



**REPUBLIC OF KENYA**

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

**ELC JUDICIAL REVIEW APPLICATION NO. 48 OF 2017**

**IN THE MATTER OF APPLICATION BY AKIYDA TWO THOUSAND LIMITED FOR JUDICIAL REVIEW ORDERS**

**AND**

**IN THE MATTER OF PUBLIC PETITION TO THE COUNTY ASSEMBLY OF KISUMU ON KIBOS ONG'WANO MARKET**

**AND**

**IN THE MATTER OF LAND REFERENCE NUMBER 15401**

**AND**

**IN THE MATTER OF ARTICLES 40 (1), 47 (1), 50 (1), & 63 (2) OF THE 2010 CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 4 (3) (a) & (b), 4 (4), 7 (1) (a), 7 (2) (a) (i) & (ii), 7 (2) (d), 7 (2) (f), 7 (2) (g), 9 (1), 10 (1), 11 (1) (a) (b) & (c), OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF ORDER 53, RULES 3 & 4 OF THE 2010 CIVIL PROCEDURE RULES, CAP 21**

**BETWEEN**

**AKIYDA TWO THOUSAND LIMITED.....APPLICANT**

**AND**

**COUNTY ASSEMBLY OF KISUMU.....RESPONDENT**

**AND**

**ALLAN OJWANG' OUMA.....1<sup>ST</sup> INTERESTED PARTY**

**GREGORY NGOCHE.....2<sup>ND</sup> INTERESTED PARTY**

**MARTIN OKOTH.....3<sup>RD</sup> INTERESTED PARTY**

**MAURICE OWINO.....4<sup>TH</sup> INTERESTED PARTY**

**NAFTALI OKOTH.....5<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. That vide the notice of motion dated the 3<sup>rd</sup> October 2017 brought under **Order 53 Rule 3 of Civil Procedure Rules** and **Section 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya**, Akyda Two Thousand Limited, the Applicant, seeks for the following orders;

1. “An order of mandamus be and is hereby issued compelling the respondent to avail the applicant’s advocates with certified true copies of the respondent’s proceedings depicting the time, date, place and quorum under the auspices of which the decision to consider and deliberate on a Petition on Kibos Ong’wano Market was made.
2. An order of mandamus be and is hereby issued compelling the respondent to avail and provide certified copies of the resolution to constitute the Joint Committee on Planning, Housing and Industrialization; Trade, Cooperatives and Enterprise Development.
3. An order of certiorari be and is hereby issued quashing the decision of the respondent to consider and deliberate on the Petition on Kibos Ong’wano Market submitted to it.
4. An order of certiorari be and is hereby issued quashing the decision of the respondent to constitute a Joint Committee of Planning, Housing and Industrialization; Trade, Cooperative and Enterprise Development to investigate the petitioner’s claims.
5. An order of certiorari be and is hereby issued quashing the recommendations made against the applicant in the report of the respondent’s joint committee.
6. An order of prohibition be and is hereby issued prohibiting the respondent from continuing any further proceedings, commencing or instituting any fresh proceedings, issuing any orders or carrying out any related or other enforcement or punitive actions against the applicant in relation Land Reference No. 15401.
7. Costs of this application be borne by the respondent.”

