REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL CAUSE NO 128 OF 2016

IN IN THE MATTER OF AN APPLICATION BY STEPHEN

GATHUITA MWANGI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AGAINST THE COMMISSION ON ADMINISTRATIVE JUSTICE.

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW

REFORM ACT (CHAPTER 26 OF THE LAWS OF KENYA)

AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC…….……..…….APPLICANT

AND

THE COMMISSION ON ADMINISTRATIVE JUSTICE…....….RESPONDENT

EX PARTE: STEPHEN GATHUITA MWANGI

JUDGEMENT

Introduction

1. By a Notice of Motion filed 14th April, 2016, the *ex parte* applicant herein, **Stephen Gathuita Mwangi**, seeks the following orders:

a) an order of Certiorari to remove to this Honourable Court to be quashed the decision of the Commission on Administrative Justice (hereinafter referred to as the Commission) the Respondent herein, to publish the report titled "A GRABBERS PLAYGROUND" published, on July 2015, casting criminal liability and recommending that the Nairobi City County Public Service Board takes disciplinary action against the *Ex parte* applicant.

b) An order of Prohibition prohibiting the Nairobi City County Public Service Board from by themselves, their agents/and or assigns acting jointly and/or severally from proceeding to take any disciplinary action against the *Ex parte* Applicant as well as prohibiting the Respondent herein from by themselves, their agents and/or assigns, acting jointly and/or severally from proceeding to aid the execution of recommendations set out in the unfounded report.

c) An order of Mandamus compelling the Respondent to expunge the *Ex parte* Applicant's name from the said Report forthwith.

d) The costs of this application be provided for.

***Ex Parte* Applicant's Case**

2. According to the applicant, he is the Chief Officer of Lands for Nairobi City County Government.

3. The applicant averred that on or about the 28th day of December 2014, media reports alleged that a piece of land used by Langata Road Primary School as a playground had been illegally acquired by a private developer and on account thereof, on or about 19th January 2015, school children from Langata Road Primary School, together with Civil Society activists held demonstrations against the alleged illegal acquisition of the said land. As a result investigations were duly instituted by the relevant arm of the state being the National Police Service to discern whether the said school land was illegally acquired as alleged. Concurrently with the Police investigations, the Respondent herein embarked on its own parallel investigations into the illegal acquisition of the said piece of land culminating in the publishing of a report titled *"A Grabbers Playground – An Investigation report on the Acquisition of the Langata Road Primary Playground, Nairobi"* (hereinafter referred to as "the Report") on July 2015.

4. According to the applicant, at all material times to the publishing of the Report dated July 2015, the Respondent herein was well aware that two independent offices, namely the National Police Service and the National Land Commission had already instituted investigations into the acquisition of the afore stated piece of land ostensibly belonging to Langata Road Primary School. The applicant disclosed that the conclusions of the said Report cast criminal culpability upon him to wit that he abetted the illegal acquisition of land belonging to Langata Road Primary School through misleading information given to other officers. The report also recommended that the Nairobi City County Public Service Board takes disciplinary action against the *ex parte* Applicant for criminal culpability, which action is on the verge of being conducted.

5. Based on legal advice the applicant contended that Article 67 of the Constitution of Kenya, as read together with section 5(1)(e) of the ***National Land Commission Act, 2012*** provides that the functions of the National Land Commission includes the initiation of investigations, on its own initiative or on a complaint, into present or historical land injustices, and the recommendation of appropriate redress thereto. Further, section 30(h) of the ***Commission on Administrative Justice Act, 2011*** (CAP 102A, Laws of Kenya) (hereinafter referred to as "the Act") on the limitation of jurisdiction of the Respondent provides that the Respondent shall not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law. Despite the foregoing explicit provisions of the law, the Respondent herein though fully aware courtesy of the Applicant's letters dated 14th and 21st January 2015, that the National Land Commission as the appropriate body to investigate any complaint, into present or historical land injustices, had already been seized of the aforestated facts, still went ahead and conducted its own parallel investigations into the same matter, contrary to the aforesaid express provisions.

