



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MILIMANI COMMERCIAL COURTS**  
**JR. NUMBER 117 OF 2016**

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND  
COMMISSION.....RESPONDENT

**EX-PARTE**

CECILIA CHEPKOECH LETING,  
MAUREEN CHEPTOO LETING AND  
ANTONIO KIPROP LETING

(Suing as the Executors of the  
Estate of Joseph Tendenei Arap Leting)

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 18<sup>th</sup> March, 2016, the *ex parte* applicants herein seek the following orders:

1. That an Order of Certiorari do issue to remove into this Court and quash the decision by the National Land Commission to issue a Notice and conduct a review and hearing in respect of the property known as Land Reference Number 209/6506/1 belonging to the Estate of **Joseph Tendenei Arap Leting (Deceased)** which said decision appeared in an advertisement in the Standard Newspaper and the Daily Nation issues of 22<sup>nd</sup> January, 2016 by the National Land Commission.

2. That an Order of Prohibition do issue to forbid the National Land Commission from

**conducting any hearing or review over the complaint in regard to the property known as Land Reference Number 209/6506/1 whether on the 15<sup>th</sup> March 2016 or any other date.**

**3. That a declaration do issue that the National Land Commission has no jurisdiction to hear or adjudicate and determine any proceedings touching on the property known as Land Reference Number 209/6506/1 either in the manner suggested by the Commission or at all.**

**4. That an Order of stay of all the impugned proceedings by the National Land Commission in respect of the property known as Land Reference Number 209/6506/1 be issued until the hearing and determination of this Application**

**5. That the costs of this application be provided for.**

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

2. According to the applicants, on 22<sup>nd</sup> January, 2016, the **National Land Commission**, the Respondent herein (hereinafter referred to as "the Commission") published a notice in the *Standard Newspaper* of that date requiring the property owners named in the Notice, Including the deceased, to appear before the Commission on "a Wednesday, 27<sup>th</sup> February, 2016 at 10.00 a.m." to attend to a public hearing regarding the "affected plots" which day turned out to be a Saturday and not a Wednesday as stated in the Notice.

3. As the applicants were not sure of the actual date intended in the Notice, they instructed the firm of A. H. Malik & Company Advocates to represent the Estate of the deceased in the matter and the said Advocates sent an Advocate from the firm to the Commission on Wednesday 24<sup>th</sup> February, 2016 to confirm whether the hearing aforesaid was scheduled for that date or the 27<sup>th</sup> February, 2016 which was on a Saturday and the said advocate was informed that the hearings were actually intended to be on 24<sup>th</sup> February, 2016 and not 27<sup>th</sup> February, 2016 a Saturday. The said advocate was however informed that the matter relating to Estate of the deceased was not to be heard on that day and the same had been postponed to a date to be advertised in a Daily Newspaper later and which, he said would be on or about 15<sup>th</sup> March, 2016 and that a Public Notice would be issued in the local dailies and further A. H. Malik & Company Advocates will be duly notified.

4. According to the applicants, the aforesaid Notice relates to the deceased's Property known as Land Reference Number 209/6506/1 measuring approximately 0.3479 of a hectare situate in Upper Hill area, Nairobi whose history is that on 14<sup>th</sup> November 1988, the Commissioner of Lands had issued the deceased with a Letter of Allotment on terms, *inter alia*, that the deceased pays a total consideration of Kenya Shillings 49,946.70 for the Property. Upon full compliance of all the terms contained in the Letter of Allotment including full payment of the said sum of Kenya Shillings 49,946.70, on 13<sup>th</sup> April, 1989, the Commissioner of Lands issued the deceased with a Grant of Title to the aforesaid Property for a term of 99 years from 1<sup>st</sup> November, 1988 and thereafter and upon compliance of the terms of the Grant of Title, the deceased proceeded to construct 19 Flats on the said property presently valued at approximately Kenya Shillings 450,000,000/-.

5. It was averred that the said construction took place with the express consent and approval of the Commissioner of Lands in compliance with Special Condition Number 1 of the Grant of Title and that upon completion of the construction which too was with the approval of the City Council of Nairobi, the Council duly approved the buildings and issued the deceased with a Certificate of Occupation of Buildings dated 3<sup>rd</sup> September, 1991.

