



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 409 OF 2016

(CONSOLIDATED WITH JR NO. 514 OF 2016)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS BY KARISA IHA IN THE NATURE OF CERTIORARI, AND PROHIBITION

AND

IN THE MATTER OF: CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES, 21(1), 23(1), 23(3) (f), 25(c), 47(1), 48 & 50(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE LAW REFORM ACT, SECTIONS 8 AND 9 OF CAP. 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT, 2011

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2011

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT NO. 17 OF 2011

AND

IN THE MATTER OF: THE PHYSICAL PLANNING ACT, CAP 286 LAWS OF KENYA

AND

IN THE MATTER OF: THE LOCAL GOVERNMENTS ACT, CAP 265 (REPEALED)

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005

AND

IN THE MATTER OF: THE LAND ACT, NO. 6 OF 2012

IN

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSION ON ADMINISTRATIVE JUSTICE.....RESPONDENT

NAIROBI COUNTY GOVERNMENT.....1ST INTERESTED PARTY

HON. DR. EVANS KIDERO.....2ND INTERESTED PARTY

AND

KARISA IHA.....1ST EX PARTE APPLICANT

FARAH MOHAMED.....2ND EX PARTE APPLICANT

ALI SHEIK MOHAMUD.....3RD EX PARTE APPLICANT

JUDGEMENT

Introduction

1. The ex parte applicants in these consolidated applications have moved this Court seeking the following orders:

1) **THAT** the Honourable court be pleased and do hereby grant judicial review order of Certiorari to remove into this Honourable Court and quash the findings and recommendations contained in the Report of Commission on Administrative Justice titled “An Investigation Report on the Alleged Irregular Allocation of Eastleigh Market to Private Developers” published in August 2016.

2) **THAT** the Honourable court be pleased and do hereby grant judicial review order of Prohibition to remove into this Honourable Court and prohibit the 2nd Interested Party from implementing the Respondent’s report on the alleged irregular allocation of Eastleigh Market to private developers published in August 2016.

3) **THAT** this Honourable Court be pleased to grant an order of Prohibition directed towards the Interested Party, prohibiting it from retaking possession of the Applicant’s Parcel of Land L. R. No. 36/VII/1037.

4) **THAT** this Honourable Court be pleased to grant any other orders and or directions as it may deem fit and just to issue under the circumstances;

5) **THAT** cost of this Application be provided for.

Applicants’ Case

2. According to the 2nd and 3rd ex parte applicants, they were registered proprietors of all that property known as L. R. No. 36/VII/1037 situate in Eastleigh, Nairobi County by dint of grant registered at the Lands Registry Grant Number I.R. No. 10447/1 and Certificate of Title issued on 29th January 2007. The said title was initially part of L. R. No. 36/VII/619 registered to the Nairobi City County, previously the City Council of Nairobi, as lease from the President for a term of 99 years under grant no. I. R. No. 33892/1 under the **Government Lands Act**.

3. It was therefore averred that the title under review, L. R. No. 36/VII/1037, was borne as a result of the subdivision of L. R. No. 36/VII/619 into smaller parcels of land which were leased to several entities.

4. The said applicants disclosed that there are three suits pending in court regarding the ownership of the Applicant's Title to the property; ELC Petition No. 1127 of 2015 - **Benedict Kabugi and Mwathi Mugwe versus Nairobi City County and 2 Others**; ELC Petition No. 1047 of 2015 - **Swaleh Njiru and Hamisi Ali versus Nairobi City County and 5 Others**. The said suits revolve around the allegation that the Applicant acquired it irregularly.

5. It was averred that the Interested Party, who was the initial owner of the property, has never denied transferring it to the Applicants and/or alleged that the same was done irregularly and unlawfully. In fact vide letter dated 14th February 2014 it confirms that the Applicant is the lawful proprietor of the property. It was however averred that the matters are still in court and are yet to be determined conclusively.

