REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

MISCELLANEOUS APPLICATION NO. 227 OF 2016

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(6) AND (7) OF THE CONSTITUTION

AND

IN THE MATTER OF EXERCISING SUPERVISORY JURISDICTION OVER THE NATIONAL LAND COMMISSION'S INVESTIGATIONS AND PROCEEDINGS UNDER ARTICLE 67(2)(e) OF THE CONSTITUTION AND SECTION 14 OF THE NATIONAL LAND COMMISSION ACT, 2011 TOUCHING L.R NO. 209/12647/4

AND

IN THE MATTER OF ENFORCEMENT OF THE APPLICANT'S RIGHTS UNDER ARTICLES 40 AND 50 OF THE CONSTITUTION

BETWEEN

STEPHEN GITHINJI KAMAU.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

DIRECTOR, PLANNING COMPLIANCE & ENFORCEMENT,

NAIROBI COUNTY GOVERNMENT.....3RD RESPONDENT

AND

THOME 'V' RESIDENT WELFAREASSOCIATION.....INTERESTED PARTY

JUDGMENT

THE APPLICANT'S CASE:

The Applicant's case is set out in the Originating Notice of Motion dated 2nd September 2016, Amended Originating Notice of Motion dated 18th December 2018 and the respective supporting affidavits sworn by the applicant.

The Applicant's application was initially brought against the National Land Commission as the only respondent with Thome "V" Resident Welfare Association as Interested Party. Through the amendment that was made to the Originating Notice of Motion on 18th December 2018, the Applicant added the 2nd and 3rd Respondents to the suit. The Applicant has averred that he is the registered proprietor of all that parcel of land known as L.R No. 209/12947/4(hereinafter referred to as "the Applicant's property") following an allotment that was made to him in 1997 in respect thereof. The Applicant has averred that he followed due process in acquiring the property and that he has been in possession of the property since he acquired the same and has put up there on a semi-permanent three-bedroom house.

The Applicant has averred that on 23rd January 2016, he saw an advertisement in the Daily Nation Newspaper requiring him to appear before

the 1st Respondent for a public hearing that the 1st Respondent was going to conduct in relation to the title of the Applicant's property that was under review. The Applicant has averred further that in March 2016, he received a complaint from the Interested Party that the allocation of a parcel of land known as L.R. No. 12647/4 (hereinafter referred to as "the suit property") to the Applicant was illegal and that the property was reserved for a police post. The Applicant has averred that the said complaint did not indicate the particulars of the complainant and how the complainant was connected to the Applicant's property. The Applicant has averred that the complainant did not include in the complaint the Commissioner of Lands or any government entity involved in allocation of land and issuance of titles. The Applicant has averred further that complaint was not accompanied with the documents describing the interest that the complainant had on the Applicant's property. The Applicant has averred that the proceedings that were conducted by the 1st Respondent were against the rule of law, Articles 47 and 50 of the Constitution and the rules of natural justice. The Applicant has averred that at the hearing before the 1st Respondent that was attended by his two friends and his advocate, the 1st Respondent conducted only three sittings and only a surveyor gave evidence. The Applicant has averred that the Interested Party who was the complainant did not tender evidence. The Applicant has averred that he filed a reply in response to the complaint supported by an affidavit the contents of which was never controverted by the Interested Party. The Applicant has averred that the 1st Respondent ought to have accepted the facts as stated in his reply and affidavit, and dismissed the complaint. The Applicant has averred that after the third sitting of the 1st Respondent, the 1st Respondent reserved its ruling which it delivered on 22nd August 2016.

The Applicant has averred that the 1st Respondent's determination was prejudicial to him and that the same offended the Wednesbury Principles. The Applicant has averred that the said determination was on the following terms;

> **1. The allocation to Stephen Githinji Kamau of the purported L.R No. 209/12647/4 is illegal and the allocation is cancelled and that includes any subsequent transfers of the land to third parties.**
>
> **2. The Respondent revokes the title in respect of L.R No. 209/12647/4.**
>
> **3. The Chief Land Registrar is directed to effect/implement the revocation.**
>
> **4. The part of the land with the Police Post is allocated to the Cabinet Secretary, Ministry of Interior and Coordination of the National Government and the remaining open space is allocated to Nairobi City Council to be held upon trust for the Thome V Residents.**
>
> **5. The Director - Land Administration is directed to issue the new allocations.**

The Applicant has averred that although the Applicant's property was not the subject of the complaint and was not referred to in the 1st Respondent's determination, he was apprehensive that he could be dispossessed of the property. The Applicant has contended that he was not given sufficient time to prepare his case and to respond to the complaint.

In his affidavit in support of the Amended Originating Notice of Motion, the Applicant has stated that following that determination by the 1st Respondent, it filed these proceedings and on 13th October 2016, the court issued an order staying the 1st Respondent's said determination and restrained the Applicant from carrying out any construction or development on the suit property. The Applicant has averred that the said order was extended on 5th December 2016. The Applicant has averred that the 1st Respondent ignored the said court order that was duly served upon it in that on 17th July 2017 it caused to be published a Gazette Notice No. 6862 which purported to direct the Chief Land Registrar to revoke L.R No. 209/12647/4, Thome (the suit property) and vest the land in the County and National Government for re-planning for various public uses in Thome 'V' Estate.

The Applicant has averred that on 4th October 2018, officers of the 2nd and 3rd Respondents visited the Applicant's property and served an Enforcement Notice that referred to the structures on the property as illegal development. The Applicant has averred that the 1st Respondent and the Interested Party are determined to dispossess him of the Applicant's property and to destroy the structures that he has put up thereon. The Applicant has averred that the purported Enforcement Notice was based on the purported revocation of the title for the suit property by the 1st Respondent which revocation the court had stayed.

