Land Registrar of Titles** and the **Hon. Attorney General** while the interested party is **Kenya Medical Training College [KMTTC]** the difference is in the respective land Reference numbers and names of exparte applicants. Accordingly, all the parties' legal representatives agreed that they argue out one matter and the court considers writing one judgment to affect the other matter. In this JR 298 of 2014, the exparte applicant's case as per the substantive Notice of Motion dated 19th August 2014 seeks for the following orders:

*i. An order of Certiorari to remove to this Honourable Court and quash the decision of the 1<sup>st</sup> respondent National Land Commission published in the Newspaper on 4<sup>th</sup> and 7<sup>th</sup> July 2014;*

*ii. order of Certiorari to remove to this Honourable court to expunge all registry entries entered or derived by the 1<sup>st</sup> respondent's and effected by the 2<sup>nd</sup> respondent Chief Land Registrar of Titles before or after the publication in the newspaper the determination revoking the title No.LR 209/14272.*

*iii. An order of Prohibition to prohibit the 2<sup>nd</sup> respondent (Chief Land Registrar of Titles from registering, entering or in any other manner interfering with the records of LR No. 209/14272 pursuant to the decision of the 1<sup>st</sup> respondent National Land Commission while ELC No, 354/2009 is pending in court;*

*iv. Such further and other relief as the Honourable court may deem fit and expedient.*

*v. Costs to be provided for.*

2. The notice of motion is predicated on the verifying affidavit and statutory statement in support of the chamber summons dated 30<sup>th</sup> July 2014, supporting affidavit, skeletal submissions and subsequent submissions both written and orally canvassed in court.

3. The exparte applicant in this case is **Robert Mutiso Lelli**. He claims that he is registered owner of all that parcel of land known as **LR No. 209/14272** Matumbato Road, Nairobi ( herein after referred to as the "suit property") having been issued with a title in 2001 by the Government of Kenya.

4. That in the year 2009, the exparte applicant filed suit against the 2<sup>nd</sup> interested party who is the **Kenya Medical Training College vide ELC 354/2009** seeking inter alia, to remove persons who had squatted in the suit property with the consent and authority of the 2<sup>nd</sup> interested party.

5. That when the 2<sup>nd</sup> interested party appeared in that suit, it made a counter claim laying a claim on the suit property and seeking to have the title issued to the exparte applicant revoked.

6. That the 1<sup>st</sup> respondent **National Land Commission (NLC)** and the 1<sup>st</sup> interested party, **the Attorney General** were enjoined to the said suit by an application filed by the 2<sup>nd</sup> interested party, **Kenya Medical Training College(KMTC)** which suit is still pending in court.

7. It is alleged that while the said suit was and is still pending in court and the 1<sup>st</sup> respondent and 1<sup>st</sup> interested party have not been active participants therein, the 1<sup>st</sup> respondent NLC illegally summoned the applicant to appear before it in respect to the suit property which summons were through a newspaper advertisement. That the applicant obliged to the summons and appeared before the 1<sup>st</sup> interested party NLC.

8. The applicant claims that he did protest and pointed out in the course of the said interrogation by NLC officials that the matters being raised by the interested party KMTC were pending before the court; matters which the 1<sup>st</sup> interested party acknowledged, being aware of.

9. That on 4<sup>th</sup> and 7<sup>th</sup> July 2014. The 1<sup>st</sup> respondent NLC advertised in the newspaper that it had determined the revocation of the title to the suit property. The applicant being aggrieved by the said decision of the 1<sup>st</sup> interested party he instituted these Judicial Review proceedings on account that **the decision by the 1<sup>st</sup> respondent was unfair, unprocedural, unreasonable, inconsiderate, illegal, irrational and abuse of office hence the decision of National Land Commission be quashed.**

10. The ex parte applicant in JR 363 of 2014 is **Cabin Crew Investments Limited a limited liability company**. In the Notice of motion dated 12<sup>th</sup> November 2014 pursuant to the leave granted on 4<sup>th</sup> November 2014 to apply, the ex parte applicant seeks the following orders:

- a) An order of **Certiorari** removing to the High Court for purposes of being quashed and quashing the 1<sup>st</sup> respondent (National Land Commission)'s decision issued on 7<sup>th</sup> July 2014 purporting to revoke the applicant's title to **LR 209/14277** the impugned decision; and
- b) An order of **Prohibition** precluding the respondents and any of their respective officers, Commissioners, servants, agents, and or employees from alienating, revoking the title to, making any recommendations for the revocation of the title or taking any step or action with regard to **LR No. 209/14277**.
- c) That costs of and incidental to these proceedings be borne by the 1<sup>st</sup> respondent; and
- d) Any such other, further, or incidental orders or directions as the Honourable court may deem just and expedient in the circumstances.
- e) The application by Cabin Crew Ltd is predicated on the grounds, statutory statement and supporting affidavit of **Kennedy Orangi Ondieki** the director of the applicant who also swore a verifying affidavit.

11. The ex parte applicant's case in JR 363 of 2014 basically, is that it is the registered leasehold owner of the title No. **LR 209/14277** situate in Upper Hill. That on 30<sup>th</sup> October 2013 it learnt of court proceedings filed by the 3<sup>rd</sup> respondent **Kenya Medical Training College** on 27<sup>th</sup> September 2013 in **ELC No. 1162 of 2013** claiming ownership of the suit property on account of a purported error of allotment. That the ex parte applicant filed a defence to those proceedings and that the said case is still pending in the Environment and Land Court for determination of the issue of acquisition and ownership of the disputed property, as shown by copies of plaint and defence annexed to the verifying affidavit.

12. Further, that on 11th April 2014 while suit No. ELC 1162/2013 was pending the 1<sup>st</sup> respondent herein National Land Commission published an advertisement in the newspapers inviting members of the public to participate in investigations that the 1<sup>st</sup> respondent indicated it was conducting on the suit property No. **LR 209/14277** among other properties.

13. That on 14<sup>th</sup> April 2014 the ex parte applicant wrote to the 1<sup>st</sup> respondent National Land Commission pointing out that it was irregular for the 1<sup>st</sup> respondent to purport that it was conducting a concurrent inquiry relating to the ownership of the same suit property during the pendency of the court proceedings over the same subject property in which the 1<sup>st</sup> respondent was directly named as a party. That despite the protests the 1<sup>st</sup> respondent continued with the purported inquiry and that in a surprising turn of events, the 1<sup>st</sup> respondent National Land Commission published yet another curious advert in the newspaper on 7<sup>th</sup> July 2014 through which it indicated that it had revoked the title to the suit property No. **LR 209/14277**.

