REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 284 OF 2013

BETWEEN

REPUBLIC...APPLICANT

AND

THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION.........1ST RESPONDENT

THE ATTORNEY GENERAL...2ND RESPONDENT

Ex-parte

BETH WAMBUI MUGO

JUDGEMENT

Introduction

1. By a Motion brought on Notice dated 5th August, 2013, the ex parte applicant herein, **Beth Wambui Mugo**, seeks the following orders:

> 1. **An order of certiorari to issue bring unto this Honourable High Court the findings and recommendations contained in the Report of the 1st Respondent wherein the ex parte applicant has been adversely mentioned therein more specifically in Volume 11B Chapter 2 paragraph 206 page 240/448, "As already noted other key personalities also benefited from irregular land deals during Kenyatta's administration, especially his close associates who irregularly acquired prime land at the coast, mostly beach plots including Eliud Mahihu the Coast Provincial Commissioner then, Isaiah Mahihu, former Provincial Commissioner, Rift Valley, Matu Wamae, John Michuki and Beth Mugo" for purposes of being forthwith quashed.**
>
> 2. **An order of prohibition to issue prohibiting the 2nd Respondent from implementing the offensive recommendations contained in the Report of the 1st Respondent until the Report reflects a true record of events and all inaccuracies are permanently expunged from the Report of the 1st Respondent.**

3. **The costs be provided for.**

Applicant's Case

2. According to the applicant, the 1st Respondent (hereinafter referred to as "the Commission") was created by an Act of Parliament whose date of commencement was 9th March, 2009 and its commissioners were appointed by Gazette Notice No. 8737 of 22nd July, 2009. According to the applicant, the Commission's broad mandate was to inquire into gross violations of human rights and historical injustices that occurred in Kenya from 12th December, 1963 to 28th February, 2008. Its functions included an inquiry into the irregular and illegal acquisition of public land and make recommendations on the repossession thereof and the determination of cases relating thereto.

3. The applicant disclosed that she was made aware that she was mentioned adversely in the Commission's report to the effect that she had benefited from irregular land deals during the administration of the first President, President Kenyatta. The applicant averred that the said finding was informed by a literary work published in 2012 by I B Tauris and Co. Ltd and authored by **Charles Hornsby**, described as an international manager with a multinational corporation who completed his doctorate in Kenyan Politics in 1986 and co-authored a book with **David Throup**, described as a Senior Associate. Africa Press gram, Centre for Strategic and International Studies Washington DC.

4. According to the applicant, the paragraph associating her with irregular acquisition of land in inaccurate and is deliberately designed to wrongfully implicate and destroy her standing in society and eventually strip and permanently deny her the right to dignity. To her she was amongst other Kenyans who tirelessly fought for the return of multiparty democracy in Kenya in the early 90's and she at no time benefited from irregular land deals during Kenyatta's administration. Though she disclosed that she is the niece to the late Jomo Kenyatta, she asserted that to suggest that as a close associate she benefited from irregular land deals is a blatant disregard for the truth.

5. The applicant averred that the findings of the Commission's report are an attack on her honour, reputation and the said allegations are tantamount to discrimination and at attempt to arbitrarily derive her of her property that was lawfully acquired.

6. To the applicant, the Commission relied on a literary work without taking into account the principle criteria of relevance, probative value and reliability when considering evidence thus its recommendations are tainted with illegalities. It was further contended by the applicant that the findings of the Commission to the effect that the applicant was responsible and contributed to the intra-interethnic conflict in Kenya though damaging to her were arrived at without being afforded an opportunity to respond thereto. She averred that at no time during the four years lifetime of the Commission was she ever summoned, notified or informed that she was adversely mentioned in order to enable her rebut the said allegations in breach of the rules of natural justice. To her, had she been notified thereof and given an opportunity, she would have demonstrated to the Commission that the said allegations were not true. The applicant contended that the Commission's action was contrary to section 48(f) of the Statute that created the Commission that required the Commission to be true and honest in pointing out facts.

7. The applicant disclosed that the only property she owns in Mombasa was purchased with her husband, **Nicholas Muratha Mugo** from Nyali Limited.