2. The motion is premised on the grounds on its face summarized as follows:

- a) That the County Assembly of Kisumu, the Respondent, purported to exercise the Jurisdiction it did not have by receiving and entertaining a petition from Allan Ojwang’ Ouma, Gregory Ndoche, Martin Okoth, Maurice Owino, Naftali Okoth and Vincent Osewe, the Interested Parties, over an alleged Land dispute between the residents of Kolwa Central Ward, where Kibos Ong’wano Market is situated, and developers with lawful titles in the area.
- b) That the Respondent purportedly passed a resolution to constitute a Joint Committee on Planning, Housing and Industrialization; Trade, Cooperatives and Enterprises Development, (The Joint Committee), to investigate the Interested Parties petition and it held a meeting on the 4<sup>th</sup> August 2016, and resolved to visit Kibos Ong’wano Market on the 11<sup>th</sup> August 2016, for a public meeting with the aggrieved community members and relevant stakeholders.
- c) That the meeting of 11<sup>th</sup> August 2016 was attended by six (6) members of the Joint Committee, officials, and members of the Committee Executive Office Kibos Market plus 176 members of the Community, but the Applicant who has title to a property in the area was not invited. That the resolutions made are of a Judicial and or quasi-Judicial nature as it was resolved that they summon and hear officers of the defunct local authority, Ministry of Lands, culprits and trace the maps and stolen records from the National Land Commission. That though the Applicant was affected by the resolutions made thereof, it has not been availed with copies of the proceedings.
- d) That the Joint Committee in its meetings of 15<sup>th</sup> and 29<sup>th</sup> September 2016 resolved and mandated the Committee Clerk to request the Applicant to provide evidence of the process it followed to acquire L. R. No. 15401, and the Applicant’s Counsel responded by providing evidence of the Applicant’s legal title. That however, the Joint Committee omitted to include that fact in its “*Report on the Public Petition to Kisumu County Assembly on Kibos Ong’wano Market in Kolwa Central Kisumu East Constituency.*” That the said report contains recommendations which are likely to materially and adversely affect the Applicant’s legal interests and rights.
- e) That the Applicant, through its Advocates wrote to the Joint Committee Clerk on the 19<sup>th</sup> October 2016 requesting for particulars of any investigation touching on the Applicant’s legal interests and adequate prior notice of any intended administrative action likely to adversely affect the Applicant’s rights, but there has been no response. That the Applicant’s Advocates did a letter dated the 16<sup>th</sup> January 2017 seeking for details of the Joint Committee’s investigation and a copy of the Joint Committee’s Report on the Public Petition to Kisumu County Assembly on Kibos Ong’wano Market in Kolwa, Central, Kisumu East Constituency and was provided in June 2017 through their reply from which the irregularities set out above were noted.
- f) That the Joint Committee usurped the powers and functions of a Judicial tribunal of competence Jurisdiction such as the Environment and Land Court by making Judicial and or quasi-Judicial resolutions. That it also usurped the investigative role, and mandate of the National Land Commission provided in Sections 5 (1) (a) & (e), 6 (2) (a) & (b), 18 (1) & (9) (a) & (b)

of the National Land Commission Act 2012.

**g) That the Joint Committee in performing the purported functions failed and or neglected to give the Applicant adequate notice, opportunity to attend the meetings, to be heard and cross-examine those testifying against it. That the Joint Committee recommendations that have serious constitutional implication were based on nothing more than untested assertions by the Interested Parties, and members of the alleged aggrieved Community whose identities, addresses, legal rights and interests were unverified.**

3. The motion is supported by the statement dated the 20<sup>th</sup> July 2017 and verifying affidavit sworn by Elka Kwamboka Motanya, the Legal Officer with the Applicant, on the 20<sup>th</sup> July 2017 whose highlights are as follows, among others;

**a) That the Applicant acquired L. R. No. 15401, measuring 1.367 hectares, the property, vide sale agreement dated 13<sup>th</sup> October 2014 at Kshs. 20,800,000/=, from Jacktone Mark Kegohi. That the property was regularly and procedurally transferred and registered in the Applicant's name on the 13<sup>th</sup> August 2015.**

**b) That between late 2015 and early 2016, the Applicant's development plans were done, submitted to the City Manager, County Government of Kisumu and National Environment Management Authority and relevant approvals and licence granted.**

**c) That in 2016, the Applicant received a letter from the Respondent about a petition from the community protesting the Applicant's on-going developments on the property dated the 4<sup>th</sup> October 21065. The letter disclosed that the matter was being investigated by a Committee and the Applicant was invited to submit any legal documents supporting its ownership of the property. That the Applicant supplied the documents required through its advocates, in which it also requested to be provided with copies of the details of investigations, and reasons of any proposed administrative action to safeguard the Applicant's right to fair administrative action and hearing. That on failing to get a response, the Applicant's Counsel wrote the letter dated 16<sup>th</sup> January 2017, seeking for details of the investigations and through a reply in June 2017 received a copy of the Report.**

