



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 178 OF 2014**

**IN THE MATTER OF AN APPLICATION BY TRANQUILITY DEVELOPMENT LIMITED  
FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE CIVIL PROCEDURE  
ACT, CAP 21, OF THE LAWS OF KENYA, THE ENVIRONMENT AND LAND COURT ACT,  
NO. 19 OF 2011, THE LAND REGISTRATION ACT, NO. 3 OF 2012, THE NATIONAL LAND  
COMMISSION ACT, NO. 5 OF 2012 AND THE LAND ACT, NO. 6 OF 2012**

**AND**

**IN THE MATTER OF TRANQUILITY DEVELOPMENT LIMITED**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION .....RESPONDENT**

**CLASSIC JUA KALI CO-OPERATIVE SOCIETY LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**THE NATIONAL CHRISTIAN COUNCIL OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**EXPARTE – TRANQUILITY DEVELOPMENT LIMITED**

**JUDGMENT**

1. Pursuant to the leave of court granted on 24<sup>th</sup> April, 2014 by Honourable Lenaola J ( as he then was), the exparte applicant instituted these Judicial Review proceedings vide notice of motion dated 28<sup>th</sup> April, 2014 on the same day seeking the following substantive orders:-

I. That the court do issue orders of certiorari to remove into the High Court and quash the entire decisions of the respondent made on the 14<sup>th</sup> day of April 2014, directing the submissions to it, of representations and documents on the complaint by the 1<sup>st</sup> interested party, over the exparte applicant's ownership of property LR No. 209/9324, with a view to establishing

the propriety and legality of the same.

II. That the orders of prohibition do issue prohibiting the respondent from proceeding with the review of the propriety and legality of the *ex parte* applicant's ownership of property LR NO. 209/9324 and /or making any decision in that regard, at the behest of the 1<sup>st</sup> interested party.

III. Spent

IV. The costs of this application are provided for.

2. The motion is supported by 7 grounds on the face thereof and the statutory statement and verifying affidavit of Zoher Husein Pirbhai all in support of the chamber summons for leave, and the annexures contained in the bundle.

3. The *ex parte* applicant's case as per the grounds and as supported by the depositions and annexures to the verifying affidavit, the applicant Tranquility Development Limited is the registered owner of the land known as LR No. 209/9324 having purchased it for value from the National Christian Council of Kenya, the 2<sup>nd</sup> interested party herein.

4. That following the said purchase and transfer of the land in favour of the *ex parte* applicant by the 2<sup>nd</sup> interested party, a dispute arose culminating in several court cases between the same and other interested party, a dispute arose culminating in several court cases between the same and other interested parties which cases are listed, and their respective status stated as follows:-

**a) ELC No. 878 of 2013 which was between Honourable Gideon Mike Mbuvi vs The Registered Trustees of National Christian Council of Kenya & 3 Others** - settled and compromised by consent order made on 19<sup>th</sup> February 2014 and adopted by the court on 24<sup>th</sup> February 2014 as per annexure 'ZHP6', it is therefore averred that the compromise settlement in the above case precludes the making of any further claim on property on behalf of and or at the behest of the 1<sup>st</sup> interested party Classic Jua Kali Co-operative Society Ltd hence, the respondent National Land Commission had no power to receive and or hear and determine any complaint regarding ownership of the said named parcel of land.

b) ELC No.708/2013 consolidated with ELC 878/2013 pursuant to a ruling made on 15<sup>th</sup> January 2014 and later withdrawn on 20<sup>th</sup> February 2014 by a notice of withdrawal dated 14<sup>th</sup> February 2014. The case was between **Tranquility Development Ltd vs. Honourable Gideon Mike Mbuvi & Honourable Rachael Shebesh.**

The applicant therefore avers that the respondent has no power to inquire into the propriety or legality of the said title ownership and that such inquiry would be illegal as the intended review is *Resjudicata* and in breach of the applicant's legitimate expectation that the decisions of the court on the ownership, propriety and legality of the grant over LR No, 209/9324 are final and should be honoured;

c) Milimani Commercial Court CC 932/1996 between Classic Jua Kali Co-operative Society Ltd vs The National Christian Council of Kenya;

d) CA No. Nairobi 190 of 2000 **Classic Jua Kali Co-operative Society Ltd v The National Christian Council of Kenya & 3 others.**

5. It is alleged that despite the above positions, the respondent did, by notice published in the Daily Nation of 14<sup>th</sup> April 2014, directed the submission to it, of representation and documents on the complaint by the 1<sup>st</sup> interested party, over the applicant's ownership of LR No. 209/9324, with a view to establishing the propriety and legality of the same as shown by annexure ZHP8.