8. The applicants contended that the Commission acted without jurisdiction in coming up with the findings which were prejudicial to her in breach of the rules of natural justice hence the decision, findings and recommendations of the Commission are illegal. Irrational, actuated with malice and bad faith and ought to be expunged from the said report so as to restore the rule of law in the dispensation of legal and public duties by public officials.

9. To the applicant the Commission's action not only breached the rules of natural justice but violated her constitutional right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under Article 47 of the Constitution. Further the said actions were unreasonable,

accentuated by malice and founded on pre-planned determination to ensure that the Applicant and her family is stripped of all dignity and rights.

1st Respondent's Case

10. In response to the application, the 1st Respondent averred that it honestly and faithfully complied with the provisions of the law particularly the provisions of the ***Truth Justice and Reconciliation Act***, 2008 (hereinafter referred to as "the Act") in discharging its mandate and compiling the impugned report.

11. According to the Commission, its mandate under section 5 of the Act was to promote peace, justice, national unity, healing and reconciliation among the people of Kenya and was enjoined under section 48 of the Act upon conducting investigations and holding public hearings to submit its report. In compliance with the said provision, the Commission conducted its investigations and public hearings and finally compiled a report with recommendations in compliance with the said Act.

12. To the Commission, since there is no challenge in the application to the constitutionality of the Act, or its provisions, the Commission's actions done pursuant thereto are presumed constitutional until proved to the contrary. According to the Commission, it was empowered in carrying out it functions to gather, by any means it deemed appropriate, any information it considered relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary.

13. While admitting that the circumstances in which the Commission acquired information was from literary work of **Charles Hornby** as a foresaid, it was contended by the Commission that though the said work was published in 2012, the applicant never contested the assertions of the author before any court or tribunal since then and there exist no matter pending in court or before any tribunal in regards to the assertions. To the 1st Respondent, the applicant has waived and should be deemed to have waived her rights to contest this version or in the alternative offer a competitive narrative.

14. It was contended that the allegations as to whether the report is accurate and misleading are serious in nature and should be interrogated within the context of the Act. To the Commission, the applicant ought to be put to strict proof thereof on her allegation and or refusal on whether she benefited from irregular land dealing during the former President Kenyatta's administration.

15. It was averred that the applicant had failed to demonstrate how her fundamental rights were violated while her allegations that the report is an attack on her honour/reputation are questions which must be specifically pleaded in a forum for determination of issues relating to defamation and cannot be repackaged as constitutional or issues requiring redress by way of judicial review. Additionally the same must be particularised with utmost certainty. Ian any case, it was contended a public body acting pursuant to statutory regulation cannot be the subject of an action founded on allegations of defamation.

16. According to the Commission compiled its report in accordance with recommendations consistent with the provisions of the Act and contrary to the applicant's allegations, the Commission conducted public hearings throughout the country which hearings were preceded by intense civic education pursuant to the Commission's mandate. It was averred that members of the public were invited to make oral and/or memoranda presentations which invitations were done both in the media and in village *barazas* in the villages and by way of mobilization vis caravans.. The Commission also invited and/or summoned persons or individuals adversely mentioned to appear in person with or without legal representations and were given a chance to respond to the allegations made against them.

17. To the Commission the applicant knew or ought to have known of the assertions of adverse allocation of the subject property and in fact admitted that fact. It was contended that the applicant was accorded opportunity and time to make representations not only during ordinary public hearings but also during thematic/specific hearings on land.

18. As the report of the Commission was done pursuant to a statutory mandate the same is not subject to

challenge by the applicant.

19. It was the Commission's case that the implementation of the recommendation touching on the applicant has been constitutionally bestowed upon an institution created by the Constitution i.e. The National Land Commission which has the original legal and independent jurisdiction to look at the matters afresh and that the applicant shall be accorded further opportunity to make representations in his favour. In the alternative, it was contended that the implementation of the Commission's report will be preceded by due process and the Applicant will be granted an opportunity to articulate her response before the implementing institution.

20. It was therefore the 1st Respondents case that the orders sought by the applicant are not capable of being granted at this stage and that the same ought to fail with costs.

21. I have considered the submissions filed by the applicant.

Determinations

22. I have considered the foregoing.

23. I must mention that though made a party to these proceedings, the 2nd Respondent, the Attorney General of the Republic of Kenya despite being afforded several opportunities to appear in these proceedings particularly in light of the non-existence of the Commission took a lackadaisical attitude to these proceedings and failed to actively participate in the same. Such attitude is a serious indictment on the State Law Office.

