



Republic v National Land Commission & 2 others; Eastern Produce Kenya Limited & 4 others (Exparte Applicants) (Judicial Review Application 6 of 2020) [2023] KEELC 20855 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 6 OF 2020
JO MBOYA, J
OCTOBER 12, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

DIRECTOR OF SURVEY 2ND RESPONDENT

COUNTY GOVERNMENT OF NANDI 3RD RESPONDENT

AND

EASTERN PRODUCE KENYA LIMITED EXPARTE APPLICANT

SIRET TEA COMPANY LIMITED EXPARTE APPLICANT

KAKUZI PLC EXPARTE APPLICANT

KABOSWA ESTATE EXPARTE APPLICANT

KIBWARI PLC EXPARTE APPLICANT

JUDGMENT

Introduction and Background:

1. The Ex-parte Applicant herein filed Chamber Summons Application dated the 6th March 2019; and in respect of which same sought for Leave to commence Judicial Review Proceedings in the nature of Certiorari and Prohibition. For good measure, the reliefs under reference were sought as against (sic) the decision of the 1st Respondent published vide Gazette notice on the 1st March 2019; and subsequently, amended on the 6th April 2023.



2. Instructively, the Chamber Summons Application under reference was placed before the Honorable Duty Judge on the 7th March 2019; whereupon the Honorable Duty Judge proceeded to and indeed granted Leave to the Ex-parte Applicant to commence Judicial Review Proceedings.
3. Pursuant to and in accordance with the Leave granted, (details in terms of the preceding paragraph) , the Ex-parte Applicant herein filed a substantive Notice of Motion Application dated the 29th March 2019, wherein same sought for various orders of Judicial Review, inter-alia, an order of Certiorari and Prohibition.
4. Be that as it may, the Ex-parte Applicant herein thereafter sought for and obtained Leave to amend the Notice of Motion Application dated the 19th March 2019. In this regard, the Ex-parte Applicant thereafter filed the amended Notice of Motion Application dated the 22nd May 2023; and in respect of which same sought for the following reliefs;
 - i. An order of Certiorari to remove into the court for purposes of being quashed and quashing the gazette notice published on the 1st March 2019; and amended on the 6th April 2023 insofar as it relates to the National Land Commission determination dated the 7th February 2019; made in respect of the complaint by Talai-Nandi under reference NLC/HLI/013/2017, NLC/HLI/447/2018 and NLC/HLI/333/2018.
 - ii. The honorable court does issue an order of prohibition prohibiting the Director of Survey under the Ministry of Land and the County Government of Nandi from implementing the recommendation in the Gazette notice published on the 1st March 2019; and amended 6th April 2023; insofar as it relates to the National Land Commission determination dated the 7th February 2019 made in respect of the complaint by Talai-Nandi under reference NLC/HLI/013/2017, NLC/HLI/447/2018 and NLC/HLI/333/2018.
 - iii. The Honorable court does issue a Declaratory order that the National Land Commission proceedings and determination dated the 7th February 2019; made in respect of the complaint by Talai-Nandi under reference NLC/HLI/013/2017, NLC/HLI/447/2018 and NLC/HLI/333/2018 are unlawful and tainted with illegality for contravening Section 4(3) (4) of the Fair Administrative Action Act and Article 47 and 50(1) of the Constitution; and are consequently null and void.
 - iv. Any other or further consequential orders and/or directions that may be given.
 - v. Costs of the Application be awarded to the Applicant.
5. Instructively, the instant Application is premised and or anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the statement of facts which was filed alongside the Chamber Summons Application for Leave; as well as the Affidavit in Verification of the Statement of Facts sworn on the 6th March 2019.
6. Be that as it may, upon being served with the substantive Notice of Motion Application, the 1st Respondent herein filed a Replying affidavit sworn by one, namely, Edmond Gichuru; whereas the 3rd Respondent filed a Replying affidavit sworn by Maurine Chengetich, and which Replying affidavit is sworn on the 25th July 2023.



7. Other than the foregoing, it suffices to point out that the Application came up for hearing on the 14th June 2023, whereupon the advocates for the respective Parties agreed to canvass and dispose of the Application by way written submissions. In this respect, the Ex-party Applicant proceeded to and filed written submissions dated the 25th September 2023.
8. On the other hand, the 3rd Respondent proceeded to and filed written submissions dated the 7th October 2023; and in respect of which same raised and canvassed various issues inter-alia, that the determination by the 1st Respondent, which is the subject of the current application, was lawful and legitimate.
9. Other than the foregoing, it is instructive to underscore that the 1st and 2nd Respondents herein did not file any written submissions despite having been present on the 14th June 2023; when directions pertaining to and concerning the filing of written submissions were given.

