



REPUBLIC OF KENYA



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**Prosperity Developers Limited v National Land Commission & 3  
others (Environment and Land Constitutional Petition 8 & 24 of 2019  
(Consolidated)) [2022] KEELC 12651 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12651 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ENVIRONMENT AND LAND CONSTITUTIONAL  
PETITION 8 & 24 OF 2019 (CONSOLIDATED)**

**JM MUTUNGI, J**

**SEPTEMBER 27, 2022**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(2), 10 20(2), 21,  
22(1) 25(C) 27(1), (2), 40, 47, 50(1) 165(5), AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION AND INFRINGEMENT OF THE RIGHT  
TO PROPERTY, FAIR ADMINISTRATIVE ACTION, EQUAL TREATMENT  
& PROTECTION OF THE LAW & FAIR TRIAL OF THE PETITIONER**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT  
NO.3/2012, FAIR ADMINISTRATIVE ACTION ACT,**

**2016.**

**AND**

**IN THE MATTER OF GAZETTE NOTICE NO.1716 IN THE  
GAZETTE VOL.CXX1 NO.23 PUBLISHED ON 22ND FEBRUARY 2019**

**AND**

**IN THE MATTER OF REVOCATION OF TITLE  
NO.LR.NO.5212 REFUSAL TO APPROVE AND REGISTER SUBDIVISIONS AND  
TRANSFERS IN RESPECT OF LR.NO.5212/168 NAIVASHA MUNICIPALITY**

**BETWEEN**

**PROSPERITY DEVELOPERS LIMITED ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**



CHIEF LAND REGISTRAR .....	2 <sup>ND</sup> RESPONDENT
DIRECTOR OF SURVEYEORS .....	3 <sup>RD</sup> RESPONDENT
ATTORNEY GENERAL .....	4 <sup>TH</sup> RESPONDENT

## JUDGMENT

1. This judgment is in respect of two consolidated petitions namely Nakuru ELC Petition No.8 of 2019: Prosperity Developers Ltd -vs- The National Land Commission & 4 others, and Prigal Ltd- Vrs- National Land Commission & 2 others. The genesis of the petitions is the Gazette Notice No.1716 issued by the National Land commission carried in the Kenya Gazette published on 22<sup>nd</sup> February, 2019. The Gazette Notice was in the following terms:-

The *constitution* of Kenya

National Land Commission

Inquiries/investigations on Public Land In Respect of the Following Grants and Orders

In Exercise of the powers conferred by Article 68 (c) (v) of the *Constitution* of Kenya and Section 6 of the [National Land Commission Act](#), 2012, the chairman of the National Land Commission informs the general public that the National Land Commission upon receipt of complaints from the National Government, County Government and members of the public, undertook investigations/inquiries on public land to establish their legalify or otherwise. The Commission via public Notices in the national dailies invited all interested parties to appear before it to inspect documents and make written and oral representations and submissions. Consequently, the Commission has made recommendations in respect of the following grants/Titles and recommends for revocation, regularization, upholding of the titles where applicable as indicated or give further orders.



S/No.	Property Description	Location	Interested Parties	Recommendation of the Commission
1.	LR.No 5211 LR.No.5212	Nakuru	Top Farm Karati Farm Kenya Agricultural and Livestock Research Organization (KALRO)	The Chief Land Registrar is directed to revoke the title for LR. No.5211 and LR No.5212 respectively held by Karati Farm and Top Farm and vest the property to Kenya Agricultural and Livestock Research Organization (KALRO)

The full determination may be collected from the Legal Directorate Registry, 4<sup>th</sup> Floor, Wing C, from Monday to Friday, 8.00a.m to 5.00 p.m

Abigael Mbagaya- N

Vice-chairperson

National Land Commission

2. In order to contextualize the two petitions it is necessary to set out albeit briefly the facts in regard to each of the petitions.

#### **Petition No.8 of 2019**

3. The petitioner stated it was the registered proprietor of LR No.5212/168 (Orig.5212/20) measuring approximately 15.21 hectares situated in Naivasha within Nakuru County (“the suit property). The petitioner averred that it had acquired the suit property for valuable consideration from Prigal Limited in 2016, was registered as owner and a certificate of title issued in its favour on 22<sup>nd</sup> December 2016. The petitioner averred that it was a bonafide purchaser for value without any Notice of any defect in the title and asserted that before purchase of the property all appropriate and requisite due diligence was carried out which revealed the vendor held a good title with No encumbrances. The petitioner asserted that in the course of due diligence it verified that the Commissioner of Lands (Now 1<sup>st</sup> Respondent) had affirmed that the suit land before being allocated to the vendor constituted government land that had Not been alienated to any person. The property thus had Not been alienated and/or reserved for public purpose or for any public entity. The petitioner further stated that after acquisition of the property it took vacant possession and has constructed multi dwelling residential premises for commercial purposes.