24. Although this issue was not raised by the Respondent, it is important in view to deal with the question whether the Commission having ceased to exist by the operation of the law, its decisions can still be subjected to this Court's judicial review jurisdiction. That issue was considered by the Court of Appeal in **David Mugo T/A Manyatta Auctioneers vs. Republic Civil Appeal No. 265 of 1997** in which the Court held that if a new Act replaces an old one and sets a new body without a saving provision, the old body ceases to exist. However, where the body has ceased to exist but its decision is still enforceable, certiorari must issue to quash or nullify it.

25. Therefore notwithstanding the fact that the Commission has ceased to exist, if its decisions are still enforceable, this Court has the jurisdiction to quash them if grounds for doing so exist.

26. It was contended that since the Commission's report was made pursuant to its statutory mandate, the same cannot be challenged can be challenged. However it is now trite that where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

27. It was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to**

be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

28. It is therefore clear that where an authority acts in excess of the powers donated to it by the legislative instrument creating it, the Court must intervene. It was in appreciation of this position that the Court in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

"Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law…"

29. It was contended that the applicant had not shown how her rights were violated since the allegations of violation of her rights were not particularised. In taking this position, the 1st Respondent must have been alluding to the holding in the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272** where it was held that:

"…if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

30. Section 7(1) of the Transitional and Consequential Provisions of the Constitution of Kenya provides:

All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

31. Just like legislation in force before the effective date, decisions handed down before the effective date must similarly be considered in the light of the current constitutional dispensation. This does not mean that all such decisions ought to be ignored but must be interpreted and construed in a manner that gives effect to the Constitution.

32. In my view, the said decision in ***Karimi Case*** must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant or petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in our view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding

objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

33. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

34. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is our view and we so hold that the later ought to prevail over the former.

35. This was the position adopted by this Court in **Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others Petition No. 229 of 2012 [2012] eKLR** in which the Court stated at paragraphs 45 and 46:

"We must point out that *Anarita Karimi Njeru* was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the New Constitution. In our view, the present position with regard to the admissibility of Petitions seeking to enforce the Constitution must begin with the provisions of Article 159 on the exercise of judicial authority. Among other things, this Article stipulates that: *(d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.* We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case. While the present Petition might not be the epitome of precise, comprehensive, or elegant drafting, our view is that the complaints raised by the Petitioner are concrete enough to warrant substantive consideration by the Court: The Petitioner complains against the appointment of the Interested Party to the Commission; and thinks that the appointment, at a minimum, violates Article 73 of the Constitution as far as integrity and suitability of the Interested Party for the appointment to the position is concerned. That much seems not to be in doubt. Indeed, both the Respondents and the Interested Party have proceeded from this understanding. They have sought to explain at length the contours of Article 73 and Chapter Six of the Constitution in response to the Petitioner's allegations. If one needed evidence that these parties understood the claim facing them, it is to be found in their various papers filed

in Court and the oral submissions made in Court. This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits."

36. Whereas the Court of Appeal in an appeal from that decision seems to have been of a contrary view, the same Court in **Peter M Kariuki vs. Attorney General [2014] eKLR** was of the view that:

"Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154*, the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal. By that decision which held sway for a number of years, a party was forced to elect between invoking *section 84 of the Constitution*, or any other remedy that was available to him. Yet the words of *section 84* were clear enough that the remedy available under the provision was *"without prejudice"* to any other remedies that the applicant might have."

37. It is therefore my view that the holding in the **Anarita Karimi Case** ought not to be adopted line, hook and sinker.

38. From the Respondent's own version, it is clear that the applicant's contention that she was never afforded an opportunity of being heard before the report was compiled was not controverted.

39. ***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."

40. **Republic versus The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua, Nairobi HCMCA No. 1298 of 2004** held as follows:

"The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/ likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…"

41. The Commission however relied on section 7(2)(a) of the Act which provides that the Commission is

empowered to:

> ***gather, by any means it deems appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary***

42. That provision however did not rule out the application of the rules of natural justice in the conduct of the Commission’s functions. In in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

> **“*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*...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].