The Parties' Submissions:

Ex-parte Applicant's Submissions

10. The Ex-parte Applicant herein filed written submissions dated the 25th September 2023; and in respect of which same isolated, highlighted and canvassed five (5) salient issue for due consideration by the Honourable court.
11. Firstly, Learned counsel for the Ex-parte Applicant has submitted that the 1st Respondent herein commenced and undertook proceedings touching on and/or concerning various properties belonging to and registered in the name of the Ex-parte Applicant and her associate Companies, albeit without due notice to the Ex-parte Applicants.
12. Furthermore, Learned counsel has contended that by undertaking and conducting proceedings touching on and concerning the properties belonging to the Ex-parte Applicants, albeit without notice unto the Ex-parte Applicants, the 1st Respondent herein breached and/or violated the Ex-parte Applicant's constitutional right to Fair Administrative Action as envisaged under the provisions of Article 47 of *the Constitution*.
13. Secondly, it was the submissions of Learned counsel for the Ex-parte Applicant that the 1st Respondent herein also failed to accord and/or afford the Ex-parte Applicant reasonable opportunity to be heard on issues touching on and/or affecting her property rights over the various properties, which were the subject of deliberations by the 1st Respondent.
14. To the extent that the Ex-parte Applicant was neither availed nor afforded the opportunity to be heard, Learned counsel for the Ex-parte Applicant has therefore submitted that the resultant proceedings; as well as the determination by the 1st Respondent were therefore undertaken and arrived at in utter and flagrant violation of the provisions of Article 50(1) of *the Constitution*, 2010.
15. Thirdly, Learned counsel for the Ex-parte Applicant has also submitted that the manner in which the 1st Respondent conducted the impugned proceedings and thereafter generated the offensive determination violated the Rule of Natural Justice, which underscores that no Party, the Ex-parte Applicant not excepted, ought to be condemned without being heard.
16. At any rate, Learned counsel for the Ex-parte Applicant has contended that where proceedings are undertaken and thereafter a decision made in contravention of the Rule of Natural Justice, the resultant proceedings and the attendant decision(s), if any; are a nullity ab initio and thus amenable to be quashed Ex-Debito-Justitiae.



17. Fourthly, Learned counsel for the Ex-parte Applicant has submitted that the 1st Respondent herein was obligated to make and proclaim Rules of engagement by dint of Section 14(2) of the [National Land Commission Act, 2012](#); prior to and before undertaking any proceedings pertaining to and or concerning investigations on account historical land injustice. Nevertheless and in this respect, Learned counsel for the Ex-parte Applicant pointed out that no such rules and/or regulations have since been promulgated by the 1st Respondent.
18. Notwithstanding the foregoing, counsel contended that despite not having promulgated the Rules/ Regulations as statutorily prescribed, the 1st Respondent herein proceeded to and undertook the offensive proceedings albeit in vacuum. Consequently and in this regard, Learned counsel has thus contended that the impugned proceedings and the determination arising therefrom were therefore taken in vacuum.
19. Lastly, Learned counsel for the Ex-parte Applicant has also submitted that the 1st Respondent herein after undertaking the offensive proceedings, without notice to and involvement of the Ex-parte Applicant, proceeded to and rendered a determination contrary to and in contravention of the provisions of Article 67(2) of [the Constitution](#), which only mandates the 1st Respondent to issue Recommendations; and not to make a determination.
20. Owing to the fact that the 1st Respondent herein rendered and handed down a Determination as opposed to recommendations, Learned counsel for the Ex-parte Applicant has therefore invited the court to find and hold that the 1st Respondent herein acted ultra vires her constitutional mandate.
21. In support of the various submissions, whose details have been highlighted in preceding paragraphs, Learned counsel for the Ex-party Applicant has cited and relied on various decisions inter-alia Republic vs National Land Commission & Others, Ex-party Oyester Village Ltd (2021)eKLR, Sceneries Ltd vs National Land Commission (2017)eKLR, Republic vs National Land Commission & 20 Others, Ex-party James Finley's Kenya Ltd & Others (consolidated with ELRJR No. 4 of 2020 and No. 5 of 2020) (UR), Judicial Service Commission vs Mbalu Mutava & Another (2014)eKLR, Dry Associate Ltd vs Capital markets Authority & Another (2012)eKLR and Kenya Human Rights Commission & Another vs Non-governmental Organization Coordination Board & Another (2018)eKLR.
22. Premised on the foregoing, Learned counsel has thus implored the court to find and hold that the impugned proceedings and the attendant determination by the 1st Respondent, were illegal, unlawful and unconstitutional.
23. Consequently, the Ex-parte Applicant has invited the Honourable court to find and hold that the Application under reference is meritorious and thereafter, to proceed and grant the Reliefs sought thereunder.

