**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO 172 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**Ex-parte**

**KRYSTALLINE SALT LIMITED**

**(As consolidated with)**

**JR CASE NO. 309 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**TROPICAL TREASURE LIMITED.....INTERESTED PARTY**

**Ex-parte**

**KRYSTALLINE SALT LIMITED**

**JUDGMENT**

1. This matter **(Nairobi High Court Judicial Misc. Civil Application No. 172 of 2014, Republic v The National Land Commission ex-parte Krystalline Salt Limited)** was on 4th November, 2014 consolidated with **Nairobi High Court Misc. Application No. 309 of 2014, Republic v The National Land Commission ex-parte Krystalline Salt Limited.** In the second case, Tropical Treasure Limited is an Interested Party. This file **(JR No. 172 of 2014)** was designated the lead file.
2. The notice of motion application for consideration in **JR No. 172 of 2014** is dated 19th May, 2014. Through the said application the Applicant prays for orders that:

**"1. The Honourable Court be pleased to grant an:**

a. **ORDER OF CERTIORARI to remove into this Court for the purpose of being quashed the decision made by the Respondent to review the grant and/or titles of plot numbers L.R. 29026 and L.R. 29027 (herein referred to as the suit properties).**
b. **ORDER OF PROHIBITION directed to the Respondent prohibiting it, whether by itself, its agents, and/or its servants or otherwise howsoever from reviewing of the titles of the suit properties and from interfering in any manner whatsoever with the applicant's ownership and quiet possession of the suit properties.**
c. **ORDER OF PROHIBITION directed to the Respondent prohibiting it, whether by itself, its agents, and/or its servants or otherwise however from purporting to take any action that may violate the rights of the Applicant.**

2. **Costs be provided for."**
3. As for **JR No. 309 of 2014,** the notice of motion is dated 13th August, 2014. The prayers sought are:

> **"1. CERTIORARI to remove into this Court for the purposes of being quashed the decision of the Respondent published in Gazette notice No. 5022 dated 18th day of July, 2014 (hereinafter the said decision) to revoke the grant and/or titles numbers L.R. 29026 and L.R. 29027 (herein after referred to suit properties).**

2. **PROHIBITION to prevent the Respondent and the Interested Party by themselves, their agents or persons acting under them from reviewing, revoking, evicting or from taking any action on the suit property in any manner that interferes with the Applicant's quiet possession of the suit properties.**

3. **Costs of this application be provided for.**
4. **That such further and other reliefs that the Honourable Court may deem just and expedient to grant."**

4. As can be seen from the prayers, the two applications relate to the same parcels of land namely L.R. No. 29026 and L.R. No. 29027.
5. According to the Applicant, it is the registered holder of L.R. No. 29026 and L.R. 29027. On 11th April, 2014 the Respondent placed an advertisement at page 43 of the Standard newspaper stating that it had received numerous complaints against the legality of the grants and dispositions listed in the notice and gave dates for reviewing the listed grants and dispositions. Among the properties listed were those of the Applicant. The review in respect of the Applicant's properties was slated for 24th April, 2014.
6. Through the statutory statement and the verifying affidavit of the Applicant's Director Hasmita Patel which were filed with the chamber summons application for leave on 9th May, 2014, the Applicant contends that the decision to review its titles was unconstitutional and unlawful as the two parcels of land were private properties and thus not subject to the jurisdiction of the Respondent. It is the Applicant's case that the jurisdiction granted to the Respondent by the Constitution only extends to public land. In support of the argument that the jurisdiction of the Respondent is limited to public land, the Applicant cited Article 67 of the Constitution and Section 14 of the National Land Commission Act, 2012.
7. The Applicant contends that Article 40 of the Constitution provides that every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya. Further, that the Constitution provides that Parliament shall not enact a law that permits the state or any person to arbitrarily deprive a person of property of any description. The Applicant therefore submits that the Respondent's action breached its constitutional rights. It is the Applicant's case that the protection of the right to property is further buttressed by Section 26 of the Land Registration Act, 2012. The Applicant therefore urges this Court to find that the Respondent's decision to review private land was irrational and unreasonable and based on fundamental error of fact and gross error of law.
8. The Applicant asserts that the Respondent committed an error of law by interpreting Section 14 of

the National Land Commission Act so as to claim jurisdiction over its parcels of land. According to the Applicant, the powers of the Respondent should always be interpreted in accordance with the Constitution.