In the Amended Originating Notice of Motion dated 18th December 2018 the Applicant has asked the court;

> **1. To call for the record of the proceedings before the 1st Respondent touching on investigations of L.R. No. 209/12647/4(the suit property) to determine the legality of the said proceedings and make such orders or give such directions as it considers appropriate to ensure the fair administration of justice.**
>
> **2. To expunge the name of the Applicant from the complaint filed with the 1st Respondent in respect of the suit property on 10th March 2016.**
>
> **3. To expunge the name of the Applicant from the decision of the 1st Respondent dated 22nd August 2016.**
>
> **4. To declare that the proceedings of the 1st Respondent relating to the suit property to which the proprietor was not a party are null and void.**
>
> **5. To order (in the alternative to (1) to (4) above) the 1st Respondent to make rules for the better carrying out of its functions under Article 68 of the Constitution to enable the review of all grants or dispositions of public land to establish their**

propriety or legality.

6. To declare that the rules made above shall comply with the provisions of Article 47 and 50 of the Constitution.

7. To declare that the rules made above shall inter alia require the 1st Respondent to supply all parties to its proceedings with copies of those proceedings.

8. To declare that any party to be potentially affected adversely by the 1st Respondent's review of propriety and validity of title and/or investigations is entitled to be personally served with the complaints lodged with the 1st Respondent and all notices of the proceedings of the said 1st Respondent.

9. To declare that any party to be potentially affected adversely by the 1st Respondent's review of propriety and validity of title and/or investigations is entitled to reply to complaints lodged with the 1st Respondent and submit memoranda and submissions in opposition to the complaints.

10. To declare that any party to be potentially affected adversely by the 1st Respondent's review of propriety and validity of any title and/or investigations is entitled to participate in all its proceedings, prosecute applications and cross examine all witnesses who tender evidence before it and tender its evidence in rebuttal.

11. To declare null and void the 1st Respondent's proceedings in respect of investigations of the validity of title in respect of the suit property.

12. To issue an order of certiorari to bring to the Court the proceedings and determination of the 1st Respondent in respect of the suit property for purposes of quashing the same.

13. To stay execution of the 1st Respondent's determination dated 22nd August 2016 touching on the suit property pending further orders of the Court.

14. To stay execution of the 1st Respondent's determination dated 22nd August 2016 touching on the suit property pending the making of the rules prayed for in the foregoing sections.

15. To stay permanently the execution of the 1st Respondent's determination dated 22nd August 2016 and touching on the suit property.

16. To issue an order of mandamus requiring the 1st Respondent to undertake the review of propriety and legality of title and/or investigations in respect of the suit property in accordance with the law.

17. To issue an order of prohibition to prohibit the Chief Land Registrar from acting on the determination of the 1st Respondent dated 22nd August 2016.

18. To declare that the 1st Respondent is in contempt of court for purporting to write a second determination and publishing a purported cancellation of title of the suit property during the pendency of this suit and in breach of the orders made on 13th October 2016 and 5th December 2016.

19. To issue an order of certiorari to bring up to the Court the purported second determination in respect of the suit property and dated 22nd August 2016 for quashing.

20. **To issue an order of certiorari to bring before the Court Kenya Gazette Notice No. 6862 for purposes of quashing in so far as the same relates to the suit property and L.R. No. 209/12947/4(the Applicant's property).**

THE 1ST RESPONDENT'S CASE:

The 1st Respondent filed a replying affidavit sworn by its Deputy Director, Legal Affairs and Enforcement, Brian Ikol on 13th February 2017. Brian Ikol set out the 1st Respondent's case as follows: In addition to its functions relating to management of public land on behalf of the National and County Governments, the 1st Respondent was also mandated under section 14 of the National Land Commission Act, 2013 to review grants and dispositions of public land to determine their legality or propriety. The 1st Respondent received a complaint from the Interested Party to the effect that L.R. No. 209/12947/4 (the Applicant's property) that was reserved for public purposes had been allocated to the Applicant herein under unclear circumstances. The 1st Respondent admitted the complaint and commenced the process of reviewing the title in respect of the Applicant's property. In keeping with the requirements of section 14(3) of the National Land Commission Act, the 1st Respondent circulated a public notice in all dailies with nationwide circulation. The notice required anyone who would be affected by the review to appear at the 1st Respondent's office for a hearing. The 1st Respondent advised the Interested Party's advocate to serve the Applicant herein with a copy of the complaint. The Applicant's advocate confirmed receipt of the same. The Applicant participated in the review process through the firm of Triple OKLaw Advocates. The Applicant attended the hearings and filed a memorandum of reply and supporting affidavit dated 14th March 2016.

The 1st Respondent complied with the provisions of Article 50 of the Constitution, the Fair Administrative Action Act 2015 and Section 14 (3) of the National Land Commission Act while carrying out the review of the title for the Applicant's property. On 22nd August 2016, the 1st Respondent after reviewing the legality of the title of the Applicant's property prepared a report of its findings. Its determination contained a typographical error. It indicated the land whose title was being reviewed as L.R No. 209/12647/6(the suit property) instead of L.R No. 209/12947/6(the Applicant's property. Upon the realization of that error, the 1st Respondent amended its determination on the review to reflect the correct land parcel; something that its rules of procedure allow it to do.

The 1st Respondent averred that the Applicant's contention that his parcel of land (the Applicant's property) was not the subject of review cannot stand as the advertisement in the dailies referred to Applicant's property as the parcel of land whose title was under review. The 1st Respondent denied that its action violated the Applicant's right under Article 40 (1) of the Constitution. The 1st Respondent averred that a right to own property guaranteed under Article 40 of the Constitution is not absolute to the extent that it does not extend to property found to have been unlawfully acquired. The 1st Respondent contended that, it is only this court and the 1st Respondent that have jurisdiction to determine the legality of grants or dispositions of public land and as such the 1st Respondent cannot be accused of violating Article 40 of the Constitution while exercising its constitutional powers in that regard. The 1st Respondent urged the court to dismiss the Applicant's application with costs as an abuse of the court process.