6. The applicant also averred that section 30(c) of the Act also bars the Respondent herein from investigating a matter that is pending before any court of law or judicial tribunal. However, vide the applicant's letter dated 10th April 2015, the Respondent herein was duly informed of an impending court case touching on L.R. No. 209/12848 (The allegedly Grabbed Land) where Airport View Housing Limited had sued the Hon. Attorney General, National Land Commission and the Cabinet Secretary for Lands and Housing claiming ownership of the said piece of land. To the ex parte applicant, the Respondent blatantly chose to ignore the aforestated information and proceeded to carry out their investigations in disregard of the impending Court case and the express provisions of the law, despite not having jurisdiction to do so.

7. It was further averred that apart from the foregoing section 30 (b) of the Act, on the limitation of the Respondent's jurisdiction provides that the Respondent herein is precluded from investigating any criminal offence.

8. It was the applicant's case that the Respondent herein overstretched its mandate to conclude that the applicant was criminally culpable for abetting the illegal acquisition of land belonging to Langata Road Primary School having conducted investigations which did not incorporate any input from the investigative arm of government, The National Police Service, which organ under Article 245 of the Constitution of Kenya is the only organ mandated to investigate criminal offences which recommendations are then forwarded to the office of the Director of Public Prosecutions who has the discretion to then institute criminal proceedings.

9. In addition the applicant averred that the Respondent's actions of investigating the illegal acquisition of the Langata Road Primary School playground by a private developer was well beyond their jurisdiction as the same amounts to a criminal offence under the jurisdiction of the National Police Service thus a glaring contravention of section 30(b) of the Act. The applicant therefore accused the Respondent for having acted *ultra vires* and in excess of its jurisdiction contrary to the express provisions of Article 67 of the Constitution of Kenya, section 30 of the Act and section 5 of the ***National Land Commission Act, 2012*** by purporting to carry out parallel investigations into matters that were beyond the reach of its mandate. The Respondent was further accused of having contravened the clear provisions of the law by purporting to usurp the mandate of the National Land Commission and the National Police Service without jurisdiction hence the purpose of these proceedings before this honourable Court.

10. To the applicant, the commission's anxiety to investigate the above matter and give recommendations therein was glaringly suspicious and plagued with malicious intentions against the *ex parte* Applicant. The applicant averred that in reaching its final conclusion, the Respondent blatantly ignored relevant considerations that had been brought to its attention and to this end, could only err in reaching a final determination.

11. It was the applicant's case that as is well admitted in the Respondent's Report, Airport View Housing Limited was duly allocated all that piece of Land known as L.R. No. 209/12848 (the suit land) vide a letter of Allotment dated the 4th of October 1989 by the then Commissioner of Lands, **FWS Mwithukia**. Subsequent to the Letter of Allotment dated 4th October 1989, a title to the said piece of land was duly conferred upon Airport View Housing Limited under the ***Registration of Titles Act*** (Cap. 281 of the Laws of Kenya) for a period of Ninety Nine years (99) years with effect from the 1st day of October 1989 by the then Commissioner of Lands **Wilson Gachanja** in the presence of the Registrar of Titles, the two relevant Public officers with the mandate to confer such title and which title could only be revoked by a court of law once allotted. It was revealed that prior to the allocation of the suit land to Airport View Housing Limited, **L.R. No. 209/7996** had previously been allocated to Langata Road Primary School in the year 1970 by the then Commissioner of Lands and that for purposes of rates, L.R. No. 209/7996 was entered in the valuation Roll in the year 1980 while L.R. No. 209/12848 was entered in the valuation Roll in the year 2000 and as such the records of Nairobi City County profess that the rateable owner of L.R. No. 209/12848 is Airport View Housing, Nairobi.