9. Additionally, the Applicant submits that it was never notified of any complaint against its properties and neither did it have any information or knowledge of the complaint.
10. The Respondent opposed the application through the replying affidavit sworn on 1st December, 2014 by its Assistant Director of Legal Affairs and Enforcement, Brian Ikol. Through the said affidavit it is stated that the Respondent is a constitutional commission established under Article 67 of the Constitution. Its functions are not only found in the establishing law but also in Section 14 of the National Land Commission Act.
11. Mr Ikol averred that the mandate of the Respondent is not limited to managing public land as alleged by the Applicant but extends to review of all grants or dispositions of public land to establish their propriety within five years of the commencement of the National Land Commission Act. This mandate can be exercised on the Respondent's own motion or upon a complaint by the national government, a county government, a community or an individual.
12. It is the Respondent's case that under Section 14(5) and (6) of the National Land Commission Act the Respondent is mandated to instruct the Chief Land Registrar to revoke a title that was acquired in an unlawful manner or regularise any irregularity in respect to an irregularly acquired title.
13. It is the Respondent's case that the process of reviewing grants or dispositions of public land involves reviewing the manner in which public land was allotted to private persons and whether the procedure that was used to allocate public land was legal and regular. The Respondent contends that in order to execute its mandate, it must review the process by which public land was allotted/granted to private persons and therefore the Applicant's assertion that the suit property is not subject to review under Article 68(c)(v) of the Constitution and Section 14 of the National Land Commission Act is untenable.
14. Further, the Respondent contends that any lease or certificate of title where the government remains the head lessor and determines the conditions under which the said land is to be held and utilized and which upon expiry of the lease reverts to the Government, falls under the purview of a grant and the Respondent has jurisdiction to review and determine its legality or propriety. It is the Respondent's case that the Applicant's properties are under leasehold tenure and the Government is the head lessor thus making them subject to its review.
15. Turning to the facts of the case, Mr Ikol avers that on diverse dates the Respondent received complaints from members of the public and Government institutions regarding alleged unlawful and irregular acquisition of certain titles. One such complaint was from the residents of Kilifi County. Tropical Treasure Limited was one of the complainants.
16. The complaint related to twelve parcels of land, including those of the Applicant, within Kawala 'A' and Kawala 'B', Kadzidzo Madzimbani Adjudication Area in Kilifi County. The Respondent was requested to review the said titles on the grounds that the boundaries of the parcels fell within the Mombasa-Nairobi Highway and some overlapped on each other. The Respondent embarked on a review of the said grants and conducted its investigations to ascertain the veracity of the complaint.
17. After concluding its investigations, the Respondent thereafter published a notice in the Standard newspaper of 11th April, 2014 and the Daily Nation newspaper of 13th April, 2014 in which it notified the members of the public of the grants it intended to review and invited representations and submissions by interested parties. The hearing was slated for 24th April, 2014.
18. According to the Respondent, despite the adequate notice given, the Applicant failed and/or refused to appear before it on 24th April, 2014. The hearing proceeded as scheduled and the Respondent was therefore surprised to learn that the Applicant had moved the Court on 19th May, 2014 and obtained an order prohibiting further proceedings. For record purposes, I need to state at this point that the Applicant actually moved the Court on 9th May, 2014 and not 19th May, 2014 as stated by the Respondent.
19. The Respondent contends that by the time it received the Court order, it had already concluded the hearing. It is the Respondent's case that the Applicant's decision to approach the Court is an abuse of the court process since it ignored and neglected to use the proper procedure to defend its position by failing to appear before it.