4. The petitioner further averred that in March 2019 when it sought approval for subdivision and registration of subleases, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents declined to process the approvals indicating there were ownership issues raised by the 1<sup>st</sup> Respondent in regard to LR No.5212 (mother title to the suit property) and referred the petitioner to Kenya Gazette Vol.CXX1 No.23 of 22<sup>nd</sup> February 2019, Notice No.1716. The petitioner stated after it procured the Gazette it discovered that the 1<sup>st</sup> Respondent had vide the said Gazette Notice purported to direct the Chief Land Registrar (2<sup>nd</sup> Respondent) to revoke the titles comprised in LR No.5211 and LR.5212 which were held by Top Farm and Karati Farm respectively and to vest the land to Kenya Agricultural and Livestock Research Organization ( KARLO). The petitioner stated that though the 1<sup>st</sup> Respondent as per the Gazette Notice indicated that it had Notified the public and all affected parties that it was investigating complaints respecting illegally and unlawfully acquired public land, and in that regard issued public Notices and invited all interested parties to appear before it to inspect documents and make written and oral representations and submissions, No Notice was ever served upon the petitioner. The petitioner averred that as it was a body corporate and its records were available to the public and that the 1<sup>st</sup> Respondent ought to have effected service of the Notice of the purported inquiry or investigation together with the particulars of any charges to afford the petitioner the opportunity to defend its title. The petitioner contends. The National Land Commission in proceeding to conduct a hearing and consequently recommending the revocation of the petitioners title without giving the petitioner the chance of being heard was in contravention of the constitution, the National Land Commission Act, and the Fair Administrative Actions Act 2015.
5. The petitioner thus contended that the National Land Commission in recommending the revocation of its title was were in clear breach of the petitioners fundamental rights of protection of its property. The petitioner's claimed its constitutional rights as enshrined under Articles 40,47 and 50 of the Constitution were violated and inter alia prayed that the Gazette Notice No.1716 published in the Kenya Gazette Vol CXXI No. 23 on 22<sup>nd</sup> February 2019 to the extent that it affected LR No.5212/168 (Orig.LR No.5212/20) be annulled and quashed. The petitioner further prayed that the 1<sup>st</sup> respondent be restrained and /or prohibited from in any manner dealing and/or interfering with the suit property.

#### **Petition No.24 of 2019.**

6. The petitioner in this matter Prigal Limited, in the petition dated 12<sup>th</sup> November, 2019 filed on the same date, stated that it was the registered proprietor for an estate in fee simple of land parcel LR No.5212 measuring approximately 400.7 hectares situated in Naivasha within Nakuru County ("The suit property "). The petitioner stated that it acquired the property from Pritam Singh Panesar for the consideration of Kshs25,000,000/= and the property was transferred and registered in the petitioner's name on the 25<sup>th</sup> March 2002. The petitioner stated that it took possession of the land as from 2002 and was together with other persons to whom it had leased portions of the Land, carrying on commercial flower farming on approximately 250 hectares for both local and export market and had collectively engaged over 4500 workers on the farm. The petitioner further stated that it had since acquisition of the property caused subdivisions of the same to be done and that several of the portions had been sold and transferred out as evidenced by the 259 entries made against the head title exhibited in the affidavit sworn in support of the petition.
7. The petitioner averred that before acquiring the suit property it had carried out due diligence and had verified that the vendors who transferred the land to the petitioner had procedurally been allocated the land by the government. The commissioner of lands duly approved the transfer of the land that was undeveloped to the petitioner. The petitioner further averred that the suit land was unalienated government land that was allocated to the vendors who in turn sold the land to Pritam Singh Panesar



- who later transferred, the property to the petitioner. The petitioner stated that while undertaking due diligence before the purchase it verified that the Commissioner of Lands vide a letter dated 6<sup>th</sup> November 1997 had affirmed that the original allottees were the rightful owners of the suit property.
8. The petitioner further stated that on diverse dates in September 2019 its Director and Management were summoned by Ethics and Anti- Corruption Commission (EACC) Nakuru Regional Office and attended at their offices on 11<sup>th</sup> October 2019 when the EACC informed the petitioner that it was investigating a complaint by KARLO who were claiming ownership of the suit property. The petitioner averred even though its director recorded a statement and availed all the necessary evidence to prove the petitioner's ownership of the land, EACC did Not thereafter communicate to the petitioner respecting its findings. The petitioner stated that on 29<sup>th</sup> October 2019, a group of people who turned out to be EACC employees came to the property ostensibly on a fact finding mission pursuant to the alleged investigations, but to the surprise of the petitioner, the group from EACC convened a press conference at the petitioners club house in the suit property where they issued a press statement (memo) to journalist who had accompanied them announcing that EACC had recovered a total of 1,068.9 hectares of land in the county. The Memo (press statement) indicated the petitioner's LR No.5212 was among the parcels of land that were allegedly recovered following a multi-agency investigation conducted by EACC and the 1<sup>st</sup> Respondent in July 2018 into irregular acquisition of various properties including the suit property by owners and consequently the 1<sup>st</sup> Respondent issued Gazette Notice No.1716 dated 22<sup>nd</sup> February 2019 revoking the title deeds.
  9. The petitioners lamented that it was Not given any Notice of the alleged hearing and/or any particulars of the charges that were labelled against it. The petitioner further stated its efforts to get the proceedings and the reasoned ruling/decision from the 1<sup>st</sup> Respondent have been unsuccessful and therefore the petitioner is Not able to understand the basis upon which the decision to revoke its title was reached. The petitioner contended that its constitutional rights relating to protection of property were violated. In particular the petitioner averred that its fundamental rights as enshrined under Articles 40, 47 and 50 of the Constitution were violated and that the 1<sup>st</sup> Respondent in purporting to exercise its mandate failed to adhere to the dictates of the Constitution, the Fair Administrative Actions Act and Section 14 of the Land Commission Act and that rendered its decision illegal and null and void.
  10. The petitioner consequently has sought for a declaration that its fundamental rights under the Constitution were violated; that Kenya Gazette Notice No.1716 of 22<sup>nd</sup> February 2019 be quashed and that the Respondents be prohibited from in any manner dealing or interfering with the petitioner's land parcel LR No.5212.