THE 2ND AND 3RD RESPONDENTS' CASE:

The 2nd and 3rd Respondents filed a replying affidavit sworn by the Senior Building Inspector, Wilfred Wanyonyi Masinde on 20th April 2021 in which the 2nd and 3rd Respondent's case was set out as follows: The Applicant had submitted a development application for construction of a dwelling house on the Applicant's property around February 2016. The application was approved around April 2016 on condition that the Applicant's property did not constitute disputed private or public utility land. The 1st Respondent eventually revoked the title held by the Applicant in respect of the suit property after finding that the property was reserved for public purposes.

On 4th October 2018, the 2nd Respondent served the Applicant with the enforcement notice complained of. The Applicant had 14 days to challenge the same through an appeal to the Liaison Committee under the then Physical Planning Act, Chapter 286 Laws of Kenya (now repealed). The Applicant did not do so. The 2nd and 3rd Respondents urged the court to dismiss the application.

THE INTERESTED PARTY'S CASE:

The Interested Party filed a Notice of Preliminary Objection dated 28th September 2016 in opposition to the application. The Interested Party contended that the application was not properly before the Court as it was brought through a wrong procedure. The Interested Party contended that the application was an attempt to re-open for litigation issues that had already been heard and determined. The Interested Party contended that the proceedings herein as instituted were intended to defeat justice by denying the Interested Party which was the complainant before the 1st Respondent a proper hearing.

THE SUBMISSIONS:

The application was heard by way of written submissions. The Applicant, the 2nd and 3rd Respondents and the Interested Party filed submissions while the 1st Respondent did not file submissions.

THE APPLICANT'S SUBMISSIONS:

The Applicant filed his submissions on 11th December 2019. The Applicant made submissions on both facts and law. On the facts of the case, the Applicant reiterated the contents of his affidavits in support of the Originating Notice of Motion and amended Originating Notice of Motion. The Applicant submitted that he was not given prior and adequate notice by the 1st Respondent of the complaint that had been lodged against him by the Interested Party. The Applicant submitted that the notice that was given by the 1st Respondent through the local dailies fell short of the requirements of a proper notice. The Applicant submitted further that his advocates were served with a copy of the complaint after the 1st Respondent had commenced the hearing of the complaint. The Applicant submitted further that the 1st Respondent's determination made on 22nd August 2016 was on a wrong property namely; L.R No. 209/12647/4(the suit property) when the Applicant's property was L.R No. 209/12947/4(the Applicant's property). The Applicant submitted that he was never heard by the 1st Respondent as regards the Applicant's property. The Applicant submitted that the 1st Respondent purported to revoke the title for the Applicant's property contrary to the law.

On the law, the Applicant flagged out a number of issues that he submitted on. The first issue that the Applicant submitted on was the jurisdiction of this court over the proceedings of the 1st Respondent. The Applicant submitted that this court is empowered under Article 165(6) and (7) of the Constitution, section 7 of the Fair Administrative Action Act, 2015 and section 13 of the Environment and Land Court Act, 2011 to exercise supervisory jurisdiction over any person, body or authority exercising quasi-judicial function. The Applicant submitted that the 1st Respondent is one of the bodies over which this court has supervisory jurisdiction. In support of this submission, the Applicant cited Erastus Kihara Mureithi *v* Josphat Njoroge Ragi & 2 others [2011] eKLR, Nyongesa & 4 others *v* Egerton University College [1990] eKLR and Republic *v* Karisa Chengo & 2 others [2017] eKLR. The Applicant submitted that this court has jurisdiction to hear the constitutional application before it and to grant the reliefs sought.

The second issue that the Applicant submitted on concerned the jurisdiction of the 1st Respondent to hear complaints. The Applicant submitted that the 1st Respondent was established under Article 67(1) of the Constitution and was empowered under Article 67(2)(e) of the Constitution to initiate investigations on its own initiative or a complaint into present or historical land injustices and to recommend

appropriate redress. The Applicant submitted that Article 68(c)(v) of the Constitution enjoined Parliament to enact legislation to enable the 1st Respondent to review all grants and dispositions of public land to establish their propriety or legality. The Applicant submitted that the Applicant was only empowered to review grants or dispositions of public land. The Applicant submitted that section 14 of the National Land Commission Act, 2013 that was enacted pursuant to the said provision of the Constitution gave the 1st Respondent power to investigate on its own motion or upon a complaint by the national or county government, community or an individual and to review all grants or dispositions of public land to establish their propriety or legality.

The Applicant submitted that although section 14(1) of the National Land Commission Act sets out how the review was to be conducted, the same was ignored in relation to the Applicant. The Applicant submitted that the 1st Respondent had no jurisdiction to investigate the propriety or legality of title to private land. The Applicant submitted that if the Applicant was to be clothed with such power then it would usurp the role of this court. The Applicant while acknowledging that there are conflicting decisions on whether the 1st Respondent's review powers can extend to private land urged the court to adopt the decisions which are to the effect that the 1st Respondent had no power to review titles relating to private land.

The Applicant submitted further that the law only allowed the 1st Respondent to recommend a redress. The Applicant submitted that in the impugned decision, the 1st Respondent made a determination instead of a recommendation. The Applicant submitted that the purported determination dated 22nd August 2016 was tainted with illegality and it was contrary to the provisions of the Constitution. In support of these submissions, the Applicant relied on the cases of Republic *v* National Land Commission & 4 others ex parte Fulson Company Limited & another [2015] eKLR, Republic *v* Chairman & Members of National Land Commission Ex Parte Turf Developers Ltd [2016] eKLR and Sceneries Limited *v* National Land Commission [2017] eKLR.