6. It was the applicants' case that upon issuance of the Grant of Title the applicant became protected by the provisions of section 23 of the **Registration of Titles Act** as the absolute and infeasible owner of the property and the title to this property cannot be subject of any challenge. Further, as this Property is and was private property as at the date the Commission came into being on 27<sup>th</sup> August, 2010, the Commission has had no jurisdiction to deal with any dispute in respect to the same. In addition, the said

Property having been transferred to the deceased upon payment of consideration, and the deceased having had no Notice of any wrong doing involving him, either from the Commissioner of Lands or the Commission, the Commission lacks jurisdiction to adjudicate on any dispute relating to the ownership of this Property.

7. According to the applicants, the notice by the Commission aforesaid did not indicate the nature of claim or complaint against the deceased or his Estate relating to ownership of the Property and yet the Notice required the deceased to respond to the notice within a very short period of time. It was therefore contended that the notice was not only inappropriate and unreasonable but inadequate and confusing in regard to the date and day of hearing.

8. The applicants revealed that both on 18<sup>th</sup> February, 2016 and 2<sup>nd</sup> March, 2016, the deceased's Estate's Advocates aforesaid wrote to the Commission requesting it for a copy or copies of any complaint or complaints against the Estate of the deceased in relation to the Property in dispute, but the same has to date not been provided by the Commission.

9. The applicants reiterated that the Commission has no jurisdiction to undertake any hearings or review over the deceased's title to property which is indefeasible under the provisions of section 23 of the Registration of Titles and as the Deceased's Property is private land, it is the jurisdiction of the Commission whose jurisdiction is in respect of Public land. The applicants were however apprehensive that unless the Commission is prohibited from conducting the hearing on the deceased's property which is private land, it would proceed to conduct a review of the Deceased's Title to the Property contrary to the Constitution and the law and in excess of its jurisdiction. Further unless the Commission is stopped, the Applicants will be subjected to an unnecessary hearing process by a body which has no jurisdiction to do so.

10. It was submitted on behalf of the applicant that the Commission herein is a Commission created under both Article 67 of the Constitution of Kenya and the **National Land Commission Act**, Act Number 5 of 2012 and that the subject property being Land Reference Number 209/6506/1 is private land as defined under Article 64 of the Constitution of the Respondent herein. However, the jurisdiction of the Commission as stipulated in Articles 67 and 68 of the Constitution only relates to Public land. Therefore the Applicant's property being private land as defined above and particularly under Article 64(b) of the Constitution, the jurisdiction of the Commission as provided under the **National Land Commission Act** leaves no doubt that the same only extends to public land and no more.

11. It was the applicant's case that once the Commissioner of Lands issued the Applicant with the Grant of Title, upon the Applicant complying with all the requisite conditions set out in the Letter of Allotment, the Applicant's property became private land as defined under Article 64 (b) of the Constitution and the same is outside the jurisdiction of the Commission. Besides, the moment the Applicant paid the sum of Kenya Shillings Forty Nine Thousand Nine Hundred and Forty Six and Seventy Cents (Kshs. 49,946.70), he became an innocent Purchaser for value without Notice of any wrong doing and his property rights are protected by section 14(7) of the **National Land Commission Act**. At all material times prior to and up to the time the said Grant was made to the deceased in respect of Land Reference Number 209/6506/1 this property belonged to the Republic of Kenya, and no other party had any right to it. It was submitted that at the time the Applicant was issued with the Grant of Title, the property herein was governed by the provisions of the registration of Titles Act, Chapter 281 (now repealed) laws of Kenya.

12. It was submitted that once the deceased was issued with the Grant of Title on 13<sup>th</sup> April, 1989, the deceased became the absolute and indefeasible proprietor of the property and the National Land Commission has no jurisdiction to revoke or even investigate the deceased's Title to the land. In support of these submissions the applicants relied on **Nairobi Permanent Markets Society and Others vs. Salima Enterprises and Others (1995-98)1 EA 232** , **Bwambale and Another vs. Matte And Others (2005) 2 EA 49**, and **Moya Drift Farm Limited vs. Theuri (1973) EA 114**

13. It was submitted that prior to the Notification in Newspapers, neither the deceased nor his family had been served with any Notice of Complaint whether by the Commission or by any third parties and further

that no hearing notice served on the deceased prior to his demise or on his family at any given time or at all. To the applicants, this practice by the Respondent is against all the known Rules of Natural Justice which entitle the Applicant to be adequately informed of any Complaint either by the Respondent or any Third parties.