20. It is the Respondent's case that it is mandated under Article 67 of the Constitution and Section 14 of the National Land Commission Act to review grants and no grant or disposition of public land is exempted from its review. The Respondent contends that this Court cannot interfere with its constitutional and statutory mandate unless and until it performs its mandate in a manner contrary to the Constitution. The Respondent argues that granting an order of prohibition as prayed by the Applicant will be tantamount to preventing it from executing its legal mandate.
21. In addition, the Respondent contends that although the right to property is jealously guarded by the Constitution, Article 40(6) of the Constitution provides that the protection does not extend to any property that has been found to have been unlawfully acquired. The Respondent asserts that the purpose of reviewing grants and dispositions is to determine whether the disposition of public land was done lawfully and regularly.
22. The Applicant's application in **JR No. 309 of 2014** is based on the same grounds with those of **JR No. 172 of 2014.** The Applicant has, however, placed additional information before the Court in the latter application. The Applicant asserts that it bought the two parcels of land in question on 24th September, 2012 from the previous owners, Mombasa Bond Warehouse Limited. The Applicant contends that it entered into the sale agreement after due diligence which included a search on the said property and a visit to the site. Further, that it obtained all the relevant consents for the said transfer including change of user. The Applicant asserts that it paid stamp duty for the parcels of land and after the said purchase has continued paying rates to date.
23. It is the Applicant's case that it enjoyed vacant possession of the land until sometime later when one Yaa Mangi Mavilo alias Mwanyole Mangi Yaa started claiming that the said land belonged to him and lodged a complaint with the Land Fraud Department of the Directorate of Criminal Investigations. The Applicant asserts that investigations carried out by the police concluded that Mr Mangi's claim was unfounded since it was against another parcel of land and not that of the Applicant.
24. Thereafter the Applicant continued enjoying quiet possession and went ahead to put up a perimeter wall at a great cost on the said parcel of land. The Applicant was therefore taken aback by the advertisement in the newspaper.
25. At paragraphs 19 and 20 of his verifying affidavit sworn on 5th August, 2014 Hasmita Patel avers:

> **"19. THAT on the 11th day of April, 2014, the Applicant was perturbed when they saw a public notice on the Standard newspaper at page 43 issued by the Respondent giving notice to the Applicant and other individuals that the said Commission would conduct hearings for the purposes of reviewing grants to several parcels of land including the suit property.....**
>
> **20. THAT contrary to other notices issued with regard to other parcels of land on the said notice, there was no indication on who the complainant was when it came to the parcels belonging to the Applicant."**

26. It is the Applicant's case that despite the stay order, issued by this Court (Odunga, J) in this matter, the Respondent went ahead to revoke its titles in a notice in the newspapers of 1st July, 2014 and confirmed the same through Notice No. 5022 in the Kenya Gazette of 18th July, 2014.
27. Therefore, on top of the grounds upon which relief is sought in **JR No. 172 of 2014,** an additional ground in **JR No. 309 of 2014** is that the Respondent's decision to revoke its title was illegal and unlawful as the same was done in disobedience of a Court order which had been served on the Respondent.
28. Mr Patel avers that upon learning of the revocation of the titles, he went to the offices of the Respondent on 15th July, 2014 where he met one Commissioner by the name Mrs Abigael Mbagaya and that is when he learned that the person who had complained to the Respondent about the Applicant's titles was the Interested Party, Tropical Treasure Limited on the ground that it had allegedly bought the land from Mr Mangi Yaa whose complaint had been dismissed by the police. He avers that he also learned that Mr Mangi had filed a suit in Court in 1997 and attempted to evict occupants of the suit land but later withdrew the suit after it emerged that he had no basis for claiming proprietorship.