14. The ex parte applicant **Cabin Crew Ltd** in **JR 363/2014** was aggrieved by the arbitrary and unilateral decision taken on 7<sup>th</sup> July 2014 by the 1<sup>st</sup> respondent the National Land Commission and wrote a protest letter expressing its disappointment and dissatisfaction with the purported revocation of the title to the suit property and also requested for the reasons for the purported revocation, as stipulated in Article 47 of the Constitution, but that to date the 1<sup>st</sup> respondent has not furnished the ex parte applicant with those reasons for revocation of the title to the suit property No. **LR 209/14277**.

15. The ex parte applicant believes that the 1<sup>st</sup> respondent's decision to inquire into the ownership of the

property wherein it was a party to judicial proceedings pending before the ELC court was calculated to steal a march and preempt a fair hearing and determination of **ELC No. 1162/2013**.

16. The ex parte applicant in **JR 363/2014** believes that the 1<sup>st</sup> respondent's (NLC) decision offends the rules of natural justice, is tainted with illegality, irrationality and procedural impropriety and hence amenable to Judicial Review for reasons, among others,

*1) That the decision is subjudice ELC 1162/13.*

*2) The decision is illegal, unlawful, null and void for being contemptuous of the honour, authority and dignity of the Environment and Land Court.*

*3) The decision is ultra vires the powers, functions and jurisdiction of the 1st respondent; and*

*4) The impugned decision violates the applicant's fundamental rights and freedoms guaranteed under Articles 40,47, 48 and 50(1) of the Constitution of Kenya, 2010 and related principles in inter alia, the following ways:-*

*i. By unilaterally and arbitrarily issuing a decision whose effect is to unlawfully deprive the applicant of its property, the 1<sup>st</sup> respondent violated the applicant's right to property enshrined in Article 40 of the Constitution.*

*ii. The process by which the 1<sup>st</sup> respondent purported to direct the cancellation of the applicant's title to the suit property was not reasonable and procedurally fair to the extent that the applicant was not afforded an effective hearing before the decision was issued in clear violation of Article 47 of the Constitution which guarantees fair administrative action.*

*iii. Whereas the 1<sup>st</sup> respondent (National Land Commission) had an obligation to take into account the applicant's indication that there were pending proceedings pending in court and thereby not oust the ongoing judicial process, the 1<sup>st</sup> respondent undermined the applicant's right to access justice in contravention of the provisions of Article 48 of the Constitution.*

*iv. In failing to respond to the applicant's letter of 17<sup>th</sup> July 2014 requesting for reasons for the impugned decision, the 1<sup>st</sup> respondent acted in contravention of the provisions of Article 47(2) of the Constitution and the applicant's lawful and legitimate expectations.*

*v. The 1<sup>st</sup> respondent's decision undermined the authority of the court in the ongoing **ELC case No. 1162 of 2013** and had the effect of subverting judicial proceedings relating to the same issue of ownership of the suit land and thereby thwarted the applicant's right to a fair hearing before court in contraventions of Article 50(1) of the Constitution.*

*vi. The 1<sup>st</sup> respondent acted in violation of Article 10 of the Constitution which enjoins public bodies to uphold the national values and principles of governance, including integrity, transparency and accountability in making or implementing any public policy issues.*

17. Both the ex parte applicant in **JR 363 of 2016 – Cabin Crew Investments Limited**, and **Mr Robert Mutiso Lelli** in **JR 298 of 2014** associate themselves with each other's complaints against the respondents and interested parties.

18. The ex parte applicants aver that since there were suits pending before a competent court of law

touching on the question of ownership of the disputed properties namely No. **LR 209/14277** and **LR 209/14272**, any other action by the National Land Commission was subjudice to the case hence the NLC could therefore not have had jurisdiction to review the grant of the said title as that was now in the purview of the jurisdiction of a competent court. The ex parte applicants further aver that no hearing took place.

19. In addition, it is averred that the ex parte applicants notified the National Land Commission of the pendency of the suit but it nonetheless went ahead and revoked the title.

20. The ex parte applicants maintain that they have guaranteed rights under Article 40 and 47 of the Constitution which the National Land Commission has violated.

21. It was stated that no written reasons for revocation of titles were supplied to the ex parte applicants by the National Land Commission which is contrary to Article 60(b), (d) of the Constitution on principles of land policy which the NLC must apply when deciding any matter affecting land.

22. It was averred that there was no transparency in the process conducted by the National Land Commission which is contrary to Section 14 of National Land Commission Act. It was further averred that Section 68(c)(iv) of the Constitution empowers the National Land Commission to deal with public land and not the ex parte applicant's land which is private land.

23. It was averred that the decision of National Land Commission to deal with the ex parte applicants' land which is private land was without jurisdiction.

24. It was averred that the decision of National Land Commission to revoke the titles in issue was unreasonable, in bad faith, abuse of power, ultra vires. Section 14 of National Land Commission Act and that it was made in violation of the Rules of natural justice and subjudice court proceedings hence the decisions should be quashed in order for the court to proceed to hear and determine the dispute pending before court.

25. The 1<sup>st</sup> respondent National Land Commission's case on the other hand is as per the opposition contained in the replying affidavit sworn by **Brian E. Ikol** and submissions filed on 27<sup>th</sup> June 2016 to the effect that Section 14 of the National Land Commission Act mandates National Land Commission to review all grants and dispositions in public land either on its own motion or on a complaint by the National Government, the County Government groups or Organizations and even individuals.

26. That Section 14 of the NLC was enacted pursuant to Article 68(c)(v) of the Constitution as a framework for review of grants and dispositions relating to public land.

27. That in this case, National Land Commission received a complaint from Kenya Medical Training College the 4<sup>th</sup> respondent herein requesting the Commission to review the legality of the subject titles on grounds that the same had been unlawfully acquired.

28. That although there was in existence HCC 354/2009 and HCC 1162/2013 (ELC), the National Land Commission came into effect as a creature of the Constitution and that its mandate was to determine the legality of the manner in which the applicants acquired that land.

29. In their submissions, the 1<sup>st</sup> respondent relied on the case of **Elizabeth N. Njoroge vs National Land Commission[2013] e KLR** where the court was called upon to answer the question as to whether the National Land Commission could review the legality of the title when the dispute was pending in court over ownership of the said title.

30. It was further submitted that review proceedings before NLC were not in any way prejudicial to the ex parte applicants in both cases herein. Further, that the ex parte applicants were given an opportunity to appear before the Commission and make representations and were represented by their counsels

hence they were given a fair hearing. That the National Land Commission reached a determination that the suit parcels were acquired unlawfully because they had been reserved by the Government in favour of Kenya Medical Training College which is a government institution. That therefore the National Land Commission acted within the confines of the law by directing the revocation of the titles by the Registrar hence it acted within its mandate in revoking title LR 209/14272 by publication in the Kenya Gazette.

31. On the part of the **Cabin Crew Investment** NLC claimed that the latter refused to participate in the hearing despite being invited to make representation on the grounds that there was a pending civil suit before Environment and Land Court regarding the subject parcel of land but that particulars of the subject matter were not brought to the National Land Commission's attention and hence the National Land Commission took such conduct as unwillingness to participate in the proceedings hence it had no option but to proceed to make a determination under the law.

