



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.491 OF 2014

BETWEEN

KARSAN VELJI VELANI.....PETITIONER

AND

THE NATIONAL LAND COMMISSION..... 1ST RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Karsan Velji Velani, is a beneficiary and Administrator of the Estate of the Late Velji Parbat who was the lessor of property known as Plot No. L.R 12224 measuring 1, 500 acres for a period of twenty seven years and 6 months starting 1st June 1980. The property is situated in Vanga Location, Kiwegu sub-location, Bondeni Mtungoni in Kwale County.
2. He has filed this Petition challenging the National Land Commission's Public Notice titled 'Expiry of Leases and Revocation to County Government Kwale-Tiwi Block 11, 12, 18 and 12225 KIDOMAYA/LUNGALUNGA' posted in the "East African Standard" Newspaper of 19th September, 2014. The said Notice revoked the Petitioner's lease over Plot No. L.R 12224 (the suit property).
3. It is the Petitioner's claim that the revocation of the lease to the suit property violated his right to fair administrative action as provided for under **Article 47** of the **Constitution** because he was not afforded an opportunity to be heard before the Respondent made its determination. He further claims that his right to property under **Article 40** of the **Constitution** has been violated and is also his contention that the Respondent is acting outside its mandate and in violation of **Articles 62** and **67** of the **Constitution**.
4. In its Petition dated 1st October, 2014 he therefore seeks the following orders;

“(a) The Petitioner prays this Honourable Court be pleased to remove into this Court and quash the Public Notice published in the Standard Newspaper of 19th September 2014 in toto. (sic)

(b) The Petitioner also prays that the Hon. Court be pleased to prohibit the Respondent from looking into or in any way whatsoever interfering with the property under lease by the Petitioner

for the extended duration of the lease.

(c) The Petitioner prays that the Honourable Court be pleased to declare that the Petitioner is entitled to receipt of the extended lease and signing of its certificate of lease.

(d) Costs of the Petition to the Petitioner.

(e) Any other relief the Honourable Court may be pleased to grant.

(f) Declaration that the Public Notice by the Respondent was both irregular, unreasonable, and procedurally unfair contrary to Article 47 of the Constitution.”

The factual background

5. The factual background of the case has been set out in the Petitioner’s supporting affidavit as follows;
6. That prior to the expiration of the Petitioner’s 27 years lease granted to the Petitioner’s late father, the latter applied for an extension of the same in 1993 and the County Council of Kwale in its Full Council Meeting held on 21st July, 1993 approved the extension for a further 66 years commencing 1st January 2009, but with certain conditions to wit, that the Petitioner surrenders 185 acres for settlement of squatters and a further 115 acres to the County Council for its development agenda. The Petitioner accepted the conditions and implemented them.
7. Subsequently, the Commissioner of Lands on 4th January 1996 wrote to the Petitioner’s father confirming that the request for extension of the lease had been approved subject to him fulfilling the stipulated conditions. On 7th September, 2007, the County Council of Kwale wrote to the District Commissioner, Kwale, informing him that the Petitioner’s late father’s lease to the suit property had been renewed.
8. The Petitioner’s father then proceeded to fulfill the set conditions and sub-divided the original land into three. He thereafter obtained the Deed Plan No. 189817 being for the 185 acres for squatters’ settlements, Deed Plan No. 284110 being for the 115 acres to be surrendered to the County Council of Kwale and Deed Plan No. 884111 to be registered in the Petitioner’s name. He also surrendered the original lease documents and paid requisite surrender lease fees to allow issuance of new leases.
9. On 20th December, 2010 the County Council of Kwale through its Trade, Planning and Marketing Committee allegedly purported to alter the decision of the Full Council and instead granted the Petitioner’s father 400 acres out of the 1500 acres of the suit property for a lease period of 33 years.
10. The Petitioner dissatisfied with that decision, moved the High Court and filed **Judicial Review Miscellaneous Applic No.19 of 2012** to challenge the said decision. In a judgment delivered on 14th February, 2014, the Court found in favour of the Petitioner in terms I shall revert to later.
11. On 14th September, 2014 the Respondent published the public notice of 19th September, 2014 in the “East African Standard” Newspaper notifying the public of the expiry of the lease and reversion of the suit property to the County Government of Kwale hence the present Petition.