**d) That in the Report, the Committee inter alia recommended that the National Land Commission be advised to revoke the title to the property as it was donated by the Community in 1948 for a market place; the Applicant stop the development and vacate the property at its own costs; and Kisumu City Management provide a budget to fence off the entire open air market, [Kibos Ong'wano Market]. That the proposed administrative action would materially and adversely affect the Applicant's rights and were taken in violation of Articles 47 (1) and 185 of the Constitution, Sections 4 (3) (a) & (b) and 4 (4) of the Fair Administration Act, 2015 and Section 8 of the County Government Act, 2012.**

**e) That the Respondent has failed, refused and or neglected to avail to the Applicant copies of the historical record on the ownership of the property, which would have been helpful in determine its true current status. That the Applicant's operations have ground to a halt due to the uncertainty in its ownership of the property, resulting to losses due to the delays in the development works and hence these proceedings.**

4. The motion is opposed by the Respondent through the Replying Affidavit sworn by Benson Opiyo, the Clerk to the Respondent, on the 5<sup>th</sup> April 2018 in which he among others deponed as follows;

**a) That as Judicial review proceedings are concerned with decision making processes, and not merits of decisions; the application is frivolous, vexatious and an abuse of the court's process as no illegality or unlawfulness in the process has been demonstrated.**

**b) That the Respondent has not acted beyond its Jurisdiction or usurped the powers and functions of this court in entertaining the petition. That the petition had been presented to the Respondent by the Petitioners who are residents of Kolwa Central Ward, as a matter of public Interest pursuant to Article 37 of the Constitution, Section 88 (1) of County Government Act No. 17 of 2012 and Standing Order No. 196. That the County Speaker committed the petition to the Joint Committee in accordance with Standing Order No. 185 (1) to research and hold public meetings concerning the matters raised in accordance with Standing Order No. 204 (1) and submit a detailed report to the house for adoption.**

**c) That the resolutions made by the committee in the Report are not wrong or illegal, as the Applicant ignored the proceedings and did not provide proof of their title to the property.**

**d) That the Respondent acted in good faith and in accordance with the rules of natural justice in making and publishing its recommendations, as the Applicant had been given prior notice vide letter dated 10<sup>th</sup> October 2016, but blatantly ignored to be involved in the matter and the application should be dismissed with costs.**

5. The application came up for hearing on the 15<sup>th</sup> October 2018 when directions on filing and exchanging written submission were given. That subsequently the learned Counsel for the Applicant and Respondent filed their written submissions dated the 19<sup>th</sup> November 2018 and 16<sup>th</sup> January 2019 respectively which are as summarized herein below;

**A: THE APPLICANT'S COUNSEL SUBMISSIONS:**

**a) The learned Counsel referred to Court of Appeal decision in Ransa Company Ltd vs Manca Francesco & 2 Others [2015]**

eKLR, on what Judicial review deals with, definition of prohibition and mandamus orders, and High Court cases Republic vs National Transport & Safety Authority & 10 Others, exparte James Maina Mugo [2015] eKLR, Eunice Khalwali Miima vs Director of Public Prosecutions & 2 Others [2107] eKLR, and Kisoba Association vs Nairobi City County Government & 2 Others Judicial Review Application No. 412 of 2017 on what Certiorari orders are, scope, ambit and purpose of Judicial review proceedings, and submitted that Article 185 of the Constitution as read with Part 2 of the fourth Schedule does not give the Respondent any constitutional roles, powers and functions to entertain the petition, and therefore acted outside its statutory role assigned to it under Section 8 of the County Government Act 2012.

b) That the Joint Committee failed and or neglected to give the Applicant prior, and adequate notice of the nature and reasons of its proposed administrative action, i.e. the recommendations that were incorporated in the Report.

c) That the Applicant was not invited to hear and to attend the public hearings and meetings held for the purposes of investigating the petition, and was not afforded an opportunity to be heard and make representations.

d) That the Respondent did not have Jurisdiction to clothe the Joint Committee with power and mandate of a Judicial and or quasi-Judicial nature, to investigate and conduct hearings on the merits of the property. That the decisions made thereof, without establishing whether the petitioners had legally enforceable rights over the property, and without the backing of official or historical records cannot be allowed to stand but should be quashed.