32. It was submitted by National Land Commission that the two parcels of land emanate from original plot Nos. 61,62,63 and 64 which were all surveyed and which had been reserved for the Kenya Medical Training College in 1996 while the allocations to the exparte applicants were made in the 2000. It was further submitted that the subject parcels are grants of public land having been initially public land allocated to the exparte applicants.

33. Reliance was placed on **JR 316/2014** where it was held that once public land is converted to private land it does not mean that the land is out of the realm of what National Land Commission is support to act upon in reviewing grants and dispositions.

34. It was submitted that the National Land Commission is supposed to probe on how private individuals acquired public land. Reliance was placed on **Republic vs Land Registrar, Mombasa & 2 Others exparte Bhangra Ltd [2012] e KLR** where the court stated that the National Land Commission had power to review grants.

35. It was submitted by National Land Commission that it appears that both parties to these two applications came to court because there was no favourable decision in their favour. Further, that the court should take cognizance of the fact that the right to own property under Article 40 of the Constitution is not absolute and that protection against deprivation of personal property does not extend to property acquired in an unlawful manner. It was however conceded that the National Land Commission had not annexed any evidence of how the unlawful acquisition was arrived at.

36. On behalf of Kenya Medical Training College, who opposed the Exparte applicant's application, through a replying affidavit of Dr Olango Onudi filed in JR 363/2014 sworn on 29<sup>th</sup> October 2014 it was deposed and submitted that reservation of the subject parcels of land for the Kenya Medical Training College was done as per the letter of allotment dated 24<sup>th</sup> December 1996 although the Kenya Medical Training College paid for the land in 1960s but delayed in processing the title. That investigations revealed that the exparte applicants herein were given letters of allotment in the 2000(22/8/2000) as per the bundle on pages 81-117 and that titles were issued to them 8 days later. Further, that the titles which were issued ran from LR No. 209/14269 to LR 209/14278 all inclusive.

37. According to KMTC, the Exparte applicant in JR 298/2014(Robert Mutiso Lelli) benefited from LR 209/14270,14271,14272 whereas Cabin Crew Investments, the exparte applicant in JR 363/14 benefitted from LR 209/14277.

38. It was contended that the issue of acquisition of the subject land was escalated to the Ndungu Land Commission of inquiry into the illegal allocation of public land. That the verdict at pages 14-15 of the Ndungu report of June 2004 was that the said titles be revoked.

39. That the matter was later escalated to the Parliamentary Public Investments Committee (PIC) and relayed to the Attorney General and it was recommended that the titles be surrendered.

40. It was contended that the purpose of Judicial Review application is to inquire into decision making

process and not a decision in itself or its merits.

41. That the National Land Commission having informed the ex parte applicants of the intention to inquire into how the suit properties were acquired and that Mr Mutiso Lelli, the ex parte applicant in JR 298/2014 having appeared before the National Land Commission while Cabin Crew Investments ( JR 363/2014) having written to National Land Commission saying that there was a matter pending before the court, then they cannot claim that they were denied an opportunity to be heard.

42. Reliance was placed on **Republic vs Commissioner of Lands & 2 Others [2013] e KLR** (HC Miscellaneous No. 23 & 28 of 2010 where the court restated the principles of a Judicial Review. KMTC maintained that Section 14 of the National Land Commission Act empowers the Commission to review or inquire into how a public land was subsequently converted into private land.

43. On whether the ex parte applicants were heard before a decision was made, it was submitted that the applicants were issued with notices in the newspapers showing the date, place and time of the hearing.

44. On whether the decision maker took into account relevant or irrelevant matters, it was submitted that the facts of the proceedings and the report of the Ndungu Land Commission are in the public domain and that in any event, Mr Mutiso Lelli surrendered parcel NO. 209/14271 but held onto LR 209/14270 and 14272 hence he is estopped by conduct from questioning the illegality of holding onto the two parcels because Kenya Medical Training College submitted all that evidence before the National Land Commission.

45. It was submitted that in view of the above, these proceedings are an abuse of the court process in view of the determinations by the Public Investments Committee and the Ndungu Land Commission.

46. It was submitted that the National Land Commission is a constitutional body seized of the same jurisdiction as the courts and that there is no legal prohibition of the National Land Commission hearing a dispute which is pending before the court. It was further submitted that in any event, the National Land Commission was never enjoined from conducting the review proceedings for want of jurisdiction hence public land should remain public land for purposes of training of medical personnel.

47. In a rejoinder on behalf of the ex parte applicant in JR 298/2014 Mr Mutiso's counsel submitted that although the National Land Commission was not a party to HCC ELC 351/2009 and that albeit Section 30(b) of National Land Commission Act, 2012 is a transitional provisions, the National Land Commission took over proceedings previously handled by the Ministry of Lands so they are deemed to be parties.

48. Mr Mutiso's counsel maintained that the National Land Commission is only empowered to deal with public and not private land and that it is guided by principles espoused in Article 47 of the Constitution.

49. Further, it was submitted that in the absence of proceedings on what transpired at the hearing before the National Land Commission, the court cannot know who said what.

50. It was further submitted that Section 5 of the Rules of Procedure under the National Land Commission Act mandates the Commission to keep minutes and proceedings of its proceedings.

51. It was submitted that there are no written reasons for revocation of the titles. Further, that the NLC has dwelt on matters to be canvassed in ELC 354/2014. That the applicants are aggrieved by the process of reaching at the determination and on the claim that some title was surrendered to Kenya Medical Training College, yet there was no such evidence of surrender.

52. On the issue that the land in issue was subject to the Ndungu Land Commission and the Public Investments Committee, it was submitted that the applicant in JR 298/2014 (Mr Mutiso) was never summoned by the Ndungu Land Commission to defend himself. Finally, that the cases cited by Kenya

Medical Training College support the case for the ex parte applicants hence the Judicial Review applications should be allowed.

53. In a rejoinder on behalf of the ex parte applicant in JR 363/2014, (Cabin Crew Investments) Mr Angwenyi submitted that his client Cabin Crew Investments was compensated for its land taken by the Registrar of the titles as is required where private land has to be acquired.

54. Further, that where ownership to a land dispute is involved, the court takes precedence yet the National Land Commission has taken that right away.

55. That the court's jurisdiction cannot be ousted by any other body. In addition it was submitted that HCC ELC 1162/2013 was filed by the Kenya Medical Training College themselves and that since the National Land Commission was a party in those proceedings, it cannot abandon court proceedings to be a judge in its own cause by purporting to review the same title hence those review proceedings were prejudicial to the applicant (Cabin Crew Investments which is in occupation of the land but is unable to enjoy it due to external interference.