12. According to the applicant, anchored solely on the records of the County Government, he herein

wrote a letter dated 12th November 2014 to Vinemag Enterprises Limited and an internal memo dated 2nd December 2014 to the effect that L.R. No. 209/12848 was private property bordering Langata Road Primary School but was not the property of Langata Road Primary School. Thereafter, following national concerns that L.R. No. 209/12848 was part of Langata Road Primary School, the *Ex parte* Applicant herein wrote two letters to the National Land Commission dated 14th January 2015 and 21st January 2015, as the appropriate body with the requisite mandate, to investigate and determine the true status of L.R. No. 209/12848, which letters are yet to elicit any form of response. It was therefore the applicant's case that it is glaringly visible that as at the time L.R. No. 209/12848 (the Plot in dispute) was being allocated to Airport View Housing Limited, the *ex parte* Applicant herein was not at all involved in the process as he was neither working in the Lands Department under the Ministry of Lands nor was he at the Lands Department at the then County Council of Nairobi. It is therefore practically impossible by any stretch of imagination that the *ex parte* Applicant abetted the illegal acquisition of the said land. In this respect, as the Chief Officer of Lands at Nairobi City Council, all that was reasonably required of the *ex parte* Applicant was a confirmation of the records which in fact identifies Airport View Housing Limited as the proprietor of the disputed piece of land.

13. It was deposed that from the Report it is discernible that the Respondent's recommendations were solely anchored upon letters from the *ex parte* Applicant's office confirming that L.R. No. 209/12848 – Langata Road, as per the records at the City County Government is not registered in the name of Langata Road Primary School. This was to the exclusion of all other facts presented.

14. Based on legal counsel the applicant averred that the title to L.R. No. 209/12848 (the Plot in dispute) has never been revoked by any court of law and thus the *ex parte* Applicant herein had no prerogative to dispute the title or question the legality or otherwise of its acquisition.

15. It was further the applicant's case that he was deprived of the right to be heard before the Respondent published the report dated July 2015 contrary to the rules of Natural Justice, the procedural safeguards in Sections 36, 37 and 39 of the Act and Article 47 of the Constitution despite having been fully cooperative in the course of the Respondent's investigations with anticipation of a fair hearing on the same. This was however not the case as he never received any further communication from the Respondent to defend his honour. Further, the publication of the report is evidently anchored upon a perversion of pertinent facts which have been excluded as the investigations have not been conducted with due diligence and reasonable and/or probable deduction of the information readily available.

16. The applicant disclosed that he continues to suffer from a negative public image as a law-abiding citizen and also a public officer due to the publication of the Report by the Respondent and that unless this Court intervenes, the axe as currently held by the Respondent herein will perennially hang over his head and that he will likely continue to suffer prejudice and irreparable harm.

17. To the applicant therefore, it is fair and just that the Court grants the Orders sought.

18. It was submitted on behalf of the applicant that the net effect from the foregoing events is that investigations were conducted by the National Police Service to discern whether the said land was illegally acquired. Fully aware of the said investigations, the Respondent herein embarked on its own parallel investigations culminating in the publishing of the report which report cast criminal liability upon the Applicant herein on grounds that he abetted the illegal acquisition of the said parcel of land and the report further recommended disciplinary action upon the Applicant.

19. It was submitted that the said investigations which the Respondent carried out fell within the mandate of the National Land Commission and the National Police Service which mandates limit the functions of the Respondent and this information was relayed to the Respondent vide letters dated 14th and 21st January 2016which information the Respondent ignored.

20. It was further submitted that the Applicant was never given a chance to be heard before the Respondent published the report therefore violating the rules of Natural Justice and the procedural safeguards under sections 36, 37, and 39 of the Act and Article 47 of the Constitution of Kenya 2010. In

this respect the applicant relied on the decision of **Lord Hodson** in **Ridge vs. Baldwin [1964] AC 40** which sets out the three cardinal features of the rules of natural justice which include the right to be heard by an unbiased tribunal; the right to have notice of charges of misconduct; and the right to be heard in answer to the charges levelled against a person. It was however submitted on behalf of the applicant that he was not accorded a chance to be heard in rebuttal of the allegations levelled against him. According to him, he was never served with any notice informing him of the contents of the report which implicated him. Secondly, the Commission never responded to the letters he sent them. He relied on **Lord Loreburn LC's** decision in **Board of Education vs. Rice; [1911] AC 179.**