The Applicant submitted further that when he instituted these proceedings, the 1st Respondent had not gazetted the purported determination. The Applicant submitted that the 1st Respondent published the purported determination in Gazette Notice No. 6862 on 17th July, 2017. The Applicant submitted that it was after the publication of this Gazette Notice that the 2nd and 3rd Respondents served the Applicant with an Enforcement Notice. The Applicant submitted that the said gazettement of the purported determination was carried out in breach of the orders made by this court on 13th October 2016 and 5th December 2016 and as such the same is null and void. The Applicant submitted further that the 2nd and 3rd Respondent's Enforcement Notice that was issued on the basis of the said null and void Gazette Notice is similarly null and void. In support of this submission, the Applicant relied on Judicial Service Commission *v* Speaker of the National Assembly & another [2013] eKLR in which the court held that any act done in disobedience of a court order is null and void.

The Applicant submitted further that the 1st Respondent lacked jurisdiction to rectify the register for the suit property as such action could only be taken where fraud is proved. Section 80 of the Land Registration Act, 2012 and a number of cases including Richard Oduol Opole *v* Commissioner of Lands & 2 others [2015] eKLR and Kinyanjui Kamau *v* George Kamau Njoroge [2015] eKLR were cited to support this assertion.

The other issue raised by the Applicant is what he referred to as breaches of constitutional rights and fundamental freedoms by the 1st Respondent during the review hearing. Relying on the case of Mwangi Stephen Muriithi *v* National Land Commission & 3 others [2018] eKLR and Article 259 (1) of the Constitution, the Applicant submitted that whereas the 1st Respondent gave notice of the intended review, the same did not amount to adequate notice as required by Article 47 and 50 of the Constitution and as such he was not granted a fair hearing.

The Applicant submitted further that the 1st Respondent's impugned decision violated the Applicant's right to property protected under Article 40(1), (2) and (3) of the Constitution. The Applicant submitted that its title to the Applicant's property was revoked without being afforded an opportunity to be heard and/or due process being followed. In support of this submission, the Applicant relied on Republic *v* National Land Commission & 2 others Ex-parte Airways Holdings Limited [2015] eKLR and Evelyn College of Design Ltd *v* Director of Children's Department & another [2013] eKLR.

The Applicant submitted further that the Interested Party was guilty of laches in challenging the Applicant's title 19 years after the Applicant acquired the Applicant's property. The case of Benjoh Amalgamated Limited & another *v* Kenya Commercial Bank Limited [2014] eKLR was relied upon in support of this submission. The Applicant submitted further that the claim that the Applicant acquired his title fraudulently was not proved and he was not given sufficient material to enable him respond to such complaint.

The Applicant submitted further that his right to Fair Administrative Action under Article 47 of the Constitution was violated. The Applicant reiterated that during the first two sittings of the 1st Respondent, the Applicant's advocates did not have a copy of the complaint nor of the documents relied upon by the Interested Party and 1st Respondent. The Applicant submitted that the complaint was served three days before the last sitting. The Applicant submitted that at the last sitting of the 1st Respondent, a surveyor testified and produced a beacon certificate. The Applicant submitted that the 1st Respondent did not state which documents were relied upon by the 1st Respondent in reaching its determination. In support of this submission, the Applicant relied on the cases of Republic *v* Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua [2010] eKLR, Christopher Ndarathi Murungaru *v* Kenya Anti-Corruption Commission & another [2006] eKLR and Republic *v* Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo [2016] eKLR. The Applicant submitted that even in matters of public interest, due process must be followed.

The next issue raised by the Applicant concerned breaches of natural justice by the 1st Respondent. The Applicant submitted that since the 1st Respondent did not have a well set out procedure for conducting hearings, it was required to adhere to the rules of natural justice as set out in the cases of Judge of the High Court and Another *v* Nguni [2007]2 EACA 2001 and Desouza *v* Tanga Town Council (1961) EA 377. Relying on the case of Choitram & Others *v* Mystery Model Hair Salon [1972] EA 525 the Applicant argued that a departure from the rules of natural justice deprived the 1st Respondent of jurisdiction to entertain the complaint that was before it and to make the impugned decision.

The next issue concerned procedure. The Applicant submitted that the 1st Respondent was under an obligation to make rules of procedure for reviewing grants. The Applicant cited David Oloo Onyango *v* Attorney-General [1987] eKLR and submitted that absence of such rules did not however absolve the 1st Respondent from following the rules of natural justice.

The next issue that the Applicant submitted on was whether the 1st Respondent gave prior and adequate notice to the parties. The Applicant reiterated that the notice placed in the dailies by the 1st Respondent was not adequate as it did not among other things state the nature of the complaint that had been lodged against the Applicant. The cases of Pithon Waweru Maina *v* Thuka Mugiria [1983] eKLR, Geothermal Development Company Limited *v* Attorney General & 3 others [2013] eKLR, Multiple Hauliers East Africa Limited *v* Attorney General & 10 others [2013] eKLR and Republic *v* National Land Commission & Tropical Treasure Limited Ex-Parte Krystalline Salt Limited [2015] eKLR were relied upon by the Applicant to underscore the importance of adequate notice.

