



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**MISC APPLICATION NO. 277 OF 2013**

REPUBLIC .....APPLICANT

VERSUS

THE TRUTH JUSTICE AND

RECONCILIATION COMMISSION.....1<sup>ST</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

INSPECTOR-GENERAL NATIONAL POLICE SERVICE.....3<sup>RD</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT

EX-PARTE.....NGENGI MUIGAI

**JUDGEMENT**

1. Through the Notice of Motion application dated 30<sup>th</sup> July, 2013 the ex-parte Applicant, Ngengi Muigai prays for orders as follows:

“a. **AN ORDER OF CERTIORARI** to issue, to bring unto this Honourable Court the findings and recommendations contained in the Report of the 1<sup>st</sup> Respondent wherein the ex-parte Applicant has been adversely mentioned therein more specifically Volume IIB Chapter 2 paragraph 358 page 294/448 which states that in 1997, 85 hectares of Karura Forest were illegally excised and allocated to S.K. Macharia, Joseph Gilbert Kibe and Ngengi Muigai. The beneficiaries almost immediately sold the land, registered as L.R. No. 216/8 to the Kenya Re-Insurance Corporation for Kshs550 million. Allocation of the land coincided with the 1997 General Election. It is recommended that all such illegal land allocations should be nullified. Land should be repossessed and restored to the purpose for which they were reserved, in this case, a forest reserve for purposes of being forthwith quashed.

b. **AN ORDER OF MANDAMUS** to issue forthwith directed at the 1<sup>st</sup> Respondent compelling it either be itself, its servants, employees, agents and/or persons acting under their instructions to forthwith and unconditionally bring to this Honourable Court evidence of the allegations made by the commissioners of the 1<sup>st</sup> Respondent

and publicly broadcasted on the 3<sup>rd</sup> of June 2013 that the First President of the Republic of Kenya grabbed what should have been public or communal land and dished it to relatives. The specific case being the allocation of large tracts of government land acquired without official approval and without compliance of legal procedures and granted to the Applicant as a wedding gift.

**c. A FURTHER ORDER OR MANDAMUS that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents be compelled to carry out comprehensive investigation on the veracity or otherwise of the allegations contained in the 1<sup>st</sup> Respondent's report and recommendations regarding the matter herein for which the 1<sup>st</sup> Respondent omitted to do so as in order to establish the fact and the truth surrounding the issues and allegations in respect of Land Registration number 216/8.**

**d. AN ORDER OF PROHIBITION to issue prohibiting the 2<sup>nd</sup> Respondent from implementing the offensive recommendations contained in the Report of the 1<sup>st</sup> Respondent until the investigations by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are carried out and the Report reflects a true record of events and all inaccuracies are permanently expunged from the Report of the 1<sup>st</sup> Respondent.**

**e. The costs be provided for."**

2. The application is supported by the statutory and the verifying affidavit of the Applicant filed together with the chamber summons application for leave on 25<sup>th</sup> July, 2013.
3. The 1<sup>st</sup> Respondent, the Truth, Justice and Reconciliation Commission ("the Commission") was a commission established under Section 3 of the Truth, Justice and Reconciliation Act, 2008 ("the Act") whose functions as found in Section 6 of the Act included investigation of gross violations and abuse of human rights between 12<sup>th</sup> December, 1963 and 28<sup>th</sup> February, 2008, reconciliation and recommendation of redress.
4. The Attorney General who is the 2<sup>nd</sup> Respondent is the principal legal advisor to the Government of Kenya pursuant to and within the meaning of Article 156 of the Constitution.
5. The 3<sup>rd</sup> Respondent, the Inspector General is the head of the National Police Service whereas the 4<sup>th</sup> Respondent, the Director of Criminal Investigations who is under the 3<sup>rd</sup> Respondent is responsible for investigation of crime, the collection of criminal intelligence and apprehension of offenders.
6. The Applicant's case is that he is a businessman based in Nairobi. He averred that on 21<sup>st</sup> May, 2013 he heard from media reports that the Commission had presented its report to the President of the Republic of Kenya. Subsequently the Commission's servants, employees, and/or agents sent a statement to media houses which suggested that he was a beneficiary of the breach of the public trust by benefiting from vast tracks of public land as a wedding gift from the First President of the Republic of Kenya.
7. It was the Applicant's case that the false information was broadcast in various media and he arranged for the online report of the Commission to be downloaded from its website. After going through the report, he established that he had indeed been adversely mentioned in a section titled: The Case of Karura Forest in paragraph 358 at page 294 of Chapter Two of Volume IIB. The Applicant averred that the Commission's report recommended that the allocation of L.R. No.216/8 be nullified and the land be repossessed and restored for the purpose for which it had been reserved namely a forest reserve. The report also further stated that the allocation of the land conceded with the 1997 General Election thus creating the impression that public land may have been illegally allocated as a political reward.
8. It is the Applicant's case that the Commission made a finding that historical grievances over land constituted the single most important driver of conflicts and ethnic tension in Kenya and that close to 50% of the statements and memorandum it received related to or touched on claims over land. According to the Applicant, the paragraphs implicating him in the illegal acquisition of public land are deliberately inaccurate and designed to wrongfully implicate him and destroy his