### **The Respondents case.**

11. The Respondents as per the record did Not file any responses to the petition in Nakuru ELC Petition No.24 of 2019. The Respondents however made responses in the instant matter Nakuru ELC Petition No.8 of 2019. The 1<sup>st</sup> Respondent, the National Land Commission, filed grounds of opposition to the petition dated 5<sup>th</sup> July 2019 contending that the petition was premature and did Not disclose a cause of action. The 1<sup>st</sup> Respondent alleged that the petition lacked precision as to the rights alleged to have been infringed and could Not therefore quality as a constitutional petition. The 1<sup>st</sup> respondent contended the petition raised issues of ownership of the suit land and was therefore Not suited to be adjudicated as a constitutional matter. The 1<sup>st</sup> Respondent further averred it had its constitutional mandate which it was entitled to execute. The 1<sup>st</sup> respondent sought the dismissal of the petition.
12. The Attorney General filed a response to the petition on behalf of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents dated 17<sup>th</sup> August 2021. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents generally denied the petitioner's averments in the



petition and invited proof thereof. In particular the said respondents denied any of the petitioner's constitutional rights were violated. The respondents denied the petitioners were bonafide purchasers for value without any Notice of any defect in the title to the suit property. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents denied that the petitioners were the registered absolute owners of the suit property. The respondents denied that any constitutional rights of the petitioner were violated and further contended that the petitioner's petition did Not meet the threshold of what constitutes a constitutional petition as established in the Anarita Karimi case and asserted that the petitioner was Not entitled to the reliefs sought in the petition.

13. The petitioner filed a reply to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents responses to the petition on 13<sup>th</sup> September 2021. The petitioner joined issue with the respondents on their responses and generally reiterated the contents of the petition in reply. The petitioner asserted that the 1<sup>st</sup> Respondent in the execution of its functions failed to adhere to the mandatory provisions of the National Land Commission Act as well as the constitution resulting in the impugned actions and decision as communicated vide the impugned Gazette Notice No.1716 of 22<sup>nd</sup> February, 2019. The Petitioner further asserted that the 2<sup>nd</sup> respondent as the custodian of the land records knew and/or ought to have kNown that the suit property was Not public land and neither had the same been reserved for any public purpose. The petitioner contended that the petition was compliant and indeed satisfied the threshold set out in the case of Anarita Karimi -vs- R (1979) eKLR as to what constituted a constitutional petition.

#### **Case of the Interested Party**

14. The Ethics & Anti-corruption Commission (EACC) with the leave of the court were joined as interested parties in the petition and filed a replying affidavit with annexures in response to the petition on 6<sup>th</sup> December 2021. The replying affidavit of the interested party was sworn by Agosta Mecca, a Forensic Investigator of the interested party and was dated 6<sup>th</sup> December 2021. The EACC under the Ethics and Anti-corruption Act, 2011 is empowered to investigate and make recommendations to the to the Director of Public Prosecution (DPP) for the prosecution of persons found culpable of committing acts of corruption. The interested party stated that their investigations revealed that the suit land LR No.5212 measuring approximately 990 acres was together with other lands, set aside for government use and a livestock Experimental Farm in 1904 by the Commissioner of Lands and was being used for research on Sahiwal Cattle, sheep and goats. The investigator stated the farm was developed with infrastructure that included staff houses, a public primary school, a nursery school, a government dispensary and an anti-stock theft police camp. There were also boreholes, stores, night bomas dips etc and the land had a current value of Kshs.6,900,000,000/= as per the exhibited valuations report.
15. The interested party averred that the suit property Naivasha LR No.5212 was in the actual possession of Kenya Agricultural Research Institute (KARI) Now KARLO when it was allegedly allocated to Henry Tarus & 4 others all of P O Box 2060 Nakuru on 19<sup>th</sup> October 1995 as per letter of allotment exhibited. The interested party averred that the allottees were aware the land belonged to KARI as on 15<sup>th</sup> June 1997, Henry Tarus one of the allottees wrote to KARI requesting them to confirm they did Not need the farm so that they could commence developments where upon KARI responded and indicated the land was reserved for research programmes. The interested party further averred that on 24<sup>th</sup> July 1997 KARI was issued with a letter of allotment for the suit property for a term of 99 years from 1<sup>st</sup> August 1997 and as at that time the allotment that had been made to Henry Tarus & 4 others had in any event lapsed as they had Not accepted the offer within 30 days as the letter of allotment required.