56. On allegations that no particulars of the pending court case were provided to the National Land Commission by the applicant (Cabin Crew Investments), it was submitted that the National Land Commission was a party to that suit hence it cannot pretend not to be aware of the said suit.

57. Mr Angwenyi maintained that as there are no minutes of the Review of Titles process by the NLC, the applicants herein cannot be said to have been accorded a fair hearing as there are no reasons for revocation of titles provided to this court.

58. It was also submitted that there was no unlawfulness in the Registrar of Titles compensating Cabin Crew Investments.

59. On the powers and functions of the National Land Commission, it was submitted that the National Land Commission cannot revoke titles yet they did so as per annexure RML4 dated 7<sup>th</sup> July 2014. That the National Land Commission ought to have only made recommendations under Section 14(1) (5), to the Registrar to revoke the titles which was not the case here.

60. Reliance was placed on the **Supreme Court Advisory Opinion by Honourable Ndungu SCJ SCK AD.OP. 2 of 2014**. It was also submitted that the **Elizabeth Njoroge** case was clear that the National Land Commission can only investigate the illegality and bring evidence to court in a matter which is pending.

61. Further, that in the **Republic v Land Registrar Kakamega, JR 20/2012** Honourable Chitembwe J found that several cases show unconstitutionality of cancellation of titles.

62. Mr Angwenyi maintained that the National Land Commission has no jurisdiction to revoke titles whether it conducted a hearing or not hence the court must quash the decision of National Land Commission.

## **DETERMINATION**

63. Before identifying the issues for determination in these twin matter, it is important to highlight that this matter was slated for judgment on 17<sup>th</sup> October 2016 after the hearing on 6<sup>th</sup> September 2016 but the court was heavily engaged in other matters and despite re-fixing it for 15<sup>th</sup> November 2016 and 24<sup>th</sup> January 2017 respectively, it was not possible to write the judgment due to heavy workload compelling me to reschedule it further to 14<sup>th</sup> February 2017. On the latter date, I was indisposed but noted that one of the files in this case, JR 363/2014 was inadvertently filed away in the registry with other files thereby making it impossible for me to complete writing the judgment hence this date.

64. I have considered the two *ex parte* applicants' respective notices of motion which were filed separately but owing to similarity in the prayers and the cause of action being the same- the decision of the National Land Commission as published on 7<sup>th</sup> July 2014, the parties advocates agreed to argue the applications jointly for a common decision, in order to save on time and resources of writing two separate judgments.

65. Therefore, although the two matters were not consolidated, the parties agreed and the court directed that the decision in one file will be applicable to the other file with necessary modifications as to the names of parties and the title(s) that were revoked. It is for that reason that this judgment which is written in JR 298/2014 also brings on board the facts disclosed in JR 363/2014, and shall apply, with necessary modifications, to JR 363/2014.

66. In my humble view, the issues that flow from the two applications as submitted by the respective parties' advocates both orally and in writing are:

*1) Whether the National Land Commission had jurisdiction or power to conduct proceedings for review of title(s) when the disputes on ownership of the impugned titles were pending before a court of competent jurisdiction, and whether the National Land Commission became a judge in its own cause; being a party to court proceedings.*

*2) Whether the National Land Commission has jurisdiction to revoke titles to land where it finds, after an inquiry, that such title was irregularly or illegally acquired?*

*3) Whether the National Land Commission was under a duty to accord the *ex parte* applicants an opportunity to be heard and if so, whether the applicants were heard before their titles were revoked.*

*4) Whether the National Land Commission was under a statutory duty to provide reasons for the determination that the suit titles were illegally/irregularly acquired.*

*5) Whether the Judicial Review Orders sought are available to the *ex parte* applicants in both cases.*

*6) orders should this court make*

*7) Who should bear costs of these Judicial Review proceedings?*

67. On the first issue of whether the National Land Commission which is the 1<sup>st</sup> respondent had jurisdiction/power to conduct proceedings for review of titles when the disputes over ownership of the said titles subject to these two cases were pending before the Environment and Land Court which is a competent court; and therefore whether the National Land Commission became a judge in its own cause being a party to the said court proceedings; It is not in dispute that there are court proceedings pending before the Environment and Land Court vide **ELC 354/2009 – Robert Mutiso Lelli vs Kenya Medical Training College, Attorney General and Commissioner of Lands** and **HCC (ELC) 1162 of 2013** involving parties to these proceedings over ownership of the suit titles. It is also not in dispute that the *ex parte* applicants herein were summoned by the National Land Commission, the 1<sup>st</sup> respondent herein vide Newspaper advertisements of 14<sup>th</sup> April 2014 in the Daily Nation to appear before the National Land Commission on the stated dates of 24<sup>th</sup> April 2014 over LR 209/14272 and LR 209/14277 respectively wherein the complainant was Kenya Medical Training College, the 2<sup>nd</sup> interested party herein JR 298/2014. It is also not in dispute that National Land Commission took over the functions of the Commissioner of Lands after the promulgation of the 2010 Constitution and the establishment of the National Land Commission.

68. On 7<sup>th</sup> July 2014, Honourable L. Gicheru J of Environment and Land Court delivered a ruling in an application for a restraining injunction in **ELC 354/2009** wherein Kenya Medical Training College

had sought to restrain the *ex parte* applicant Robert Mutiso Lelli herein from dealing in any way with LR Nos. 209/14270 and LR No. 209/14272. The learned ELC Judge dismissed the application filed by KMTC. From that ruling which is annexed to these proceedings, it emerges that in **ELC 354/2009**, the *ex parte* applicant herein is the plaintiff whereas Kenya Medical Training College is the 1<sup>st</sup> defendant and it did file a counterclaim in that suit. Both parties were claiming for ownership of titles to the disputed parcels.

69. From the above brief facts, it is clear that indeed, the Environment and Land Court is seriously seized of the dispute involving the parcels of land subject of these proceedings, and is yet to determine the issue of ownership. The Environment and Land Court has jurisdiction conferred upon it by Article 162(2) (b) of the Constitution to hear and determine disputes relating to title to, the use of and occupation of land. Since both Kenya Medical Training College and the *ex parte* applicants to these proceedings are claiming ownership to the suit lands, with the National Land Commission being a party to those proceedings, it is my humble view that the National Land Commission cannot escape from the court process which is a judicial legal process and decide that it now becomes the judge and jury over the same subject matter.

70. The principle of *audi alterum partem* as espoused in law is clear that a party cannot be a judge in their own cause. By seeking to determine the legality or irregularity of the acquisition of the subject titles when court proceedings to which the National Land Commission was a party were pending before a court of competent jurisdiction, the National Land Commission was seeking to oust the jurisdiction of the court.

71. The jurisdiction of the court can only be ousted by the Constitution ( see Article 165(5) b) or by an Act of Parliament, but not by an administrative body or state organ or institution exercising *quasi-judicial* authority.