- standing and dignity in society.
9. The Applicant asserted that it had been stated in the report that the Commission had over 300 statement takers and had put in place a specific procedure for statement taking. The Applicant deposed that although the Commission was in existence for over four years, at no time did it summon, notify or inform him about his being adversely mentioned and this contravened the rules of natural justice.
  10. It is the Applicant's position that he was never given a right of reply nor an opportunity to rebut the allegations made against him during the statement taking. The Applicant averred that had he been given a right of reply he would have demonstrated that L.R. 216/8 was never part of Karura Forest as the initial owner of the said parcel of land was one Gladys Thompson.
  11. The Applicant asserted that the Commission relied on previous reports without taking into account the relevance, probative value and reliability of those reports when considering them therefore making the Commission's recommendations tainted with utmost illegalities. Further, that the report is damaging to his reputation and is based on rumours and allegations to which he was never given an opportunity to respond to.
  12. It is therefore the Applicant's assertion that the recommendations and findings in the report of the Commission are illegal, irrational, actuated by malice and bad faith. In addition, it is his case that the report violated his constitutional right under Article 47 of the Constitution to fair administrative action.
  13. The Applicant postulated that the recommendations contained in the report were likely to be implemented as the Act expressly obligated the Commission under Section 48(2)(f) to make recommendations on the mechanism and framework for the implementation of its recommendations and on institutional arrangement in that connection.
  14. As per the statutory statement, the Applicant seeks relief on the grounds that the Commission acted irregularly, in breach of the rules of natural justice, without jurisdiction, in breach of his legitimate expectation and abused its discretionary powers.
  15. Although all the respondents were served, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any response to the application. The Commission opposed the application through the replying affidavit of its Chief Executive Officer, Elijah Leiro Letangule sworn on 19<sup>th</sup> August, 2013.
  16. From the said affidavit it is the Commission's case that it honestly and faithfully complied with the provisions of the law and particularly the provisions of the Act in fulfilling its objective of promoting peace, justice, national healing and reconciliation of the people of Kenya. Mr Letangule averred that in compliance with the Act the Commission conducted its investigations and public hearings and finally compiled a report which was presented to the President of the Republic of Kenya on 21<sup>st</sup> May, 2013. He also averred that the Applicant has not challenged the constitutionality of the Commission.
  17. Turning to the facts of the application, Mr Letangule averred that the information in respect to the Applicant was acquired from the report of the Ndung'u Commission of Inquiry into Illegal/Irregular Allocation of Public Land, 2002 ("the Ndung'u Report"). He deposed that the said Ndung'u Report is a public record containing information from findings concerning illegal/irregular allocation of public land. It is the Commission's case that it was mandated by the Act to draw inferences and rely on information it had cause to believe to be true.
  18. Further, that the law empowered the Commission to gather, by any means it deemed appropriate, any information it considered relevant including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary. Mr Letangule averred that to the best of the Commission's knowledge the Applicant had never challenged the findings of the Ndung'u Commission and he was therefore deemed to have waived his right to contest those findings.
  19. It is the Commission's case that its report was made public as per the requirement of the Act. Further, that the implementation of the recommendation touching on the Applicant has been constitutionally bestowed upon the National Land Commission which is a creature of Constitution and the National Land Commission will look at the matter afresh and afford the Applicant a further opportunity to make representations in his favour. The Respondent also asserted that in any case the Applicant will be granted an opportunity by the implementing institution to articulate his side of the case.
  20. Considering the arguments of the parties herein, it emerges that one of the questions for the

determination of the Court is whether the Applicant was given an opportunity to be heard by the Commission. The other question is whether the orders of judicial review are available to the Applicant in the circumstances of this case.