16. The interested party averred that Notwithstanding that KARI had been issued with an allotment letter, the original allottees went ahead to offer the suit land for sale to one Pritam Singh Panesar for the sum of Kshs.25 million. The Lands office approved the sale and processed titles in favour of Pritam Singh Panesar after the allotment charges of Kshs14,143,500/= was paid to the Commissioner of Lands. The Commissioner of Lands consented to the informal transfer and the Director of Surveyors prepared a deed plan for the suit land and consequently a lease was prepared and a Grant number 76031 was issued and registered in favour of Pritam Singh Panesar on 2<sup>nd</sup> March 1998.
17. The interested party averred that their investigations as set out in the replying affidavit revealed that the suit property LR No.5212 was at all times government land that had been reserved for research within the ministry of livestock and that the Ministry of Agriculture vide letter dated 6<sup>th</sup> November 2009 exhibited in the replying affidavit as “EACC21” initiated follow up in a bid to recover the lost land which included the suit property. Following a request by KARI to the National Land Commission to investigate the propriety of the title of the suit property held by the petitioner, the National Land Commission vide its letter dated 17<sup>th</sup> February 2015 exhibited as: EACC23” informed KARI that it had commenced investigations. The National Land Commission carried out its investigations that culminated in its recommendation for the cancellation of the certificate of title issued in respect of the suit property as communicated vide Gazette Notice No.1716 of 22<sup>nd</sup> February 2019.
18. The interested party averred that following the cancellation of the certificate of title as recommended by the National Land Commission, KALRO was issued a letter of allotment for the suit premises on 25<sup>th</sup> July, 2019 (“EACC27”) and a certificate of Title issued in favor of KARLO (“EACC28”). The interested party asserted that the certificate of title over the suit land acquired by the private investor was not acquired procedurally and was irregularly and illegally procured.
19. The interested party contended that the appropriate procedure for alienation of government/public land was Not followed and hence the title the petitioner held was Not legally acquired and therefore canNot be legally protected. The interested party further averred the National Land Commission had the statutory mandate pursuant to section 14 (1) and (6) of the *National Land Commission Act* to investigate title and make appropriate recommendations. The interested party further averred that No constitutional rights of the petitioner had been violated as any constitutional rights ought to be enjoyed subject to the limitations imposed under Article 24 (1) of the *Constitution*. Besides, the interested party contended that under Article 40 (6) of the *constitution*, where property is found to have been unlawfully acquired such property cannot be protected under Article 40 of the *Constitution*.
19. The petitioner in reply to the interested party’s replying affidavit, filed a supplementary affidavit sworn by Igal Elfezouaty on 19<sup>th</sup> January 2022.
20. In the supplementary affidavit the petitioner reiterated the contents of the petition and affidavit filed in ELC Petition No.8 of 2019. The Petitioner asserted that the interested party had Not illustrated that the suit land had at any time been reserved for Public purpose or registered to KARI/KARLO prior to allocation to the petitioners or their vendors. The petitioner averred that prior to 1965, the Commissioner of Lands had No authority or power to allocate government land as such authority was donated by the President on 9<sup>th</sup> November 1965 vide Gazette Notice No.4141 and hence the interested party’s assertion that the special Commissioner of Lands/Ag.Commissioner of Lands vide a letter dated 6<sup>th</sup> November 1952 allocated the suit land was untenable as he had No capacity to do so.
21. The petitioner maintained the suit property was legally and lawfully allocated to Henry Tarus & 4 Others in 1995 by the Commissioner of Lands as the first allottees. The Commissioner of Lands prior to the sale by the allottees to Pritam Singh Panesar in 1997/1998, affirmed the allotment to Henry



Tarus & 4 others was valid and gave approval to the sale pursuant to which the allotment charges were paid and approval of the informal Transfer was given. The petitioner maintained the suit land was Not public land or reserved for any public purpose as alleged by the interested party and the interested party's assertion that the land had been allocated and/or reserved for KARI/KARLO was an afterthought. The petitioner averred that KARI/KARLO vide a letter dated 7<sup>th</sup> February 2017 by secretary Ministry of Land and Physical Planning to the 1<sup>st</sup> Respondent EACC24") was applying to be allocated LR No.5212 yet as at the time the land had been allocated and title issued to Pritam Singh Panesar and besides KARI had allegedly been allocated the same land vide the allotment letter date 24<sup>th</sup> July 1997 and hence the application for allocation in 2017 would have been unnecessary.

22. The petitioner in refuting the interested party's assertion that KARI/KARLO had been in possession averred that the petitioner had since 1998 been in actual occupation of the land and had subdivided the land into various parcels which were all occupied by the petitioner and third-party purchasers. The petitioners asserted that neither they Nor the third-party purchasers were served with Notices and/or invited to give presentations in defence of their titles during the purported review of title LR No.5212 before the impugned gazette Notice was given. The petitioner maintained that the 1<sup>st</sup> Respondent in the purported review exercise failed to comply with section 14 of the National Land Commission Act and/or Articles 40 and 47 of the constitution which rendered the impugned decision null and void. The petitioner further contended that the 1<sup>st</sup> Respondent acted ultra vires and without jurisdiction as the period within which it was allowed to review any dispositions of public land within 5 years from the date of the commencement of the Act had lapsed. The petitioner additionally averred that the unsigned letter of allotment dated 25<sup>th</sup> July 2019 and the undated certificate of lease in respect to LR No.5212 issued to KARLO by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were effected in breach of the court order dated 3<sup>rd</sup> July 2019 served on the 1<sup>st</sup> Respondent on 11<sup>th</sup> July 2019 and hence the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted in contempt of court.
23. The petitioners in consequence averred that the interested party had No basis to oppose the petition and their replying affidavit was baseless and vexatious and had been conceived as an afterthought in an attempt to defeat the petitioner's rights to the disputed property. The petitioner in concluding their reply to the interested party's replying affidavit reiterated that they acquired the suit land lawfully and procedurally after carrying out due diligence and that there was No illegality that would disentitle them protection under the constitution as envisaged under Article 40 of the constitution.
24. The parties by agreement canvassed the petitions by way of written submissions. The petitioners filed their initial submissions on 10/11/2021 and supplementary submissions on 8<sup>th</sup> December 2021. The Attorney General filed submissions on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup>, Respondents on 27<sup>th</sup> June 2022. The 1<sup>st</sup> Respondent (NLC) did Not file any submissions.
25. Having reviewed the petitions, the affidavits in support and in opposition and further having considered the submissions by the petitioners and the interested party the following are the issues that arise for determination.
  - i. Whether the commissioner of Lands lawfully allocated and/or alienated the suit property to the petitioners.
  - ii. Whether the petitioners acquired and held good title over the suit property that deserved protection under the law?
  - iii. Whether the 1<sup>st</sup> Respondent's decision conveyed vide Gazette Notice No.1716 of 22<sup>nd</sup> February 2019 to revoke the petitioners title was lawful and/or violated the petitioners fundamental rights to own property?