21. It was the applicant's case that the Respondent never put into consideration before coming into its conclusion the issues raised by the Applicant but rather went ahead to condemn the Applicant herein unheard. He relied on **Republic vs. the Honourable the Chief Justice of Kenya & Others Ex Parte Justice Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** and **Ahmed Issack Hassan vs. Auditor General[2015] eKLR** as justifying the prayer compelling the Respondent to expunge the applicant's name from the report. while relying on the above case granted the Applicant an order directing the Respondent to delete the information about the Petitioner in the Special Investigation Report on the Procurement of Electronic Voting Devices for 20113 General Election that adversely mentioned the Petitioner and any other information in the said report that adversely mentioned the Petitioner. In support of his submissions the applicant relied on

22. The applicant relied on **Chief Constable Pietermaritzburg v shim 1908 29 NLR 338 341**, **Onyango Oloo vs. Attorney General [1986-1989] EA 456** and **Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair Ex parte Hon Professor George Saitoti**.

23. It was submitted that similarly in this case the Respondent went ahead and published the Report which in its recommendation casts criminal liability upon the Applicant unheard which therefore shifts the burden of proof. It was submitted that in arriving at its decision the Court in **Ahmed Issack Hassan vs. Auditor General[2015] eKLR** relied on *inter alia* **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Applic No.18 of 2010.**

24. The applicant further relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** in which **Prof Sir William Wade** in his book ***Administrative Law*** was cited with approval and **Rahab Wanjiru Njuguna vs. Inspector General of Police & another [2013] eKLR** and submitted that one of the fundamental precepts of natural justice, encapsulated in the maxim *audi alteram partem*, is the right of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his rights, interests or legitimate expectations. This precept of law forms part of the larger duty imposed upon every administrative authority to act legally, rationally and procedurally. The duty to act lawfully, reasonably and in a fair manner. The obligation to act in a fair manner requires giving of adequate notice of the nature and purpose of the proposed action and a reasonable opportunity to make adequate representations as well as adequate notice of any right of review or appeal where applicable. It is this statutory duty in particular that the Applicant has invoked to challenge the Respondent actions presently under consideration. This is because the Respondent used its power in a manifestly unreasonable manner, acted in bad faith, refused to take relevant factors into account in reaching its decision or based its decision on irrelevant factors. Therefore it is the duty of this Court to intervene on the ground that the Respondent never gave a hearing to the Applicant before its decision was made.

25. It was submitted that the functions bestowed upon the Respondent are very clear and there can be no ground for ambiguity in the said functions. Nobody denies that the respondent is clothed with investigative powers but there are limits imposed upon the same. Section 30 of the ***Commission on Administrative Justice Act No. 23 of 2011*** is very clear that the Respondent shall not investigate—

a) .....

b) A criminal offence;

c) A matter pending before any court or judicial tribunal;

d) .....

e) .....

f) .....

g) .....

h) Any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

26. According to the applicant, the facts are very clear that indeed the Respondent was informed of a Pending case touching on the alleged grabbed land which is L.R No. 209/12848 but it blatantly ignored such critical information and went ahead to conduct an investigation. While the Respondent averred that it was not aware of a pending case whereas the Applicant states clearly that Airport View Limited has sued the Attorney General, The National Land Commission and the Cabinet Secretary for Lands over the ownership of the said piece of land. From the above it is very clear that the Respondent did not even make an effort to conduct the said parties even where the Law provides for the right to access of information. According to the applicant, the Respondent cannot compel and dictate terms on how the National Police Service should work and conduct investigations. The Respondent's argument lacks any legal basis and only amounts to overstepping its mandate if not to cast the Respondent as a busy body. The law within which the Respondent operates is very clear that the Respondent cannot delve into any matter under investigation by any other person or Commission established under the Constitution or any other written law. In this respect the applicant relied on **Resley vs. The City Council of Nairobi [2006] 2 EA 311** and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] eKLR** for the submission that where a body acts outside the scope of its mandate then the decision is laced with illegality.

27. According to the applicant, there are bodies which are created by law to perform the functions which the Respondent herein decided to undertake which bodies not only reflect the will and wishes of the people under the Constitution of Kenya 2010 but also the intention of the Legislature which has conferred such bodies functions not beyond their capabilities which bodies include the National Land Commission and the National Police service.