72. In stepping from the court room to a judge in an inquiry room proceedings, the National Land Commission was doing was , in my view, restlessly, overzealously and obsessively tanked-up with power and in total disregard of the law as established.

73. Section 14 of the National Land Commission Act and Article 68 of the Constitution espouse that in the exercise of its functions under the law, the National Land Commission must adhere to the principles of natural justice and one such cardinal principle is that one cannot be a judge in their own cause.

74. From the facts of this case, in my humble view, the National Land Commission was acting arbitrarily and abusing its powers under the law. The court acknowledges that the National Land Commission is an independent commission under the Constitution but the powers and functions vested in it under several statutes including the National Land Commission Act and Article 68 of the Constitution are not absolute powers. Those powers must be exercised within the confines of the law.

75. What this court sees in the NLC from the facts of these two cases is an institution that has ran amok, competing for power and jurisdiction conferred on competent courts of law established under the Constitution.

76. Once there is a suit pending before a competent court and the NLC or its predecessor is a party, and the proceedings are either pending determination or have been fully determined by that court, the NLC cannot purport to hear and determine an inquiry touching on the same dispute.

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

78. It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise

restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court's jurisdiction by taking upon itself the mandate of hearing and determining the dispute.

79. In my humble view, therefore, the National Land Commission exceeded its jurisdiction in taking over proceedings pending before a court of competent jurisdiction and in purporting to hear and determine the same when National Land Commission was a party to those proceedings. It cannot, therefore, be said that the *exparte* applicants came to court because they had an unfavourable outcome before National Land Commission and or that they refused to appear before the National Land Commission to make representations concerning the legality of their respective titles.

80. I reiterate that the National Land Commission must not usurp the powers of a court of competent jurisdiction in as much as it has the power to inquire into how a title or disposition in public land was acquired. In this case, what the National Land Commission did, in my humble view, was in effect to remove the pith of litigation from a court of competent jurisdiction and leave only a shell. The Court of Appeal principle in **Dr Alfred Mutua v Ethic and Anti-Corruption Commission & Others Civil Application Nairobi No. 31 of 2016** citing the Nigerian Court of Appeal decision in **Olusi & another V Abanobi & Others suit No. CA/B/309/2008** stated:

***“It is an affront to the rule of law to....render nugatory an order of court whether real or anticipatory. Furthermore.....parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”***

81. In other words, parties who have submitted themselves to the court's jurisdiction to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the court would be of no use.

82. It is for that reason that I also agree with the Nigerian Court of Appeal decision in **United Cement Company of Nigeria Vs Dangote Industries Ltd & Minister of Solid Mineral Development /CA/A/165/2005** that the court ought to ensure that

***“ appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgment or order.”***

83. Although the above decisions are mostly cited in applications for stay in judicial review applications for leave, but the principle espoused therein is that a person who is a party to court proceedings should not do anything which will render the court completely helpless or render nugatory any judgment or decree or order.

84. What the Kenya Medical Training College and National Land Commission should have done in circumstances where there were pending court proceedings is to apply for stay of court proceedings pending determination of the inquiry by the National Land Commission, if they believed that the National Land Commission was the appropriate forum for resolving the dispute and the court would then be the last resort, especially where the NLC is not a party to those proceedings. That was not the case here in that after the Kenya Medical Training College failed to prevent evictions of civil servants/staff occupying the land, instead of going back to the court which had issued an injunction, it wrote to the National Land Commission a letter whose tone is that of dire helplessness, asking for intervention.

85. In other words, the Kenya Medical Training College felt that the court was unable to enforce the injunction granted and hence only the National Land Commission could salvage the situation by carrying out an inquiry.

86. On this point I must point out that I am in agreement with National Land Commission and Kenya Medical Training College that one cannot claim that the National Land Commission has no jurisdiction

or power to inquire into how land which was public land was converted into private land for, without that power, the National Land Commission would be powerless since it is public land that was alienated and allocated to private individuals to develop. Therefore, it is not true to claim as the ex parte applicants have claimed in these proceedings that the National Land Commission is hell bent to deprive them of their right to own property or interests therein without compensation for such deprivation not being offered.

87. The right to own property or interest therein is limited by the Constitution itself. That right is not absolute. Where it appears that the property in question was acquired irregularly or illegally, then the person so acquiring cannot claim an absolute right thereto, as the National Land Commission has the power to inquire into that form of acquisition and where appropriate, recommend to the Registrar for revocation.

88. However, where it is clear that prior to the establishment of the National Land Commission or prior to the inquiry being commenced by the National Land Commission, there was a suit pending in court touching on ownership of the property in question, and where persons claiming ownership have even enjoined the National Land Commission as a party thereto, a party to a dispute cannot be the referee to the same dispute in a different forum. In this case, the National Land Commission turned into a judge in its own cause.

89. Thus, however, is not to say that the National Land Commission cannot carry out independent investigations on the legality of the title in question, for purposes of adduction of evidence in those pending court cases to enable the court make an appropriate decision.

90. A reading of Article 68 of the Constitution and section 14 of the NLC Act presupposes that the National Land Commission would have jurisdiction to review grants and dispositions of public land, where there are no other proceedings in motion such as court proceedings. This is so because where there are pending court proceedings, then by dint of Article 162(2) (b) of the Constitution, it is the Environment and Land Court that has competent jurisdiction to hear and determine a dispute relating to occupation and title to land. The court would no doubt determine whether the title to the disputed land was acquired legally or otherwise and it would have the power to order for revocation of the title that is found to be illegally or irregularly acquired .

91. The second issue that I have to determine is whether the National Land Commission has jurisdiction to revoke titles to land even where it finds, after an inquiry, that such title was irregularly or illegally acquired.

92. Article 68 of the Constitution empowers Parliament to enact legislation to among others, (c) (v) to enable the review of all grants or dispositions of public land to establish their propriety.

93. The above constitutional provision was implemented by the enactment of the National Land Commission Act No. 5 of 2012. Section 14 of the National Land Commission Act espouses the review of grants and dispositions, pursuant to Article 68 (c) (v) of the Constitution. Under the said Section , the National Land Commission shall within 5 years of the commencement of the 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.

94. Section 14 of the National Land Commission Act provides a procedure for the review of grants and disposition of public land to establish their propriety and legality. Where the Commission under Section 1(5) of the Act finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.

95. There is no legal provision for the Commission to revoke titles where upon inquiry it establishes that such titles were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend.

96. However, the Daily Nation of Monday 7<sup>th</sup> July 2014 which is an advertisement by the National Land Commission is clear that it was publishing a Determination of Review of grants/dispositions of public land.