6. At the time of filing of the chamber summons for leave, the review hearing before the National Land Commission was scheduled for hearing on 23<sup>rd</sup> April 2014 at 4.00p.m. Out of abundant caution, however, the applicant filed a replying affidavit to the invitation by the respondent but approached this court to intervene in view of the matters allegedly determined before the High Court and Court of Appeal and those compromised and settled.

7. According to the *ex parte* applicant, the respondent's decision to review the title to the said propriety is unconstitutional, illegal, ultra vires and contravenes statute because it seeks the exercise by the respondent of functions and powers outside its constitutional and statutory mandate; that the intended review is *resjudicata* settled matters by a court of competent jurisdiction, is in breach of his legitimate expectation that decisions of the court on ownership of the suit property and legality of the grant thereof are final and should be honoured and therefore the respondent should be prohibited from reviewing the said grant and the decision thereof made to the review the grant brought unto this court for purposes of being quashed.

8. The respondent filed a replying affidavit sworn on 18<sup>th</sup> September 2014 by Mr Brian Ikol, its Assistant Director, legal Affairs and Enforcement of the Respondent contending that the respondent is established and mandated by Articles 67 and 68 of the Constitution and Section 14 of the National Land Commission Act to among others review all grants and disposition of public land to establish their propriety or legality within 5 years if the commencement of the Act hence the respondent was acting within its constitutional and statutory mandate when it published notices calling for submissions on property in issue to wit LR No, 209/9324, having received a complaint from the 1<sup>st</sup> interested party, Jua Kali Co-operative Society Limited.

9. According to Mr Ikol, the court never determined the legality of or the propriety of the grant of the title in issue and that the civil suits No. 932/1996 concerned whether the 2<sup>nd</sup> interested party was holding the land in trust for the 1<sup>st</sup> interested party and its members, as shown by issues for determination framed by the parties.

10. It was further contended that CA No. Nairobi 190/2000 never determined the legality of the suit title but was an application for extension to file an appeal out of time.

11. In addition, it was contended and deposed by the respondent that in ELC 708/2013, the plaintiff/applicant herein sought for a permanent injunction restraining Mike Gideon Sonko and Rachael Shebesh from trespassing or interfering with the applicant's user and quiet possession of the suit property. That albeit the suit was withdrawn by consent between the parties, it never determined the legality, propriety or the manner in which the grant was acquired.

12. Further, that the ELC 878/2013 did not determine the legality of the said grant as it involved Honourable Mike Sonko seeking for injunction against the *ex parte* applicant herein from trespassing into, demolishing, erecting structures, developing or disposing off the suit property and that parties consented leaving the *ex parte* applicant to remain in possession thereof, but that no court ever determined the legality, propriety of title or manner in which that title was acquired hence, the respondent has the power to inquire into how the same was acquired as stipulated by Article 67 of the Constitution and Section 14 of the National Land Commission Act, which functions have not been shown to be performed outside the constitutional framework.

13. The respondent urged the court to dismiss the *ex parte* applicants' application dated and filed on 28<sup>th</sup> April 2014.

14. The 1<sup>st</sup> interested party did not file any documents opposing the motion by the *ex parte* applicant, despite being served with the pleadings.

15. The 2<sup>nd</sup> interested party filed a replying affidavit on 16<sup>th</sup> May 2016 sworn by Oliver Kisaka Simiyu its Deputy Secretary General.

16. According to the 2<sup>nd</sup> interested party National Christian Council of Kenya, the grant to LR No. 209/9324 was registered in its name on 1<sup>st</sup> July 1983 until 18<sup>th</sup> February 2013 when the Council transferred the same to the exparte applicant herein Tranquility Development Ltd for valuable consideration.