The Petitioner’s case

12. It is the Petitioner’s case that the Respondent, in issuing the purported public notice, acted ultra-vires its mandate. That the mandate of the Respondent is limited to only managing and overseeing public land and not private land. He claims therefore that since the suit property is private land, the

Respondent cannot exercise its oversight powers over it. He further claims that the Respondent did not have jurisdiction to issue the public notice with regard to the suit property and submitted that the Respondent is a creature of the Constitution and the relevant Act and as such it could only exercise its powers as is conferred to it by the Constitution and the relevant Act i.e. the National Land Commission Act. He therefore contended that the impugned notice was a nullity. In that regard, he relies on the decision of ***Re Hebtulla Properties Ltd (1979) KLR 96*** where it was held that a body that is a creature of Statute can only do the things it has been empowered to do by the same Statute.

13. The Petitioner also submits that he had obtained a judgment in its favour that is binding since no appeal was preferred against it and that the judgment is particularly binding on the County Government of Kwale and other parties such as the Respondent.
14. It is the Petitioner's further submission that the Respondent in publishing the purported Public Notice violated its right to fair administrative action. That the Respondent violated **Section 14(3)** of the **National Land Commission Act** that requires it to give a hearing to any person who may have an interest in the grant or disposition in question. It is therefore the Petitioner's case that its right under **Article 47** of the **Constitution** has been violated and relies on the decision of ***Attorney General vs Ryath (1980) AC718*** and ***Compar Investments Ltd vs Kenya Urban Roads Authority (2014) e KLR*** where it was held that a party affected by an administrative decision had a right to be heard especially when the ultimate decision to be made may be adverse to him.
15. The Petitioner in addition contends that his right to property as provided for under **Article 40** of the **Constitution** had been violated and that he has a proprietary right in and over the suit property. That the decision by the Respondent to issue the public notice in question is an attempt at arbitrarily depriving the Petitioner of his interest in and over the suit property.
16. The Petitioner also submits that his legitimate expectation was that the lease extension would be signed pursuant to the Court order and that he would continue to be the sole registered proprietor of the suit property for the extended lease period. He relies on the decision of ***Diana Kethi Kilonzo & Another vs The Independent Electoral and Boundaries Commission (IEBC) & 2 Others (2013) e KLR*** in making that point where the High Court held that legitimate expectation created an estoppel against a public body or official so that the person benefitting from the practice would continue to so benefit and it would not be withdrawn without due process. He claims that it was his legitimate expectation therefore that the lease documents would be signed in accordance with the Court order in ***Msa Judicial Review No. 19 of 2012*** and that it is a violation of his legitimate expectation for the County Government of Kwale to hold consultations with the Respondent and cause the Respondent to issue a public notice which has the effect of terminating the Petitioner's right to property, arbitrarily.
17. The Petitioner therefore urges the Court to find that the actions of Respondent are ultra vires and asked the Court to quash the same and grant all other orders reproduced elsewhere above.

The Respondent's case

18. The Respondent, in opposing the Petition, filed the following grounds of opposition on 4th March, 2015;

“(1) That this Honourable Court lacks jurisdiction to determine the Petition for the following reasons;-

- i. ***Article 67 of the Constitution, Section 5 and 18(9) of the National Land Commission Act and Section 12 and 13 of the Land Act confers the responsibility of allocating public land and extending lease on behalf of the National and County Governments to the Respondent.***
- ii. ***The Petitioner seeks to unprocedurally enforce a Court order through the Petition contrary to***

the provisions of the law.

(2) *That the Petitioner is asking this Court to prevent the Respondent from performing its constitutional and statutory mandate without a sufficient reason.*

(3) *That Respondent's mandate to publish notices does not violate the Petitioner's rights."*

19. Further, it submits that the Courts lack jurisdiction to hear and determine the Petition because the issue as to whether there is an extended lease and whether the lease should be signed in favour of the Petitioner is the mandate of the Respondent. That **Section 13** of the **Land Act** also confers the responsibility of extending any lease on behalf of the National and County Governments on the Respondent. It is therefore its other submission that the Constitution and the relevant statute confer the responsibility of allocating public land, renewal and extension of leases of public land on the Respondent. In addition it claims that it is for the Respondent to determine whether applications for allocation, renewal and extension of public land meet the requirements set out in the law and that where the law has mandated a certain organ/body to perform an Act, then the Court should let that body perform its mandate without interference. It relies on the case of *Diana Kethi Kilonzo & Another vs The Independent Electoral and Boundaries Commission & 10 Others (supra)* in that regard.