#### B: RESPONDENTS COUNSEL'S SUBMISSIONS;

a) That the Joint Committee did not make any decision that warrants the Applicant to file these proceedings, and it is their submissions that the Applicant intention in these proceedings is to shield itself from the legal process of reclaiming and repossessing the public property.

b) That Sections 15 and 88 of the County Government Act 2012 and Standing Order 196 empowers any person to petition the Respondent and the County Government on any matters under their responsibility. That the Respondent received the Interested Parties petition on a claim of illegal allocation of unregistered community land that is held in trust by the County Government under Article 63 (3) of the Constitution.

c) That as the petition had raised a matter of public, as opposed to private interest, the Respondent was with authority under Sections 15 and 88 of the County Government Act as read with Kisumu County Assembly Standing Orders 196 and 197 as it related to management of public resources, and the Respondent has authority to hear and discuss matters of illegal allocation of community and public land.

d) That to hold as the Applicant seems to do that Article 185 read with Part 2 of the Fourth Schedule of the Constitution to mean that the Respondent is without Jurisdiction to deal with the petition is to take an unfortunate narrow and eye folded interpretation which is inconsistent with the spirit of the Constitution, the roles of County Governments and their assemblies.

e) That the Respondent acted in accordance with the laid down legal procedures, in that the Speaker, upon receiving the petition as provided by Standing Order 197 (i) reported about it to the County Assembly, and in accordance with Standing Order 185 (1), committed it to the Committee who were to act in accordance with Standing Order 204 (1), and submit its Report. That the Joint Committee determined the time and place of the Public hearings and complied with Article 10 of the Constitution, Sections 87 and 89 of the County Government Act to ensure public participation. The learned Counsel referred to the decision of Republic vs County Government of Kiambu exparte Robert Gakuru & Another [2016] eKLR, on what amounts to public participation. The Counsel also referred to the case of Republic vs Kenya National Commission on Human Rights Exparte Uhuru Muigai Kenyatta Misc. Civil Appeal No. 86 of 2009 [2010] eKLR in support of their submission that public interest outweighs private rights in Judicial review application.

f) That the Respondent in compliance with Section 4 of the Fair Administrative Action Act, gave adequate notice to parties, including the Applicant, regarding the nature and reasons for the administrative action, but the Applicant declined to participate. The learned Counsel referred to the case of County Government of Nyeri vs County Assembly of Nyeri exparte Dickson Mirichi Kihagi T/A Munyaka Bar & Another [2016] eKLR and submitted that the Applicant had ignored the Respondent's Judicial competence to entertain the petition as a quasi-judicial body and cannot therefore seek judicial review remedies. [See Court of Appeal decision in Jaldesa Tuke Dabelo vs Independent Electoral & Boundaries Commission & Another [2015] eKLR, where the court held that a litigant cannot ignore the Jurisdictional competence of a court, or the procedure for commencing a cause of action, and then aver that he has not been heard. The Counsel submitted that neither Article 159 of the Constitution, nor the overriding objective principles provision can shelter a party who disregards the proper forum, or jurisdictional competences of a court or fails to follow the procedure for commencing a cause of action and prays for the Applicant's application to be dismissed with costs.

g) The Respondent's Counsel cited the case of Union Insurance Co. of Kenya Ltd vs Ramzan Dhanji Civil Application No. NAI. 179 of 1998 cited in Republic vs County Government of Kiambu exparte Robert Gakuru & Another [2016] eKLR where the Court of Appeal after restating that the *"right to be heard is a basic natural justice concept and ought not to be taken away lightly"*, observed that the Applicants in the matter before it had been duly notified of every step the Respondents there intended to take but did not attend and held that *"The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point of which the party not utilizing the opportunity can be heard is why he did not utilize it"*.

h) That the Joint Committee's recommendations to the Respondent are legal, unbiased and not prejudicial to the Applicant

for reasons that they first recognizes the interest of the community; and secondly they require the Applicant to provide legal documents on ownership, among others. That the Applicant has failed to demonstrate in what way the Respondent failed to act in accordance with its obligations and cited the case of Republic vs Kenya Power & Lighting Company Ltd & Another [2013] eKLR where the court held that *“it is not enough for an applicant in Judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for Judicial review remedies to be granted.”*

i) That as the Respondent was with Jurisdiction to entertain the petition as it did, and it was not biased when conducting the proceedings, and had no ulterior motives aimed at prejudicing the Applicant, and therefore the application must fail with costs to the Respondent.