17. That subsequent to the said transfer, on 22<sup>nd</sup> July 2013 Honourable Mike Sonko filed HCC ELC 878/2013 against the 2<sup>nd</sup> interested party Tranquility Development Limited, the National Land Commission (respondent) and the Attorney General questioning the legality and integrity of the title and validity of the transfer and the 2<sup>nd</sup> interested party National Christian Council of Kenya contested the suit as shown by annexed copies of plaint, defences, affidavits, statements and other pleadings including submissions for and against an injunction that had been sought in the said suit.

18. That in the said suit, a preliminary objection was argued and Honourable Nyamweya J rendered her ruling on 15<sup>th</sup> January 2014 after which the plaintiff Honourable Mike Mbuvi withdrew the said suit on 19<sup>th</sup> February 2014. That the named suits challenged the legality of the suit title LR 209/9324 and the fact that the respondent was privy to the said suits which were settled despite an appeal vide to the Court of Appeal, the respondent herein cannot and has no jurisdiction to review the grant to the said title.

19. That the respondent's actions violate Article 40 of the Constitution and is intended to give the 1<sup>st</sup> interested party a second bite to the cherry, having lost its claims before a court of competent jurisdiction.

20. Further, that the suit land is private and not public land hence it is beyond the purview of the respondent to review its title whose legality was adjudicated upon and upheld by the court in HCC 878/2013.

21. That Honourable Nyamweya J in her ruling clearly found that the suit was resjudicata HCC 932/1996 and that the 1<sup>st</sup> interested party was litigating under the same title and capacity, attacking the 2<sup>nd</sup> interested party's title to the suit property.

22. According to the 2<sup>nd</sup> interested party, the respondent will be acting ultra vires, unconstitutionally, usurping judicial authority which is not vested in it to purport to review the propriety or legality of LR 209/9324 after the High court has already made a determination of the same issues on the subject property.

23. That the court is not subject or subordinate to the respondent herein and that the intended review is meant to undermine the sale between the 2<sup>nd</sup> interested party and the exparte applicant yet the 2<sup>nd</sup> interested party upon receiving the proceeds of sale invested the money in other projects and programmes. The 2<sup>nd</sup> interested party urged the court to allow the exparte applicant's application for Judicial Review with costs to the 2<sup>nd</sup> interested party.

24. The party's advocates agreed and filed written submissions urging their client's respective positions. They also highlighted the said written submissions on 1<sup>st</sup> November 2016 and this matter was slated for judgment delivery on 18<sup>th</sup> January 2017 but the court file was inadvertently returned to the Registry and I only managed to get it much later, after 18<sup>th</sup> January 2017 hence this delay in delivering this judgment.

25. The said parties also filed authorities for consideration and despite the court directing that they file soft copies of their submissions, none of the parties complied hence the court had to write the judgment from the hard copies filed which also takes much of the constrained judicial time.

26. In the written submissions as highlighted by its counsel Mr Osundwa, the exparte applicant

reiterated what was stated in the grounds, verifying affidavit and maintained that they are registered owners of the suit land and that the claim over that title has been litigated over and determined by Courts including the Court of Appeal hence it is not right that the 1<sup>st</sup> interested party herein, after losing its claims in court, decided to forum shop and end up at the respondent as if the latter is an appellate court. Counsel urged the court to grant the orders sought in the motion.

27. On the part of the 2<sup>nd</sup> interested party, its counsel Mr Wekesa supported the applicant's motion and as submissions by Mr Osundwa while reiterating its replying affidavit and maintaining that the respondent has no jurisdiction to consider what the courts had conclusively determined. That in HCC 878/2013, the 1<sup>st</sup> interested party herein took issue with the legality of title to the suit land granted to the 2<sup>nd</sup> interested party as an allotment and that in his judgment at page 25 paragraph 2, Honourable Mbaluto J( as he then was) found that the land in question was given to the 2<sup>nd</sup> interested party without any qualifications. Further, that even the then Commissioner of Lands Mr Zablon Mabeya testified in the said suit and stated how the suit title was acquired by the exparte applicant herein.

28. It was submitted that even HCC 878/2013 and 708/2013 were still concerned with the issue of the exparte applicant's title to the suit land. It was therefore submitted that it was not possible that National Land Commission could revisit matters which had been adjudicated upon by a court of competent jurisdiction.