The next issue concerned a right to be heard. The Applicant submitted that that it is a fundamental principle of fairness that a party is entitled to disclosure of all the material that may be taken into account when reaching a decision adverse to that party. The Applicant contended that his advocate was served with the complaint three days before the third sitting of the 1st Respondent. The Applicant submitted further that the documents used by the 1st Respondent in reaching its impugned decision were not supplied to him. The cases of Roberts *v* Parole Board (2005) UKHL 45 and JMK v MWM & another [2015] eKLR were relied upon to emphasize the importance of a party being given a hearing.

The Applicant submitted further that although the impugned decision was rendered before (sic) the coming into force of the Fair Administrative Action Act, 2015, the 1st Respondent was still required to follow the rules of natural justice. The case of Judicial Service Commission *v* Mbalu Mutava & another [2015] eKLR was relied upon in support of this submission.

The next issue raised by the Applicant concerned contempt of court. The Applicant submitted that the 1st Respondent was in contempt of court. The Applicant submitted that the court had temporarily stayed execution of the 1st Respondent's decision by the order that was made on 13th October 2016 and extended on 5th December 2016. The Applicant submitted that despite the existence of the said orders, the 1st Respondent issued a Gazette Notice on 17th July 2017 purporting to direct the Chief Land Registrar to revoke the Applicant's title. The Applicant submitted that contempt of court should be punished so as to safeguard the rule of law which is fundamental to the administration of justice. The cases of Teachers Service Commission *v* Kenya National Union of Teachers & 2 others [2013] eKLR and Kenya Tea Growers Association *v* Francis Atwoli & 5 others [2012] eKLR were relied upon in support of this submission. The Applicant submitted that any action taken in furtherance of such disobedience of a court order is null and void. The Applicant urged the court to quash the impugned determination by the 1st Respondent due to its acts of contempt.

The next issue that the Applicant submitted on was whether the Applicant is entitled to the orders sought. The Applicant argued that he is entitled to all the 22 prayers sought in the amended Originating Notice of Motion based on what he has established in the foregoing submissions. The cases of Republic *v* National Land Commission & 2 others Ex-parte Airways Holdings Limited(supra) and Republic *v* Chairman & Members of National Land Commission Ex Parte Turf Developers Ltd(supra) were relied upon in support of the argument that the court can make the orders sought.

The final issue which the Applicant submitted on concerned the costs of the application. The Applicant urged the court to consider the conduct of the parties when awarding costs and to exercise its discretion judicially while undertaking the exercise. The cases of Jasbir Singh Rai & 3 others *v* Tarlochan Singh Rai & 4 others [2014] eKLR and Republic *v* Communication Authority of Kenya & another Ex-Parte Legal Advice Centre Aka Kituo Cha Sheria [2015] eKLR were relied upon on this issue.

THE 2ND AND 3RD RESPONDENTS' SUBMISSIONS:

The 2nd and 3rd Respondents filed their submissions on 3rd May 2021. They framed the issues for determination as follows;

1. Was an Enforcement Notice Issued?

2. Was the Physical Planning Act adhered to?

3. Was an Appeal Lodged?

On the first issue, the 2nd and 3rd Respondents submitted that the Applicant was issued with an Enforcement Notice on 4th October 2018 as the 1st Respondent had revoked his title by a Gazette Notice dated 17th July 2017. The 2nd and 3rd Respondents submitted that the case against them is frivolous and vexatious as no orders were sought against them. The case of Trust Bank Limited *v* H.S.Amin & Company Ltd & another [2000] eKLR was relied upon for the definition of the word frivolous.

On the second issue, the 2nd and 3rd Respondents submitted that the 2nd and 3rd Respondents adhered to section 38 of the then Physical Planning Act in serving the Applicant with the Enforcement Notice following the Gazette Notice issued by the 1st Respondent revoking the Applicant's title. The 2nd and 3rd Respondents argued further that the Applicant did not comply with section 38 of the then Physical Planning Act as he did not appeal to the relevant Liaison Committee against the same.

On the third issue, the 2nd and 3rd Respondent submitted that since no appeal was lodged against the said Enforcement Notice, the same took effect as provided by the law.

THE INTERESTED PARTY'S SUBMISSIONS:

The Interested Party filed its submissions on 20th February 2020. The Interested Party reiterated that the application was not properly before the court as it was brought by way of an Originating Notice of Motion instead of a petition as required under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Interested Party submitted further, that the Applicant's submissions were not in accord with the Environment and Land Court Practice Directions as they exceeded the 10-page limit provided for in direction 33(b). The Interested Party submitted further that the infringements complained of by the Applicant were not precisely pleaded. The Interested Party urged the Court to dismiss the application since the 1st Respondent had already made a decision and it would be against the rules of natural justice for the dispute to be determined afresh.

ISSUES FOR DETERMINATION:

From the application and the responses thereto by the Respondents and the Interested Party, the following in my view are the issues arising for determination by the court;

1. Whether the application is properly before the court.

2. Whether the 1st Respondent had jurisdiction to determine the complaint that was lodged against the Applicant by the Interested Party.

3. Whether the Applicant was accorded a fair hearing and a fair administrative action by the 1st Respondent.

4. Whether the 1st Respondent had jurisdiction to make the impugned determination.

5. Whether the Enforcement Notice that was issued by the 2nd and 3rd Respondents was valid?

6. Whether the Applicant is entitled to the reliefs sought.

7. Who is liable for the costs of the application?

Whether the application is properly before the court:

The Applicant's application has been brought under Article 165(6) and (7) of the Constitution and Rules 24 to 30 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. In the application, the Applicant has invoked the supervisory jurisdiction of this court under 165(6) and (7) of the Constitution which provides as follows:

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**
>
> **(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

It is not disputed that this court by dint of the said Article of the Constitution has supervisory jurisdiction over subordinate courts and any person, body or authority exercising judicial or quasi-judicial function in respect of matters falling within its jurisdiction. See, Robert Mutiso Lelli and Cabin Crew Investments Ltd *v* National Land Commission & 3 others [2017] eKLR at paragraph 108 and Kellico Ltd. *v* National Land Commission & 4 others [2016]eKLR.