- iv. Whether the petitioners are entitled to the reliefs sought in the petitions?
26. The petitioners in their submissions contended that the suit property was unalienated government land before it was allocated to the allottees who sold the same to Pritam Singh Panesar who in turn transferred the land to the petitioners. The petitioners submitted that the land was lawfully allocated by the Commissioner of Lands pursuant to his delegated authority by the President under Section 3 of the *Government Land Act*, Cap 280 Laws of Kenya (Now repealed) Section 3 (a) of the *Government Lands Act* provides as follows:-
3. The President in addition to but without limiting, any other rights, power or authority vested in him under this Act, may-
- (a) Subject to any written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land.
27. The President of the Republic of Kenya vide Gazette Notice No.4141 dated 9<sup>th</sup> November 1965 published in the Kenya Gazette of 16<sup>th</sup> November 1965 delegated the President's Powers to make grants to the Commissioner of Lands. The Gazette Notice was in the following terms: -
- “It is hereby Notified for general information that I, Jomo Kenyatta, with effect from 12<sup>th</sup> December 1964, have authorized the Commissioner of Lands to make grants or dispositions of any estates, interests or rights in or over lands that are for the time being vested in the government of Kenya .
- Gazette Notice No.3510/965 is hereby cancelled.
- Dated this 9<sup>th</sup> day of November 1965.
- Jomo Kenyatta  
President
28. The petitioner contended that the subject land was properly allocated by the Commissioner of Lands under the power delegated to him under section 3 of the *Government Lands Act*, Cap 280 Laws of Kenya. The petitioner submitted the land was unalienated government land and No evidence was adduced by the Respondents and/or the interested party to prove that the land had been alienated to any public entity as alleged by the interested party. The petitioners submitted there was clear evidence that the Commissioner of Land vide a letter dated 19<sup>th</sup> October 1995 made an offer of allotment of LR No.5212 to Henry K Tarus & 4 others for a sum of Kshs14,143,500/= . The Commissioner of Lands vide a letter dated 6<sup>th</sup> November 1997 affirmed to the 2<sup>nd</sup> petitioners advocates that the offer of allotment remained valid and went ahead and approved the informal transfer against which the title was processed after the stand premium and the related charges as per the letter of allotment were duly paid.
29. The interested party in its submissions contended that the suit property was Not available for alienation by the Commissioner of Lands since the land had hitherto been alienated and had been reserved for KARI/KARLO for Agricultural research services. The interested party submitted that the suit land together with other land parcels in Naivasha being LR Nos 5210 and 5211 were set aside for government use as a livestock Experimental Farm in 1904 as outlined in the letter Ref. No.6542/11 dated 6<sup>th</sup> November 1952 by the Special Commissioner & Ag. Commissioner of Lands annexed to the interested party's replying affidavit. The petitioners in response contended the special commissioner / Ag Commissioner of Lands did Not have any authority and/or mandate to allocate land and that the letter dated 6<sup>th</sup> November 1952 did Not constitute an allotment to KARI/KARLO and could Not vest the land to them. The petitioners maintained the interested party and the respondents produced No



proof that the suit land had been alienated to anybody else before it was allocated in 1995 to the allottees who sold the same to Pritam Singh Panesar in 1998. The petitioners submitted that the Commissioner of Lands by virtue of section 3 of the *Government Lands Act*, Cap 280 Laws of Kenya had power and authority to allocate the suit land to the original allottees as the land was un-alienated government land within the meaning of section 2 of the *Government Lands Act* that defines “Unalienated Government Land” as follows:-

“ - Government land which is Not for the time being leased to any other person or in respect of which the Commissioner has Not issued any letter of allotment.”

30. I have considered the evidence and the submissions made by the petitioners and the Interested Party on the question of alienation of the suit land and it is my view that there has been No demonstration that the suit land had been alienated in favour of KARI/KARLO or any other person before its allocation to the original allottees in 1995. The letter of 6<sup>th</sup> November 1992 did Not in my view constitute an allotment to the Ministry of Livestock and/or Agriculture. No evidence of any instrument alienating the suit land to any person other than the allottees prior to 1995 was exhibited. The supreme court of Kenya in its Advisory opinion Reference 2 of 2014 - *In the matter of the National Land Commission* (2015) eKLR Noted at paragraph 107 that section 3 of the *Government Lands Act* (GLA) conferred powers on the President which were delegated to the Commissioner of Lands to allocate unalienated government land. The court observed thus:-
107. Section 3 of the *Government Lands Act* (GLA) conferred Powers on the Present to make grants of freehold or leasehold of un-alienated Government Land. Section 7 prohibited the Commissioner of Lands from exercising the powers of the President under section 3-subject to certain exceptions; though the President could (and did) delegate his powers to the commissioner. Procedures were laid out, to guide the allocation of Government land; but those were Not followed, subsequently. The government treated public land as its “Private property”, and the public interest element in administration and allocation of public land was negated. The Commissioner of Lands was making allocations of Land by direct grant, routinely exceeding his authority. (Such excesses of Power are well documented in the Ndungu Report).
31. Indeed it was the rampant excesses and widespread manipulation, and corrupt Practices, in the alienation of Government land and general lack of confidence in the land administration system that led to the clamour for land reform that resulted in the birth of the National Land Commission which was anchored in the *Constitution* of Kenya 2010.
32. On the issue whether the Commissioner of Lands had the power to make the allotment of the suit property to the original allottees, I answer in the affirmative as the land was unalienated land in terms of section 3 of the *Government Lands Act*. The Commissioner of Land could properly allocate and/or alienate such land. The validity or otherwise of the allotment would invite different considerations.
33. On the face of it and having held the Commissioner of Lands had the power and authority to allocate the suit land, it follows that the original allottees were properly allocated the suit land by the Commissioner of Lands who had mandate to do so. Though there was No evidence that the allottees accepted and complied with the terms of the letter of allotment dated 19<sup>th</sup> October 1995, the Commissioner of Lands vide a letter dated 6<sup>th</sup> November 1997 to the advocates of Pritam Singh Panesar who wanted to purchase the land from the allottees, affirmed the allotment was still valid and the land had Not been allocated to any other person. The Commissioner of Lands went ahead to approve the sale and consent to the Informal Transfer in favour of the said Pritam Singh Panesar who paid the full