29. Further, that the National Land Commission does not have unlimited power where the issue of title has been determined by a court of competent jurisdiction and that the National Land Commission cannot read Article 67 of the Constitution outside the context of the Constitution including the provisions of Article 10 on the national values and principles of governance.

30. It was submitted that the National Land Commission cannot review orders of the court which latter exercises judicial authority. It was submitted that the Commissioner of Lands Mr Z. Mabeya adduced all the evidence which Mbaluto J relied on to render his decision in the case finally hence what the National Land Commission was doing was sitting on appeal of the decision and judgment of Mbaluto J, as an appellate court, on the legality or propriety of the title through second guessing which is an ultra vires act.

31. Reliance was placed on **HC NAIROBI Petition No.311/2014** wherein Honourable Lenaola J ( as he then was) held that the National Land Commission had jurisdiction to review the grant but the issue is distinct from what was before this court in that a competent court determined the legality of title and it cannot therefore be overruled by or superintended upon by the National Land Commission which does not exercise judicial powers of an appellate court.

32. Further reliance was placed on **Republic Vs National Land Commission exparte Holborn Properties Ltd [2016] e KLR** on the extent and powers of and jurisdiction of the National Land Commission. It was therefore submitted that the National Land Commission cannot determine an issue which a competent court of law has already adjudicated upon and moreso, that the 2<sup>nd</sup> interested party stands to loose if review of its title is carried out since it has sold the land to the exparte applicant at valuable consideration hence this court should allow the exparte applicant's application.

33. On behalf of the respondent, Miss Amuko submitted, relying on their replying affidavit sworn by Brian Ikol, submissions filed and list and bundle of authorities and supplementary authority filed on 14<sup>th</sup> September 2016. It was submitted, in opposition, that the respondent has the requisite jurisdiction and mandate to review the legality and propriety of the suit property pursuant to Article 68 of the Constitution and Section 14(1) of the National Land Commission Act, whether there is a complaint or on its own motion.

34. According to Miss Amuko, the court, in the cited litigation did not determine the legality of propriety of the disposition of the suit property. It was submitted that in the annexed judgment of Mbaluto J, the

court was concerned with the issue of whether the 2<sup>nd</sup> interested party National Christian Council of Kenya was holding the suit land in trust for the 1<sup>st</sup> interested party.

35. Further, that in HCC 932/1996, the issue was similar. Further, that in the Court of Appeal case cited, the issue was for extension of time to file an appeal out of time and that none of the cases referred to determined the propriety of conversion of the suit title from public to private land. It was also submitted that in HCC /ELC/708/2013 the prayers were for an injunction not legality or propriety of title. It was submitted that in this case, National Land Commission is not seeking to review what the court determined and that the orders sought herein are intended to shield the applicant from a constitutional process of the Respondent's constitutional and statutory duties.

36. It was further submitted that the **SK Macharia vs KCB** case was distinguishable in that Supreme Court was determining the issue of whether the applicant can reopen a case that is determined, and that in the **John Mukora Washishi V Minister for Lands & Six Others** case, the court determined the issue of whether the National Land Commission can revoke title. It was submitted that the notice issued by National Land Commission was not for revocation of title but invitation to members of the public to make representations to it in respect of the complaints received concerning the legality/propriety of the named titles hence the National Land Commission was according those individuals a right to be accorded a hearing which process this court should not interfere with. The respondent's counsel urged the court to dismiss the exparte applicant's application with costs.

37. In a brief rejoinder, Mr Osundwa counsel for the exparte applicant submitted that the ruling of Honourable P. Nyamweya of 15<sup>th</sup> January 2015 addressed all issues and questions raised by the respondent. Counsel also urged the court to define what a trust is and where it ends.

## **DETERMINATION**

38. I have carefully considered the foregoing. The issues for determination are:

- 1) Whether the respondent had jurisdiction to review the title to LR No. 209/9324, under the circumstances and at the material time. And if so, whether it acted within the law in seeking to review the said title subject matter of these proceedings.
- 2) What orders should the court make.
- 3) Who should bear the costs of these Judicial Review proceedings?

39. On the issue of the jurisdiction of the National Land Commission, Article 67 of the Constitution establishes the National Land Commission. The functions and powers of the Commission are as stipulated in Articles 67 (3) and 68 of the Constitution and other pieces of legislation including Section 14 of the National Land Commission Act.