21. It is not disputed that in Volume IIB at paragraph 358 of page 280 of the Commission's report the following statement appear:

**“The case of Karura Forest**

**358. In 1997, 85 hectares of Karura Forest were illegally excised and allocated to S.K. Macharia, Joseph Gilbert Kibe and Ngengi Muigai. The beneficiaries almost immediately sold the land, registered as L.R. No.216/8 to the Kenya Re-insurance Corporation for Kshs.550 million. Allocation of the land coincided with the 1997 General Election, creating the impression that public land may have been illegally allocated as a political reward.<sup>362</sup> It is recommended that all such illegal land allocations should be nullified. Land should be repossessed and restored to the purpose for which they were reserved, in this case, a forest reserve.”**

Footnote 362 is given as:

**“Report of the Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002) at page 83. See, also report of Ndung'u Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2002), Annexes, Volume II, Annex 1, page 6.”**

22. It is the Applicant's case that he was never summoned by the 1<sup>st</sup> Respondent and neither was he granted the right of reply. The Commission does not dispute the Applicant's assertion that he was never contacted for comments on that finding in the Ndung'u Report.
23. The Applicant submitted that seriousness should be accorded to the Commission's report considering that it was a component of transitional justice. The Applicant pointed out that the components of transitional justice are interrelated. They are criminal prosecutions of those perpetrators considered to be the most responsible; reparations through which the governments recognize and take steps to address the harm suffered; institutional reforms of abusive state institutions such as armed forces, police and courts in order to dismantle structural machinery for abuse and prevent recurrence of serious human rights abuses and impunity; and truth commissions to investigate the patterns of abuse, recommend changes and help in understanding the underlying causes of serious human rights violations.
24. According to the Applicant, the 1<sup>st</sup> Respondent was given wide mandate by the Act in the performance of its duties but it did not conform to the law and the standards of fair procedure. It is the Applicant's case that Rule 20(3) of the Truth, Justice (Hearing Procedure) Rules clearly provided that interested parties, including adversely mentioned persons or their representatives, shall at the individual, thematic and institutional hearings have a right of reply. The Applicant further stated that the report of the Commission stripped him of his dignity and this is in breach of Article 28 of the Constitution.
25. It is the Applicant's case that the Commission's assertion that he waived his rights is untenable as fundamental rights are mandatory on the state and no citizen can by his act or conduct relieve the state of the solemn obligation imposed on it. On this argument reliance was placed on the decision of the Indian Supreme Court in **Bashesher Nath V Income Tax Commissioner, AIR 1959 S.C. 149.**
26. The Applicant submitted that in adopting the Ndung'u Report, the Commission ought to have been guided by three principal criteria namely relevance, probative value and reliability. The Commission ought to have established that the research techniques of the Ndung'u Commission met or exceeded its standards. Furthermore, the Truth, Justice and Reconciliation (Hearing Procedure) Rules required the Commission to inform any person adversely mentioned in a document so that the person could respond to the allegations.
27. The Applicant contended that had the Commission carried out investigations it would have established that L.R No. 216/8 was not excised from a forest.

28. The Applicant asserted that as per Section 48 of the Act, the report of the Commission shall–

**“(a) summarize the findings of the Commission and make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the object of the Commission;**

**(b) make recommendations for prosecution;**

**(c) recommend reparations for the victims;**

**(d) recommend specific actions to be taken in furtherance of the Commission’s finding;**

**(e) recommend legal and administrative measures to address specific concerns identified by the Commission;**

**(f) make recommendations on the mechanism and framework for the implementation of its recommendations and an institutional arrangement in that connection.”**

29. Even though the Commission filed a replying affidavit, it did not participate in these proceedings thereafter. The reason could be the fact that section 52(1) of the Act clearly provides that **“[t]he Commission shall stand dissolved three months after the submission of its report to the President.”** That means that the Commission stood dissolved three months from 21<sup>st</sup> May, 2013 when it presented its report to the President.