14. It was further submitted that apart from the known Rules of Natural Justice section 14(3) of the **National Land Commission Act** requires the Commission to provide the Applicant or any other person concerned with a review of Grant of Title with a notice of such review but in this case, neither the deceased nor his family have ever been served with such mandatory notice nor been provided any complaint relating to the Grant of Title. In addition, the deceased and his family have not been afforded any relevant documents at all.

15. It was submitted that the provisions of section 14(8) of the **National Land Commission Act** imposes an obligation on the Respondent to apply the principles set out under Article 47 of the Constitution of Kenya. Hence the Applicant is entitled to written reasons (read complaint) for the Respondent's actions of summoning the Applicant to attend a Hearing and Review of Grant of Title. The Respondent has a constitutional obligation to provide the Applicant with its complaint or that of any Third party that has necessitated the review of the Grant of Title. As the Respondent was in breach of the requirement to provide the Applicant with the reasons for the hearing and review which the Applicant is being asked to attend, it was submitted that it was procedurally unfair for the Respondent to summon the Applicant to attend a hearing without the Applicant knowing what the complaint he is expected to answer is about.

16. According to the applicants, under the provisions of Article 68(c) (vi) of the Constitution, the Respondent is under an obligation to protect the rights of the dependants of a deceased person and his widow and that the Respondent's conduct of calling for a hearing and review of the deceased's Grant without even notifying the widow of the same and further, without providing the widow and the children of the deceased with reasons for such a hearing and review is in breach of the provisions of Article 68(c) (vi) of the Constitution.

17. It was submitted that the deceased being an innocent purchaser for value of Kenya Shillings Forty Nine Thousand Nine Hundred and Forty Six and Seventy Cents (Kshs. 49,946.70), from the Government of Kenya, the Respondent has no power to review this Grant of Title, especially, if to do so may lead to revocation of the same. In the applicants' view, the Respondent's Notice for Review of Grant is accordingly in breach of the mandatory provisions of section 14(7) of the **National Land Commission Act**.

18. It was therefore the applicants' case that the Respondent has breached the Applicant's rights to a fair administrative action as well as all other rights the Applicant is entitled to under the Article 47 of the Constitution and the urged the Court to allow this Application with costs.

### **Respondent's Case**

19. The application was opposed by the respondents.

20. According to the Respondent, it is an independent commission established under Article 67(1) of the Constitution and is operationalized by the Act, and has as its fundamental functions, the management of public land on behalf of the National and County Government. In addition to the functions denoted to it under the Constitution, the respondent is also mandated under section 14 of the Act to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. In the exercise of this mandate the respondent operates as a quasi-judicial body within the full meaning of Article 169 (1) of the constitution and the procedure for carrying out this mandate is clearly set out under section 14 of the Act.

21. To the respondents, review of grants and dispositions of public and simply entails the respondent analysing the process under which public land was converted to private land and making findings of the legality of the grants in question and once the Commission has determined on its own motion that a

particular grant warrants review or a complaint is determined to warrant review of a particular grant, the respondent will publish a notice of intended review in the dailies notifying all interested parties the dates and venue of the scheduled review, as well as the period within which interested parties are required to submit their documents. After expiry of the notice of a particular grant commences at the scheduled date and venue prescribed in earnest, wherein all interested parties are first established after which parties are directed to disclose and exchange all documents.

22. It was averred that under section 14(1) of the Act, the Respondent commenced review proceedings seeking to establish the legality of the grant over LR No. 209/6506/1, amongst other parcels which process commenced following receipt of a complaint from the Kenya Railways Staff Retirement Benefits Scheme requesting the Respondent to review the legality of the grant on the grounds that it was unlawfully acquired.

23. It was averred notices were duly published in various dailies notifying the public about the parcels of lands due for review but due to an error the notice in respect of the suit land apparently scheduled the date of review as a Saturday when the intended date was Monday, 29<sup>th</sup> January, 2016 and that this fact was explained to a representative of the Estate of the deceased who appeared on 24<sup>th</sup> February, 2016.

24. It was however averred that as a result, the review process has not commenced in earnest and that no proceedings in relation to the subject parcel have been taken. In the Respondent's view the ex parte applicant's rights to natural justice have therefore not been breached by the Respondent as the applicant shall have the opportunity to inspect all relevant documents the Commission intends to rely on and parties shall be directed to disclose and exchange documents including the complaint.