28. It was the applicant's case that the position in law is very clear that **a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute. The limitations of the Respondent have well been spelt out under the Act which the Respondent so operates. If a body whose jurisdiction is limited by statute or subsidiary legislation goes ahead and performs that which it is not empowered to perform then that amounts to usurpation of the law which a court of law cannot turn a blind eye on. The purported determination by a body acting outside its mandate cannot be legal determination but a nullity. Error of law by a body is a ground for judicial review because an administrative authority entrusted with the exercise of a discretion must direct itself properly in law. It is obvious that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.**

29. It was therefore the applicant's case that as he had **shown that the decision taken by the Respondent was laced with illegality, irrationality and procedural impropriety, the decision taken by the Respondent was** *ultra vires* **and contrary to the provisions of a law which the Respondent ought to restrict itself to and hence the orders sought herein ought to be granted.**

Respondent's Case

30. On behalf of the Respondent Commission it was averred that following the media reports that a parcel

of land belonging to Langatta Road Primary School (hereinafter referred to as "the School") had been irregularly acquired by a private developer and that the matter had been taken over by civil society activists, the Respondent invoked its *suo moto* powers under the Act and commenced investigations into the matter.

31. It was averred that the Respondent notified the Ministry of Lands, Housing and Urban Development, the National Land Commission and the City County Government of Nairobi in writing of its intended action.

32. It then proceeded with the said investigations and issued a report to the relevant bodies in July, 2015 in which it was inter alia found that the ex parte applicant herein was culpable of misleading the Respondent in his presentation as documents contradicting his presentation were recovered from the County Government respecting he School. It was therefore recommended that the County Public Service Board takes disciplinary action against the applicant for abetting the illegal acquisition of the said land through misleading information given to other public officers regarding the status and ownership of the said land.

33. The Respondent denied that it initiated the said investigations during the pendency of other investigations initiated by another constitutional Commission and contended that it was unaware of any such investigations by the National Land Commission and the National Police Service. To the Respondent, being conscious of concurrent jurisdiction, it informed the National Land Commission of its intention but the latter never objected to the Respondent's intended action.

34. It was the Respondent's case that investigations by the National Police Service does not bar the Respondent from carrying out its investigations which are geared towards the allegations of maladministration as opposed to that undertaken by the police which is limited to the criminal aspects.

35. Whereas the Respondent admitted that its jurisdiction is restricted with respect to matters pending before the Court, this restriction is limited to the issues specifically pending before the Court for determination.

36. The Respondent however denied that it was aware of the alleged case between Airport View Housing Limited and the Attorney General and Others and the particulars thereof.

37. It was the Respondent's case that when it initiated the investigations, it interviewed the applicant to hear his version which the applicant who cooperated fully with the Respondent.

38. While accepting that the Respondent has no jurisdiction to investigate a criminal matter, the Respondent averred that investigations of maladministration in some cases can lead to findings of criminal culpability hence reference to the Director of Public Prosecutions under section 41(a) of the Act. It was the Respondent's case that upon realising that there was an element of a crime in the dispute, it made recommendations to address the administrative maladies by recommending administrative disciplinary proceedings against the ex parte applicant and referred the criminal aspect to the DPP for action.

39. The Respondent reiterated that the applicant was given an opportunity of being heard on several occasions, including an interview on 26th January, 2015 and allowed to submit relevant documents to the Respondent. It was contended that the applicant was accorded a further chance to make his representations on the preliminary findings and recommendations in writing but in his response the applicant did not substantially respond to the allegations against him.

Determination

40. I have considered the application, the affidavits in support of and in opposition to the application the submissions as well as the authorities relied upon and this is the view I form of the matter.

41. According to the applicant, he was deprived of the right to be heard before the Respondent published the report dated July 2015 contrary to the rules of Natural Justice, the procedural safeguards in sections 36, 37 and 39 of the ***Commission on Administrate Justice Act,*** 2011 and Article 47 of the Constitution despite having been fully cooperative in the course of the Respondent's investigations with anticipation of a fair hearing on the same. This was however not the case as he never received any further communication from the Respondent to defend himself.

42. On its part the Respondent contends that when it initiated the investigations it interviewed the applicant to hear his version of the story.