20. In addition to its mandate under **Section 13** of the **Land Act**, it contends that **Article 67(2)(e)** of the **Constitution** grants the Respondent the right to initiate investigations, on its own initiative or on a complaint made into present or historical land injustices and recommend appropriate redress. It therefore submits that granting an order prohibiting the Respondent from investigating dealings regarding the suit property would amount to preventing it from performing its constitutional and statutory mandate.

21. On the issue of the judgment delivered by Mukunya J. in *Msa Judicial Review Applic No. 19 of 2012*, the Respondent asserts that if the Petitioner had any right arising from that judgment, the same should be determined and enforced by the same Court which gave the judgment and not in another suit in the disguise of a Constitutional Petition. It claims further that **Section 34** of the **Civil Procedure Act** provides that all questions arising between parties to a suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. On that point, reliance is placed on the decisions of *Fatuma Mohamed Sharif vs Principal Magistrate Court Kajiado & 2 Others (2014) e KLR* and *Kemrajh Harrikisson vs Attorney General of Trinidad and Tobago (1979) 3 WLR 63* where the Courts held that where a procedure is provided for in law, that procedure must be followed unless there is good reason not to do so.

22. On the issue of alleged failure to issue notice to the Petitioner the Respondent submits that **Section 14** of the **National Land Commission Act** does not apply to the present proceedings because the suit property does not involve an interest in the grant or disposition of land.

23. The Respondent for the above reasons therefore urges the Court to dismiss the Petition with costs to the Respondent.

Determination

24. I have read the Parties' respective pleadings and their submissions both oral and written in support of their respective cases. In the Petition, as can be seen above, the Petitioner goes into some detailed factual background about his ownership of the suit property and basically alleges that the Respondent, in issuing the public notice published in the East African Standard Newspaper of 19th September, 2014 violated his rights to fair administrative action as provided for under **Article 47** of the **Constitution** and the right to property as stipulated in **Article 40** of the **Constitution**.

25. In that regard, it must be borne in mind that in determining the present dispute, the Court is not

- inquiring into the merits or otherwise of the lease entered into between the Petitioner and the Respondent. Rather its role is limited to an inquiry as to whether the Respondent has violated the Petitioner's constitutional rights in issuing the impugned public notice.
26. In that context, the substratum of the Petitioner's case is that there is a judgment ordering the County Government of Kwale to sign a lease in his favor and that despite the judgment, the Respondent went ahead and issued the impugned public notice in contravention of **Articles 40 and 47** of the **Constitution**.
27. The Respondent on its part has claimed that it was within its mandate to issue the public notice because it has the statutory mandate to determine the extension and renewal of any lease involving public land. It is its position that this Court does not have the jurisdiction to hear and determine the Petition herein because the issue of extension of a lease, subject matter of the Petition, is a function of the Respondent. This is therefore where I shall begin and for good reason; jurisdiction is everything and without it, no Court can take a single step - See ***Owners of Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd (1989) 1 KLR 14***.
28. On my part therefore, the Respondent is a constitutional commission established under **Article 67(1)** of the **Constitution** with certain specific functions.
29. In addition to the above, **Section 5(2)** of the **National Land Commission Act** provides that the Respondent shall *inter alia* alienate public land on behalf of and with the consent of the National and County Governments. Further, **Section 18** of the same **Act** requires the Respondent to establish **County Land Management Boards** whose function is to, *inter alia* process applications for allocation of land, change and extension of user of and sub-division of public land as well as renewal of leases.
30. **Section 13** of the **Land Act** also confers the Respondent with the responsibility of extending any lease of public land on behalf of the National and County Government.
31. It is clear to my mind therefore that since the Constitution and the Statute confer the responsibility of allocating public land, renewal and extension of leases of public land on the Respondent, it is therefore specifically the body that has the mandate to determine the issue of extension of the Petitioner's lease. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy or procedure to a party, this Court must exercise restraint and first give an opportunity to such relevant bodies or State organs to deal with the dispute as provided in the relevant statute – See Court of Appeal decision in ***Speaker of National Assembly vs Njenga Karume [2008] 1 KLR 425***.
32. It is also my view, that the above principle lays down an important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue and where there exists another organ or body vested with the mandate of determining the dispute, then it is desirable that such a procedure/remedy should be pursued first - See ***Harrkinson vs Attorney General of Trinidad and Tobago [1980] AC 265***.
33. Applying the above principle to the instant case, I am aware that the Petitioner has filed this petition under **Articles 22** of the **Constitution** seeking to enforce his rights to fair administrative action and to property. In that regard, I have already stated that his case is straight forward and it is that the Respondent alleged violated the aforesaid constitutional rights and disregarded the judgment in ***Msa Judicial Review No.19 of 2012***. However, the Respondent has contended in reply that the said judgment was unclear as to what orders were being granted and so I will now pause here to look at the said judgment.
34. Mukunya J in concluding his judgment of 14th day of February, 2014 stated as follows;

“Should the orders prayed herein be granted? My answer to this question is in the affirmative. I

grant the applicant the relief he seeks in his application dated 24th August, 2012”.