6. However during the pendency of the said matters, the Respondent undertook an investigation on the legality of the title by the Applicants and made several recommendations and findings regarding the same which findings were contained in a report released on August 2016 titled "*An Investigation Report on the Alleged Irregular Allocation of Eastleigh Market to Private Developers*".

7. This prompted the applicants to instruct their advocates on record to write to the Respondent advising that the matters were in court and as such it should refrain from making any determination on the subject. It was the applicants' contention that the publication of the said report contravened the principle of *sub judice* since the substantive issue was in court.

8. According to the applicants, the powers of the Respondent, a statutory body established under and derives its duties, functions and powers from the **Commission on Administrative Justice Act**, Act no. 23 of 2011 (hereinafter referred to as "the Act" or "CAJA") are contained under section 29 of the Act which gives the Respondent powers to investigate matters arising from the carrying out of an administrative action of public officers. These powers are however limited in the terms of section 30 of the Act which prevents the Respondent from simultaneously investigating matters that are in court.

9. It was the applicants' case that as ownership of land matters cannot, by any stretch of imagination, be deemed to be part of administrative function as defined by the Act, the Respondent acted *ultra vires*, contrary to and in breach of the express language of the provisions of section 30(c) of the **Commission on Administrative Justice Act** CAP which bars the Respondent from investigating matters before any court or judicial tribunal.

10. The said applicants further averred that they were never afforded an opportunity to be heard by the Respondent before making its said recommendations and that this was in clear breach of the applicants' right to fair administrative action and goes against the norms of justice.

11. It was averred that one of the recommendations in the said report was that the title be revoked which recommendation, in the applicants' view, was particularly malicious, vexatious and unfairly accuses the Applicants of what in the colloquial language is termed as 'land grabbing' without such findings ever being made by a court or tribunal of competent jurisdiction.

12. It was the said applicants' case that Respondent has no jurisdiction to pass orders on land matters as the same is the purview of the National Land Commission which is the correct constitutional and statutory body mandated to review grants and dispositions relating to land in any part of this country.

Accordingly, it was urged that orders of Certiorari and Prohibition ought to issue to prevent the Respondent from going further with its illegality, arbitrariness and abuse of statutory power.

13. The said applicants contended that from the above facts, it is clear that the investigation report is a nullity in law for want of jurisdiction and as such the Respondent's report and findings should not be left to stand as it will create the undesirable and extremely prejudicial perception that the Applicants acquired the property irregularly.

14. In furtherance of the foregoing, it was disclosed that the Interested Party wrote to the National Land Commission to put into action the recommendation made by the Respondent.

15. Apart from reiterating the averments made by the 2nd and 3rd ex parte applicants, the 1st ex parte applicant averred that the investigations, findings and recommendations against him were irregular, shoddy, marred with errors of the law, illegal, malicious and fundamentally unreasonable.

16. It was submitted on behalf of the applicants that the decision made by the Respondent of conducting an investigation during the pendency of a lawsuit in court is an illegality for being contrary to the provisions of section 30 of the Act which establishes the limitations to the jurisdiction of the Respondent by providing that:

“the Commission shall not investigate a matter pending before any court or judicial tribunal.”

17. It was submitted that as at 15th December, 2016 when the Respondent contended that it received a complaint relating to the alleged allocation of the property known as L.R. No. 36/VII/1037 located in Eastleigh to private developers, several matters were pending before court relating to the suit property. According to the applicants, pleadings had been filed in **Swaleh Njiru and Hamisi Ali versus Nairobi City County and 5 Others, ELC No. 1047 of 2015** on 16th October 2015 relating to the alleged irregular alienation of the property known as L.R. No. 36/VII/619 while **Benedict Kabugi and another versus Nairobi City County and another, Constitutional Petition No. 48 of 2015** was filed on 10th December 2015. It was disclosed that there is also an application pending before the Supreme Court relating to the suit property being **Supreme Court Application No. 11 of 2016, Golden Lime International Ltd vs. Blusea shopping Mall Ltd & 3 others** which is an Appeal from the Judgement of the Court of Appeal in Civil Appeal No. 129 of 2013. It was submitted that the existence of these matters were brought to the attention of the Respondent.