25. In the Respondent's view, since it is mandated to review all grants and dispositions of public lands even where there is no complaint, lack of a complaint does not necessarily invalidate the proceedings of the Respondent.

26. It was the Respondent's view that the orders sought cannot issue as to do so would amount to curtailing a proper constitutional process and the Respondent's mandate. In any case there are no sufficient reasons why the Respondent should not discharge its constitutional mandate. It was however submitted that in the event that the Court finds that the rules of natural justice were not adhered to the option would be to direct the same to be complied with instead of prohibiting the Respondent from carrying out its mandate.

27. In the Respondent's view, the right to ownership is not absolute as it does not extend to property found to have been unlawfully acquired and since the legality of the grant held by the estate of the deceased is in issue, it is in public interests that the same be reviewed and that the Applicants stand to suffer no prejudice in the process.

28. In the premises the Respondent urged the Court to dismiss the instant application with costs.

29. It was submitted on behalf of the Respondent that whereas Article 40 of the Constitution guarantees the right to ownership of property of any description in any part of the Country, this right does not extend to any property that is found to have been acquired in an unlawful manner and that similar sentiments are echoed under section 26 of the **Land Registration Act, 2012**.

30. According to the Respondent, prior to the overhauls in land management in the country, the three major laws governing land in the Country were the **Government Lands Act, Registration of Titles Act** and the **Registered Land Act**. None of these laws, however, provided a framework for the review of titles and the issue of illegally acquired titles could therefore only be addressed by the Court. This meant that the various land institutions mandated with management and coordination of land matters in the country could not address the issue of fraudulent titles other than by moving the Court. However, following promulgation of the new Constitution in 2010 and the enactment of the **Land Act 2012, Land Registration Act** and the **National Land Commission Act**, Kenya witnessed positive and tangible overhauls in land management in the country. For instance, for the first time in the history of the country,

the Constitution and the *National Land Commission Act*, provided a framework through which the legality of titles could be addressed without necessarily having to invoke the jurisdiction of the Court. In this respect the Respondent relied on section 14(1) of the *National Land Commission Act* which provides as follows:-

***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.***

31. It was the Respondent's position that from the above, it is clear that with the current legislative set up, other than the Court, the Respondent has authority to review the legality of grants and dispositions of public land and that this authority, conferred upon the Respondent by Law and by extent Article 68 of the Constitution, is equal to that of the Court. Therefore, anyone with a complaint regarding legality of a title may elect to seek redress from either the Environment and Land Court or the National Land Commission and in this respect, reference was sought in Republic vs. Land Registrar Mombasa & 2 Others Ex Parte Bhangra Limited [2012] eKLR where Tuiyott, J observed as follows:-

**“...It is common ground, I think, that The Land Registrar has no power either under the Constitution or The Registered Land Act (now repealed) to revoke Title. A string of decisions have restated this rather uncontested position of the law. That power has until recently rested exclusively with the Court. From 2<sup>nd</sup> May 2012, when The National Land Commission Act commenced, power to review grants or dispositions of public land was given to The National Land Commission. Section 14 of The Act makes provision on how that power is to be exercised...So in respect to public land the Court shares this authority with the National Land Commission...”**

32. The Respondent further relied on the decision of Korir, J in JR 376 of 2014 - Muktar Saman Olow vs. National Land Commission, where the learned had this to say regarding review of private titles by the Respondent:

**“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.”**

33. The Respondent therefore urged this Court to uphold a similar position as that of **Korir, J** and find that the Respondent has power to review grants and dispositions of public land as well as private titles in order to establish their legality or propriety.

34. It was submitted that the question of what a grant of public land is, includes any conveyance, agreement for sale, lease or license, made by and on behalf of the Government, and includes a certificate of title issued by the Land Registration Court, and a certificate of title issued pursuant to the provisions of any Act of Parliament. Public land on the other hand is undoubtedly defined under Article 62 of the Constitution as to also include a reversionary interest in land. Under Section 3 of the *Government Lands Act*, the President had the special power to make grants or dispositions of any estates, interests or rights in or over unalienated government land. The process of making grants or disposition of unalienated government land by the President or by the office of the former Commissioner of Lands is what was commonly referred to as allocation. Under section 7 of the *Land Act*, allocation is one of the many ways in which interests in land are acquired.