6. The following are the issues for the court’s determinations;

a) Whether the Applicant has established that the Respondent had no Jurisdiction to make the impugned decisions or it exceeded its Jurisdiction in arriving at the said decisions.

b) Whether the Applicant was given an opportunity to make its presentations or be heard before the impugned decisions were made.

c) Whether the Respondent considered irrelevant matters, or failed to consider relevant matters, in arriving at the impugned decisions.

d) What order(s) to issue.

e) Who pays the costs.

7. The Court has carefully considered the grounds on the motion, statement, verifying and replying affidavits, written submissions and come to the following determinations;

a) That from the affidavit evidence availed by the Applicant and the Respondent, it is clear that Kisumu County Assembly, the Respondent, received a petition from the Interested parties in 2016. That the Respondent has annexed a copy of the said petition as “ANNEX 1” that shows at the top of the front page handwritten note, that it was *“received and cleared to the house”* by the Deputy Speaker on the 21<sup>st</sup> July 2016. The Interested Parties have appended their identity card numbers, mobile numbers and signatures next to their names and are described at paragraph 1 as *“the Kibos Ong’wano Market /committee in Kolwa Central, Kisumu East District, Kisumu East Constituency.”* That the Interested Parties at paragraph 1 headed *“Introduction” “request the County Assembly of Kisumu in the protection of public interest; intervene in reclaiming Ong’wano Market for our utilization for economic and livelihood benefits and activities.”* That the Respondent is like other County Assemblies, established by **Article 176 of the Constitution 2010** which states;

**“176. (1) There shall be a County government for each County consisting of a County assembly and a County executive.”**

b) That it is the Applicant’s case that **Article 185 read with Part 2 of the Fourth Schedule of the Constitution 2010** does not clothe the Respondent with the powers to deal with the petition it had received from the Interested Parties and come up with the decisions as it did. That the Respondent has responded that the Applicant’s interpretation of the said Constitutional provision is narrow and eye folded one, which is inconsistent with the spirit of the Constitution, roles of County Governments and their Assemblies. That **Article 185 of the Constitution** provides for the Legislative authority of County assemblies, while **Part 2 of the Fourth Schedule** thereof sets out the powers and functions of County Governments in Agriculture; health services; air pollution, noise pollution, public nuisances and outdoor advertising; cultural activities, public entertainment and public amenities; transport; animal control and welfare; Trade development and regulation; County planning and development; pre-primary education, village polytechnics, home craft centers and childcare facilities; implementation of specific national government policies on natural resources and environmental conservation; public works and services; firefighting services and disaster management; control of drugs and pornography; and ensuring and coordinating the participation of committees and locations in governance at the local level. That the petition related to land alleged meant for a market and under **Section 7 (a) of Part 2 of the Fourth Schedule, the County Governments** have powers and functions in trade development and regulation over markets in their Jurisdiction. That the aspect of regulation would require the County assembly legislative input. That however does not confer upon the Respondent the power and function to determine ownership of alienated public land as that Jurisdiction rests with this court under **Article 162 (2) (b) of the Constitution, and Section 13 of the Environment and Land Court Act No. 19 of 2011.**

c) That **Section 14 of Part 2 of the Fourth Schedule of the Constitution confers** upon the County Government the function and power of *“Ensuring and Coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.”* That the Interested Parties, as officials of Kibos Ong’wano Market, forwarded their petition to the Respondent who acted and processed it through the relevant committees, and came up with recommendations for adoption. That the court finds nothing wrong with the Respondent acting on a complaint from the residents of their County, so long as all the parties affected or likely to be affected are given notice and opportunity to make representations, or to be heard and that the decisions arrived at are within the Respondent’s powers.