allotment charges of Kshs.14,143,500/= consequent to which the title was processed in the name of Pritam Singh Panesar. On the evidence therefore, the said Pritam Singh Panesar acquired a valid and good title. The said Pritam Singh Panesar made the effort to validate the letter of allotment with the Commissioner of Lands and I do Not consider there was anything more he was required to do beyond that considering the land was Not registered and he was as it were dealing with the first allottees of the property. Pritam Singh Panesar was in the premises a bonafide purchaser for value without any Notice of any defect in the title (if any). As owner of the property he had acquired, Pritam Singh Panesar could transact in regard to the suit property and could likewise pass a good title to any third party. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners in my view were bonafide purchasers for value without any Notice of any defect in the title from the vendor. To the extent permissible under the law, the titles they acquired deserved protection under the law.

Under section 25 and 26 of the [Land Registration Act](#), 2012 the Registered proprietor of a parcel of land is vested with absolute rights of ownership and title of such land may only be challenged under the limited instances set out under section 26(1) (a) (b) of the [Land Registration Act](#), 2012 being, if it was shown the title was obtained through misrepresentation or fraudulently, and/or if it was shown the title was obtained unprocedurally, illegally or through a corrupt scheme, sections 25 and 26 (I) of the [Act](#) provides:-

25. Rights of a proprietor.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall Not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 Not to require Noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship.

- (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.



34. On the issue whether the decision by the National Land Commission to recommend revocation of the petitioners titles as communicated vide Gazette Notice No.1716 of 22<sup>nd</sup> February 2019 was lawful and/ or violated the petitioners rights guaranteed under the Constitution, the interested party contended that the National Land Commission lawfully exercised its mandate both under the constitution and the National Land Commission Act, 2012. The petitioners countered that, their rights were violated and further that the National Land Commission acted without jurisdiction. The petitioners insisted that the National Land Commission did Not follow due process before it came up with the impugned Gazette Notice arguing that the National Land Commission merely published Gazette Notice No.1716 in Kenya Gazette Vol.CXXI No.23 of 22<sup>nd</sup> February 2019 anNouncing that it had directed the Land Registrar to revoke the titles yet the petitioner who were the parties affected had Not been given any Notice of any investigations and/or Notice of any hearing to defend their ownership of the suit properties. The petitioners submitted their fundamental rights under Articles 25 (c), 27 (I) 40,47 and 50 of the constitution were violated and hence the Gazette Notice was illegal and a nullity.
35. The National Land Commission was established under Article 67 (I) of the constitution and its functions were set out under Article 67 (2) of the constitution and interalia included under Article 67 (2) ( e) the mandate:-
- “ to initiate investigations, on its own initiative or on complaint into present or historical land injustices, and recommenced appropriate redress”
- Article 67(3) of the Constitution provided thus:
- (3) The National Land Commission may perform any functions prescribed by national legislation.
36. Under Article 68 of the Constitution Parliament was mandated to enact legislation to deal with the matters set out under Article 68 (c) (v) which included: -
- “ to enable the review of all grants or dispositions of public land to establish their propriety or legality”.
37. The National Land Commission Act No.5 of 2012 was enacted pursuant to the provisions of Article 68 (c) of the Constitution.
- Section 14 of the Land Commission Act provides as follows:-
14. Review of grants and dispositions
- (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 decide.
- (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.  
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- (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).

38. In undertaking its mandate to investigate the grants/ titles in contention the commission invoked the above provisions of the *Act*. It is No sufficiently clear as to whether the commission was investigating whether the subject titles had been illegally or irregularly acquired or it was investigating a case of historical injustice that would have fallen to be considered under the provisions of section 15 of the *Act*. However, all indications are that the Commission was in undertaking investigations, exercising its mandate under section 14 (I) of the *Act*. In exercising its review mandate, the commission in terms of section 14 (3) of the *Act* was required to give every person who had any interest or appeared to have an interest in the grant or disposition the subject of the review, a Notice of such review and an opportunity to appear before it and to inspect any relevant documents. The commission was also in the exercise of its review mandate required to be guided by the principles set out under Articles 47 of the *constitution*. Articles 47 of the *constitution* provides as follows:-

47. Fair administrative action

- (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) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

39. The National Land Commission did Not file a replying affidavit in answer to the petitions and it is therefore Not evident how they carried out the investigations. The petitioners have averred that they were never given any Notice regarding the review and have averred that inspite of requesting to be furnished with the proceedings and the decisions of the commission, the same have Not been availed



to them. It was the responsibility of the 1<sup>st</sup> Respondent (the Commission) to ensure that due process was observed while undertaking the review.