> 23. The issues raised by the applicant herein calls for what encompasses an opportunity to be heard. Section 4(3) of the ***Fair Administrative Action Act, 2015*** provides as follows:
>
> > ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
> >
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***
> >
> > ***(e) notice of the right to legal representation, where applicable;***
> >
> > ***(f) notice of the right to cross-examine or where applicable; or***
> >
> > ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

43. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

> **"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *"(c) responsive, prompt, effective, impartial and equitable provision of services"* and *"(f) transparency and provision to the public of timely, accurate information."***
>
> **...**
>
> **28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."***
>
> **29. Fair and reasonable administrative action demands that the taxpayer would be given a**

clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439).

30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."*

44. In this case, it is clear that what the Respondent did was to interview the ex parte applicant. There is no indication that the charges facing the applicant were laid before the applicant and that he was required to respond to them specifically.

45. It is therefore clear that for an administrative action to meet the threshold, it is not only the allegations that must be furnished but the basis thereof must also be availed to the person who stands to be adversely affected thereby. The right to a hearing contemplates full disclosure by the administrator and therefore there must be given full information on the case against the person and a reasonable opportunity accorded to him to present a response. He is *entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision***.** As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be**.**

46. The consequences of the failure to comply with the principles of natural justice were enumerated in Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR at page 7 where the Court referred to **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, in which the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

47. Whereas there was a letter dated 2nd April, 2015 in which the recommendations of the Respondent were transmitted to the applicant and he was asked to respond thereto, this Court in **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeri [2015] eKLR** *expressed itself inter alia as hereunder:*

"In my view a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria."

48. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."**

49. Therefore it is my view and I hold that if the applicant was not accorded a hearing as contemplated by the law before the Respondent arrived at its recommendations the letter dated 2nd April, 2015 could not cure the failure to accord him a proper hearing. A mere interview cannot be equated to a hearing since a person who stands to be adversely affected cannot be places on the same plane as a witness. It must be brought to him in clear terms that he is under investigations and he must understand that adverse findings may be made against him.

50. In this case I cannot find any evidence that the Respondent did set out particulars in the notice, assuming there was such notice in the first place, which notice was sufficiently explicit to enable the ex parte applicant understand the case he was to meet and to prepare his answer and his own case.

51. Having considered the issues raised in this application it is my view and I find that the manner in which the proceedings leading to the findings in the impugned report was conducted was tainted with procedural impropriety as the applicant as never afforded an opportunity of being heard throughout the process of investigation. Whereas it may well be that in some instances, the applicant was notified of the process, to my mind the person who stands to be adversely affected by the decision ought to be accorded an opportunity to deal with all the allegations made against him at every stage at which such allegations arise. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular**

nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

52. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

53. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

54. In my view even if it is true that the *ex parte* applicant was duly notified of the findings by the Respondent such notification was unprocedural and did not lend itself to a fair hearing.

55. It was the applicant's case that the ***Commission on Administrative Justice Act*** (Cap 102A, Laws of Kenya) (hereinafter referred to as "the Act) provides in section 30(h) that the Commission on Administrative Justice (herein after referred to as the Commission) shall not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law. The said section provides as hereunder:

The Commission shall not investigate—

(a) proceedings or a decision of the Cabinet or a committee of the Cabinet;

(b) a criminal offence;

(c) a matter pending before any court or judicial tribunal;

(d) the commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;

(e) the grant of Honours or Awards by the President;

(f) a matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;

(g) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or

(h) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

56. I agree that the Respondent is expressly prohibited by the law from investigating criminal offences.

The question however is whether the Respondent was in fact investigating the commission of a criminal offence.