Although controversy arose before me as to the meaning of the above statement, it is obvious that the learned judge granted the Applicant all the orders he had sought in the Application dated 24th August, 2012. To my mind, those orders can only have been the orders sought in the substantive motion for judicial review application and not the chamber summons for leave to institute judicial review orders. I say so because a judgment must be read holistically. Having said so one of the issues framed by the learned judge for determination was; **“Can the application for judicial review be granted and that is what he answered in the affirmative.”** That then clears any doubts as to what was before the judge. I reiterate that it could not have been the application for leave to institute judicial review proceedings as argued by the Respondent and I have said why.

35. Further, I sadly note that parties neither extracted the decree arising from the above judgment and if they did, they never availed it to this Court nor did they supply the pleadings in the judicial review matter. I do not therefore have the final orders issued in that suit and I am unable to determine whether the Court granted the Petitioner an order specifically to the effect that the County Government of Kwale should sign the extension of lease. However and having said so and as a pointer to what was before the judge, in the body of the judgment, the learned judge reproduced the prayers in the leave application and they were as follows;

“(a) The Petitioner prays this Honourable Court be pleased to remove into this Court and quash the Public Notice published in the Standard Newspaper of 19th September 2014 in toto. (sic)

(b) The Petitioner also prays that the Hon. Court be pleased to prohibit the Respondent from looking into or in any way whatsoever interfering with the property under lease by the Petitioner for the extended duration of the lease.

(c) The Petitioner prays that the Honourable Court be pleased to declare that the Petitioner is entitled to receipt of the extended lease and signing of its certificate of lease.

(d) Costs of the Petition to the Petitioner.

(e) Any other relief the Honourable Court may be pleased to grant.

(f) Declaration that the Public Notice by the Respondent was both irregular, unreasonable, and procedurally unfair contrary to Article 47 of the Constitution.”

36. Reading the above prayers, it can only be that the orders that the learned judge granted in the Notice of Motion dated 24th August 2012 can only be the same ones for which leave was granted. I shall revert to this issue later in the judgment.

37. Having said so, I now turn to consider the arguments made on the Petition. As stated earlier, the Petitioner’s case is that the Public notice published by the Respondent violated his rights to fair administrative action and right to own property.

38. It is not in dispute that the Respondent issued the impugned notice. The said notice read as follows;

PUBLIC NOTICE

EXPIRY OF LEASES AND REVERSION TO COUNTY

GOVERNMENT OF KWALE – TIWI BLOCK 11, 12, 18 AND 12225

KIDOMAYA/LUNGALUNGA

The National Land Commission was established pursuant to Article 67(2) of the Constitution and Section 5 of the National Land Commission Act, 2012 lists the functions of the National Land Commission which include the management of Public Land on behalf of the County Governments.

Following a consultative meeting held between the County Government of Kwale and the National Land Commission on 15/9/2014, the Commission wishes to give the following Public Notice.

- 1. That the 99 year leases for parcel numbers Tiwi Block 11 (167.5 acres), Tiwi Block 12 (167.5 acres), Tiwi Block 18 (710 acres) and Kidomaya/Lungalunga/12224 (1500 acres) all situated in Kwale County and registered in 1904 expired in 2013,*
- 2. That the said leases have never been extended or renewed,*
- 3. That the said parcels have reverted back to the County Government of Kwale,*
- 4. That no form of transactions shall be approved or recognized after the expiry of the lease in 2013.*
- 5. That no developments of any kind shall be approved on these parcels,*
- 6. That occupation of any part of these parcels by unauthorised persons shall be treated as trespasser squatter on public land.*

The National Land Commission and the County Government of Kwale shall conduct a status appraisal of these four (4) parcels of land in order to inform themselves on the most beneficial use of the parcels. Members of the public are therefore notified that officials of both the National Land Commission and the County Government of Kwale will be visiting the four parcels of land mentioned in this notice and will carry out field surveys and other forms of data collection.