18. It was submitted that section 30(c) of the Respondent's governing act strictly precludes it from investigating matters pending before a court. And reliance was placed on **Republic vs. Commission on Administrative Justice and another Ex-parte Samson Kegengo Ongeri [2015] eKLR** where the court held that:

“...even if the Commission had powers to investigate the nature of the complaints in issue but the Legislation under which it operates restricts its powers as was the case, in the instant case, the Commission would not have jurisdiction to embark on the said voyage unless the statutory bottlenecks had been removed or settled. A tribunal which has no jurisdiction to entertain a matter, it has been held, cannot purport to accord the respondent a fair hearing.”

19. They also relied on **Choitram and Others vs. Mystery Model Hair Saloon [1972] EA 525** cited in the *Kegongo Case* (supra) that:

“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction.”

20. According to the applicants' case it is the sidestepping of the Respondent's mandate under section 30 (h) of the Act that forms the foundation of the illegality.

21. It was further submitted that the 2nd and 3rd Applicants were not afforded a fair hearing before the aforementioned adverse actions were taken against them. The only correspondence between the Respondent and the 1st *Ex-parte* Applicant was the latter's objection to the former's exercise of jurisdiction, an objection that the former failed to respond to and thus created the assumption that they had halted its investigations. This, it was submitted was a major procedural impropriety and breach of the rules of natural justice by the Respondent based on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** and Article 47 of the Constitution of Kenya 2010 which places a fundamental requirement on all public bodies to exercise administrative action in a manner that is lawful and procedurally fair.

22. It was further submitted that the Respondent's conduct after the aforementioned correspondence and prior to the publication of its report, were contrary to the legitimate expectation held by the 1st *Ex-parte* Applicant that they would be afforded with an opportunity to be heard prior to any adverse action being taken against them in the future. In this respect the applicants relied on **Republic vs. Attorney General & Another Ex-parte Waswa & 2 others [2005] 1 KLR 280** where the court held that:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantages or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognized and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

23. They similarly relied on **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it held that:

“...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

24. On the authority of **Onyango Oloo vs. Attorney General [1986-1989] EA 456**, it was submitted that administrative or executive authority entrusted in public bodies such as the Respondent must properly be directed in accordance with the law. Principally, the bodies must have the necessary jurisdiction in default of which the courts must hold them accountable and render any decisions made *ultra vires* void *ab initio*.

25. In view of the arguments, principles of law and authorities advanced herein, the Applicants prayed that the orders sought for in the Notice of Motion dated 2nd November 2016 be allowed.

The Interested Parties' Case

26. The interested parties supported the application.

27. According to them, the 1st and 2nd ex parte applicants entered into an agreement with City Council of Nairobi (defunct) on the 16th of January, 2007 for a lease agreement under the repealed **Local Government Act** (CAP 265) and they became the rateable and registered owners of the of LR. No. 36/VII/1037. However, the City Council then discovered that the lease was awarded to the said applicants erroneously and wrote a letter on the 15th of February, 2007 to the Land Registrar indicating that the land LR. No. 36/VII/1037 was a market place and that the said lease was fraudulently obtained and proposed that the said lease should be revoked.