43. It therefore follows that even where the legislation does not expressly mention the application of the rules of natural justice, unless the said rules are expressly excluded the Court will not imply that they are so excluded. In this case, there was no provision that expressly excluded the application of the rules of natural justice. 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.”**

44. In this case, a reading of the provisions of the Act clearly leads to the conclusion that the rules of natural justice were applicable to the proceedings of the Commission. This is clearly discernible from a reading of section 28 of the Act which provided that:

> ***(1) Subject to subsection (3), any person whose conduct is the subject of inquiry under this Act or who is in any way implicated or concerned in any matter under inquiry, shall be entitled to be represented by an advocate in the proceedings of the inquiry or any part thereof, and any other person who desires to be so represented may, by leave of the Commission, be so represented.***
>
> ***(2) Any person whose conduct is the subject of inquiry under this Act or who is implicated or concerned in any matter under inquiry under this Act and who is summoned to appear before the Commission in person shall appear in person.***
>
> ***(3) The Commission may, in order to expedite proceedings, place reasonable limitations with***

regard to the time allowed in respect of the examination of a witness or any address to the Commission.

45. In my view, there is no way the Commission could set out to achieve the purpose of the foregoing provisions without notifying the applicant of the adverse allegations and affording her an opportunity of being heard.

46. Failure to adhere to the rules of natural justice where the Act requires the authority to do so may deprive that authority of jurisdiction. Want of jurisdiction, it has been held may therefore arise under two or more circumstances. **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** expressed himself on this issue as hereunder:

> **"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."**

47. The Commission however contended that by not contesting the literary work relied upon by the Commission in its report when the same was published, the applicant was deemed to have waived the right to contest the same. To the Commission the correctness of the said allegations could only be contested in a suit for defamation and not by way of constitutional petition or in judicial review proceedings. I must say with due respect to the Commission that this view was contrary to requirements of fairness. To contend that because a person has not instituted proceedings for defamation amounts to a waiver on his/her part to challenge the allegations made in a patently defamatory material amounts to a negation of fairness in administrative or quasi-judicial proceedings. It is not contended that the author of the literary work sought the applicant's version before publishing the said work.

48. The court is concerned here with procedural fairness and in particular the principle of *audi alteram partem or* hear the other side. Since the person affected by a decision should be afforded some opportunity to present his case, a tribunal making a finding in the exercise of an investigative jurisdiction is required to base its decision on evidence that has some probative value, in the sense that there has to be some material that tends logically to show the existence of facts consistent with the finding and the reasoning supporting the finding, if disclosed is not logically self-contradicting. A tribunal exercising an investigative jurisdiction is also required to listen fairly to any rational evidence conflicting with, and any rational argument against, a proposed finding that a person represented at the inquiry whose interests (including his career and reputation) might be affected, wishes to place before the inquiry. Accordingly a person represented at the inquiry who would be adversely affected by a decision to make a finding is entitled to be informed that there is a risk of the finding being made and to be given the opportunity to adduce additional material of probative value which might deter the tribunal from making that finding. See **Mahon vs. Air New Zealand Ltd and Another [1984] 3 ALL ER at 201 and 202.**

49. In the premises I am unable to agree with the Commission's view that the ex parte applicant is deemed to have waived her right to challenge the allegations the contents of the said work.

50. The Commission contended that the implementation of the recommendation touching on the applicant has been constitutionally bestowed upon an institution created by the Constitution i.e. The National Land Commission which has the original legal and independent jurisdiction to look at the matters afresh and that the applicant shall be accorded further opportunity to make representations in his favour. In the alternative, it was contended that the implementation of the Commission's report will be preceded by due process and the Applicant will be granted an opportunity to articulate her response before the implementing institution.

51. If I understood the Commission correctly, its view is that since the report contains only recommendations, the Court ought not to quash the same since the contents of the report do not amount to

binding resolutions.

52. The general position on this matter is stated in ***Halsbury's Laws of England*** (supra) as follows:

> **"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded."**

53. This position found favour in our local jurisprudence in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** in which the Court stated:

> **"The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."**

54. However, in **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

> **"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. *It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.* They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."** [Emphasis mine].

55. ***Halsbury's Laws of England*** (supra) puts it thus:

> **"However, the nature of the inquiry or a provisional decision may be such as to give rise to a**

reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; ad it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."