30. Although the Attorney General is a party to this matter, and counsel from that office attended the mentions in these proceedings, the Attorney General never filed any papers in response to these proceedings.

31. The importance of the Commission’s report to the wellbeing of this country can be seen from the fact that Section 10 of the Act provides that out of the nine commissioners, three were to be non-citizens who were to be picked by the Panel of Eminent African Personalities which had spearheaded mediation efforts following the post–2007 election crisis. Although the formation of a truth commission had been mooted prior to the post-2007 election crisis, its necessity became pronounced after the crisis.

32. The Commission was therefore one of the tools, identified by the people of Kenya through their parliamentary representatives, for addressing historical injustices and bringing a closure to the past. It is therefore surprising that the state was not interested in having its voice heard in such a weighty matter. Be that as it may, I will proceed to make my decision based on the material placed before the Court.

33. Ordinarily, the rules of natural justice are not applicable to reports and investigations. In normal circumstances recommendations in reports do not therefore attract judicial review orders. There are, however, two exceptions to this rule. One exception is that where a recommendation or report will have direct impact on the rights of an individual, the individual must be given an opportunity to defend himself/herself before the report is compiled. The other exception is that if the report is likely to be adopted as it is or if the adopting body has no discretion over the adoption of the report, then its preparation must comply with the rules of natural justice.

34. H.W.R. Wade and C.F. Forsyth in the 10<sup>th</sup> Edition of **Administrative Law** at pages 466 to 467 have discussed the principles governing the application of the rules of natural justice to reports and investigations and stated that:

**“Natural justice is concerned with the exercise of power, that is to say, with acts or orders which produce legal results and in some way alter someone’s legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step**

is fair to persons affected.

The House of Lords considered this question in an income tax case where the tax authorities, before they could take the taxpayer before the tribunal which determines whether the object of some transaction is tax avoidance, were required to show a prima facie case to the tribunal. The tribunal refused to allow the taxpayer to be represented, or to see the evidence submitted to it by the authorities, at that stage. The House of Lords upheld this ruling, since the taxpayer would have full opportunity to state his case to the tribunal in the later proceedings. As Lord Reid said, every public officer who has to decide whether to prosecute ought first to decide whether there is a prima facie case, but no one supposes that he need consult the accused. There was nothing inherently unjust in the procedure, which as a whole was found to be fair in its statutory context. But the House of Lords strongly reaffirmed the general doctrine of the right to a fair hearing, and held that there was nothing about the determination of a prima facie case which automatically excluded it: the procedure must pass the test of fairness at each and every stage.

In general, however, the courts are favourable to the observance of natural justice in the making of preliminary investigations and reports which may lead to serious legal consequences to some person. The Commission for Racial Equality and its committees must act fairly in making their investigations, though considerable latitude is allowed as to its procedure. Inspectors investigating the affairs of a company under statutory powers must give the directors a fair opportunity to meet criticisms, even though the object is merely to make a report. A police officer threatened with compulsory retirement is entitled to have the report of a preliminary inquiry disclosed to his own doctor. A gas company should be given the opportunity to comment on an adverse report by a gas tester which might lead to an order against it by the local authority. These are really instances of the right to know the opposing case. But an academic board considering a student's record and recommending his expulsion was not obliged to give him a hearing since it merely made a recommendation and there was adequate opportunity for his case to be heard by the governing body when considering the recommendations.”

(Citations omitted)

35.A perusal of the Act clearly shows that Parliament intended that the recommendations of the Commission be implemented. That is why it provided the implementation and monitoring mechanism in sections 49 and 50 as follows:

**“49. Implementation of Commission’s report**

(1) The Minister shall, upon the publication of the report of the Commission, operationalise the implementation mechanism or arrangement in accordance with the recommendations of the Commission under section 48(2)(f) to monitor the implementation of the recommendations of the Commission and to facilitate their implementation.

(2) The implementation committee shall publish the reports of the Government in the appropriate form and submit its own quarterly reports to the public evaluating the efforts of the Government and the efforts of any other person or body concerned to implement the recommendations of the Commission.

(3) Implementation of the report of the Commission shall commence within six months upon publication.