28. It was averred that the Nairobi City Council further entered into an agreement with a Public Private Partnership firm in 2008, after a Full Council meeting passed a resolution awarding the contract to Golden Lime International Limited for the proposed redevelopment of Eastleigh Market as a commercial market and Golden Lime International Limited was awarded a lease on 24th November, 2008. As result of the signed Public-Private Partnership agreement between the Nairobi City Council (defunct) and Golden Lime International, the 2nd and 3rd applicants succeeded in cancelling the said agreement and rendering it void and they remained the rateable and registered owners of the lease. It was disclosed that the said agreement between Nairobi City Council (defunct) and Golden Lime International was subsequently nullified by court in Court of Appeal at Nairobi, Civil Appeal No. 129 of 2013, arising from H. C Misc. C. C. No. 808 of 2008, the court quashed the award of Public Private Partnership tender to Golden Lime International Limited, for being unlawful, irregular and in contravention of the **Public Procurement and Disposal Act, 2005**. However, after the letter dated 2nd December, 2008 the then Registrar of titles, Ministry of Lands, **Mrs. T. N. Mbaru** issued a Revocation Notice of the lease to the 3rd Interested Party vide a gazette Notice No. 11951 dated 19th December, 2008. This prompted the 2nd and 3rd Applicants to file Judicial Review Misc. Civil Application No. 37 of 2009 in which they obtained leave to apply for Judicial Review Orders of Certiorari and Prohibition and in which the leave obtained was to operate as stay of the cancellation of the instrument of lease in their favour.

29. To the interested parties as the orders obtained in **Judicial Review Misc. Civil Application No. 37 of 2009** have not been discharged by the said court, this means that the said lease that was registered in favour of the 2nd and 3rd applicants was never cancelled and that they are the registered owners of the suit property LR. No. 36/VII/1037. To them since a gazette notice cannot deregister interest in land, the parties involved should go through the court and get a court order to that effect. In this respect the interested parties relied on the case of **John Mukora Wachuhi vs. Minister for Lands & 6 Others (2013) eKLR**, in which **Mumbi Ngugi, J.** stated that:

“The question whether the Registrar or indeed any of the respondents has a right to revoke the title of a registered owner of property by way of a Gazette Notice has been the subject of several decisions of this court and, in my view, is now settled in the negative.”

30. They also relied on the decision of the case of **Kuria Greens Limited vs. Registrar of Titles & Another [2011] eKLR** where it was stated as follows:

“In Gazette Notice No. 15584 which the First respondent purported to revoke the petitioner’s title to the suit land he did not indicate the provisions of law that he invoked as the basis for his decision. Was that an omission? I do not think so. This is simply because there is no provision under the Registration of Titles Act or any other Act that bestows on the First respondent or the Commissioner of Lands or the Government power to revoke a registered title in the absence of a court order to that effect. I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the Registered Lands Act and the Land Control Act and I did not come across any provision that grants power to a Registrar of Titles or the Commissioner of Lands to arbitrarily revoke a valid land title.”

31. It was disclosed that the Respondent received a complaint on 15th December, 2015 from representatives of a group of traders who had operated stalls at Eastleigh Market (LR. No. 36/VII/1037) alleging that they were allocated space at the market by the defunct Nairobi City Council in 1981 and

they constructed stalls which were demolished on the 10th of January, 2009.

32. It was therefore averred that the Respondent has thus published a Report based on their findings and are implicating the 1st ex-parte applicant of gross misconduct and breach of public trust for confirming to the 2nd and 3rd applicants through a letter dated 14th February, 2014 that they are the rateable and registered owners. To them, in any case the Respondent's Report was illegal & in total disregard of the Act that establishes them under section 30(c) which clearly states that a matter that is already pending in Court should not be investigated. In this case, the matter on Eastleigh Market is already in court as a constitutional Petition - **Nairobi Constitutional Petition No. 482 of 2015 - Benedict Kabugi Ndungu & Another vs. Nairobi City County & Farah Mohamed Barrow and Ali Sheik Mohamud t/a Alfa Traders** that is still ongoing, which makes the Report a nullity and should be quashed by this court as the Respondent IS in breach of the law of the land.