3rd Respondent's Submissions:

24. The 3rd Respondent herein filed written submissions dated the 7th October 2023; and in respect of which same has raised, highlighted and canvassed three(3) issues for consideration by the Honourable court.
25. First and foremost, Learned counsel for the 3rd Respondent has submitted that the 1st Respondent is conferred and/or vested with wide ranging powers pursuant to and by dint of Article 67(2) of [the Constitution](#) 2010.
26. Furthermore, Learned counsel has added that pursuant to and by dint of the powers vested in the 1st Respondent, same was obligated to undertake her functions in such a manner determined by herself,



- namely, National Land Commission, provided that same observed the Values and Principles espoused under *the constitution*.
27. Consequently and in this respect, counsel has contended that the recommendation(s) by and on behalf of the 1st Respondent, which are the subject of complaint before the court were/are lawful and legitimate.
 28. Secondly, Learned counsel for the 3rd Respondent has submitted that the fact that the 1st Respondent has not promulgated the Rules/ Regulations stipulated pursuant to Section 14(2) of the *National Land Commission Act*, 2012, does not ipso facto invalidate the proceedings and the outcome reached and/or arrived at by the 1st Respondent.
 29. Further and in any event, Learned counsel has added that the benchmark applied and relied upon by the Ex-Parte Applicant in seeking to invalidate the proceedings and recommendations of the 1st Respondent, is not well founded.
 30. Thirdly, Learned counsel for the 3rd Respondent has submitted that the Ex-parte Applicant herein sought for time before the 1st Respondent to be able to file documents with a view to assisting the 1st Respondent to resolve the dispute which was under investigation, but despite having been availed time, same failed and/or neglected to comply with the directions of the 1st Respondent.
 31. Arising from the forgoing, Learned counsel for the 1st Respondent has therefore contended that the orders of Judicial Review, which are being sought for by the Ex-parte Applicant are thus not available, either as prayed or at all.
 32. In a nutshell, Learned counsel for the 3rd Respondent has therefore impressed upon the court to find and hold that the Notice of Motion Application beforehand is devoid of merits; and thus same ought to be dismissed with costs.

Issues For Determination:

33. Having reviewed the Pleadings filed by and on behalf of the respective Parties; and upon consideration of the written submissions, (whose details have been highlighted herein before), the following issues do emerge and are thus worthy of determination.
 - i. Whether the Ex-parte Applicant was duly notified of the intended Proceedings touching on and affecting her rights over the properties in question and whether same was afforded an opportunity to be heard.
 - ii. Whether the Proceedings before the 1st Respondent and the resultant determination were arrived at in contravention of Article 47 of *the Constitution*, 2010.
 - iii. Whether the determination by and on behalf of the 1st Respondent was lawful and constitutional.

Analysis And Determination

Issue Number 1 Whether the Ex-parte Applicant was duly notified of the intended proceedings touching on and affecting her rights over the Properties in question and whether same was afforded an opportunity to be heard.

34. There is no gainsaying that the 1st Respondent herein is a constitutional commission established pursuant to and by dint of the provisions of Article 67(2) of *the Constitution* 2010.