40. Material to these proceedings is that Article 68(b) (v) of the Constitution confers upon the National Land Commission power to review all grants or dispositions of public land to establish their propriety or legality. The same function is found at Section 14 of the National Land Commission Act.

41. According to the exparte applicant, Tranquility Development Limited, and as supported by the second interested party National Christian Council of Kenya, the applicant is the registered proprietor of property comprised in LR No. 209/9324 having purchased it from the 2<sup>nd</sup> interested party for valuable consideration. It is therefore claimed that the land in question is private land and not public land whose title is therefore not subject to review by the National Land Commission.

42. However, it is not in contention that the head lease is owned by the Government of Kenya and that the title is leasehold with a specific term of 99 years after which unless renewed, it will revert back to the Government of Kenya.

43. The position being the case, it is my humble view that albeit the property in question is private land, the fact that it was acquired from the Government means that it was initially public land and therefore the National Land Commission has the jurisdiction to review the title and disposition in the said property, to investigate, on its own motion, or following a third party's complaint to establish whether the process of acquisition of that land and hence its conversion to private land from public land to private property was done in a regular, legal way and without any fraud or misrepresentation.

44. Thus, for the National Land Commission to exercise its mandate as stipulated in the Constitution and statutory provisions, it must review the process by which the public land was granted to private individuals and if that were not to be the case, as I have previously held in **JR 53/2016 Republic vs National Land Commission & Another exparte Joseph Kariuki Iregi**. *".....then the principles and purposes of the Constitution would be defeated since in Kenya, one has to appreciate the history of the land question which is hinged on the private individuals who were loyalists to the establishment of the day were, over a period of time heavily rewarded with allocation of public land including land occupied by the public institutions including police stations, schools and even the courts buildings were not spared by the private land grabbers."*

45. It is for that reason that I find, without hesitation, that the framers of the Constitution found it necessary to provide for review of titles of public land with a 'read in' establishing that it would defeat logic if the Commission was to review public land owned by and in possession and occupation of public institutions.

46. For the foregoing reasons, I find that the National Land Commission who is the respondent in these proceedings has the requisite jurisdiction to review title to land which, though private, but is leasehold land where the grantor remains the Government of Kenya, in order to establish whether the process of acquisition of that title LR 209/9324 was legal or proper/regular.

47. The question however, with regard to these proceedings, is, whether the respondent National Land Commission had jurisdiction to review title or disposition in LR No. 209/9324 when the legality or propriety of the said title was subject of adjudication and or was allegedly adjudicated upon by the courts of competent jurisdiction.

48. Section 14(8) (5) of the National Land Commission Act is clear that where the Commission finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title; 14(6) where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularities and may also make consequential orders.

49. According to the exparte applicant as supported by the 2<sup>nd</sup> intended party, the issue of ownership of title to the LR No. 209/9324 had long been considered and determined by a court of competent jurisdiction.

50. On the part of the respondent, it is contended that none of the decisions of the court touching on the subject title, even determined the issue of legality or propriety of obtaining the suit title by the 2<sup>nd</sup> respondent. All the pleadings in the respective suits as well as rulings and judgment were annexed to the respective parties' affidavits for consideration by this court.

51. The grant No. I.R. 37649 dated 10th June 1985 was issued to the exparte applicant herein, the National Christian Council of Kenya Registered Trustees for a term of 99 years from 1<sup>st</sup> March 1976 at an annual revisable rent of shs 60,000. The property LR No. 209/9324 measures 3.051 Ha. and situate in the City of Nairobi, in the Nairobi Area District, Land Survey Plan No. 111547. There are special conditions of the grant and on it is annexed a Deed Plan No. 111547 and endorsements registered against the title.

52. Vide HC/ELC No.875/2013 filed on 22<sup>nd</sup> July 2013 Honourable Gideon Mike Mbuvi sued the 2<sup>nd</sup> interested party National Christian Council of Kenya (Registered Trustees); the exparte applicant herein Tranquility Development Limited, The National Land Commission of Kenya and the Attorney General

seeking for the following orders, among others.