Under Article 47 (2) of the Constitution where a right of a person has been or is likely to be adversely affected by administrative action, such person must be given written reasons for the action. The Fair Administrative Action Act, 2015 enacted pursuant to the provisions of Article 47 (3) of the constitution made provisions to give effect to Article 47 (1) of the constitution and effectively set out the procedure that needed to be complied with to attain fair administrative action. Section 4(3) and (4) of the Fair Administrative Actions Act provides as follows: -

- 4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person the administrator shall give the person affected by the decisions:-
- a. Prior and adequate Notice of the nature and reasons for the proposed administrative actions;
  - b. An opportunity to be heard and to make representations in that regard;
  - c. Notice of a right of review or internal appeal against an administrative decision, where applicable;
  - d. a statement of reasons pursuant to section 6;
  - e. Notice of the right to legal representation, where applicable;
  - f. Notice of the right to cross examine where applicable or
  - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action
- 4(4) The administrator shall accord, the person against whom administrative action is taken an opportunity to-
- a. attend proceedings, in person or in the company of an expert of his choice”
  - b. be heard
  - c. cross examine persons who give adverse evidence against him; and
  - d. request for adjournment of the proceedings, where necessary to ensure a fair hearing.

40. There is No doubt the commission in carrying out the purported review were executing an administrative act and in consequence were expected to comply with the dictates of the constitution under Article 47, its own enabling Act section 14(3) and section 4 of the Fair Administrative Actions Act as related to service of Notice, furnishing of information and conduct of the hearing. The petitioners needed to be given ample Notice, furnished with information as to the nature of the investigations and/or inquiry, and finally afforded an opportunity to be heard. Was that done? The petitioners contended they were Not served with any Notice and were Not given any particulars relating to the complaint and neither were they afforded any opportunity of being heard. They have argued this was contrary to the rules of natural justice and in violation of their rights under Article 47 and 50 of the constitution. They contended the commission acted in breach of section 14 (3) of the National Land Commission Act and Section 4 of the Fair administrative Actions Act by Not giving them any Notice and/or affording them an opportunity to be heard. The petitioners in their submissions have placed reliance on the cases of Sceneries Limited -vs- National Land Commission (2017) eKLR; Mwangi Stephen Muriithi -vs- National Land Commission & 3 others; (2018) eKLR



and *Samuel D.Omwenga Agwenyi -vrs- National Land Commission & 2 others* (2019) eKLR where the courts held where No appropriate service of Notice was effected on the affected party any decision made or reached would be ultravires and null and void for being in breach of the rules of natural justice. In the Sceneries Ltd cases (*supra*) Mativo, J (as he then was) held as follows:-

“The right to be heard requires Not only that the party, concerned be given prior Notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient information to prepare his/her case. As to disclosure of information this implies that the party concerned be apprised of reports and documents in the body’s possession that may be prejudicial to his/her case. He /she should at least have access to all information the tribunal or body relied upon when it made the decision”.

41. On the issue of service of Notice the judge further stated:-

“I have carefully analyzed the facts, of this case. I Note that No Notice was served upon the applicant or the second interested Party. Details of the complaint were Not availed to them in advance, yet their rights were bound to be affected by the decision. The alleged publishing of Land Reference numbers in a local daily is in my view Not proper Notice. I find No difficulty in concluding that the Respondents violated the rules of natural justice by failing to serve the applicant with adequate with adequate Notice and details of compliant and on this ground alone, I am inclined to allow the original summons”

42. This court sitting at the Kisii ELC in the case of *Samuel D Omwenga Angwenyi vs National land commission and 2 others* (2019) KLR had occasion to consider what would constitute adequate Notice at Paragraph 22 of the judgement where I observed as follows:-

22. The 1<sup>st</sup> respondent’s replying affidavit affirms that the petitioner amongst other persons were served with a Notice of the commission’s intention to review their grants and /or titles vide Gazette Notice of 16<sup>th</sup> march 2016.This Notice was deficient to the extent that it did Not set out any particulars of the facts constituting any alleged illegality, irregularity and/or fraud in the alienation and/or acquisition of the property. The Notice did Not afford the petitioner the opportunity to kNow the allegations and/or case he was required to answer. The Notice in my view did Not satisfy the provisions of Article 47 (I) which provides:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

The 1<sup>st</sup> Respondent was in actual sense carrying out an administrative function as per its mandate yet it did Not avail the petitioner the relevant information and/or any documents to enable him to respond appropriately”.

43. In the case of *Republic -Vs- National Land Commission & Tropical Treasure Ltd; Exparte Krystaline Salt Ltd* (2015) eKLR Korir, J ( as he then was) held:-

“The Notice in the newspapers did Not have the name of the complainant and neither did Not disclose the complaint against the Applicant’s title.

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.



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”

44. In the present petitions the content of the Notice that was supposedly sent out to the petitioners and others has Not been exhibited by the Respondents. The 1<sup>st</sup> Respondent as earlier explained did Not file any replying affidavit where such Notice and other relevant information and documents could have been contained and/or exhibited. All the court is left to go by is what is indicated in the impugned gazette Notice No.1716 that the Commission upon receipt of complaint from various parties it undertook investigations/inquiries on public land to establish their legality or otherwise and that---

“The commission via public Notices in the national dailies invited all interested parties to appear before it to inspect documents and make written and oral representations and submissions”.