35. By virtue of being a constitutional commission, the 1st Respondent herein is not subject to the direction of any person and/or body. However, it is instructive to state and underscore that like all constitutional commissions and state organs, the 1st Respondent herein is subordinate to and must at all times comply with and observe the National values and principles of governance articulated vide Article 10 of *the Constitution*, 2010.
36. Owing to the fact that the 1st Respondent is subordinate to *the constitution*, it is therefore common ground that in the discharge and execution of her functions, the 1st Respondent must no doubt observe and uphold the fundamental freedoms of the citizens, the Ex-parte Applicant not excepted.
37. Premised on the foregoing, it is important to point out and underscore that where the 1st Respondent was keen to undertake investigations, whose net effect was to impact upon and/or otherwise affect the rights of the Ex-parte Applicant, it was thus incumbent upon the 1st Respondent to issue and serve the Ex-Parte Applicant with due and reasonable notice, intimating the nature of the issues to be investigated; the time and place of such investigation.
38. Additionally, it was also incumbent upon the 1st Respondent to avail to and/or supply the Ex-Parte Applicant with the substance of the complaints, if any, as well as the documents to be relied upon as against the Ex-Parte Applicant, so as to enable the Ex-Parte Applicant to be for-warned of the nature and extent of complaint(s) to be met and (sic) responded to.
39. Additionally, it is also important to underscore that other than issuing the requisite notice and availing the substance of complaint, if any, it also behooved the 1st Respondent to afford the Ex-parte Applicant a reasonable opportunity to be heard on the issues under investigations.
40. Instructively and in this respect, the opportunity to be heard would include, inter-alia, opportunity to file Written representations; and where appropriate, to attend a physical hearing with a view to canvassing her (Ex-Parte Applicant's) case and/ or Defence, if any.
41. However, despite the significance of the need to issue and serve due notice on the adverse party and thereafter afford same an opportunity to be heard, the 1st Respondent herein proceeded to and undertook proceedings which were held on various dates, inter-alia, the 11th July 2018, 17th August 2018, 14th September 2018 and 11th October 2018, respectively, albeit without notice to and involvement of the Ex-parte Applicant.
42. Furthermore, even though the impugned proceedings touched and/or concerned various properties belonging to and registered in the name of the Ex-Parte Applicant and affiliated companies, the 1st Respondent herein also did not deem it fit and/or expedient to afford the Ex-parte Applicant an opportunity to be heard.
43. Arising from the foregoing, the 1st Respondent herein proceeded to and indeed heard the Complaint(s) that were mounted by and on behalf of Talai Clan Community versus The British Colonial Government and the Government of Kenya, but without taking into cognizance that the impugned proceedings had a directive bearing on the rights and interests of the Ex-parte Applicant.
44. To the extent that the impugned proceedings were taken and/or conducted without notice to and involvement of the Ex-parte Applicant, it is the finding and holding of this court that the impugned proceedings were thus carried out in utter and flagrant disregard of the Ex-parte Applicant's Rights to Fair Hearing, as espoused and entrenched in Article 50(1) of *the Constitution*, 2010.
45. Similarly, there is no gainsaying that where the impugned proceedings are bound to affect and/or impact on the rights and/or interests of a particular person, in this case the Ex-parte Applicant, the



Rule of Natural Justice dictates that the affected Party be afforded an opportunity to be heard before a decision is made by the concerned authority.

46. Further and in any event, it is trite and established that where a decision is made and/or arrived at without affording the affected Party the requisite opportunity to be heard, then the impugned proceedings and the resultant decision(s), if any, becomes null and void, irrespective of the merits thereof.
47. To this end, it suffices to cite and reiterate the ratio decidendi in the case of *Oloo Onyango versus The Attorney General* (1986)eKLR, where the Court of Appeal stated and held thus;

“The obvious answer to that argument is that one cannot tell if the commissioner acted subjectively and arbitrarily. A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at: *De Souza v Tanga Town Council* [1961] E A 377 at page 338, letter E-G. “

48. Additionally, the significance of the Right to Fair Hearing and the attendant Due process was also elaborated upon and underscored by the Court in the case of the *County Assembly of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 others* [2015] eKLR, where the court held thus;

“The primary meaning of the rule of law as anybody who has anything to do with the law knows, “is that everything must be done according to law.” In relation to governmental power, this means that every government authority must justify its action, which deprives an individual of his right or infringes his liberty, as authorized by law. This “is the principle of legality.” But the rule of law demands more than just the principle of legality. It demands, and this is the second meaning of the rule of law, “that government should be conducted within a framework of recognized rules and principles which restrict discretionary power.” This is the principle of due process.

1. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
2. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the



allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.