What I need to determine is the procedure through which a person seeking to invoke the supervisory jurisdiction of the court under Article 165(6) and (7) of the Constitution should move the court. The Applicant has moved the court by way of an Originating Notice of Motion. The Interested Party has contended that the Applicant should have moved the court by way of a Petition in accordance with The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, L.N No. 117 of 2013(hereinafter referred to as "Mutunga Rules"). I find no merit in this contention by the Interested Party. The Mutunga Rules were made under the Constitution of Kenya 2010 and they were limited only to the procedure for enforcement of Fundamental Rights and Freedoms in the bill of rights under Article 22 of the Constitution. Prior to the Mutunga rules, we had The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, L.N No. 6 of 2006 (hereinafter referred to as "Gicheru Rules"). Gicheru Rules were made under the old Constitution and they provided for; the procedure for invoking the supervisory jurisdiction of the High Court in Part I, the procedure for invoking the interpretation jurisdiction of the High in part II and the procedure for enforcing violation or threatened violation of fundamental rights and freedoms in part III thereof. When Mutunga Rules were made, it repealed only part III of the Gicheru Rules that was dealing with the procedure for enforcing violation or threatened violation of fundamental rights and freedoms. The rest of Gicheru Rules remained. What this means is that the procedure for invoking the supervisory and interpretation jurisdiction of the High Court remained that in the Gicheru Rules. Rule 2 of Gicheru Rules provides that a person wishing to invoke the supervisory jurisdiction of the court shall do so by way of an Originating Notice of Motion. This is the procedure through which the Applicant has moved the court. The Applicant's application is therefore properly before the court although some of the Gicheru Rules that the Applicant has cited are irrelevant. That disposes of the Interested Party's preliminary objection.

Whether the 1st Respondent had jurisdiction to determine the complaint that was lodged against the Applicant by the Interested Party:

The 1st Respondent was established under section 67 of the Constitution of Kenya which also spelt out some of its functions. Article 68 of the Constitution directed Parliament to enact legislation providing for among others the review of all grants or dispositions of public land to establish their propriety or legality. The National Land Commission Act, 2012 was enacted pursuant to the provisions of Articles 67(3) and 68 of the Constitution. Pursuant to Article 68(c) (v) of the Constitution, the 1st Respondent was given power under the National Land Commission Act, 2012(hereinafter referred to only as "the Act" where the context so permits) to review grants and dispositions of public land. Section 14 of the Act provides as follows:

> **"14. (1) Subject to Article 68 (c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.**
>
> **(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).**
>
> **(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.**
>
> **(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.**
>
> **(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.**
>
> **(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.**
>
> **(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.**
>
> **(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.**
>
> **(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1)."**

The Applicant has contended that the 1st Respondent's review powers were limited to public land and as such the 1st Respondent had no jurisdiction to review the title for the Applicant's property which was private land. It is common ground that once public land is alienated to a private entity or person, it becomes private land. See, section 9(2) of the Land Act, 2012. I am of the view that the powers that were conferred upon the 1st Respondent by section 14 of the National Land Commission Act, 2012(the Act) were intended to enable it examine the propriety and legality of alienation of public land for private use. It follows therefore that the 1st Respondent could only review titles for public land that had already been alienated and as such converted to private land. I have considered the cases that were cited by the Applicant in support of his submission on this issue both for and against him. I am persuaded with the observation that was made by W.Korir J. in Republic *v* National Land Commission & another, Exparte Muktar Saman Olow[2015] eKLR in which he stated that:

> **"47. Under Section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent."**

In Republic *v* National Land Commission, Ex parte Holborn Properties Limited[2016]eKLR, that was cited by the Applicant, the court after reviewing several policy documents that informed the establishment of the 1st Respondent stated as follows:

> **"54. It is clear from the history that gave rise to the establishment of the National Land Commission that the Respondent's mandate was not only to review grants or dispositions of public land that were issued after the effective date of the Constitution, but also those allocations over public land that were done even before the promulgation of the Constitution in the year 2010.**
>
> **55. Although it is true, as submitted by the Applicant's counsel, that for the first time, the 2010, Constitution comprehensively defined at Article 62 what public land entails, the same Constitution recognises the fact that there were other definitions of "public land" even before its promulgation in the year 2010.**
>
> **56. I say so because the Constitution has defined "public land" in Article 62 (1) (n) (i) as follows: -**
>
> **"62 (1) Public land is-**
>
> **(n) any other land declared to be public land by an Act of Parliament-**

(i) in force at the effective date;"

57. Having recognised the fact that even before it defined in detail what "public land" entailed there still existed "public land", the review of grants or dispositions of public land to establish their property or legality was retrospective.

58. The body that was to be given the mandate to review such grants or dispositions by Parliament was not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before. That is what the Kenyan people wanted as discerned from the Ndung'u Commission Report and the National Land Policy, which preceded the Constitution.

59. Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.

60. I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done."

Due to the foregoing, it is my finding that the 1st Respondent had jurisdiction to review the grant in respect of the Applicant's property to determine its propriety or legality. Since the Applicant's property was public land before it was alienated for private use, the process of alienation of the same was subject to review by the 1st Respondent under section 14 of the National Land Commission Act, 2012. I disagree with the contention by the Applicant that the 1st Respondent had no jurisdiction to review the title for the suit property because it was private land. I am also not in agreement with the Applicant that the 1st Respondent was out to determine the ownership of the Applicant's property as between the Applicant and the Interested Party. There is no evidence that the Interested Party claimed to own the suit property. The Interested Party's complaint was that the Applicant's property was reserved for public use within Thome "V" Estate and that the same was irregularly allocated to the Applicant and a title issued to him. The 1st Respondent was therefore not called upon to determine the ownership of the Applicant's property and made no attempt to do so in its impugned determination.