- a) A declaration that the 1<sup>st</sup> defendant (National Christian Council of Kenya) having not complied with the special conditions of the grant given on 1<sup>st</sup> July 1983 and registered IR No. 37649 in the register of titles, the title to LR No. 209/9324 reverts back to the Government of Kenya;
- b) A declaration that the transfer of LR No. 209/9324 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant without having complied with the special conditions of the grant is illegal, invalid and should be cancelled;
- c) A declaration that any developments on LR NO. 209/9324 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants other than the construction of inoffensive light industries is illegal and in contravention of the conditions of the grant;
- d) A declaration that any consent to transfer LR No. 209/9324 by the 3<sup>rd</sup> defendant and or any other person under its charge is illegal, invalid and in contravention of the conditions of the grant given on 1<sup>st</sup> July 1983;
- e) A declaration that LR No. 209/9324 should revert back to the Government of Kenya as to be re-allocated as per the special conditions of the grant given on 1<sup>st</sup> July 1983; and
- f) An injunction restraining the 2<sup>nd</sup> defendant from trespassing into, demolishing erecting illegal structures, fencing, developing, alienating, disposing of, charging, gifting or otherwise dealing in any way with LR No. 209/9324.

53. In the said suit, the plaintiff leaded at paragraph 19 of the plaint dated 22<sup>nd</sup> July 2013 that there had been 2 other suits pending in the subordinate court mentioning the suit title between him and the National Christian Council of Kenya and Tranquility Development Limited namely CMCC No. 7708/2012 Nairobi for eviction of over 20,000 members of the public from the suit land, where he sought to be enjoined as an interested party; HC ELC No. 708/2003 Nairobi a suit in which the plaintiff had been sued for an alleged trespass to LR No. 209/9324.

54. In CMCC 7708/2012 which was mentioned in the above suit, there is an order given on 9<sup>th</sup> January 2013 evicting the 1<sup>st</sup> interested parties herein from the said suit land, which order was temporarily stayed on 8<sup>th</sup> April 2013 by the Chief Magistrate.

55. Among the documents attached to its replying affidavit in this matter, is a notice to terminate tenancy by the 2<sup>nd</sup> interested party issued on 15<sup>th</sup> June 2012 to the 1<sup>st</sup> interested party, pursuant to Section 4(2) of the Landlord, Tenant (shops, Hotels and Catering Establishment Act) Cap 301, a clear indication that the 1<sup>st</sup> interested party were at all material times tenants of the 2<sup>nd</sup> interested party and had breached terms of payment and or that the 2<sup>nd</sup> interested party Landlord intended to dispose of the land and give vacant possession to another party.

56. Amongst the annexures is also a judgment and pleadings in HC Milimani Commercial Courts civil suit No. 932 of 1996 Classic Jua Kali Co-operative Society Ltd vs National Christian Council of Kenya & 2 Others and HC ELC 878/2013.

57. In HCC 932/1996, the judgment of Honourable Mbaluto J is clear that the dispute was over LR 209/9324 where the plaintiff averred that at the time of allocation of the land to the 1<sup>st</sup> defendant, National Christian Council of Kenya and subsequent grant of the land to National Christian Council of Kenya by the Government of Kenya, it was understood by all parties concerned that the land would be developed and utilized solely for the benefit of the plaintiff and its members and that the 1<sup>st</sup> defendant would only hold it in trust for the plaintiff and its members and so the National Christian Council of Kenya collected monies from the plaintiff as rents and remitted it to the Commissioner of

Lands and Land Rent and stand premium in respect of the property.

58. The National Christian Council of Kenya denied the allegations that the land was allocated to it to hold in trust for and for the benefit of the plaintiffs and in his judgment delivered on 24<sup>th</sup> September 1999, Honourable Mbaluto J dismissed the plaintiff/1<sup>st</sup> interested party's suit with costs while emphasizing that the 1<sup>st</sup> interested party herein had not established any such trust on the part of the 1<sup>st</sup> defendant (2<sup>nd</sup> interested party herein).

59. From the judgment of Mbaluto J (as he then was), it is not in doubt that the claim by the 1<sup>st</sup> interested party against the 2<sup>nd</sup> interested parties herein was over ownership of the suit property LR 209/9324. The learned judge held that the 1<sup>st</sup> interested parties were estopped from challenging the 2<sup>nd</sup> interested party's title to the suit land; that there was ample evidence to show that the suit property was owned by the 2<sup>nd</sup> interested party National Christian Council of Kenya; and that in fact, the artisans who occupied the sheds constructed on the said land acknowledged the defendant's title; that Section 23(1) of the Registration of Titles Act conferred upon the holder of the title an absolute and indefeasible title under the Act, and that the Section as cited defeated the plaintiff/1<sup>st</sup> interested party's claim.