29. It is the Applicant's assertion that it is a *bona fide* purchaser for valuable consideration and there is no prove that it was a party to any fraud or misrepresentation.
30. The Applicant asserts that by conducting a hearing, the Respondent usurped the powers of the Environment and Land Court and if allowed to conduct such hearings it will render the Environment and Land Court nugatory.
31. The Applicant reveals that following the decision by the Respondent, the Interested Party has gone ahead to demand that it vacates the land or else its structures on the land will be demolished.
32. The Interested Party opposed the application through the replying affidavit of its Director and Shareholder Abdulswamad Abeid Said sworn on 31st October, 2014.
33. The Interested Party's case is that it acquired a parcel of land known as L.R. No. 28534 and registered at the Coast Lands Registry as C.R. No. 53828 measuring approximately 33.61 hectares as delineated on the Land Survey Plan Number 321708. The property was the ancestral land of the family of the late Mwanyule Mangi Yaa who was born in 1915 and raised on the property. The Interested Party acquired the property from the beneficiaries of his estate.
34. Mr Said avers that the property was the subject of a familial dispute between the late Mwanyule Mangi Yaa and Mwanzije Mwadahabu. The dispute was referred to the District Officer, Kaloleni by the Principal Magistrate's Court at Mombasa for settlement. The Tribunal ruled in favour of the deceased Mwanyule Mangi Yaa in **Land Award Case No. 37 of 1987** and the decision was later adopted by the Court.
35. The Interested Party asserts that the late Mwanyule Mangi Yaa died on 6th August, 2004 but prior to his death he made a formal written application for allotment of the property vide a letter dated 13th December, 1996 addressed to the Town Clerk, Mariakani Urban Council and the District Commissioner, Kilifi District. The setting apart was recommended and approved by the Mariakani Town Council on 1st July, 1997. Further, that the setting apart was captured in a letter dated 23rd June, 2007 addressed to the Commissioner of Lands and copied to the Permanent Secretary in the Ministry of Local Government.
36. In addition, the District Land Officer in a letter dated 21st November, 2008 forwarded to the Commissioner of Lands the requisite documents including the letter of consent dated 11th November, 2008 for setting apart from the Kaloleni Land Control Board and a description of the land and a survey plan for the setting apart from the Provincial Surveyor, Coast Province. Consequently, the setting apart notice was issued as Notice No. 10939 in the Kenya Gazette of 16th October, 2009.
37. There being no objection raised to the setting apart, the administrators of the estate of the late Mwanyule Mangi Yaa obtained a letter of allotment dated 8th June, 2010 from the Government of Kenya. The property was surveyed and a survey deed plan together with other related survey work documentation was forwarded to the Director of Survey, Nairobi for checking and approval. The documentation was later approved and Deed Plan number 321708 issued by the Director of Survey on 23rd March, 2011.
38. It is the Interested Party's case that on 19th August, 2011 the Commissioner of Lands forwarded to the Registrar of Titles, Mombasa the duly signed and stamped original grant for the property in the name of Mwanyule Mangi Yaa for registration purposes at the Mombasa Lands Registry office and the same was duly registered on 4th November, 2011.
39. It is the Interested Party's case that Mwanyule Mangi Yaa being one of the beneficiaries and the administrator of the estate of the deceased informed the Interested Party of the alleged trespass by the Applicant and the Interested Party wrote to the police requesting that the matter be investigated. It is further the Interested Party's case that it later learned that the Adjudication Board, Kilifi County when carrying out extensive adjudication exercise within the Mariakani Area allocated the property to other persons even though the property had already been registered in favour of the Interested Party.
40. The Interested Party asserts that it carried out investigations with the assistance of the local police and identified the Applicant as the alleged trespasser and that is when it took action by complaining to the Respondent. The Interested Party's case is that it took over legal ownership of the property from the family of Mwanyule Mangi Yaa through the transfer dated 11th November, 2011 and as it was in the process of securing vacant possession in 2013, it learned that unknown

persons had trespassed into the property and started fencing off part of the property claiming to have title documents for part of the property.