Members of the public are requested to cooperate with Commission and County officials who will be identifying themselves as they perform their duties.

Signed

Muhammad A. Swazuri, PhD, OGW

CHAIRMAN , NATIONAL LAND COMMISSION.”

39.It is the Petitioner’s contention that in issuing the above Notice, the Respondent violated his right to property and in that regard, **Article 40** of the **Constitution** provides as follows;

(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.”

40. It is my understanding that in order to enforce this right, a party must demonstrate that it is entitled to the property in issue and clearly show the proprietary interest sought to be protected. That is why in *Joseph Ihugo Mwaura and 82 others vs Attorney General Petition No.498 of 2009*, the Court stated as follows;

“Section 74 of the Constitution (equivalent of Article 40 of Constitution 2010) contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically Section 75 does not create proprietary interest nor does it allow the Court to create such rights by constitutional fiat. It protects proprietary interest acquired through the existing legal framework.”

41. Further, the nature and extent of the right to property under **Article 40** was explained in *Philma Farm Produce & Supplies & 4 others vs Attorney General & 6 Others Petition No.194 of 2011* where the Court stated as follows;

“Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the Petitioners have been denied the right, either individually or in association with others to acquire or own property of any description in Kenya. In the Petitioners’ case they were given an opportunity to own land when they were issued with allocation letters but they failed to comply with the terms thereof.

Article 40(2) limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The Petitioners do not complain of any such breach.

Article 40(3) and (4) deals with the deprivation of property by the State on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application of Article 40(3) or entitle them to compensation.

The Petitioner has not made out any case that their property is being acquired in the manner contemplated by Article 40 of the Constitution to trigger application of Article 40(3) and (4). I must therefore conclude that there has been no breach of Article 40”.

42. I agree with the exposition of the law as set out above and the issue before me is, whether, in the context of this Petition, the Petitioner holds a lawful and indefeasible title to the suit property so that he can enforce the rights granted by **Article 40** of the **Constitution**.

43. In that regard, it is uncontroverted that the Petitioner’s father was granted a lease over LR. No. 12224 measuring 1,500 acres for a period of 27 years and 6 months from 1st June 1980. A simple mathematical count would reveal that the lease would have expired sometimes in the year 2007. However, from the record, I have seen annexure ‘KVV 2’ in the Petitioner’s affidavit, an extract of minutes of the Full Council Meeting held on 21st July 1993 in which the County Council of Kwale passed a resolution extending the Petitioner’s lease on the suit property with condition that he relinquishes 300 acres of land which would revert back to the County Council of Kwale. I have also seen annexure ‘KVV 3’ in which the County Council of Kwale wrote a letter dated 3rd September, 1993 and referenced as CC/KWL/LND. 16/18(129) to the Commissioner of Lands informing him of the resolution of the Council. Annexure ‘KVV4’ is a letter from the Commissioner of Lands dated 4th January, 1996, reference No. 88881, written to Mr. Velji Parbat (the Petitioner’s Late father) informing him of the approval of the extension of the lease for a term of 50 years with effect from 1st December 1995. Subsequently, the Petitioner’s late father carried out a subdivision as required of him and obtained the Deed Plan for the subdivision. He also surrendered the original lease certificate to the Commissioner of Lands and paid the requisite fees for a new Lease Certificate. However, the certificate of lease was not issued. Instead in the County Council of Kwale meeting of 20th December 2010, the Council passed a resolution that the Petitioner should be given 400 acres and a lease of 33 years out of the 500 acres. The Petitioner then contested the said decision and filed the ***Msa Judicial Review Applic No. 19 of 2012*** and I have elsewhere above explained my understanding of the orders granted in his favour. Can it therefore be said that the Petitioner’s right to property has been violated in such circumstances?

44. My answer to the above question can only be in the affirmative. I say so because the issue of extension of the lease was resolved by the High Court in Mombasa, by those orders, the right to the property was affirmed by the Court and no appeal against that decision was preferred to by knowledge. How then can the Respondent, by administrative fact declare that the said lease has never been extended? How can a lawful Court order be countermanded in such a brazen way by the Respondent and the County Government of Kwale while the Court’s orders were directed at the County Council of Kwale (the predecessor of the former)?

45. I can only conclude that the Petitioner’s right to property was violated as alleged.

46. Having so found, there is yet another issue to be determined. That in issuing the above notice the Respondent violated the Petitioner’s right to fair administrative action.

47. In that regard, **Article 47** of the **Constitution** provides as follows;

(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.