35. In this case, it was submitted that by *ex parte* Applicants' admission the subject parcel was allocated to the deceased by the Commissioner of Lands, the subject parcel was therefore previously Government

land thus the Respondent has jurisdiction to determine whether the allocation was done in proper manner and whether the title in the name of the deceased was lawfully acquired.

36. It was further submitted that the Respondent is not in breach of the rules of natural justice or the *ex parte* Applicants' right to fair administrative action because the proceedings of the Respondent looking into the legality of the grant of the subject parcel are yet to commence in earnest and it can therefore not be said that the Respondent is in breach. In this case, the circumstances surrounding the erroneous publication of dates have been given, and new dates for review of the legality of the subject parcel shall issue.

37. According to the Respondent therefore, the *ex parte* Applicant has not proved his case and the application should therefore be dismissed since the actions of the Respondent are anchored in law and the orders sought are therefore not deserving.

38. To the Respondent, the present application is in bad light and aimed solely at dragging the Respondent through needless litigation on frivolous, vexatious and scandalous grounds as the *ex parte* Applicants have not established a single ground under which the orders sought should be granted which just goes to show how frivolous the suit is. The Respondent therefore prayed that the application be dismissed and the *ex parte* Applicant be condemned to bear the costs of the suit.

### **Determinations**

39. I have considered the issues raised in this application.

40. According to Article 67(2)(e) of the Constitution one of the functions of the National Land Commission, the Respondent herein (hereinafter referred to as "the Commission") is:

***to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.***

41. I therefore agree that the Commission has power either on its own motion or pursuant to a complaint to initiate investigations into present or historical land injustices and to recommend appropriate redress.

42. Article 67(3) also empowers the Commission to perform any other functions prescribed by national legislation. Article 68(c)(v) of the Constitution empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Section 3(b) of the ***National Land Commission Act*** provides that one of the objects of the Act is to provide for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution. No doubt therefore that the ***National Land Commission Act*** is the legislation contemplated under Article 67(3) of the Constitution.

43. Section 14 of the ***National Land Commission Act***, on the other hand provides that:

***(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.***

***(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).***

44. It is therefore clear that the Commission is empowered, on its own motion or upon a complaint by the national or a county government, a community or an individual to review all grants or dispositions of public land to establish their propriety or legality, of course subject to Article 68(c)(v) of the Constitution which restricts its powers of review of all grants or dispositions to public land. In my view, land which for example was registered as a result of land adjudication system cannot be the subject of review by the Commission.

45. Article 62(1) of the Constitution defines public land as:

***(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;***

***(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;***

***(c) land transferred to the State by way of sale, reversion or surrender;***

***(d) land in respect of which no individual or community ownership can be established by any legal process;***

***(e) land in respect of which no heir can be identified by any legal process;***

***(f) all minerals and mineral oils as defined by law;***

***(g) government forests other than forests to which Article 63 (2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;***

***(h) all roads and thoroughfares provided for by an Act of Parliament;***

***(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;***

***(j) the territorial sea, the exclusive economic zone and the sea bed;***

***(k) the continental shelf;***

***(l) all land between the high and low water marks;***

***(m) any land not classified as private or community land under this Constitution; and***

***(n) any other land declared to be public land by an Act of Parliament—***

***(i) in force at the effective date; or***

***(ii) enacted after the effective date.***

46. Private land on the other hand is defined by Article 64 as consisting of:

***(a) registered land held by any person under any freehold***

***tenure;***

***(b) land held by any person under leasehold tenure; and***

***(c) any other land declared private land under an Act of***

***Parliament.***

47. It is therefore clear that any land classified as private land cannot, unless an Act of Parliament defines it so, be public land. The only land which though falls under the general definition of private land but may be deemed as public land would be Government land according to an Act of Parliament which was unalienated at the effective date. In other words Government land which was at the effective date alienated and which is private land as defined under Article 64 of the Constitution cannot for the purposes of Article 62(1) be public land. According to Article 64, it is the holding or tenure as opposed to the process of alienation that defines what constitutes private land save for what would otherwise be private land but was Government land before the effective date.

48. In this case, according to the Grant the subject of these proceedings, the suit parcel was alienated on 1<sup>st</sup> November, 1988. The effective date for the purposes of the 2010 Constitution was 27<sup>th</sup> August, 2010. It therefore follows that the subject parcel of land was alienated before the effective date which fall squarely under the definition of private land and the only basis for claiming jurisdiction is that the Commission intends to investigate the circumstances under which the suit parcel of land was acquired and transformed into a private land.