41. The Interested P arty contends that after it complained to the Respondent through a letter dated 19th November, 2013, the Respondent carried out investigations. Further, that the letters exchanged between the Respondent, the Director of Survey and the Provincial Surveyor, Coast Province confirmed the Interested Party's claim to the property. According to the Interested Party, the property was even resurveyed and the fresh data approved by the Director of Survey. The Interested Party therefore urges this Court to dismiss the Applicant's application asserting that the Respondent had jurisdiction under the Constitution to do what it did.
42. From the arguments and evidence placed before this Court, I identify two questions for determination. The first issue is whether the Respondent had jurisdiction to hear and determine the Interested Party's complaint. If the answer to the first question is in the affirmative then the other question is whether the Respondent complied with the rules of natural justice.
43. The Respondent is a constitutional commission established under Article 67(1) of the Constitution. Under Article 67 (2) it is given functions as follows:

**"(2) The functions of the National Land Commission are—**

**(*a*) to manage public land on behalf of the national and county governments;**

**(*b*) to recommend a national land policy to the national government;**

**(*c*) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**

**(*d*) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**

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

**(*f*) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**

**(*g*) to assess tax on land and premiums on immovable property in any area designated by law; and**

**(*h*) to monitor and have oversight responsibilities over land use planning throughout the country."**

44. Article 67(3) of the Constitution provides that the Respondent may perform any other functions prescribed by national legislation.
45. Under Article 68(c)(v) Parliament is authorized to enact legislation **"to enable the review of all grants or dispositions of public land to establish their propriety or legality."**
46. As per Article 62 of the Constitution, public land consists of:

**"62. (1) Public land is—**

**(*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."**

47.On the other hand private land is defined by Article 64 of the Constitution as:

**"64. Private land consists 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."**

48.Article 40 of the Constitution protects the right to property in the following words:

**"40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

**(*a*) of any description; and**

**(*b*) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

**(*a*) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(*b*) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(*a*) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(*b*) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."**

49. Article 40(6) of the Constitution is therefore clear that any property that has been found to have been unlawfully acquired does not enjoy constitutional protection.
50. Even Section 26 of the Land Registration Act, 2012 which provides for the sanctity of title to land has a proviso. The said Section states that:

**"26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2)……"**

51. In compliance with Article 68 of the Constitution, Parliament enacted among other Acts the National Land Commission Act, 2012 and at Section 5(1) the functions of the Respondent as set out in the Constitution are reiterated. Under Sub-section (2) additional functions are given to the Respondent as hereunder:

**"(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—**

**(*a*) on behalf of, and with the consent of the national and county governments, alienate public land;**

**(*b*) monitor the registration of all rights and interests in land;**

**(*c*) ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;**

**(*d*) develop and maintain an effective land information management system at national and county levels;**

**(*e*) manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and**

**(*f*) develop and encourage alternative dispute resolution mechanisms in land dispute handling and management."**

52. Section 14 of the same Act provides for review of grants and disposition of public land as per Article 68(c)(v) of the Constitution. The Section states:

**"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).”**

53. Having reproduced the applicable provisions of the law, I must state that I have also carefully gone through the written submissions of the parties herein. I will take into account the submissions in arriving my decision.
54. A reading of all the provisions cited above points to the fact that the Respondent has power to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress (Article 67(2) (e) of the Constitution). In regard to this matter, I do not think that the Respondent was executing its mandate of addressing historical injustices since Section 15 of the National Land Commission Act requires the passing of legislation by Parliament to **“provide for investigation and adjudication of claims arising out of historical land injustices for the purposes of Article 67(2)(e) of the Constitution.”** I am not aware that such legislation has been passed by Parliament and neither was it stated by the Respondent that it was acting on the strength of this particular mandate.
55. Under Section 14 of the National Land Commission Act 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 responsibility by querying 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.
56. The law (Article 40 of the Constitution and Section 26 of the Land Registration Act) only protects lawfully acquired property. Any title acquired illegally, unprocedurally or through a corrupt scheme is not protected and so is property acquired fraudulently or through misrepresentation. The Respondent is allowed by the law to enquire into unlawfully acquired public land and direct the revocation of the title or regularise the disposition if the land was irregularly acquired.
57. The Applicant contends that by wading into this dispute the Respondent exceeded its jurisdiction and usurped the role of the Environment and Land Court whose jurisdiction is given by Section 13 of the Environment and Land Court, Act 2011 as follows:

**“13. Jurisdiction of the Court**

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**(e) any other dispute relating to environment and land. (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**

**(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.**

**(5)….”**

58. The Respondent and the Interested Party hold the view that the Respondent’s mandate is not in conflict with that of the Environment and Land Court. They urge this Court to follow the decision of Waithaka, J in **Elizabeth Nditi Njoroge v The National Land Commission [2013] eKLR.** In that case the learned Judge found that there was no friction between the jurisdiction of the Environment and Land Court and that of the Respondent. I agree to some extent with the Respondent and Interested Party’s assertion. Whenever the Respondent operates within its narrow confines, I do not see how it can be said that it has usurped the work of the Environment and Land Court.
59. The jurisdiction of the Environment and Land Court on matters touching on environment and land is quite clear. It is difficult to envisage a situation where both the Respondent and the Environment and Land Court can entertain parallel proceedings between the same parties litigating over the same issues concerning the same parcel of land. Ideally, where the Respondent has jurisdiction, it should be allowed to deal with the matter first and any aggrieved party can then escalate the matter to the Environment and Land Court or the High Court. In the alternative, where the Judge hearing the matter is of the view that the input of the Court is necessary in a matter, the Judge may as well hear the matter and stay the proceedings before the Respondent. After all, the Land Act at Section 128 is clear that any matter under the Act can be referred to the Land and Environment Court for determination. The said provision does not exclude matters, for which the Respondent has been given jurisdiction by the Act, from being referred to the Court.
60. There was an argument by the Respondent that it has jurisdiction over leasehold property because the Government remains the head lessor of such property throughout the lease period. With respect to the Respondent’s counsel, I must state that this is a legal heresy as the Constitution through Article 64(b) classifies land held under leasehold tenure as private property. The Land Act, 2012 at Section 2 defines a lease as a **“grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease.”**

61. It therefore follows that once a person is lawfully and regularly granted leasehold tenure over public land, the land becomes private land and the same can only be converted to public land by (i) compulsory acquisition; (ii) reversion of leasehold interest to Government after the expiry of the lease; and (iii) transfer; or (iv) surrender-see Section 9(c) of the Land Act. Once it is established that public land was converted to private land lawfully and regularly, the mandate of the Respondent ends there. I am of course aware that the Respondent has other powers, including that of compulsory acquisition, in regard to private land but those powers are not relevant and neither are they applicable to the dispute at hand.
62. In the case before me it appears that the dispute revolves around the issuance of two titles over the same parcel of land to two different persons namely the Interested Party and the company which sold the land to the Applicant. The Interested Party gave a detailed account of how the land was lawfully set apart for the estate of the late Mwanyule Mangi Yaa. The Respondent did not cast any doubt on the legality of the process of the conversion of the land from the category of public land to that of private land.
63. In my view, this may be a case of double allocation of public land. Maybe the only way the Respondent can decide whether or not it has jurisdiction over the matter is to hear all the parties. It is, however, not advisable for this Court without the benefit of the full evidence to hold that the conversion of the land in question from public to private was legit and therefore the Respondent does not have any jurisdiction to probe the matter. For the purpose of this case, it is safe to find that the Respondent was acting within its mandate of enquiring into the legality and propriety of a grant or disposition of public land. The Respondent should, however, have the courage to tell the parties to go to the right forum if it finds that it has no jurisdiction to deal with the dispute.
64. The remaining question is whether the Applicant was afforded a fair hearing. It was agreed by the parties during the hearing of this matter that no rules have been made under Section 14(2) of the National Land Commission Act for the better carrying out of the function of review of grants and dispositions by the Respondent. This admission does not in any way change the fact that the said Section 14 requires compliance with the rules of natural justice. Sub-section 3 requires the giving of notice to every person who appears to the Respondent to have an interest in the grant or disposition to be reviewed. Such a party is also entitled to appear before the Respondent and inspect any relevant documents. Sub-section 4 provides that a determination should be made after a hearing. Sub-section 8 is emphatic that in exercise of its power under the Section the Respondent shall be guided by the principles set out under Article 47 of the Constitution.
65. Article 47 of the Constitution provides that:

> **"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.**
>
> **(3)……..”**

66. The Respondent can only exercise the power under Section 14 in compliance with the rules of natural justice. The basic requirements of the rules of natural justice were stated by the Court of Appeal in **De Souza v Tanga Town Council [1961] E.A. 377** as follows:

> **"The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of *University of Ceylon v Fernando* (4), [1960] 1 All E.R. 631. I think**

**that the principles, so far as they affect the present case, may be summarized as under:**

1. **If a statute prescribes, or statutory rules or 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 to 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 if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best…….A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant…..**
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 relevant statement they may desire to bring forward…….**
6. **The tribunal should see 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……"**

67. In summary, an accused person is entitled to know the allegations, the evidence in support of the allegations and ought to be given an opportunity to rebut the allegations before an impartial tribunal. I have already reproduced a paragraph of the affidavit in support of the Applicant's case in **JR No. 309 of 2014** in which Mr Patel admits that he saw the notice in the newspapers inviting the Applicant for a review of its titles. Was that sufficient compliance with the rules of natural justice by the Respondent? I will have to examine the evidence in this case in order to arrive at a decision.
68. The notice in the newspapers did not have the name of the complainant and neither did it disclose the complaint against the Applicant's titles. In order for the Applicant to prepare its defence it ought to have been served with the particulars of the allegations by the Interested Party and informed of the manner in which it allegedly obtained grants to public land in an illegal or improper manner.
69. In a matter that eventually led to the revocation of the Applicant's title, a notice in the newspapers without any useful information was not sufficient. In fact the standard of service is already provided in another land statute. Part VIII of the Land Act which deals with compulsory acquisition of interests in land provides for the procedure for service at Section 131 as follows:

**"131. (1) A notice which may be given under this Part Service of notices. may be served on a person—**

**(a) by delivering it to the person personally;**

**(b) by sending it by registered post to the person's**

**(c) if the whereabouts of the person or the address cannot, after reasonable inquiry, be ascertained, by leaving it with the occupier of the land concerned or, if there is no occupier, by affixing it upon some prominent part of the land;**

**(d) if the person is a body corporate, society or other association of persons, by serving it personally on a secretary, director or other**

**officer thereof or on a person concerned or acting in the management thereof,**

**or by leaving it or sending it by registered post addressed to the body corporate, society, or, if there is no registered office, at any place where it carries on business, or, if there is none, by leaving it with the occupier of the land concerned, or, if there is no occupier, by affixing it upon some prominent part of the land; or**

**(e) the Commission may in addition to serving notice by paragraph (c) and (d), place an advertisement in two newspapers with a national circulation."**

70. As if that is not enough, the same Act provides at Section 151 of the miscellaneous provisions in Part XI for substituted service as follows:

**"151. If the Commission is satisfied that a notice effected and cannot be served personally or by post, either because the person to be served is evading service or for some other reason the Commission may order service to be effected by—**

**(a) affixing a copy of the notice in a conspicuous place-**

**(i) on or as near as may be to the land where possible; and**

**(ii) if the land is community land, at the offices of the Community Land Committee or other public place within the village, or**