**50. Report to the National Assembly**

**(1) The Minister shall report to the National Assembly within three months of receipt of the report of the Commission, and twice a year thereafter, as to the implementation of the Commission's recommendations.**

**(2) All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation."**

36. In the circumstances of this case it cannot therefore be said that the report of the Commission is a mere recommendation and that orders of judicial review are not available in respect thereto. The chances are that the report may be implemented as it is and the impact of the report on the rights of the Applicant cannot be doubted.
37. As already stated, the Applicant was never afforded an opportunity to state his case. The Commission only copied and pasted the finding in the Ndung'u Report and recommended that L.R. No.216/8 be repossessed and restored as a forest reserve. Although the Respondent's position is that the implementing agency in respect of recommendations touching on public land will be the National Land Commission which will give an opportunity to the Applicant to have his say, the Act does not seem to envisage a fresh hearing before the report is implemented. The Commission's findings and recommendations therefore appear to be final only awaiting implementation by the Cabinet Secretary.
38. However, it must always be remembered that judicial review is a discretionary remedy. Its core purpose is to do justice to the aggrieved applicant as well as to the public at large. In certain situations, the effect of orders on matters that affect the greater public must be given due consideration before they are issued.
39. The discretionary nature of judicial review has been explained by the learned authors of **Halsbury's Laws of England, Administrative Law & Admiralty, 4<sup>th</sup> Edition**, page 270 para. 122 as follows:

**"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus), declaratory orders and injunction are all discretionary. The court has a wide discretion whether to grant relief at all and, if so, what form of relief to grant.**

**In deciding whether to grant relief the court will take account of the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver of the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment.**

**The court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of the demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders. Declaratory**

**relief was awarded to a probationer constable who was wrongly induced to resign. Although an order of mandamus directing his reinstatement was the only satisfactory remedy so far as the applicant was concerned. However, in practice an order of mandamus might have bordered on usurpation of the powers of the chief constable.”**

**[Footnotes omitted]**

40. In my view, there are good reasons for not exercising the Court’s discretion in favour of the Applicant in this matter. It is important to note that the implementation of the report of the Commission was supposed to commence within six months upon its publication but it seems that nothing has happened over two years since the report was published. There is therefore no imminent threat of the implementation of the recommendation against him.
41. It is also clear that according to the Act, the Minister (now the Cabinet Secretary) shall implement the recommendations of the Commission and where any recommendation has not been complied with the Cabinet Secretary shall furnish the National Assembly with reasons for non-implementation. When and if the time comes for the implementation of the recommendation against the Applicant, there will be an opportunity for the Applicant to present his case to the Cabinet Secretary and explain why the recommendation against him should not be implemented.
42. In any case, the current structure of the Government does not have a Cabinet Secretary responsible for matters relating to justice and constitutional affairs. According to Section 2 of the Act, this is the Cabinet Secretary who is supposed to be responsible for the implementation of the report of the Commission. It therefore seems like the findings and the recommendations may not be implemented in the near future.
43. Another factor that needs to be taken into account in this matter is the fact that, as was correctly stated by the Commission, there is no evidence that the Applicant questioned the findings in the Ndung’u Report. That report remains a public record and it cannot be wished away. Granting orders herein would amount to a belated attempt to quash the findings in the Ndung’u Report.
44. All in all, although the Applicant may have had a strong case for issuance of the orders sought, the circumstances of this case and the great public interest attached to the report of the Commission makes me withdraw my scalpel in order for the report of the Truth, Justice and Reconciliation Commission to remain intact. As earlier stated, the Commission was meant to address historical injustices and bring healing to our country. That is the higher ideal. The mutilation of the report as proposed by the Applicant is not in the interest of the people of Kenya.
45. As for the orders sought against the 3<sup>rd</sup> and 4<sup>th</sup> respondents, I find that those orders are not available to the Applicant. There is no evidence that he has sought the services of these respondents and they have refused to perform their constitutional and statutory duties.
46. For the forgoing reasons I find that the Applicant’s application should fail. The same is therefore dismissed.
47. In light of the reasons for my decision, it would be unjust to saddle the Applicant with the costs of these proceedings. I therefore direct each party to meet own costs of the proceedings.

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of June, 2015.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**