97. In that notice, the Commission announces that ***the Commission, upon receipt of complaints from the National Government, County Government and members of the public undertook a review of grants and dispositions (titles) to public land to establish their legality. The commission via a public notice in the national dailies invited all interested parties to appear before it, inspect documents and make written representations and submit documents. Consequently, the commission has made determination in respect of the following grants indicated below.***

5. ***LR No. 209/14272***

***LR No. 209/14277 - outcome is to revoke the title.***

98. In view of the fact that the Commission was announcing a determination to revoke the titles and not recommendation to the Registrar for revocation of the subject titles, it is clear that the Commission acted illegally and usurped the powers of the Registrar in revoking the titles to the respective land Reference numbers complained of herein being ***LR No. 209/14272 and LR No. 209/14277.***

99. Accordingly, I find and hold that the Commission acted beyond and outside its jurisdiction and where it does so, this court has the jurisdiction to interfere with such an illegal decision.

100. This court further notes that in ELC 354 of 2009 where the ex parte applicant Mutiso Lelli sued Kenya Medical Training College seeking, vide an amended plaint filed on 2<sup>nd</sup> October 2009 for general damages for trespass, illegal occupation and unauthorized entry into a private property, Kenya Medical Training College on whose behalf National Land Commission was determining the complaint on the propriety of the ex parte applicant's title(s) filed a defence and counterclaim dated 8<sup>th</sup> October 2009 seeking among others; a declaration that the property known as LR No.209/14270 and LR 209/14277 is comprised of the land reserved for and or belonging to the defendant ; A declaration that the suit titles were irregularly and or illegally issue to the plaintiff; An order compelling the defendant to surrender to the plaintiff the grants and or titles issued to him for the suit titles; and cancellation of the tiles issued to the plaintiff for the suit properties and to issue letters allotment in respect to the defendant.

101. And in these two ex parte applicants' applications-JR 363/2014 and JR 298/14 it is clear that the Ministry of Lands on 3<sup>rd</sup> July 2007 did write to the Attorney General requesting that he institutes proceedings against the titled holders of LR 209/14270-72 and LR 209/14277 who are the two ex parte applicants in the respective Judicial Review proceedings herein.

102. Further, on 23<sup>rd</sup> July 2007 the Commissioner of Lands wrote to the Clerk of the National Assembly responding to a letter of 2<sup>nd</sup> July 2007 relating to Kenya Medical Training College land and in that letter, it was made clear that the subject titles LR 14270, 14272 and LR 209/14277 which are subject of these proceedings were registered in the names of Robert Mutiso Lelli and Cabin Crew Investments Limited respectively and that the Ministry had instructed the Attorney General to institute legal(judicial) proceedings for cancellation of the subject titles.

103. Although National Land Commission claims that the ex parte applicant in JR 363/2014 did not disclose what court case was pending in court, the letter dated 24<sup>th</sup> March 2014 by Kenya Medical Training College to the Chairman National Land Commission is clear that there is a court case involving the disputed parcels.

104. As earlier stated, the National Land Commission exercises its functions on behalf of the public. Kenya Medical Training College is a public entity and it had a right to complain against any person whom it believed had acquired land belonging to it illegally. However, where it is clear that the

Kenya Medical Training College had sought the court's intervention to determine the legality of the titles issued to the *ex parte* applicants herein and even sought for an order for cancellation of such titles in its favour, the National Land Commission is no doubt embarrassingly usurping powers of the court and other entities like the Registrar, when it purports to run away with proceedings pending in court, with full knowledge that the same issues that it was going to determine are the same issues pending before a court of competent jurisdiction.

105. By so doing, the National Land Commission was sending a signal that the Court (ELC) has no jurisdiction to hear and determine a dispute wherein Kenya Medical Training College seeks for declarations and cancellation of titles issued to the *ex parte* applicants in both these matters and that jurisdiction is exclusively vested in the National Land Commission.

106. The National Land Commission, in my humble view, has no jurisdiction or power to oust the judicial authority of the court which authority is vested in the courts by the people of Kenya under Article 159 of the Constitution.

107. It would be in violation of the Constitution if the National Land Commission sought to oust jurisdiction of the court (ELC) in matters which the constitution vests jurisdiction in the courts to hear and determine see Article 162(2) (b) of the Constitution.

108. It is for that reason that the Constitution at Article 165 confers upon the High Court and by extension, the courts of equal status established under Article 162(2) of the Constitution, 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.

109. In the same vein, subordinate courts, persons, body or authority cannot supervise the superior courts in the exercise of the latter's judicial authority. Power which is unchecked is subject to abuse and it is for that reason that I find that this is an appropriate case for the court's intervention to check on the excessive exercise of power by the National Land Commission, which I find, had no jurisdiction to oust the powers of the court and neither did it have power or jurisdiction to revoke the suit titles.

110. The third issue for determination is whether National Land Commission was under a duty to accord the *ex parte* applicants opportunity to be heard before determining the legality of the two titles and if so, whether the applicants were heard before the determination to revoke their respective titles was reached.

111. The *ex parte* applicants lament that they were not accorded an opportunity to be heard before the determination and that there is even no evidence of any minutes of the business of National Land Commission wherein it deliberated on the legality of the titles in issue before arriving at the impugned determination.

112. On the other hand, the National Land Commission claims that both the *ex parte* applicants were invited to make representations in writing and to examine and present documents at the time and place of the hearing by way of newspaper advertisements. Further, that the *ex parte* applicant in JR 298/2014 appeared through his advocate whereas the *ex parte* applicant in JR 363/2014 refused to appear and instead wrote to the National Land Commission stating that the intended hearing /inquiry was subjudice court proceedings touching on the same subject matter.

113. The National Land Commission and Kenya Medical Training College further claim that in any event, the subject titles were subject of the inquiries previously conducted by the Ndungu Land Commission and the Parliamentary Public Investment Committee which both made recommendations that the suit titles should be revoked and surrendered to the Government.

114. The *ex parte* applicants contend that they were never summoned by the Public Investment Committee or the Ndungu Land Commission to be questioned over the legality of titles in issue.

115. The right to be heard is a right that is guaranteed under the Constitution. Article 50(1) of the Constitution stipulates:

***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

116. To limit such a right, Parliament must enact legislation stipulating the extent to which such a right shall be limited (Article 24(2)):

117. However, the right to a hearing which is directly linked to a right to a fair trial and a right to access justice are so fundamental that in the absence of exceptional circumstances, they cannot be limited.

118. The right to a hearing is also directly linked to the right to fair administrative action as stipulated in Article 47 of the Constitution as implemented by the Fair Administrative Action Act No. 4 of 2015, which espouses the right to an efficient, fair, lawful expeditious and reasonable and procedurally fair administrative action and Article 47(2) that the person has a right to be given written reasons for the action which adversely affects the right or freedom of that person.

119. Section 14 of the National Land Commission Act provides that in the exercise of the powers under the Section, the Commission shall give every person who appears to the commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents, and after hearing the parties, the Commission shall make a determination.