Respondent's Case

33 The applications were however opposed by the Respondent.

34. According to the Respondent, on 15th December 2015 it received a complaint from representatives of a group of traders who had operated stalls at Eastleigh Market (LR. NO. 36/VII/1037), alleging irregular allocation of the market to private developers in the guise of Public-Private partnership initiative in 2008 by the then Nairobi City Council. Pursuant to the afore-mentioned complaint and in exercise of the investigative powers of the Respondent as set out above under Articles 59 and 252(1) (a) of the Constitution and sections 8, 26, 27, 28 and 29 of the Act, the Respondent decided to undertake investigations into possible dereliction of duty, abuse of power, unfair treatment and injustice by the defunct City Council Officials in the allocation of land registered as LR 36/VII/1037 to private developers.

35. It was averred that as detailed in the Respondent's Report titled "An Investigation Report on the Alleged Irregular Allocation of Eastleigh Market to Private Developer August, 2016", the investigative process entailed the following:-

- i. That in consonance with the provisions of Section 37 of CAJA, the Respondent first notified the Governor, Nairobi City County, vide a letter Ref: CAJ/IE/6/41/15 dated 17th December 2015 of its intentions to conduct investigations into the alleged irregular allocation of the market land to private developers.
- ii. The Respondent thereafter visited various offices for investigations including the Nairobi City County, Survey of Kenya, Ministry of Lands, Kamukunji Sub-County Administration, Supreme Court, High Court, and the land in dispute at Eastleigh, 1st Avenue.
- iii. The Respondent interviewed six Eastleigh Market traders, Senior Chief, Eastleigh North Location, Assistant Chief, Garage Sublocation, Assistant Chief, Eastleigh North, County Executive Committee for Land, Nairobi City Government, Chief Officer for Land, Nairobi City Government, Director, Social Services, Nairobi City Government, Senior Assistant Deputy Commissioner, Kamukunji Sub-County, Registrar of Lands, Director, Urban Planning and Housing, Nairobi City County, Director, Legal Affairs, Nairobi City Government, Former Town Clerk, Nairobi City Council, Former Mayor, Nairobi City Council.
- iv. The Respondent recovered various documents in respect of matters in issue including a lease dated 29th January 2007 issued by the City Council of Nairobi to Mr. Ali Sheikh Mohamud and Farah Mohamed Barrow for land LR No. 36/VII/1037, a letter dated 2nd December 2008, from Director, Legal Affairs, City Council of Nairobi to the Chief Land Registrar indicating that the lease issued to Mr. Ali Sheikh Mohamud and Farah Mohamed Barrow for land LR No. 36/VII/1037 was obtained through misrepresentation/mistake(annexure **A17** of the report at page 88), and The Gazette Notice No. 11951 dated 19th December 2008 revoking the lease issued to Mr. Ali Sheikh

Mohamud and Farah Mohamed Barrow for land LR No. 36/VII/1037.

36. It was averred that vide a summons dated 15th February 2016, duly acknowledged by the Applicants, the Respondent invited the Applicants to attend the investigation proceedings. However, on the 22nd February 2016, the Respondent received the Applicant's response through his lawyer, **Mr. Ahmednasir Abdullahi, SC**, which response is summarized as follows:

i. That there were currently only two matters pending in court in respect of LR NO. 36/VII/10327, namely, *Mwanthi Mugwe and 2 others v Ali Sheikh and 6 others, ELC Civil suit No 782 of 2013* and *Blusea Shopping Mall Limited v the City Council of Nairobi and 3 others, Civil Appeal No. 129 of 2013.*

ii. Based on the two cases Applicant referred the Respondent to Section 30 (3) of CAJA which prohibits investigation if a matter is pending before court.

37. It was averred that upon receipt of disclosure by the Applicant of the existing court cases, the Respondent did establish the following regarding the stated subject court cases as detailed in page 14 of the Report:

i. High Court of Kenya at Nairobi, Civil Suit No. 24 of 2007 and High Court Civil Suit No. 615 of 2008 were struck out by the ruling of Justice J.M Mutungi, dated 19th February 2014, and later dismissed on 7th March, 2014.

ii. ELC, Civil Suit No. 782 of 2013 was also dismissed by the court, without proceeding to be heard on merit.

iii. Judicial Review Miscellaneous Civil Application No. 37 of 2009 was withdrawn on 9th September 2015.

iv. High Court of Kenya at Nairobi, Civil Suit No. 589 of 2008, was withdrawn on 9th September, 2015.

v. Court of Appeal at Nairobi, Civil Appeal No. 129 of 2013, arising from H.C. Misc. C. No. 808 of 2008 was allowed, quashing the award Public Private Partnership tender to **Golden Lime International Limited**, for being unlawful, irregular and in contravention of the **Public Procurement and Disposal Act, 2005**.