49. Before departing from the issue under discussion, it is also appropriate to take cognizance of the ratio decidendi in the case of Sceneries Limited versus National Land Commission [2017] eKLR, where the court held thus;

“Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of *the Constitution* encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. In this regard, the respondent’s complaints are that it was not informed of the complaints against it nor was the applicant supplied with details of the complaint filed by the first interested party; and that the applicant was not given adequate time to present his defence; that the applicant was not accorded an opportunity to call witnesses, in fact the findings annexed to the replying affidavit filed by the Respondent show that the matter was determined without affording the applicant the opportunity to call its witnesses. I find that the above constitutional provisions were violated, and again, on this ground, the applicants case succeeds.”

50. To my mind, it was incumbent upon the 1st Respondent, which was the decision-making organ, to ensure that the Ex-parte Applicant and such other bodies, if any, whose rights and interests were bound to be affected, were duly served with the requisite notices and thereafter afforded due opportunity to be heard.
51. For good measure, it is important to underscore that the Right to be heard is a Fundamental and non-derogable Right; which the 1st Respondent herein could not abrogate in any manner whatsoever. See Article 25(c) of *the Constitution*, 2010.

Issue Number 2 Whether the proceedings before the 1st Respondent and the resultant determination were arrived at in contravention of Article 47 of *the Constitution*, 2010.

52. Other than the requirements imposed upon all bodies and persons, the 1st Respondent not excepted, by dint of the provisions of Article 50, it is also important to underscore that every decision-making body is obligated to comply with the provision of Article 47 of *the Constitution* which relates to Fair Administrative Action, whenever a right or fundamental freedom of a person is affected or likely to adversely affected.
53. In respect of the instant matter, there is no gainsaying that the Ex-party Applicant’s proprietary rights to and in respect of various immovable properties were bound to be affected by the proceedings and the resultant decisions, if any, made by the 1st Respondent.
54. Given that the impugned proceedings and the resultant outcome were likely to impact on and/or adversely affect the rights of the Ex-Parte Applicant, it was obligatory upon the 1st Respondent to not only notify the Ex-Parte Applicant of the administrative action being taken; but also to avail to the Ex-Parte Applicant the reasons underpinning the impugned actions.
55. However, from the determination dated the 7th February 2019, which was ultimately gazette, there is no indication that the Ex-parte Applicant was availed any opportunity to interrogate the complaints



- thereunder; and in particular, there is no intimation of any reason having been availed to the ex-party applicant.
56. Furthermore, the 1st Respondent herein does not dispute that the proceedings that were conducted before her and the determination arising therefrom, have indeed affected the Rights and Interests of the Ex-Parte Applicant.
 57. Instructively, the 1st Respondent has made various determinations, inter-alia, that a re-survey be done on the lands held by the Tea Estates (read the Ex-parte Applicant) to determine if there is any residue to be held in trust for the community by the County Government for Public utility.
 58. Clearly, the re-survey alluded to, is intended to affect Private land held by, inter-alia the Ex-parte Applicant, but who was neither notified of the terms of the Complaint nor involved in the impugned proceedings.
 59. Further and in addition, the 1st Respondent has also rendered a determination whereby same has directed that the commission recommends that the renewal of Leases to this lands, namely, the Lands held by the Tea Estate firms, be held in abeyance until an agreement is reached with the respective County Governments.
 60. In my humble view, the raft of recommendations alluded to and contained in the body of the Determination by the First Respondent herein, have adverse effects on the rights of the Ex-parte Applicant herein.
 61. Notably, it is important to point out that the various determinations rendered by the 1st Respondent herein were also geared towards taking away and/or limiting the Ex-Parte Applicants' pre-emptive Rights to renewal of Leases as provided for in terms of Section 13 of the Land Act, 2012; albeit again without any reason being availed.
 62. Without belaboring the point, it suffices to point out that the first Respondent herein was indulging in administrative actions, which were ipso facto unlawful and thus unconstitutional.
 63. In this respect, it is appropriate to adopt and reiterate the holding of the Court in the case of Judicial Service Commission versus Mbalu Mutava & another [2014] eKLR; where the court stated as hereunder;

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”
 64. Arising from the foregoing, my answer to issue number two is to the effect that the actions by and on behalf of the 1st Respondent, which are the subject of the instant proceedings, were in contravention of the provisions of Article 47 of the Constitution 2010; as read together with Section 4 of the Fair Administration Act, 2016.



Issue Number 3 Whether the Determination by and on behalf of the 1st Respondent was Lawful and Constitutional.