60. From the above judgment of Mbaluto J (as he then was), it is clear that the court did determine the status of the 2<sup>nd</sup> interested party National Christian Council of Kenya on LR No. 209/9324 as the owner thereof, and dismissed all the 1<sup>st</sup> interested parties' claims of trust. There was no allegation of fraud against the 2<sup>nd</sup> interested party, but the legitimacy of the title was put to question in the form of a trust property.

61. The question is whether the National Land Commission and the 1<sup>st</sup> interested party could, 15 years after the said judgment of Mbaluto J which determined ownership of the suit property, be heard to say that the suit property was allegedly illegally and or illegally acquired hence there was need to inquire or investigate into that allegation to determine how that property was allocated to the 2<sup>nd</sup> interested party.

62. In my humble view, the National Land Commission's notice of intention to review the grant or disposition in the suit property is misconceived and an exercise that exceeds the mandate and powers of the National Land Commission.

63. Mbaluto J having exhaustively determined the mode of acquisition of the suit property and having found that no trust had been established on the part of the 2<sup>nd</sup> interested party in favour of the 1<sup>st</sup> interested party, nothing was left for determination by the National Land Commission. The issue of ownership or how the title to the suit land was acquired was long settled in 1999 by Mbaluto J and any other claim that seeks to determine a similar issue is *Resjudicata*, that suit.

64. '*Resjudicata*' means "*a thing decided*" in Latin. In Kenya, it is governed by Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya. It is a common law doctrine meant to bar re-litigation of cases between the same parties or parties litigating under the same title over the same or substantially the same subject matter that has been finally determined. It is applied to preserve the effect of the first judgment and to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court or judicial system. *Resjudicata* prevents a multiplicity of judgments. It however does not preclude an appeal process.

65. In this case, the 1<sup>st</sup> interested party after losing out its claim before Mbaluto J attempted to appeal vide Civil Application No. Nairobi 190/2000 but lost it at the preliminary stage. It subsequently filed another suit litigating in the name of the Nairobi City County Senator Honourable Mike Mbuvi vide HCC/ ELC 878/2013 seeking for declarations and reversion of the suit property back to the Government of Kenya allegedly on the grounds, among others, that the 2<sup>nd</sup> interested party herein

did not comply with special conditions of the grant but Honourable P. Nyamweya J after hearing a preliminary objection grounded on *res judicata* upheld the principle of *res judicata* as per her detailed ruling dated 15<sup>th</sup> January 2014 at page 17, 3<sup>rd</sup> paragraph of her ruling where the learned judge was categorical that the plaintiff's suit and notice of motion filed on 22<sup>nd</sup> July 2013 are *resjudicata* as between the plaintiff Honourable Gideon Mike Mbuvi and the 1<sup>st</sup> defendant (National Christian Council of Kenya), on the issues of the validity of the 1<sup>st</sup> defendant's title to the suit property LR 209/9324 and eviction of the plaintiff from the suit property.

66. In ELC 878/2013, the respondent herein was the 3<sup>rd</sup> defendant whereas the Honourable Attorney General was the 4<sup>th</sup> defendant.

67. In that kind of scenario, the other question that I must pose is would a party to proceedings which have been or not been determined step aside of those proceedings and seek to be the judge in its/ their own cause?

68. In this case, even assuming that the ruling of Honourable Nyamweya J was not in place, or that there is no judgment by Honourable Mbaluto J on the issue of ownership of the suit property, it is clear that the National Land Commission which is a party to HCC/ ELC 878/2013 wherein the 1<sup>st</sup> and 2<sup>nd</sup> interested parties are also parties is the party that now seeks to determine the legality/propriety of the same title that was being questioned in court.

69. In the exercise of its constitutional or statutory mandate, the National Land Commission exercises administrative and quasi-judicial authority. Its powers cannot be those that can be exercised to superintend over the High Court. National Land Commission has no supervisory powers over the High Court. The High Court, on the other hand, has supervisory power under Article 165 of the Constitution, to supervise the National Land Commission.