45. The petitioners have maintained that they were never served with any Notice by the commission and were Not given any opportunity to be heard. They have further submitted that though they have requested the commission to be supplied with copies of the proceedings and decision that has Not happened. It is Noteworthy that the Gazette Notice No.1716 indicated LR No.5212 was owned by Top Farm Limited yet as per the abstracts of title exhibited by the petitioners the LR No.5212 measuring approximately 400.7 hectares was first registered in favour of Pritam Singh Panesar on 3<sup>rd</sup> March 1999 and was transferred to Prigal Limited, the 2<sup>nd</sup> Petitioner on 25<sup>th</sup> March 2002 and was subsequently subdivided into various subtitles. Prigal Limited on 22<sup>nd</sup> December 2016 transferred LR No.5212/168 (original No.5212/20) to Prosperity Developers Ltd, the 1<sup>st</sup> petitioner herein. This information was public and was available at the relevant land registry. The commission would have, in my view easily accessed this information from the Lands Registry, and effectively issued Notices to the appropriate and relevant persons. At the time the commission purportedly issued Notices LR No.5212 did Not exist as a unit and the same was Not owned by Top Farm as indicated in the Gazette Notice.

46. In a crucial matter such as in the present petition that resulted in the revocation of the petitioners titles service of the Notice of the commencement of the investigation/inquiry canNot be implied, and or deduced. There must be demonstration that the affected party was indeed served with the Notice containing ample particulars of the alleged irregularities and/or fraudulent dealings in the acquisition of the title under challenge to enable he/she to respond and/or prepare his/her defence. It is Not sufficient to summon a baraza and treat such as a forum for investigation. An affected party must be afforded an opportunity to table his/her defence and to be heard, and if need be to cross examine any witnesses on the evidence tendered. In the premises and upon evaluations of all the facts, it is my determination that the petitioners right to a fair administrative action on the part of the 1<sup>st</sup> Respondent was breached and in consequence there was violation of Articles 47 and 50 of the constitution.

47. Although on the basis of what I have held it should be sufficient to dispose of the consolidated petitions, I need to make a comment on the submissions made by the interested party and the Respondent and the authorities they relied on in support of their submissions. The interested party's case in this petition was predicated on the position that the disputed land herein had been alienated to KARI/KARLO. Earlier in the judgment I dispelled that Notion as I made a finding that there was No demonstration and/or evidence that the land had been so alienated. I held the land constituted unalienated land which the Commissioner of Lands had power under section 3 of the Government Lands Act, Cap 280 Laws of Kenya to allocate. The authorities cited Nairobi, HC Misc App. No.1732/2004 James Joram Nyaga & ANother -vrs- AG, Eldoret HC JR No.10/2008 Rep -vs-



*Commissioner of Lands Exparte Lima Ltd* and Mombasa HC Misc Civil App. No.70/2010, *Rep -vs- The Senior Registrar of Titles & 2 others, Exparte Conmen Ltd* all related to land that had been alienated and/or demonstrated to have been alienated. The facts in the present petition are distinguishable from the facts in the cases cited.

48. The Petitioners have questioned the jurisdiction of the National Land Commission to deal with the matter arguing that the time within which the Commission was allowed to carry out reviews had lapsed and had Not been extended. Under Section 14 (1) of the [National Land Commission Act](#), the Commission was to review all grants or dispositions of public land within 5 years of the Commencement of the [Act](#). The Commencement date of the [Act](#) was 5<sup>th</sup> May 2012 and therefore the Commission's mandate to review grants and/or dispositions of public land lapsed on 2<sup>nd</sup> May 2017. Section 14 (9) of the [Act](#) provided that the Commission could petition parliament to extend the period provided under section 14 (1) of the [Act](#). The Commission had No jurisdiction to review grants or dispositions of public land after the mandate to do so expired on 2<sup>nd</sup> May 2017 (see [Republic -vs- National Land Commission & 3 others, Exparte Samuel Githegi Mbugua & 5 others](#) (2018) eKLR and [Republic -vs- National Land Commission, Exparte Giraffe Estate Limited; City County Government of Nairobi & 5 others](#) (2020) eKLR.
49. In the present petition No evidence was tendered to illustrate that the mandate of the Commission had been extended. The Respondents and the interested party did Not address this issue. The impugned decision in this matter was made by the Commission in February 2019 as communicated vide the Gazette Notice No.1716 carried in the Kenya Gazette published on 22<sup>nd</sup> February 2019. I agree with the petitioners that the Commission's mandate had lapsed and consequently the Commission acted ultra vires and without jurisdiction in carrying out the purported review. The decision the commission rendered was accordingly null and void for want of jurisdiction.
50. The final result is that having carefully evaluated and analyzed the facts the evidence and the applicable law, I am satisfied the consolidated petitions have merit. I find the petitioners constitutional rights under Articles 40, 47 and 50 (1) were violated by the 1<sup>st</sup> Respondent. The decision made by the 1<sup>st</sup> Respondent was clearly made without observance of the principles of natural justice and was made without jurisdiction and was therefore null and void abinitio and was of No legal effect.
51. I accordingly make an order by way of judicial review in the nature of certiorari and direct to be moved and delivered to this court for the purpose of being quashed the decision of the 1<sup>st</sup> Respondent and in particular Kenya Gazette Notice No.1716 published in the Kenya Gazette Vol.CXXI No.23 of 22<sup>nd</sup> February 2019 together with all the consequential actions by the 1<sup>st</sup> Respondent affecting LR No.5212 and /or LR No.5212/168 ( originally LR 5212/20) situate in Naivasha in any manner.
52. The costs of the consolidated petitions are awarded to the petitioners as against the 1<sup>st</sup> Respondent and the interested party.

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**J M MUTUNGI**

**JUDGE**