38. Consequently, the Respondent found no bar to its jurisdiction and proceeded to do the investigations in accordance with the law. It was its case that it thereafter analysed all the statements/information and documentation retrieved during the investigations and came up with, *inter alia*, the recommendations as guided by relevant legislative framework on public land including Article 61(1)(2), 62(1)(d), 62(2)(a)(b) and the Fourth Schedule (Article 185(2), 186(1) and 187(2) of the Constitution; Sections 8(a)(b) and 12((2)(f) of the Land Act No. 6 of 2012; Sections 5(1)(a)(c)(e)(h), 5(2)(b)(c)(d)(e), 6(1)(2)(a)-(c), 6(3)(a) of the **National Land Commission Act, 2012**; Sections 5(1)(2)(c) of the **County Governments Act No. 17 of 2012** and Sections 16(1), 21(2) of the **Physical Planning Act**.

39. It was averred that after making the above conclusions and recommendations and bearing in mind that the same adversely mentioned various individuals including the ex-parte Applicant herein, the Respondent, in consonance with the provisions of section 36 and 39(1) (b) of the Act, notified all the named individuals of the adverse findings and recommendations and called on them to make presentations thereon before compiling and publishing the Report. Upon conclusion of its investigations and in light of the ex-parte Applicant's response, the Respondent proceeded and compiled the Report subject of the instant judicial review proceedings in August, 2016.

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. In this case, there are two grounds upon which the applications are based. The first ground is that the Respondent was barred by section 30(c) of the *Commission on Administrative Justice Act* from proceeding with the subject investigation. The second ground is that the Respondent contravened the rules of natural justice by not affording the applicants an opportunity of being heard.

42. That the position is that the Commission has no power to investigate a matter which is the subject of court proceedings was upheld in Republic vs. Commission on Administrative Justice & another Ex Parte Samson Kegengo Ongeru [2015] eKLR, where the Court stated that:

“It was further contended by the applicant that since there were pending proceedings before a Court of law in respect of the same matter, the 1st Respondent was barred from conducting investigations in respect of the same issues. Section 30(c) of the Act bars the Commission from investigating a matter pending before any Court or judicial tribunal. The 1st respondent has attempted to argue that the said provision does not bar investigation but only bars the taking of an action. In my view that position is incorrect. What that provisions bars in express terms is investigation. It has further been contended that since the 1st Respondent was unaware of the existing court proceedings, section 30(c) is inapplicable. With due respect the 1st Respondent is attempting to read into legislation what does not exist. The general rule is that a statute should not, in absence of express provision, be construed so that it deprives people of their accrued rights... 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... Therefore even if the Commission had powers to investigate the nature of the complaints in issue but the Legislation under which it operates restricts its powers as was the case, in the instant case, the Commission would not have jurisdiction to embark on the said voyage unless the statutory bottlenecks had been removed or settled. A tribunal which has no jurisdiction to entertain a matter, it has been held, cannot purport to accord the respondent a fair hearing.”

43. It is however contended that the subject of the Respondent’s investigations was not the Constitutional Petition No. 482 of 2015 but the alleged maladministration by various public officers in irregular and illegal alienation of Eastleigh Market to private developers. In *Ongeru Case* (supra), this court expressed itself as hereunder:

“The 1st Respondent has however attempted to distinguish the matters it was investigating from the matters which were the subject of the said proceedings. In E & L Case No. 133 of 2010 it is clear that what was being sought was a declaration that the applicant’s title was null and void and for cancellation of his registration as the proprietor thereof. The basis for seeking the said order was that the land was part of the land reserved for a municipal market within Kisii Town and that the same was fraudulently leased. In its report, the 1st Respondent found that the applicant acquired the same plot despite the fact that it was part of the land set aside for the Kisii Municipal Market. It was held in Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR that:

“It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleading in both cases.”