d) That the Applicant’s claim that it was not given notice of the subject matter of the meetings and an opportunity to be heard was disputed by the Respondent. That both the Applicant and Respondent annexed to their affidavits copies of the letter dated 4<sup>th</sup> October 2016, by the County Assembly Clerk to the Applicant and copied to the Speaker, Majority leader and Chairman, Planning,

Housing and Industrialization Committee. The letter is as herein below reproduced;

“REF:KCA/ADM/10/2016 DATE: 4<sup>th</sup> October, 2016

**THE PROPRIETOR**

**AKIYDA 2000 LATD**

**P.O. BOX 17592-00500**

**NAIROBI**

**RE: PUBLIC PETITION TO KISUMU COUNTY ASSEMBLY ON KIBOS ONG’WANO MARKET**

**The Committee of Kibos Ong’wano market in Kolwa Central, Kisumu East Constituency forwarded a petition to the Assembly seeking for the protection of their interest and intervention in reclaiming Ong’wano market (Open Air Market).**

**The community has protested against the ongoing construction on that parcel of land which they claim is being undertaken by yourself. The matter is under investigation by the Planning, Housing and Industrialization committee to ascertain what transpired that culminated to the dispute.**

**You are hereby given opportunity to submit to the committee any legal documents supporting your ownership including the minutes of the defunct local authority indicating all the relevant processes followed to acquire that parcel of land. Please ensure that any information available and is in your custody reaches the committee not later than five working days from the date of this letter.**

**Philip Adundo**

**COUNTY ASSEMBLY CLERK**

**Cc: Hon. Speaker**

**Hon. Majority Leader**

**Chairman- Planning, Housing and**

**Industrialization Committee”**

That it is clear from the letter that paragraphs 1 and 2 contains a summary of the petition, while paragraph 3 gives the Applicant the opportunity to submit to the Committee documents supporting its ownership of the property. That while the Applicant has deponed that it indeed responded to the said letter through their Advocate’s letter dated the 19<sup>th</sup> October 2016, addressed to Mr. Phillip Adundo, County Assembly Clerk, the Respondent, has through paragraphs 11, 12, 14 and 15 of their replying affidavit denied receipt of the said communication. That the court has noted the copy of the letter dated 19<sup>th</sup> October 2016, annexed to the Applicant’s verifying affidavit at the bottom of page 2 has a faint stamp impression of the Respondent. That though the date of receipt of the letter by the Respondent is not clear, it would appear that indeed the Applicant responded. That among the documents indicated to have been annexed and forwarded to the Respondent under the letter are the instrument of transfer dated 28<sup>th</sup> October 2014, and registered on the 13<sup>th</sup> August 2015 in their favour.

e) That the Report by the Joint Committee to the Respondent dated the 24<sup>th</sup> October 2016 did not make any reference to the Applicant’s letter dated the 19<sup>th</sup> October 2016 or the property ownership document forwarded thereunder. That there is no explanation tendered, except that the Applicant opted not to participate in the proceedings. That had the Respondent’s receiving stamp on the letter exhibited by the Applicant been legible, the court would have established with finality whether the letter was received before or after the Joint Committee had finalized their Report. That as it is, and on a balance of probabilities, the court finds and holds that the Respondent failed to consider the Applicant’s response to the petition.

f) That **Article 67 of the Constitution** on the establishment of the National Land Commission sets out its functions at **sub Article (2)** which includes **“to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”** That even assuming that the Respondent did not receive the Applicant’s response to the complaint, the National Land Commission County Coordinator’s letter dated the 19<sup>th</sup> October 2016 to the Respondent on the matter of the petition communicated the following finding among others;

· **“The entire parcel of land that is L. R. No. 15401 that had already been allocated to a developer by the Commissioner of Lands under the Government Land Act Cap 280 (now repealed). The Council designated this land as open air market.**

.....**Secondly, the Council did not consult the Office Commissioner of Lands for advise on how to revoke the**