Whether the Applicant was accorded a fair hearing and a fair administrative action by the 1st Respondent:

The Applicant has contended that it was not given adequate notice by the 1st Respondent of the complaint against him and that when he received the complaint he did not have sufficient time to respond to the same. The Applicant has also contended that the complaint concerned the suit property and not the Applicant's property and as such he was not heard in respect of the complaint if any in respect of the Applicant's property. The Applicant has also contended that he was not furnished with the material on the basis of which the 1st Respondent arrived at its determination and that the 1st Respondent was empowered only to make a recommendation and not a determination. The Applicant has contended further that the 1st Respondent did not observe the rules of natural justice.

From the material on record, the 1st Respondent published a notice in the Daily Nation Newspaper on 22nd January, 2016 to the effect that it intended to conduct public hearings for the purposes of reviewing the grants and/or disposition of among others the Applicant's property. The 1st Respondent called upon all who were interested in the properties whose grants were to be reviewed to appear before the 1st Respondent at its offices on various dates when the said hearings were going to take place. In the said advertisement, the names of the Applicant and the Interested Party were given as the persons who were interested in the Applicant's property. The correct land registration number for the Applicant's property was also given. The hearing in respect of the Applicant's property was to take place on 26th February 2016. The Applicant admitted in his affidavit in support of the Originating Notice of Motion that he saw the advertisement and that it mentioned his name and his property.

The Applicant appointed the firm of TripleOKLaw Advocates to appear for him before the 1st Respondent. The Applicant's advocates appeared before the 1st Respondent and requested to be furnished with a formal complaint by the Interested Party. The Interested Party through their advocates Njeru Nyaga & Co. Advocates supplied the Applicant's advocates with a formal complaint dated 9th March 2016 together with the documents that the complaint was based. The Applicant filed a formal reply to the complaint dated 14th March 2016 supported by the Applicant's affidavit sworn on 15th March 2015. There is no doubt from the Applicant's response to the compliant that the Applicant understood who the complainant was, the property the subject of the complaint and the basis of the complaint. There is no indication in the reply to the complaint or the supporting affidavit that the Applicant protested that he was given insufficient time to prepare for the hearing or to put in that response.

After filing his response to the complaint, the Applicant's advocates appeared before the 1st Respondent for the hearing of the complaint at which the Interested Party's witness who was a surveyor gave evidence and produced documents. The Applicant chose not to attend the hearing personally but sent his two friends; Charles Nderitu Macharia and Henry Njau Njuguna to accompany his advocates to the hearing venue. For reasons only known to the Applicant, the Applicant did not tender any evidence before the 1st Respondent. The Applicant did not rebut the 1st Respondent's contention that the Applicant did not attend all the hearing sessions of the 1st Respondent despite knowledge of the same. After conducting the hearing, the 1st Respondent rendered a determination on 22nd August 2016. The initial determination referred to the suit property. The error was however noted and was corrected to reflect the Applicant's property as the property that was the subject of the review proceedings.

In Attorney General *v* Ryath [1980] AC 718 at page 730, Lord Diplock stated that:

"It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority".

In Harlsbury's Laws of England, 4th Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

"Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo judex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication."

Sections 14(3) of the National Land Commission Act, 2012 (the Act) that I have reproduced above provides that the 1st Respondent in exercise of its review powers was supposed to give every person who had an interest in the grant or disposition the subject of its review a notice of such review and an opportunity to appear before it and to inspect any relevant documents. Section 14(8) of the same Act also reproduced above provides that in exercise of its review powers, the 1st Respondent was to be guided by the principles set out under Article 47 of the Constitution which provides as follows:

"47. (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."

I am satisfied from the material before the court that the Applicant was accorded a fair hearing and fair administrative action by the 1st Respondent. The Applicant was notified of the 1st Respondent's intention to review the grant in respect of the suit property and called upon to appear before the 1st Respondent and be heard. The Applicant was served with the complaint and responded to the same through an advocate. The Applicant's advocate also attended the hearing of the complaint and was present when one of the Interested Party's witness gave evidence. The Applicant was given an opportunity to give evidence in addition to the response that it had filed with the 1st Respondent. The 1st Respondent after considering the cases presented by both sides made findings on the issues that had been raised and finally made a determination. I find no merit in the Applicant's contention that the 1st Respondent did not observe the rules of natural justice.

The Applicant had also claimed that he was not served with the documents on the basis of which the 1st Respondent based its determination. The 1st Respondent's finding was that the Applicant's property was created from land that was reserved as an open space for public purposes during the subdivision of the parcels of land on which Thome "V" Estate is situated.

The 1st Respondent held that since the land was already reserved as an open space for public use by the residents of Thome "V" Estate, the same was not available for allocation to the Applicant. Amongst the documents that accompanied the complaint that was served upon the Applicant was a survey map for Thome "V" Estate in which the land that was allocated to the Applicant (the Applicant's property) was marked as having been reserved as an open space. The surveyor who carried out survey over the land on which Thome "V" Estate is situated also gave evidence before the 1st Respondent and confirmed that the land from which the suit property was created was reserved as an open space. A part from contending that the officers who allocated the suit property to him were not joined as parties to the complaint, there is no evidence that the Applicant challenged the evidence that was tendered before the 1st Respondent to the effect that the Applicant's property was curved out of land that was reserved for public use as an open space. The said surveyor also produced evidence that he had placed beacons on the said open space on 26th March, 2013.