Having looked at the pleadings in the ELC and the subject matter which the 1st Respondent set out to investigate or which it did actually investigate and made findings on, I have no doubt that the subject matter was the same and the issues were also the same. It is not in doubt that the applicant was a party to those same proceedings. In my view the reason for barring the 1st Respondent from investigating matters which are the subject of Court

proceedings is to avoid possibility of the 1st Respondent's findings running contrary to court decisions. I am therefore satisfied that the 1st Respondent ought not to have investigated the matter the subject of these proceedings. If it did unknowingly as it alleges, that does not render its findings valid."

44. Therefore if the substance of the dispute had a nexus with the ownership or transfer of the subject land, the Commission could not evade or avoid the provisions of section 30(c) of the Act by adopting a position that amounts to splitting the hairs.

45. The Respondent also contended that the other suits which the applicants brought to the attention of the Respondent had been disposed of. This was in contrast to the position taken by the applicants that as at the time the Respondent embarked on its investigations the said suits were still pending. None of the parties have adduced satisfactory evidence on the basis of which this Court can arrive at a decision either way.

46. It is however clear that the applicants had raised an issue going to the jurisdiction of the Respondent. That issue had to be determined and a decision made either way. Since such a decision had the effect of adversely affecting the applicants' interests protected under section 30(c) of the Act, Article 47(2) of the Constitution decreed that the applicants be given written reasons for the decision before the matter could proceed further.

47. In this case it was the applicants' case that after raising those jurisdictional questions, the next thing they saw was the report. This contention has not been controverted by the Respondent who has simply averred that upon finding that the said suits did not bar it from conducting its proceedings, it proceeded to analyse the material before it and prepared its report.

48. I reiterate the decision in **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeru [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."

49. *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."

50. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, Lord Mustill held:

“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.”

51. Similarly, in Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E it was held that the commissioners;

“...must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely.”

52. In this case, it is my view that the applicants had legitimate expectation that the decision on their objection would be communicated to them before any further proceedings could be undertaken. By unilaterally proceeding to consider the material before it without notifying the applicants of the Respondent’s action amounted to a violation of the applicants’ rights to fair administrative action. The applicants were entitled to a notice of the proceedings at every stage of the proceedings.

53. I therefore have no hesitation in finding that the Respondents’ action was tainted with procedural irregularity and cannot be permitted to stand. As was stated by **Lord Wright’s 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**:

“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.”

54. 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.”

55. **Nyamu, J** (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** held that the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role hence it has powers to strike out nullities. In the premises where a decision is clearly without jurisdiction the Court ought to rise to the occasion and pronounce it to be so since as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172**:

“...where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.”

56. Consequently I find merit in these consolidated applications.

Order

57. In the premises the applications succeed and I issue the following orders:

- a. An order of Certiorari removing to this Court for the purposes of being quashed ad quashing the findings and recommendations contained in the Report of Commission on Administrative Justice titled “An Investigation Report on the Alleged Irregular Allocation of**

Eastleigh Market to Private Developers” published in August 2016 in so far as they relate to the ex parte applicants herein.

b. An order of Prohibition prohibiting Interested Parties from implementing the Respondent’s report on the alleged irregular allocation of Eastleigh Market to private developers published in August 2016 in so far as they concern the ex parte applicants.

c. The costs of these proceedings are awarded to the applicants to be borne by the Respondent.

58. It is so ordered.

Dated at Nairobi this 20th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Busaidi for Miss Asli for the applicants

Miss Nyambura for Miss Nungo for the Respondent

CA Ooko