48. It is the Petitioner’s contention in the above context that he ought to have been heard before the public notice was issued and that under **Section 14** of the **National Land Commission Act**, the Respondent is mandated to give a hearing to a party before issuing such a public notice.

49. In answer to the question I posed above, it is not in dispute that the Respondent has the mandate of determining the renewal and extension of leases. That is why **Section 13** of the **Land Act** states as follows;

(1) Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.

(2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following

- a. *prescribing the procedures for applying for extension of leases before their expiry;*
- b. *prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee;*
- c. *the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land;*
- d. *other covenants and conditions to be observed by the lessee.*

I am not aware whether the Respondent has enacted any rules for the above purposes as is required by **Section 13(2)** above but the Petitioner relied on the provisions of **Section 14** of the **National Land Commission Act** to buttress his case. It provides thus;

“(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).

50. While if it is clear that the above provision of the law applies in regard to grants or dispositions in land, it is also important to consider the provisions of **Section 13(1)** of the **Land Act** which provide that in determining the extension and renewal of leases, the Respondent ought to consider the immediate past holder of the land in question. In addition, **Article 47** of the **Constitution** is clear that when an administrative action is being undertaken, the person affected by the decision, ought to be given a hearing or written reasons for the decision - See ***Independent Police Oversight Authority & Others vs The National Police Service Commission and Others (2014) e KLR.***

51. The right to be heard is one of the two cardinal rules established under the principle of natural justice and it is generally expressed as that no party should not be condemned unheard (*audi alteram partem*). The Court of Appeal in ***Onyango Oloo vs Republic (supra)*** stated as follows as regards the importance of the right to be heard;

“It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty, leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

I am duly guided and it is thus a settled principle of law that the right to be heard requires that whenever an administrative decision is to be made, the person affected by such a decision is to be given an opportunity to express himself in that regard. See ***Ahmed Hassan Issack vs Auditor General (2015) e KLR.***

52. Applying the above principle to the instant case, I note that the Petitioner was not heard before the public notice was published and the Respondent has not denied that fact. I have also said that the judgment in ***Msa Judicial Review Applic No.19 Of 2012*** cannot be wished away. While this Court is not concerned with the merits of the decision to renew or extend the lease, I must say there is a measure of unfairness in the whole process. Until now the Petitioner does not know the fate of his lease given the contradictory positions. He led evidence to show that he has invested heavily on the suit property based on the extension of the lease he had earlier acquired. I am also aware that the Respondent was not a party in the suit at Mombasa High Court, but even so, it must have regard to procedural fairness in discharging its mandate. In the circumstances, I find that the Petitioner’s right to property and to fair hearing was violated.

What reliefs are available to the Petitioner?

53. I have determined all the contested issues in the Petition. I have found that the Respondent violated the Petitioner’s right to be heard. In the circumstances what reliefs are available to the Petitioner?

54. In prayer (a) the Petitioner sought for an order to quash the public notice published in the Standard newspaper of 19th September, 2014 in toto. It is obvious that such an order is warranted.

55. In prayer (b), the Petitioner sought an order that the Respondent be prohibited from looking into and interfering with the property under lease by the Petitioner. In that regard I have found that the Respondent has the mandate of determining the issue of extension and renewal of leases but within the limits set by the Constitution and Statute. Consequently, this prayer cannot issue for obvious reasons.

56. In prayer (c) the Petitioner sought an order that the Court declare him as entitled to receipt of the extended lease and to the signing of its certificate of lease. This Court does not have the mandate to do so because to issue this prayer would amount to it getting into the arena of extending and renewing leases. This prayer cannot therefore issue.

57. In prayer (f), the Petitioner sought an order that the public notice by the Respondent was irregular, unreasonable and procedurally unfair and contrary to **Article 47** of the **Constitution**. I have found that the Respondent issued the public notice in violation of the Petitioner's right to be heard and therefore this prayer should be granted.

Disposition

58. The final orders to be made are therefore the following;

(a) An order be and is hereby issued removing into this Court and quashing the Public Notice published in the East African Standard Newspaper of 19th September 2014 revoking the Petitioner's Lease over Plot No. L. R.12224.

(b) A Declaration be and is hereby issued that the Public Notice aforesaid by the Respondent was both irregular, unreasonable, and procedurally unfair contrary to Article 47 of the Constitution.

59. As for costs, let each Party bear its own costs.

60. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ligunya for applicant

Miss Muhindi holding brief for Miss Omuko for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE