REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JR MISC CIVIL APPLICATION NO. 5 OF 2019

IN THE MATTER OF KENYA GAZETTE NOTICE NO. 1995 DATED 1ST OF MARCH 2019 REFERENCE NLC/HLI/025/2017 EMANATING FROM NATIONAL LAND COMMISSION DECISION DATED 7.2.2019 AND IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT (CAP 26)

AND

IN THE MATTER OF ORIGINAL PARCEL OF LAND REFERENCE NUMBERS 13269 AND PLAN NUMBERS 194969, 20737/6 LAND SURVEY PLAN NUMBER 217450, L.R NO'S 20737/6, 20737/7, 20737/26, 20737/28, 20737/41 AND 20737/42

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARY, MANDUMUS AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

DISTRICT LAND REGISTRAR MERU.....4TH RESPONDENT

ONTULILI MT. KENYA FOREST SQUATTERS.....1ST INTERESTED PARTY

KIAMBOGO ONTULILI

FARMERS SQUATTERS.....2ND INTERESTED PARTY

EVEREST ENTERPRISES LTD.....3RD INTERESTED PARTY

MT. KENYA SQUATTERS GROUP.....4TH INTERESTED PARTY

EXPARTE APPLICANTS

MUTUMA ANGAINE,

JOHN MUGAMBI ANGAINE,

ELIZABETH KALIUNTU ANGAINE AND

JENNIFER KAMWITU ANGAINE

CONSOLIDATED WITH

MERU ELC JUDICIAL REVIEW NO. 7 OF 2019

REPUBLIC.....APPLICANT

VERSUS

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

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

ONTULILI MT KENYA FOREST SQUATTER.....INTERESTED PARTY

EXPARTE APPLICANT;

FLAMINGO HORTICULTURE (K) LTD

JUDGMENT

BACKGROUND

History

1. At the heart of the dispute are expansive parcels of land identified and registered as land reference numbers **13269** measuring **384.1 ha** and land reference **no. 12234** measuring **546.2 ha** (original suit parcels) which were excised from Mt Kenya forest in the 1970s through two legal notices numbers **68 of 1975** and **107 of 1977.** The total acreage was 930 hectares which is about **2,298 acres** (one hectare is equivalent to 2.471 acres).

2. In or around 1995, the two suit parcels were transferred to the late J. H. Angaine and his company who in turn sold some of the land to the exparte applicants in JR No. 7 of 2019 **(Homegrown Kenya Ltd** now **Flamingo Horticulture Ltd)**. The 3rd interested party also claims to have bought some of the land from the family of the late J. H. Angaine.

Litigation in Courts

3. Litigation appears to have thrived through the decades in respect of the suit lands, but for purposes of the dispute at hand the court will concern itself with the case **Meru Judicial Review case no.218 of 2004** and the subsequent appeal at **Nyeri Court of Appeal Case no 277 of 2011**. The judicial review case no. 218 of 2004 was filed in Meru High court by **Lucy Mirigo Munyi and 550 others vs Minister of lands & housing (1st respondent), permanent secretary ministry of lands and housing (2nd respondent), Ccommissioner of lands (3rd respondent) and Homegrown (K) Ltd (interested party-** who are now the current ex-parte applicants in JR 7 of 2019 albeit bearing the name **of Flamingo Horticulture (k) ltd)**. The exparte applicants in the aforementioned suit, (Lucy Mirigo Munyi and others) claim was that the suit land excised from Mt Kenya forest was supposed to be allocated to the landless squatters. They therefore sought an order of mandamus to compel the respondents to settle them on the aforementioned suit land.

4. The Judicial Review suit no. 218 of 2004 was dismissed triggering the appeal at Nyeri Court of Appeal. By then the appeal was dealing with consolidated suits numbers JR 218 of 2004 and Meru H.C Misc application 71 of 2003, whereby the appeal too was dismissed on **22.1.2014.**

The Claim before National Land Commission (NLC)

5. A claim of historical land Injustice was then lodged before NLC by the 1st interested party in Jr No. 5 of 2019 **(Ontulili Mt. Kenya Forest Squatters)** culminating in a **decision dated 7.2.2019** in **Reference no. NLC/HL1/025/2017.** Therein, the NLC made a recommendation to

the Chief Land Registrar for the suit land to revert to the aforementioned group, Ontulili Mt. Kenya Forest Squatters. A **Kenya Gazette Notice no. 1995 dated 1.3.2019** was published to that effect.

6. The aforementioned decision of NLC was the trigger of the two current suits, whereby the exparte applicants in these suits moved this court to have the decision of the NLC quashed.

Joinder

7. After the filing of the JR No. 5 of 2019, other groups moved the court to be enjoined as interested parties. The **Kiambogo Ontulili farmers squatters** filed their application to be enjoined in the suit on 22.5.2019 while **Everest Enterprises Limited** filed a similar application on 2.4.2019. The two applications were allowed by consent of all parties in JR 5 of 2019 on 31.7.2019. Another entity identifying itself as **Mt. Kenya squatters group** filed their application dated 27.9.2019 seeking also to be enjoined in these proceedings as interested parties, and vide a ruling dated 12.2.2020, the court allowed the application.

8. In JR No. 7 of 2019, the exparte applicants filed their case against NLC, the Chief Land Registrar and the Hon. Attorney General as respondents. **The Ontulili Mt. Kenya group** (who had been named as interested parties in Jr No. 5 of 2019) filed their application dated 15.8.2019 to be enjoined in that suit as interested parties. Vide the ruling dated 29.1.2020, the application was allowed by this court.

Directions/Case management

9. Pursuant to directions given by the court on 1.10.2019, the interested parties are identified as follows:

(i) The 1st interested parties are the Ontulili Mt. Kenya Forest Squatters (herein after the Ontulili group).

(ii) The 2nd interested parties are the Kiambogo Ontulili farmers Squatters (herein after the Kiambogo group).

(iii) The 3rd interested parties are Everest Enterprises Ltd (herein after the Everest group).

(iv) The 4th Interested parties are the Mt. Kenya squatters group (herein after the Mt. Kenya group).

10. On 17.11.2020, this court gave case management directions to the effect that all proceedings were to be recorded in JR No. 5 of 2019 and to be imported in JR No. 7 of 2019, thus JR No. 5 of 2019 is the lead file. Further, the court gave all the parties an opportunity to express their sentiments on how they desired the matter to be handled, of which the court gave directions that the said sentiments were to be given due consideration by the court in the final determination of the matter. To this end, some parties expressed a desire for the dispute to be taken back to NLC for re-hearing while others wanted the court to hear the case. Finally, the court gave directions that the matter be heard through written submissions.

THE DISPUTE

Case for the Exparte Applicant in JR No. 5 of 2019

11. The family of the late Hon. J.H Angaine namely Mutuma Angaine, John Mugambi Angaine, Elizabeth Kaliuntu Angaine and Jeniffer Kamwitu Angaine filed a chamber summons application on 22.3.2019 seeking leave to institute judicial review proceedings against the National Land Commission, the Director of adjudication and settlement, the Chief Land Registrar and the District Land Registrar Meru (as respondents) and the Ontulili group as the interested party. Leave was granted on 8.4.2019 which was to operate as a stay of the decision of NLC captured in the **Gazette notice no. 1995** dated **1.3.2019.**

12. The **Substantive Motion** was duly filed on **29.4.2019** where the exparte applicants seek the following orders:

(i) That this honourable court be pleased to grant an order of certiorari to remove into the high court for the purposes of being quashed the decision made by the 1st respondent Gazette notice no. 1995 of 1st March, 2019 in which it purports to revoke the applicants' titles to their land parcel no's 13269, 20737/26, 20737/42, 20737/7, 20737/6, 20737/28 and 20732/41 and allocate the same to the interested parties.

(ii) That this honourable court be pleased to issue Judicial Review orders of mandamus directed to the Chief Land Registrar and District Land Registrar, Meru central district requiring them to forthwith cancel the entry itemized as entry no. NLC/HLI/025/2017 for No's 13269, 20737/7, 20737/6, 20737/42, 20737/28 and 20732/41 and to forthwith re-instate the registration of the exparte applicants herein as the owners of the said plot.

(iii) That this honourable court be pleased to issue Judicial Review orders of prohibition directed to the Chief Land Registrar and District Land Registrar, Meru central prohibiting them from making attempts and/or further or future attempts to revoke, and reinstate the exparte applicants title to no's 13269, 12234, 20737/7, 20737/6, 20737/42, 20737/26, 20737/28 and 20737/41 situated within Buuri sub-county.

(iv) That the costs of the application be paid by the respondents and interested parties.

13. The motion is supported by the grounds set out in the affidavit of **Elizabeth Kaliuntu Angaine**, who identifies herself as the wife of the

late J.H Angaine. She avers that their family owned a company known as J.H Angaine and Sons Ltd which company was allocated by the government the two parcels of land situated in Timau area namely **L.R 13269** and **12234** in 1995 and the grants have never been revoked.

14. That the Angaine family sold **parcel 12234** to **Homegrown Kenya Ltd** while the original **parcel no. 13269** was sub-divided. In the year 2001, the deponent (Elizabeth) was apparently granted a parcel no. **20727/6** measuring **201.1 ha.**

15. The family of J.H.Angaine occupies and utilizes the suit parcels save where they sold. The exparte applicants contend that the **Lucy Mirigo group** filed the case against them in year 2004 which they lost in both high court and court of appeal. The exparte applicants believe that the said group is the same one now calling itself the Ontulili Mt. Kenya Forest Squatters **(Ontulili group)** and that this group should respect the rule of law since litigation ought to be finalized. They further state that the government did settle the squatters occupying Mt. Kenya Forest way back in 1985.

16. The exparte applicants contend that on 1.3.2019, the NLC published the Kenya Gazette Notice No. 1995 recommending to the Chief Land Registrar, the revocation of allocations of their lands. They aver that the proceedings before the NLC were conducted exparte without any notice to them.

17. In their submissions the exparte applicants raised two issues for determination. Firstly, they reiterated their averment that the **Ontulili group** is the same one also known as **Lucy Mirigo group** which litigated in the high court matter **No. 218/2004** and **Court of Appeal No. 277 of 2011**. They aver that NLC cannot purport to re-open the dispute all over again hence the matter is **res-judicata**. On this point, the exparte applicants cited the following cases:

- **Robert Mutiso Lelli vs National Land commission & 3 others (2017) eKLR.**

- **The National Land Commission vs Registered Trustee of the Arya Pratinidhi Sabha,Eastern Africa & another (2019)eKLR.**

- **Mwangi Stephen Murithi vs National Land Commission & 3 Others (2018) eKLR.**

18. Secondly, the exparte applicants contend that they were not heard contrary to the rules of natural justice. They aver that none of the exparte applicants is known by the name Baptisa John M. Angaine who was allegedly served. Citing the provisions of Articles 50 (1), 47 and 24 (2) of the Constitution as well as Section 14 of the NLC Act, the exparte applicants submitted that they were entitled to a hearing before the NLC. They therefore urge the court to quash the decision of NLC dated **7.2.2019** as well as the **Gazette Notice dated 1.3.2019.**

Case for Exparte Applicant in JR No. 7 of 2019

19. The exparte applicants in this suit filed their application for leave to file Judicial Review proceedings on 28.3.2019 of which the said leave was granted on the same day (28.3.2019) and the **Substantive Motion** was promptly filed on **4.4.2019.** The exparte applicants seek the following orders:

> *(i) That this honourable court be pleased to grant an order of certiorari to remove into the high court for the purpose of it being quashed a decision made by National Land Commission (historical Land Injustice Committee) dated and delivered on 7th February, 2019 and published in the official Kenya Gazette notice number 1995 of 1st March, 2019.*

20. The case of the exparte applicants is premised on the grounds set out in the statement of facts and the affidavits of **Dennis Mwirigi** sworn on **27.3.2019** and on **9.4.2019.** It is their case that they were initially known as **Homegrown (Kenya) Ltd,** they later changed their name to **Finlays Horticulture (Kenya Ltd)** and finally to **Flamingo Horticulture (Kenya) Ltd**. They contend that they are bonafide purchasers of a parcel of land **L.R No. 66260** from J.H Angaine & sons. They have also leased some of the lands from Elizabeth Kaliuntu and Salena Enterprises Ltd. Just like the case advanced by the exparte applicants in JR No. 5 of 2019, Flamingo Horticulture contend that they were not given hearing notices in the proceedings before NLC. They also aver that the said proceedings are **res-judicata** to the High Court **JR case no. 218/2004** and **Court of Appeal case No. 277 of 2011.**

21. They therefore contend that the decision of NLC was ultravires and illegal and that it contravenes the provisions of Articles 67 and 68 of the Constitution as well as Section 14 of NLC Act.

22. In their submissions, again the issues therein mirrors those raised in Jr 5 of 2019. On the question of jurisdiction, the exparte applicants cited the case of **Robert Mutiso Leli vs National land commission and 3 others (supra)** where it was stated that the National Land Commission had no jurisdiction or power to oust the judicial authority of the court.

Case for the National Land Commission

23. NLC filed their **Replying affidavit in JR 5 of 2019** sworn by **Edmond Gichuru** on **5.10.2019**. Their submissions were however filed in JR 7 of 2019. The NLC has put great emphasis on their mandate as enshrined under Article 67 (1) of the Constitution as well as the provisions of the NLC Act. They have also delved into the process of legislative reforms including the Truth, Justice and Reconciliation commission which gave the question of historical land injustice prominence and also provided redress under the 2010 Constitution of Kenya. That pursuant to the provisions of **Section 15 (3) of the NLC Act**, a claim of historical land injustice may only be registered and processed by NLC.

24. In regard to the dispute at hand, NLC contends that the **Ontulili group** lodged a complaint with the commission which was assigned a claim number **NLC/HLI/025/2017** against the suit lands. NLC duly issued hearing notices to the family of J.H Angaine through John M. Angaine as well as the Ontulili group. However, only the latter attended. In line with their mandate, the NLC conducted their investigations

including ground visits and finally made a determination which was contained in a **Gazette notice dated 1.3.2019**. NLC therefore contends that they had jurisdiction to hear and determine the complaint raised by **Ontulili group**.

25. In their submissions NLC reiterated their averments that they had the mandate to investigate historical land related injustices which took many forms such as illegal takeover of individual and community land, illegal hiving off public land and trust lands, inequalities in settlement schemes, forceful settlements of communities away from their homelands, forceful evictions and land grabbing.

26. It was submitted that the NLC had the mandate to hear the case and that the exparte applicants were aware of the proceedings. It was further submitted that the right to protection of property conferred by Article 40 (1) of the Constitution does not extend to property found to have been unlawfully acquired. NLC contends that its role was to conclusively address the historical land injustices allegations advanced by the Ontulili group as against the family of the late J.H Angaine.

27. That their decision dated 7.2.2019 gave well informed recommendations which not only provided for restitution of the Ontulili group on the suit land, but also presented an alternative remedy where the family of J.H Angaine was to provide alternative land of equal size and value. That in arriving at this decision, NLC took cognizant of the fact that the family of J.H Angaine had passed on the land to third parties.