**existing title in order to free up the land before designating the market as the law required.”** That this position communicated to the Respondent by the National Land Commission County Coordinator, leaves no doubt that L. R. No. 15401 is already alienated land, having been allocated by the Commissioner of Land to a developer. The Joint Committee Report at page 7 made reference to the Commissioner of Lands letter dated the 22<sup>nd</sup> November 2010 to the town Clerk, in which the then Council’s repossessions and reallocations of the plots were termed **“illegal and therefore invalid.”** That there is no evidence tendered before the Joint Committee to confirm whether the alienation of L.R. No. 15401 to the private developer was ever legally and successfully challenged, and the land reverted to public land. That as the National Land Commission is now the legal entity with Constitutional power under **Article 67 (d) (e) of the Constitution, and Section 14 of the National Land Commission Act No. 5 of 2012** to review the grants and dispositions of public land to establish their propriety or legality, the decision/findings by the Respondent’s Joint Committee in their Report dated the 29<sup>th</sup> October 2016, that directed the Applicant to **“stop the development and vacate the plot at his own costs”**, and for management of Kisumu City to provide a budget to fence off the entire open air market, can only be understood to have the effect of taking away the Applicant’s registered interest over the property and conferring it to among others the **“individuals who owned plot there then, and have continued to pay land rates and who “should be given authority to access the plot and develop the structures.”** That though the Respondent defended its decisions claiming it was within its powers, the reading of **Article 185 of the Constitution 2010, and Part 2 of the Fourth Schedule** of the Constitution do not in any way give the Respondent Jurisdiction to cancel, and or revoke title to alienated public land. That the court agrees with the Applicant’s position that the decisions /findings made by the Joint Committee of the Respondent appearing at pages 8 and 9 of their Report dated the 24<sup>th</sup> October 2016, was not only without Jurisdiction but also beyond its powers. That the Joint Committee appear to have been aware of this fact as they stated as follows in their **“conclusion”** at page 10; **“...it is also critical to note that Schedule Four of the Constitution of Kenya does not fully devolve land issues to Counties and therefore it is a requirement to seek the indulgence of the National Government to support streamlining the irregularities on land transactions to avoid future litigations.”** That the court finds that observation to have been spot on, and sound in law and possibly should have helped the Joint Committee to have recommended for the petition to be forwarded to the National Land Commission for necessary action, including compulsory acquisition under **Part viii of the Land Act No. 6 of 2012**, and or recommend for revocation of title and or correcting the irregularities in title under **Sections 14 (5) and (6) of the National Land Commission Act.**

g) That though the Applicant has succeeded in establishing that the Respondent’s Joint Committee breached his right to be heard by ignoring, or failing to consider its response and that the decisions made thereof were beyond the powers of the Respondent, the fact that the Respondent was acting on a complaint raised by its residents and therefore of public interests, leads the court to find that each party should bear its own costs. That prayer 7 is therefore not granted.

h) That whereas the Applicant has sought under prayers 1 and 2 of the motion for copies of the Respondent’s proceedings and resolutions, it has failed to show for what purposes the said copies would be, in view of the subsequent prayers 5 that seeks to quash the recommendations. That prayers 3, 4 and 6 of the motion to quash the decision to hear the petition, and to constitute the Joint Committee are also not established, and in any case the court would not want to unnecessarily interfere with the Respondent’s core functions under the Constitution and statute. That accordingly prayer 1, 2, 3, 4 and 6 are not allowed.

**8.** That flowing from the foregoing, the court finds partial merit in the Applicant’s motion dated 3<sup>rd</sup> October 2017, and filed on the 6<sup>th</sup> October 2017 which is hereby allowed in terms of prayer 5 only, calling into this court and quashing the recommendations made by the Joint Committee in respect of the property, against the Applicant in the Respondent’s Joint Committee Report dated the 24<sup>th</sup> October 2016.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2019**

**In the presence of:**

Applicant Absent

Respondent Absent

Interested Parties 2<sup>nd</sup>, 5<sup>th</sup> & 6<sup>th</sup> Interested Parties

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**