**(iii) if the land is public land, at the offices of the county government having jurisdiction in the area where the land is located or other public place in the area where the land is located; and**

**(b) publishing a copy in the Gazette and if it thinks fit, one or more newspapers circulating in Kenya.**

71. The Respondent must be aware or is deemed to be aware of these provisions. Personal service is very important but when that fails the preferred mode of service is by affixing a notice on the land or near it. In the case of substituted service publishing in the Kenya Gazette is one of the alternatives for substituted service. A close reading of these two sections gives the impression that advertisement in the newspapers is not considered as service but is only meant to inform the public of the intended review.
72. In this case no evidence has been placed before the Court to show that the preferred mode of service was used to reach the Applicant. Failure to serve the Applicant with notice and allegations renders the entire process improper and unlawful.
73. In the case of **Civil Service Union v Minister for Civil Service [1985] A.C. 374 at 401 D,** Lord Diplock explained the purpose of judicial review as follows:

**"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..**

**By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**

**By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"**

**(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.**

**I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

74. Failure to comply with the rules of natural justice is a ground for granting judicial review. In this case, the Applicant has proved that the rules of natural justice were not complied with before the Respondent arrived at its decision. As such, as prayed in **JR No. 172 of 2014,** an order of certiorari will issue calling into this Court the Respondent's decision as contained in the Standard newspaper of 11th April, 2014 and having it quashed. Consequently, all actions that arose from that advertisement become null and void. This includes the decision to revoke the Applicant's titles to the parcels of land in question. In my view, it was therefore not necessary for the Applicant to file **JR No. 309/2014.**
75. It must, however, be stated for record purposes that even if the Respondent's decision to hear the dispute on 22nd April, 2014 had been found to be legitimate, the decision of the Respondent to revoke the Applicant's titles as conveyed in Notice No. 5022 in the Kenya Gazette of 18th July, 2014 would still not have seen the light of day for two reasons. The first reason is that the same was made in defiance of the order issued by this Court on 9th May, 2014 staying any further action by the Respondent in respect to the Applicant's parcels of land. The Respondent did not deny receiving the Court order.
76. Any action done in disobedience of a Court order is invalid. In **Commercial Bank of Africa v Ndirangu (1990-1994) EA 69 (CAK)** the Court stated that:

> **"It is imperative that Orders of the Court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the Courts. The blatant disobedience of the Court's consent order in this case renders any transactions in breach of the order to be void and the learned Judge was fully justified in making the orders complained of. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court."**

77. The Court reaffirmed this position recently in the case of **Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others [2014] eKLR** by stating that:

> **"We cannot over emphasis the fact that court orders once issued must be obeyed by those against whom they are directed unless or until they are either discharged or set aside. More so because once a court order is issued, it binds all and sundry, the mighty and the lowly equally, and the County Assembly and the Senate are no exception. The developing trend in our country where parties to litigation appear to be choosing which court orders to obey or disobey must be stopped in order to build the public confidence in the rule of law."**

78. The Respondent acted in flagrant disregard of a clear Court order and such behaviour can only be met with the quashing of its unlawful actions. Once the law is ignored, the only result is a downwards spiral to lawlessness and anarchy. The Government and its agencies should be in the vanguard of obedience of Court orders.
79. The second ground which would lead to the quashing of the revocation of the Applicant's ownership documents is the fact that the Respondent failed to give written reasons for the decision

as required by Article 47(2) of the Constitution.

80. For the foregoing reasons and so as to avoid any doubts, I allow the substantive notice of motion in **JR No. 309 of 2014** and quash the Respondent's decision to revoke the Applicant's title to the two parcels of land in question.

81. Having quashed the decisions of the Respondent, I find no reason for granting the Applicant any other orders. The Applicant's other prayers are therefore dismissed. Each party will meet own costs of these proceedings.

**Dated, signed and delivered at Nairobi this 29th day of May , 2015**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**