57. It is true that the functions of the Respondent are set out in section 8 of the ***CAJ Act*** which provides that:-

> ***"The functions of the Commission shall be to—***
>
> ***(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;***
>
> ***(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;***
>
> ***(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;***
>
> ***(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;***
>
> ***(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;***
>
> ***(f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;***
>
> ***(g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;***
>
> ***(h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;***
>
> ***(i) publish periodic reports on the status of administrative justice in Kenya;***
>
> ***(j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;***
>
> ***(k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;***
>
> ***(l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and***
>
> ***(m) perform such other functions as may be prescribed by the Constitution and any other written law.***

58. It is therefore clear that one of the functions of the Respondent is to inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service. Section 2 of the Act defines "***administrative action"*** as

"…any action relating to matters of administration and includes—

a) A decision made or an act carried out in the public service;

b) A failure to act in discharge of a public duty required of an officer in public service;

59. In this case the Applicant has not stated with clarity the exact issues which were being investigated by the Director of Criminal Investigations. I however agree that the fact that an issue subject to an investigation has both criminal and administrative elements does not necessarily exclude the Respondent from investigating it if the Commission views the matter as being administrative in nature as opposed to a criminal one and where the facts of the case may well constitute an administrative injustice. The mere fact that an administrative injustice may similarly constitute a criminal offence does not take it outside the purview of investigation by the Respondent. In my why what is prohibited is for the Respondent Commission to set out to investigate what is purely a criminal offence with no element whatsoever of an administrative injustice. This must necessarily so in light of the provisions of section 41(a) of the Act under which it is provided that the Commission may, upon inquiry into a complaint under the Act refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons where the inquiry discloses a criminal offence. The position is similarly supported by section 44 of the Act which states that:-

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organisation which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

60. In my view what this means is that the Commission may well investigate an administrative injustice but once it forms the opinion that its investigations have unearthed the commission of a criminal offence, it must then refer the matter to the DPP or the relevant authority. In other words, it cannot take upon itself the task of undertaking what in its view amounts to a commission of a criminal offence. To this extent I have no material on the basis of which I can find that the Respondent set out to investigate the commission of a criminal offence.

61. In this case just like in any other judicial review proceedings, the burden lies on the applicant to prove his allegations. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

62. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

63. I therefore associate myself with the position adopted by the Supreme Court in the Advisory Opinion No.2 in **Speaker of the Senate & Another versus Hon. Attorney General & Others [2013] eKLR,** at paragraph 146, that:

"…lawful public agency conduct under the Constitution requires every state organ to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency

harmony and cooperation and that no state agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might to a scheme of progressive, accountable institutional interplays."

64. Similarly, I agree with the decision in **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR** at paragraph 53 that:

"The Respondent's assertion that its jurisdiction should not be viewed from a narrow context is indeed correct. It is true that the Respondent is among the commissions whose existence is rooted in the promotion of respect for human rights and development of a culture of human rights in Kenya. What the Applicant does not seem to appreciate is that human rights pervades all the activities of human species. The need to respect human rights is very important in the governance of this country and where there is an allegation of maladministration the Respondent is under a duty to enquire into the complaint and act in accordance with the powers bestowed on it by the Constitution and legislation. In the circumstances of this case, I will therefore agree with the Respondent that it had jurisdiction to investigate this matter although the nature of the complaints may have been better dealt with by EACC."

65. It was submitted that as at the time when the Respondent herein purported to carry out independent investigations in the foregoing matter, investigations by the National Land Commission, were still on-going. It is clear that under section 30(h) of the Act, the Commission is barred from investigating any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law. I associate myself with the holding in **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR** that:

"When one reads the said Section, it clearly becomes apparent that Parliament intentionally limited the jurisdiction of the Respondent in the identified circumstances. The reason for this limitation is that there was need to avoid conflicts between the Respondent and other state agencies. The limitation is therefore reasonable considering that the Respondent is not a super commission capable of investigating all the things done by state organs. Where therefore another commission or any other person established by the Constitution or any other written law is dealing with a particular issue, the Respondent has no jurisdiction to venture into that matter."