70. It therefore follows that where it is clear that there is a dispute pending in court, unless the issue of jurisdiction of that court is raised and determined in limine, the National Land Commission has no power to remove a matter from the court and purport to hear and determine the same matter. That would in essence be usurping and ousting powers of the High Court as stipulated in Article 165 of the Constitution.

71. Furthermore, where the National Land Commission is a party to court proceedings, it is my humble view that it cannot purport to step out of the adjudication arena and purport to preside over the same dispute in name of Article 68 of the Constitution as implemented by Section 14 of the National Land Commission Act.

72. It is an established rule of law that "*no one should be a judge in his own cause,*" *Nemo Judex in Parte Sua*. The doctrine must be held sacred. A party who acts as a judge in one's own cause no doubt lacks the capacity to adjudicate that dispute, such that the possibility of bias cannot be ruled out. In this case, it is not in dispute that all the cases challenging the 2<sup>nd</sup> interested party's ownership of the suit property LR No. 209/9324 were either withdrawn by consent or were determined in the 2<sup>nd</sup> interested party's favour.

73. Although the respondent claims that the question of legality or propriety of the title or how it was acquired had not been determined in any of the decided cases, the judgment by Mbaluto J in HCC 932/96 and ruling by P. Nyamweya J in ELC 878/2013 are clear and need no interpretation. In the former case, what was determined was the legitimacy of the title held by the 2<sup>nd</sup> interested party and this was after hearing all parties and their witnesses including the then Commissioner of Lands Mr Zablon Mabeya who testified and produced a file containing correspondence from the Ministry of Lands on how the subject parcel was alienated/allocated to the 2<sup>nd</sup> interested party herein( see page 6) of the judgment page 216 of the bundle. This court therefore wonders what kind of evidence the National Land Commission was seeking in its inquiry other than to rely on the concluded cases by the courts

to reopen the same determined issues for re litigation. And the National Land Commission having been a primary party to HCC ELC 878/13, this court wonders as to what hat it would be wearing in seeking to hear and determine the same dispute between two of the parties without descending into the arena of the conflict and being clouded by the dust therein.

74. It is legally unacceptable for a party to a dispute to step aside and turn into the adjudicator of the same dispute. That act is illegal, procedurally improper and moreso, irrational. The National Land Commission would be acting without jurisdiction and ultra vires the established legal principles. Article 50(1) of the Constitution contemplates and stipulates that “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

75. Whereas constitutionally, the respondent is an independent body, but hearing and determining a dispute to which it is or has been a party thereto would place it in a partial state. It would also amount to the respondent acting as an appellate court on the part of the dispute or decision of the High court or court of Equal status which is the Environment and Land Court.

76. The respondent and the 1<sup>st</sup> interested party had an opportunity in HCC 932/96 to lodge an appeal to the court of Appeal to challenge the decision of Mbaluto J.(as he then was). Having lost that opportunity through squander at the preliminary stage, the respondent cannot purport to look for residues into the dispute, from which to anchor its jurisdiction and carry out an inquiry under Article 68 of the Constitution and Section 14(1) of the National Land Commission Act.

77. It is my humble view that the National Land Commission in purporting to hear and determine a dispute which was wholly determined by a court of competent jurisdiction, and by purporting to be a judge in its own cause, was in effect abusing its constitutional and statutory powers. This court exercises jurisdiction to check on excesses of power and this is one of those proper cases where there is, demonstrably, abuse of power which must be checked and prohibited.

78. It is for the above reasons that I find that the exparte applicant’s notice of motion is merited on all fours. I proceed to issue Judicial Review Orders of certiorari and prohibition as sought in prayers Nos. 1 and 2 of the Notice of Motion dated 28<sup>th</sup> April, 2014 as prayed.

79. I also award the exparte applicants costs of these Judicial Review proceedings to be paid by the respondents. As the 2<sup>nd</sup> interested party was joined to these proceedings by the exparte applicant to protect their interests, I find that no costs accrue to it.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of May, 2017.

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Osundwa for the exparte applicant

N/A for Respondent

Mr Wesonga h/b for Wekesa for 2<sup>nd</sup> interested party

N/A for 1<sup>st</sup> interested party

CA: George