120. Under Subsection (8) of Section 14, in the exercise of its powers under the Section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

121. From the above clear provisions, the right to be heard before a determination is made cannot be compromised. The National Land Commission claims that the *ex parte* applicants were accorded a hearing and that the JR 298/2014 *ex parte* applicant was ably represented by its advocate whereas the JR 363/2014 *ex parte* applicant only wrote to the Commission a letter complaining that the inquiry was subjudice court proceedings.

122. Whereas this court cannot say that the *ex parte* applicants were denied a hearing before a determination to revoke their titles was made, what it can say is that there is absolutely no evidence that a hearing took place before a determination to revoke the titles was reached by the Commission. This is so because no minutes or proceedings of the National Land Commission respecting the subject inquiry were availed to the parties or to this court, to show how the determination to revoke the subject titles was arrived at.

123. In Judicial Review, the court is not concerned with the merits of the decision but the process by which that decision was arrived at. It follows that for the court to find that there was a hearing before the determination was made, and therefore that the hearing was fair and adhered to the rules of natural justice and the principles espoused in Article 47 of the Constitution, proceedings of the Commission must be shown to the court. Where a party claims that it was not accorded an opportunity to be heard, it is upon the party who claims that sufficient opportunity was accorded to the other party, to demonstrate that the due process was followed in arriving at the impugned decision.

124. In this case, in the absence of proceedings of National Land Commission showing how the decision to revoke the titles was arrived at, I have no option but to find and hold that there was no hearing and therefore the *ex parte* applicants cannot be faulted in claiming that they were not accorded a fair hearing.

125. Under the **Fourth Schedule** to the National Land Commission Act, which schedule is established

pursuant to Section 19(1) of the National Land Commission Act it stipulates that (1) ***the business and affairs of the commission shall be conducted in accordance with the Fourth Schedule.*** The Schedule provides for Rules of Procedure and minutes and stipulates at Section 5 thereof that:

*a) The Commission shall determine rules of procedure for the conduct of its business;*

***b) Keep minutes of its proceedings and decisions.***

126. In the absence of any minutes of its proceedings leading to the determination (decision) to revoke the ex parte applicants' titles to their respective parcels of land, this court cannot assume that there was any hearing or fair hearing accorded to the ex parte applicants.

127. Accordingly, I find merit in the ex parte applicants' complaints that they were not accorded a fair hearing and therefore the decisions that were arrived at without a hearing are amenable to the court's interference, by an order of certiorari bringing into the court for purposes of quashing and quashing the decision that was arrived at contrary to the procedure established under the National Land Commission Act.

128. The other issue for determination is whether Judicial Review order of certiorari and prohibition as sought by the ex parte applicants are available.

129. The 1<sup>st</sup> ex parte applicant's notice of motion dated 19<sup>th</sup> August 2014 pursuant to leave granted on 30<sup>th</sup> July 2014 by Honourable Korir J seeks for Judicial Review orders of:

***a) Certiorari to remove to this Honourable court and quash the decision of the newspaper on 4<sup>th</sup> and 7<sup>th</sup> of July 2014.***

***b) An order of certiorari to remove to this Honourable court and expunge all registry entries entered or derived by the 1<sup>st</sup> respondent and effected by the 2<sup>nd</sup> respondent before or after the publication in the newspaper the determination revoking the title LR No. 209/14272.***

***c) An order of prohibition to prohibit the 2<sup>nd</sup> respondent (Chief Land Registrar of Titles) from registering, entering or in any other manner interfering with the records of LR No. 209/14272 pursuant to the decision of the 1st respondent under ELC No. 354/2009 is pending in court.***

***d) Such other further and other reliefs as the Honourable court may deem fit and expedient.***

130. Judicial Review remedy is now a constitutional remedy embedded in Article 23 of the Constitution, where there is a proof of an allegation of infringement of fundamental rights or freedoms and under Article 47 where it is proved that the right to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair has been denied.

131. The role of Judicial Review Court is supervisory over subordinate courts, bodies, persons or authority exercising judicial or quasi-judicial authority. Judicial Review is about the decision making process, not the decision itself.

132. A court of law exercising Judicial Review jurisdiction is not an appellate approach. Mativo J in **JR 12/2016 Isaac Abdirahman Hussein V Registrar Academic Affairs Dedan Kimathi University of Technology [2016] e KLR** put it more succinctly and more relevantly, that Judicial Review:

***“ is the review by a judge of the High Court of the 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 to the role of the courts to***

*supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.”*

*Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the courts’ supervision in order to ensure the paramouncy of the law.”*

133. Clearly, Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. And as long as the processes followed by the decision is within the confines of the law, a court will not interfere. In **Republic vs Attorney General & 4 others Exparte Diamond Hashim Lalji and Ahmed Hasham [2014] e KLR** the court observed that:

*“Judicial Review application does not deal with the merits of the case but only with the process. In other words Judicial Review only determines*

*i. Whether the decision makers had the jurisdiction.*

*ii. Whether the persons affected by the decision were heard before it was made and whether in making the decision maker took into account relevant matters or did take into account irrelevant matters.*

134. 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 proceedings to determine such matters 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.

135. In **Republic v Inland Revenue Commissioner exparte National Federation of Self Employed and Small Business [1982] AC 617**, it was observed that the court has discretion to examine all the circumstances of the case and satisfy itself that the substantive grounds or review are serious enough.

136. In **Republic v Somerset CC Exparte Dixon [COD] [1997] QB D 323**, Sedley J stated:

*“Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs that is to say misuse of public power.”*

137. Thus, in order to succeed in Judicial Review, the applicant must demonstrate either, that: A 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 A decision or action that has been taken is beyond the powers or ultra vires of the person or body responsible for it.

138. The case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** sets out the test to be applied for Judicial Review proceedings to succeed namely:

*“ 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 - 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 a 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.”***

139. Applying the above tests to this case, I am satisfied that the *exparte* applicants have made out a case for Judicial Review orders of certiorari and prohibition to issue, bringing into this court for purposes of quashing, and quashing the decisions of the National Land Commission to revoke the titles to the LR Nos. 209/14272 and LR No. 209/14277 and to prohibit the Chief Land Registrar from effecting any changes in the titles or register until all the named suits pending in the Environment and Land Court are heard and determined.

140. This is so because I have found in my analysis of the issues framed herein above that the National Land Commission had no jurisdiction or power to conduct an inquiry and make a determination to revoke the titles to the respective parcels of land when the disputes on ownership of the said parcels was pending before a court of competent jurisdiction and *moreso* when the said National Land Commission was a party to the said suit(s) as it converted itself from a party to a judge in its own cause. No reasonable person would do such a thing. As was held in **Republic vs Commissioner of Co-operatives *exparte* Kirinyaga Tea Growers [1999] 1 EA 245** the court held that:

***“It is automatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.” See also Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1947] 2 ALL ER 680.***

141. I have also found that the National Land Commission had no power to revoke titles as Article 68 of the Constitution and Section 14 of the National Land Commission Act limits the National Land Commission’s power to carrying out an inquiry and determining the legality or propriety of a title or disposition in public land after which it can recommend to the Registrar for revocation.