66. The law however does not state that where the Commission is investigation a matter and another organ commences similar investigations then the Commission must down its tools. In this case, it is contended that as and the National Land Commission had instituted investigations into the acquisition of the subject land. However there is no allegation that these investigations were commenced before the Respondent herein commenced its own investigations. If at that time there were no on-going investigations into the subject matter, I agree that section 30(h) aforesaid would not operate as a forbearance on the part of the Respondent. Again the applicant has not satisfied me that as at the date the Respondent commenced its investigations there were pending investigations by other commissions. To the contrary the Respondent has averred that it did intimate its intention to commence its investigations to the National Land Commission and received no response. Since the burden lies upon the applicant to show that the orders sought are merited, it cannot be assumed that the Respondent would have restrained itself in carrying out a function within its lawful mandates on a presumption that investigations would be done by the other Commissions. To hold a contrary view would impose an onerous duty upon State entities to undertake investigations into whether there exist other investigations before carrying out their statutory mandate. That in my view may unduly hinder such entities from carrying out their mandate to the detriment of the public. Where however it is shown that they were aware of the on-going investigations and they proceed to commence theirs, they would be at fault. In this respect the Respondent relied on **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees** (supra) where the Court observed at paragraph 67 that:

"The EACC's letters do not, however, reveal when it started its investigations into the Project. The jurisdiction of the Respondent is only taken away by Section 30(h) of the CAJA where the matter is "for the time being under the investigation of any other person or Commission..."

67. I also agree that in order to determine this issue, it is necessary to make a determination on the exact nature of the issues which are under investigations since under section 30(h) of the Act the Commission is barred only from investigating matters which are similar to other matters being investigated by another person or a commission. This was the position adopted in **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR**, where it was held that:

"The matter under investigation by another body should be the same with the matter under investigation by the Respondent. In this case, the Applicant has not demonstrated that the issues under investigation by EACC were the same with those under the investigation of the Respondent. It is also not clear whether by the time the Respondent commenced its investigations, EACC had already started its investigations. The same position applies to the investigations by the two parliamentary committees. The danger, where there is no sufficient evidence, in acceding to an application like the one of the Applicant is that matters touching on public interest may be swept under the carpet. The risk of misuse of public finances through a multiplicity of investigations is a lesser evil compared to the failure to unearth malpractices in the public service. In the circumstances of this case this application fails and the same is dismissed."

68. In this case the applicant ought to have juxtaposed the issues which were under investigations with those which the Respondent was investigating. In my view it is not enough to simply state that the investigations were in respect of the illegal acquisition of the land belonging to the School.

69. I must however hasten to state that the mere fact that the Respondent is unaware of pending investigations by other commissions does not sanitise its actions. As was held in the ***Ongeri Case*** (supra):

"I therefore do not see the reason why the word "investigate" used in section 30 of the Act ought to be substituted with the word "act". The 1st Respondent is barred from investigating matters pending in Court knowledge or otherwise of such proceedings immaterial."

70. In this case I have however found that the Respondent's decision was tainted with procedural irregularities. I reiterate the decision in **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeri [2015] eKLR** which dealt with section 36 of the Act to the effect that:

"Therefore even without the benefit of case law, the Act itself imports the elements of a hearing before the Commission's findings are included in the report. On this issue Halsbury's Laws of England, (supra) states:

"Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."

71. Halsbury's Laws of England, 5th Edn. Vol. 61 page 539 at para 639 states:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or

contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."

72. Having so expressed myself save for the issue of fair hearing all the other issues raised by the applicant are unmerited. However the issue of failure to adhere to the fair administration process suffices for the purposes of the orders sought herein.

Order

73. In the premises I issue the following orders:

a) An order of Certiorari removing to this Court for the purposes of being quashed and quashing the decision of the Commission on Administrative Justice, the Respondent herein, to publish the report titled "*A Grabbers Playground*" published, on July 2015, casting criminal liability and recommending that the Nairobi City County Public Service Board takes disciplinary action against the *Ex parte* applicant

b) An order of Prohibition prohibiting the Nairobi City County Public Service Board from by themselves, their agents/and or assigns acting jointly and/or severally from proceeding to take any disciplinary action against the *Ex parte* Applicant based on the said report as well as prohibiting the Respondent herein from by themselves, their agents and/or assigns, acting jointly and/or severally from proceeding to aid the execution of recommendations set out in the said report.

c) As the applicant has not succeeded in the other grounds, there will be no order as to costs.

74. It is so ordered.

Dated at Nairobi this 28th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Walukwe for the applicant

NA for Respondent

CA Ooko