49. As I have said above, the jurisdiction of the Commission is, as far as relevant to these proceedings, not defined by the process of acquisition of the land but the status of the land at the time of the investigation and at the effective date. Apart from the Constitution it has not been pointed out to me that there is another definition of public land that would bring private land as defined under the Constitution within the ambit of public land in order for the Commission to have jurisdiction to review its disposition in order to establish the propriety or legality thereof.

50. Whereas it is correct that under Article 40(6) of the Constitution, land which is found to have been unlawfully acquired is not protected under Article 40, it is my view that there must be a finding that the land was unlawfully acquired. In other words the due process must be adhered to in the process of making a determination whether or not the particular property was unlawfully acquired.

51. Section 14 of the ***National Land Commission Act***, in my view contemplates three determinations. The Commission may find that the land was neither unlawfully nor irregularly acquired in which event no further action is necessary. It can also find that the title was acquired in an unlawful manner, in which event it would proceed to direct the Registrar to revoke the title. It may also find that the title was irregularly acquired, in which case it would take appropriate steps to correct the irregularity and may also make consequential orders. In other words where the title was irregularly acquired, the Commission may direct inter alia that the acquisition of the title be regularized.

52. It is however my view and I so find that though land which was unlawfully acquired does not confer a good title and is not protected under Article 40 of the Constitution, where the land in question has

acquired the status of private land pursuant to Article 62 as read with Article 64 of the Constitution, it is only the Environment and Land Court that has the jurisdiction to investigate and determine the legality of such title.

53. To permit the Commission to investigate all types of lands no matter their status would amount to clothing the Commission with jurisdiction it does not have, yet it is trite that a judicial or quasi-judicial tribunal, such as the Commission herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

54. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**

55. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, 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.

56. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and 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 tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

57. Having considered this application, it is my view that the Respondent Commission has no powers to proceed in the manner it intends to proceed. The scope of the judicial review remedy of Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...” [Emphasis added].**

58. In the circumstances of this case, this Court is entitled to prohibit the Respondent from proceedings in excess of its jurisdiction.

59. With respect to the alleged violation of the rules of natural justice, as the hearing of the matter before the Commission had not commenced, I agree that it was premature to seek orders prohibiting the Commission from proceeding. If the Commission had made a decision to proceed with the investigation without furnishing the applicant with the particulars of the subject of investigations, then this Court would be entitled to intervene. I however do not agree that the Commission may arbitrarily decide to investigate a title unless it has credible reasons for believing that there is an impropriety in the title, and it is those grounds that ought to be furnished to the persons who are bound to be adversely affected by the investigations. Section 4(3) of the *Fair Administrative Action Act, 2015* provides as follows:

***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***

***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d) a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable;***

***(f) notice of the right to cross-examine or where applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

60. This was the position in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the Court held:

**“I would at this stage adopt the observations made in the Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; “1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in**

good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best...; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”

61. I wish to conclude by restating the position of this Court in International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013, where the Court expressed itself as follows:

“Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud.”

62. I have said enough to show that the Notice of Motion dated 18<sup>th</sup> March, 2016 is merited.

### Order

63. Consequently, I grant the following orders:

a) An Order of Certiorari removing into this Court and quashing the decision by the National Land Commission to issue a Notice and conduct a review and hearing in respect of the property known as Land Reference Number 209/6506/1 belonging to the Estate of Joseph Tendenei Arap Leting (Deceased) which said decision appeared in an advertisement in the Standard Newspaper and the Daily Nation issues of 22<sup>nd</sup> January, 2016 by the National Land Commission, and the same is hereby quashed.

b) An prohibiting the National Land Commission from conducting any hearing or review over the complaint in regard to the property known as Land Reference Number 209/6506/1 whether on the 15<sup>th</sup> March 2016 or any other date.

c) A declaration that the National Land Commission has no jurisdiction to hear or adjudicate and determine any proceedings touching on the property known as Land Reference Number 209/6506/1 either in the manner suggested by the Commission or at all.

d) The costs of these proceedings are awarded to the applicant to be borne by the Respondent.

64. Orders accordingly.

Dated at Nairobi this 23<sup>rd</sup> day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

*Mr Ongicho for the applicant*

*CA Mwangi*