142. In the instant case, the National Land Commission made a determination to revoke the suit titles as opposed to recommending for revocation which act was in violation of the clear statutory provisions. In **Republic vs Ministry of Planning and Another *Exparte* Professor Mwangi HCC Miscellaneous Application 1769/03** though persuasive, the court quashed a decision of a statutory body for failure to comply with the legislative purpose, and stated:

***“So where a body uses its powers in a manifestly unreasonable manner, acted in bad faith, refuses to take relevant factors into account in reaching the decision or based on irrelevant factors, the court would intervene on that ground that the body has in each case abused its powers. The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that parliament intended it to act in a particular way.”***

143. The NLC acted exceedingly and excessively ***ultra vires*** the law. The doctrine of ***ultra vires*** is one of the pillars in which Judicial Review was founded. It would be a serious abdication of jurisdiction and powers of this court if it were to shy away from issuing orders of certiorari when there is clear evidence of the National Land Commission blatantly exercising powers which is expressly donated to a different entity- The Registrar- when the power of revoking titles was exercised illegally.

144. In **Republic vs Kajiado Land Disputes Tribunal SRM’s Court Kajiado & 3 Others HCC 689/2001** Nyamu J ( as he then was , applying the principle set out in Anisminic case held *inter alia*:

***“... This court would like to apply the principle enunciated un the landmark case of***

*Anisminic vs Foreign Compensation [1969] 2 AC 147 ‘ if a tribunal mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question i.e. one into which it was not empowered to inquire and so has no jurisdiction to determine the purported determination not being a determination within the meaning of empowering legislation was accordingly a nullity.’ It follows that both the award and purported entering of the judgment in terms of the award were nullities. This is so because the maximum ex nihilo fit applies –out of nothing comes nothing. The High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its role. In my view, it has power to strike out nullities as held in Republic vs Attorney Goldenberg Commission Exparte Honourable Mwalulu [2004] e KLR.*

145. I have also found that the National Land Commission had a constitutional and statutory duty to accord the exparte applicants a fair hearing and that in these cases even where the exparte applicants did not attend a hearing on their own accord, the NLC was duty bound to keep minutes of the hearing and determination as espoused in the Act-NLC Act. in this case, I have concluded that no such hearing took place as no proceedings or written reasons for revocations of their respective titles were given, contrary to the principles espoused in Articles 50(1),47,48 of the Constitution and Section 19 Schedule 4 ( Section 5) of the NLC Act.

146. No reasons for revocation of titles were on the face of the newspaper advertisement. In **Republic vs Secretary of State for the Home Department [2003] UKHL 36** Lord Bingham though dissenting stated to persuasively and I concur :

*“The right to access justice was fundamental and constitutional principle of the UK legal system. That right meant that notice of a decision was required before it could have the character of a determination with legal effect because the individual concerned had to be in a position on challenge that decision in the courts if he or she wished to do so. The constitutional principle requiring the rule of law to be observed also required that a constitutional stated had to accord to individuals the right to know of a decision before their rights could be adversely affected. It was an unjust proposition that an uncommunicated administrative decision could bind an individual. Parliament had not expressly or by necessary implication legislated to displace the applicable constitutional principles. The claimants appeal would accordingly be allowed.”*

147. The exparte applicants had the right to know the reasons why their titles were revoked by the National Land Commission. Although the National Land Commission and Kenya Medical Training College alleged that the exparte applicant knew that the titles were subject of the Ndungu Land Commission of inquiry and Public Investment Committee findings and recommendations, there is no evidence to show that the exparte applicants were ever summoned by the Ndungu Land Commission of Inquiry or the Public Investment Committee of Parliament to defend themselves before ‘**decisions**’ or recommendations for revocation of the affected titles were made by the said bodies.

148. Furthermore, it is clear that the said Public Investment Committee and Ndungu Land Commission of Inquiry did not revoke the titles. They only recommended and the Ministry of Lands knowing the procedure for cancellation or revocations of such titles invoked the law by instituting court proceedings and writing to the Honourable Attorney General to take action as required by law to file suit in court seeking for cancellation of the suit titles.

149. Accordingly, it cannot be said that the National Land Commission had such sweeping powers under the Constitution that it would just glance at the past reports and declare the titles illegally obtained and revoke or order for their revocation.

150. In my view, that is what can correctly be described as procedural impropriety. Fairness is the guiding principle of our public law and the law of surprise can safely be regarded as the enemy of justice. By merely publishing the determination to revoke the titles without serving the exparte applicants reasons for such revocation and or proceedings leading to such determination as espoused

in the Fourth Schedule Section 5 of the National Land Commission Act, in my humble view, the National Land Commission surprised the ex parte applicants with a summary determination. Neither cost not administrative convenience can in such a case conceivably justify a different approach to that of acting fairly towards those who will be affected by the decision of the National Land Commission.

151. In the absence of any proceedings and reasons for the decisions to show how the hearing was conducted and the reasons for the “**surprise**” determination by National Land Commission to revoke the suit titles, I find that the applicants herein have severally made out their respective cases for Judicial Review orders of **certiorari** to bring into this court and quash the decision of the National Land Commission made on 7<sup>th</sup> July 2014 vide Daily Newspaper advertisement revoking the ex parte applicant’s titles to LR Nos 209/14272 and 209/14277 respectively.

152. I also find that this is a proper case for **prohibition** and I hereby proceed to issue Judicial Review order of prohibition prohibiting the Registrar as defined in the Land Registration Act No. 3 of 2012 (Section 2) from effecting any changes in the register affecting titles Nos LR 209/14272 and 209/14277 respectively until the pending suits namely **ELC 354/2009** and **ELC 1162/2013** are heard and determined on their merits.

153. In the end, I grant to each of the ex parte applicants herein the judicial review orders of certiorari and prohibition as sought in their respective notices of motion as filed separately in JR 298/2014 and JR 363/2014, but which are hereby consolidated for purposes of this judgment.

154. I award costs of these Judicial Review proceedings to the ex parte applicants to be taxed separately in JR 298/2014 and JR 363/2014 and to be borne by the National Land Commission.

155. Dated, signed and delivered in open court at Nairobi this 23<sup>rd</sup> day of March 2017.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Mutiso for the ex parte applicant in JR 298/2014

Mr Mutiso h/b for Mr Angwenyi for the ex parte applicant in JR 363 of 2014.

Mr Munene h/b for Mr Kamau for the 1<sup>st</sup> Respondent and 1<sup>st</sup> interested party JR 298/2014

Mw Wahome for 1<sup>st</sup> Respondent in JR 298 & 363/2014

Miss Gitau for 2<sup>nd</sup> interested party in JR 298 and for 3<sup>rd</sup> Respondent in JR 363 of 2014

CA: George