The Applicant should have told the 1st Respondent how he was allocated the suit property. I have noted from the letter of allotment that the Applicant placed before this court that the suit property was purportedly allocated to the Applicant on **1st June** 1997(emphasis added). There is no evidence as to when the Applicant accepted the allotment and made payment therefor. It is common knowledge that 1st June is a public holiday in Kenya and that even in 1997, it was a public holiday. I wonder how the Applicant's property could have been allocated to the Applicant on a public holiday when government offices are closed.

Whether the 1st Respondent had jurisdiction to make the impugned determination:

The Applicant has also contended that the 1st Respondent had no power to revoke titles. The Applicant contended that the 1st Respondent's power was limited to making a recommendation and not a determination which is final in nature. I am not in agreement with this contention and I have not been persuaded by the cases that were cited by the Applicant in support thereof. Section 14 (4), (5) and (6) of the National Land Commission Act, 2012 reproduced above is very clear on the review powers of the 1st Respondent. Section 14(4) of the said Act gave the 1st Respondent power to make a determination after reviewing of a grant or disposition of public land. Article 67(3) of the Constitution gave Parliament power to confer more functions on the 1st Respondent. The functions of the 1st Respondent were therefore not limited only to those set out in Article 67 of the Constitution. It cannot be argued therefore that the function conferred upon the 1st Respondent under section 14(4) of the National Land Commission Act, 2012 to make a determination is inconsistent with Article 67(2)(e) of the Constitution. In any event, whether one calls the decision of the 1st Respondent a recommendation of redress or a determination, the effect is the same. It is a decision made by the 1st Respondent after carrying out a review. Section 14(5) of the Act gives the 1st Respondent power to direct the Land Registrar to revoke a title when it makes a finding that the title was acquired unlawfully. Section 14(6) of the Act on the other hand provides that where the 1st Respondent finds that the title was acquired irregularly, it has power to correct the irregularity.

In this case, the 1st Respondent made a finding that the title held by the Petitioner was acquired illegally since the land from which the Applicant's property was created was reserved as an open space and as such was not available for allocation. The 1st Respondent was therefore justified in directing the Chief Land Registrar to revoke the title. Once the title was revoked the 1st Respondent had power to direct that the land reverts to the purpose for which it was reserved.

The Applicant has also taken issue with the 1st Respondent correcting its impugned decision by inserting thereon the correct land parcel number. I am of the view that the 1st Respondent had power to correct arithmetical and typographical errors in its decisions. The Applicant was well aware that the land that was the subject of the review proceedings was the Applicants property and not the suit property. The Applicant was therefore aware that reference to the suit property in the proceedings of the 1st Respondent and in the 1st Respondent's determination was erroneous. The Applicant has not persuaded me that he suffered any prejudice or injustice as a result of that correction. I find no merit to this objection to 1st Respondent's determination.

The Applicant has also contended that the said correction of the determination and the gazettment was carried out in contempt of the court order that was made on 13th October 2016. The order of 13th October 2016 stayed the execution of the decision of the 1st Respondent. The order did not restrain the correction of the determination or gazettment of the same. The Applicant did not place any evidence before the court showing that the decision of the 1st Respondent was executed while the said order was in force. The alleged contempt has therefore not been proved.

Whether the Enforcement Notice that was issued by the 2nd and 3rd Respondents was valid:

I am of the view that it is not necessary to consider this issue. As was rightly submitted by the 2nd and 3rd Respondents, the Applicant has not sought any relief against the 2nd and 3rd Respondents in their amended Originating Notice of Motion. In any event, the Applicant did not deny that the development approval was given to him by the 2nd Respondent on condition that the Applicant's property was not a disputed public utility land. The 1st Respondent having made a finding that the Applicant's property was created from land reserved for public use which finding this court has found to have been made in accordance with the law, the Enforcement Notice that was served upon the Applicant cannot be faulted.

Whether the Applicant is entitled to the reliefs sought:

From the findings that I have made above, the Applicant's application fails wholly. The Applicant is therefore not entitled to any of the reliefs sought in its amended Originating Notice of Motion. I wish to point out that once it had been brought to the attention of the Applicant that the decision of the 1st Respondent was amended to correct the parcel number for the land that was the subject of review proceedings, the Applicant should have considered amending his prayers. The court was left wondering why the Applicant is pursuing reliefs in respect of the suit property that does not belong to him. I have also noted that prayers 5 to 10 in the application had already been granted by the court on 23rd February 2017 in the case of Sceneries Limited *v* National Land Commission [2017]eKLR that was cited by the Applicant. I do not think that it would have been necessary to make the same orders again even if I had found merit in the Applicant's application. In any event, the 1st Respondent's review powers have since lapsed. The rules for better carrying out of its review mandate under Article 68 (c) (v) of the Constitution and section 14 of the National Land Commission Act will therefore serve no purpose. Prayers 12 to 17 could also not have been granted by the court as they relate to a parcel of land in respect of which the Applicant has no interest. In the final analysis and for the reasons given earlier, none of the orders sought by the Applicant are for granting.

Who is liable for the costs of the application?

As correctly submitted by the Applicant, costs are awarded at the discretion of the court. In these proceedings the Applicant has failed in his application. No reason has been given that would warrant denying the successful parties their costs for defending the application. The Respondents and the Interested Party shall have the costs of the application.

Conclusion:

The upshot of the foregoing is that the Applicant's amended Originating Notice of Motion dated 18th December 2018 is without merit. The application is dismissed with costs to the Respondents and the Interested Party.

Delivered and Dated at Nairobi this 20th day of January, 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Munyori for the Applicant

N/A for the 1st Respondent

Ms. Sirma for the 2nd and 3rd Respondents

N/A for the Interested Party

Ms. C. Nyokabi - Court Assistant