56. It is therefore clear that the need to act fairly depends on the nature of the report and the recommendations to be made. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. Where the report and recommendations may have far reaching implications such as the ruining of careers and reputation as well as being the basis of judicial proceedings, the authority concerned has a duty to act fairly.

57. Section 48 of the Act required the Commission to submit its report to the President on completion of its operations which report was to inter alia recommend prosecution. The Minister was then required to table the same report before the National Assembly for consideration after which the Minister was required to set in motion a mechanism to monitor the implementation of the report in accordance with recommendations of the National Assembly with a report to the National Assembly twice a year on the status of the said implementation.

58. It is therefore clear that there was no further provisions for a hearing before the implementation of the recommendations by the Commission.

59. Therefore as opposed to a situation where a body is merely tasked with investigations and preparation of a report and what follows thereafter is solely left to the institutions to which a report is made, the Commission's report does not end at the point where it is made. The Minister has the mandate based on the recommendations of the National Assembly to implement the same. In my view the Commission's recommendations are the kind of recommendations which were contemplated in **Re Pergamon Press Ltd** (supra). I therefore find that the Commission was under a duty to act fairly and before making adverse findings against the ex parte applicant it had to afford the applicant a fair opportunity for correcting or contradicting what was said against her in the said literary work.

60. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

61. Article 47 of the Constitution provides:

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

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

62. It follows that the Commission was under the constitutional obligation to ensure that its decision met the requirement of fairness. 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."

63. 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."**

64. 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. 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."**

65. There is no doubt that the intention of Parliament in enacting the Truth, Justice and Reconciliation Commission Act was noble and that it was meant *inter alia* to address historical injustices inflicted on persons by the State, public institutions and holders of public offices. The Court further appreciates that the said historical injustices have been the cause of ethnic clashes in this Country and the same ought to be properly addressed with a view to arriving at lasting solutions thereto. My opinion is informed by the Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission which stated that the appointment of the Commission would be a milestone in the country's quest for a transitional justice agenda, representing the transformation of the soul of the Kenyan State ad a significant step in the long and arduous journey to reclaim the moral and political fibre of the country. I appreciate that transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses which measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms. However, such any resolutions must be arrived at through the due process, fairly and justly without that process itself being seen to violate the rights of the very people it is meant to protect.

66. In these proceedings this Court is not concerned with the determination of the manner in which the ex parte applicant acquired the suit land. Whether or not she acquired the land properly, the law required that she be afforded an opportunity of being heard before adverse findings were made against her. In **Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption commission & another [2006] eKLR** the court rendered itself thus:-

> **"Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the courts because of applications like the one we are dealing with. Our short**

answer to Professor Muigai is this. We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeal it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions. Occasionally, those who have been mighty and powerful are the ones who would run to seek the protection of the courts when circumstances have changed. The courts must continue to give justice to all and sundry irrespective of their status or former status."

67. Where the rules of natural justice are violated in arriving at a decision it does not matter whether the same decision would have been arrived at had the rules been complied with. A decision arrived at in violation of the rules of natural justice in null and void and cannot stand. The same must fall by the wayside and the Court must quash the same.

68. However, in deciding the nature of the orders to grant the Court ought to take note of the sentiments expressed in **Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400** to the effect that:

"Like so much straw into a burning fire let this order of certiorari consume all offending references. Like fire which converts, everything to itself let this order of certiorari remove and convert the dark spots. Like guided missiles hit only the target, let this order have the same effect by hitting only the targeted paragraphs which are in relation to the applicant only. In the result, we forthwith order the removal into this Court of the Goldenberg report and immediately quash the following paragraphs to the extent that they refer adversely to the applicant only."

69. In the result I find that the manner in which the proceedings leading to the findings in the impugned report was conducted was tainted with procedural impropriety.

Order

70. In the result, I hereby grant the following orders:

1). Certiorari removing the findings and recommendations contained in Volume IIB of the Report of the Commission at paragraph 206 page 240/448 limited to the ex parte applicant's adverse mention as having benefited from irregular land deals at the Coast during Kenyatta's administration, which findings and recommendations are hereby quashed.

71. **An order of prohibition prohibiting the 2nd Respondent from implementing the sad offensive recommendations in so far as they relate to the ex parte applicant.**

72. As the Commission nolonger exists, there will be no order as to costs.

73. Orders accordingly.

Dated at Nairobi this 17th day of February, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Muriuki