65. The 1st Respondent herein carried out and undertook the impugned proceedings, allegedly in pursuance of her Constitutional mandate donated vide Article 67(2) of *the Constitution* 2010.
66. To the extent that the 1st Respondent was purportedly acting in accordance with the named provisions of *the Constitution*, same was therefore obligated to comply with and adhere to the terms of the said provisions.
67. Instructively, under the provisions of Article 67(2) of *the Constitution*, the 1st Respondent herein was obligated to generate and make recommendations arising from her proceedings. For good measure, the terminology employed under the provisions of Article 67 of *the Constitution*, 2010; refers to “Recommendation” and not otherwise.
68. Nevertheless, it is important to observe that upon the conclusion of the impugned proceedings (which were undertaken without due notice to and involvement of the Ex-Parte Applicant), the 1st Respondent proceeded to render what is called a determination and not recommendation.
69. From the rendition delivered and handed down by the 1st Respondent, there is no gainsaying that the monster that was rendered by the 1st Respondent was contrary to the constitutional edict, which prescribed Recommendations.
70. It is not lost on this court that the drafters of *the constitution*, in their wisdom, appreciated and knew why same deployed the term Recommendations and not a determination. Further and in any event, it is instructive to emphasize that the two terminologies are not synonymous.
71. Consequently and in my humble view, where a body, the 1st Respondent not excepted, is mandated to render a prescribed outcome, but same delivers an outcome that is ultra vires her mandate; such an outcome is rendered void and thus a nullity.
72. Simply put, it behooves Every State organ and Constitutional commission, the 1st Respondent not excepted, to ensure that same operates within the constitutional parameters prescribed, without arrogating unto themselves a Jurisdiction that has not been donated under the law. Furthermore, State Organs and Constitutional Commissions, including the 1ST Respondent herein cannot expand their mandates beyond the prescription of *the Constitution*, 2010.
73. Consequently and in this respect, I similarly find and hold that the rendition of a “Determination” as opposed to “Recommendation”, the latter which is prescribed under *the constitution*, has also invalidated the entire outcome made by the 1st Respondent.
74. To fortify the holding enunciated in the preceding paragraph, I share and reiterate the ratio decidendi in the case of Sceneries Limited versus National Land Commission [2017] eKLR, where the court stated and observed as hereunder;

“ Article 67 (2) (e) of *the constitution* and section 5 of the Act stipulates the functions of the National Land Commission which included inter alia to "to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."

Form the above provision, it is clear that the Respondent is mandated to investigate and recommend appropriate redress. From its report dated 26th July 2016 annexed to the affidavit of Brian Ikol, the Respondent purported to render "a determination" as opposed to a



"recommendation." The Black's Law Dictionary defines "determination" as "a final decision by a court or administrative agency." Article 67 (2) cited above is clear and overrides the provisions of section 14 (4) of the act which provides that "after hearing the parties in accordance with subsection (3), the Commission shall make a determination." It is my humble view that under Article 67 (2) (e) of *the constitution*, the Respondent can only "recommend appropriate redress" but cannot purport to make a "determination" which is a final decision. On this ground alone, I find that the decision in question is tainted with illegality because the Respondent rendered a "determination" as opposed to a "recommendation" as provided under *the constitution*, which is the supreme law of the land."

75. Invariably, even on the basis of the outcome that was rendered by the 1st Respondent, I would still have come to the conclusion that the impugned determination is a nullity and thus amenable to the orders of judicial review in the nature of certiorari.

Final Disposition:

76. From the foregoing discourse, it is evident and apparent that the 1st Respondent herein indulged and/or engaged in activities and/or actions that were calculated to affect the rights and interests of the Ex-Parte Applicant herein, but despite being aware of the impacts of the impugned proceedings on the rights of the Ex-Parte Applicant, same remained adamant.
77. Owing to the foregoing, and taking into account the provision of Articles 2, 10(2), 27(1), 47 and 50(1) of *the Constitution* 2010, I come to the unreserved conclusion that the amended Notice of Motion dated the 22nd May 2023; is meritorious.
78. Consequently and in the premises, the amended Notice of Motion Application dated the 22nd May 2023; be and is hereby allowed in terms of prayers 1, 2 and 3 thereof. Further and in addition, costs of the application shall be borne by the 1st Respondent herein.
79. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mrs. Esther Kinyenje – Opiyo for the Ex-Parte Applicant

N/A for the 1st, 2nd and 3rd Respondents