28. NLC urged this court not to act as a court of appeal and to see to it that judicial review is only concerned with the decision making process. To this end, NLC cited the case of **Kenya Revenue Authority vs Menginya Salim Murgani (2010) eKLR** where it was held that ***"Decision making bodies are masters of their own procedures and are only required to achieve some degree of fairness appropriate to their task"***. They also cited the case of **Diana Kethi Kilonzo and another vs The Independent electoral and Boundaries Commission and 10 others (2013) eKLR**, where it was held that; ***"the court would only intervene if the respondents had failed to do that which is demanded of them by the constitution".*** They further cited the case of **Russel vs Duke of Norfork (1949) 1 ALL ER** where it was held that ***"one essential dictate of natural justice was that the person concerned by any proceedings would have had a reasonable opportunity of presenting his ca***se". Thus the right to fair administrative action and by extension, the right to be heard, should not be interpreted to mean a full adversarial hearing.

Case for the 2nd – 4th respondents

29. In opposition to the suits, the 2nd - 4th respondents relied on their **Grounds of opposition** filed on **1.10.2019**. They aver that the decision complained of fell within the provisions of Article 67(3) of the Constitution and Section 15 of the NLC Act. That the proceedings before the NLC were in the nature of a public inquiry falling squarely within the mandate of the respondent that include dealing with issues of historical injustice.

30. These respondents also aver that the orders sought are not the most efficacious in the circumstances as they required the calling of evidence as in civil suits. They contend that the order of mandamus is untenable as it is predicated on the issuance of other orders offending elementary principles to issuance of the order of mandamus, that the order of prohibition also cannot issue for an action that has already been fully or partially completed and the same cannot be contemplated to be made in future.

31. In their submissions, the 2nd – 4th respondents reiterated their averments set out in the grounds of opposition while emphasizing that NLC acted within its mandate hence the decision of the NLC was not illegal, flawed, fraudulent or irrational.

32. In support of their averments, the 2nd- 4th respondents relied on the following cases;

- **Republic vs Kenya Authority Exparte Yaya Towers Limited (2008) eKLR.**
- **Council of civil service union vs minister for the civil service (1985) AC 2**
- **Francis Bahikirwe Muntu and others vs Kyambogo University, High Court Kampala Misc. App. No. 643 of 2005 (UR).**
- **Al-Mehdawi vs Secretary of state for the Home Department (1990) AC 876.**
- **Pastoli vs Kabale District Local Government Council & others (2008) 2 EA 300.**
- **Republic vs Director of Immigration Services & 2 others exparte Olamilekan Gbenga Fasuyi & 2 others (2018) eKLR.**

Case for the 1st interested parties (Ontulili group).

33. The case for this group is anchored on the contents in the **Replying affidavit of Patrick Muriuki Kirigia** sworn on **31.10.2019**. They contend that the issue for determination before NLC related to historical land injustices and they lodged their complaint after the Court of Appeal decision in **case No. no. 277 of 2011** where the court apparently cited the mandate of the National Land Commission at paragraph 38 of the judgment.

34. They aver that the historical land injustice question was well addressed by the *"Ndungu"* report and a recommendation made vide entry no. 40 and 41. They further aver that the historical land injustice question was debated in parliament on 10.1.2013 with a motion on adoption of a report on inspection of Ontulili and lower parts of the forest. The issue was apparently revisited in parliament on 5.12.2018.

35. On the issue of service of the hearing notices, the Ontulili group contend that notices were duly issued in respect of the hearings conducted on 2.8.2018 and on 10.5.2018. They aver that all along, the family of J.H Angaine were aware of the dispute since the report of a

parliamentary committee indicates that members thereof had undertaken a field visit to Buuri constituency on 22nd and 24th March 2018 and the family of J.H Angaine were present.

36. In the circumstances, the Ontulili group contends that the Judicial review suits are baseless and frivolous. This group also submitted on the two issues of Jurisdiction and the right to be heard.

37. On jurisdiction the Ontulili group gave an extract of the contents on page 38 in the Court of Appeal judgment in case **No. 277/11** where it was held that:

> ***"It is our considered view that the issue before the high court and before this court is not whether the suit property was acquired unlawfully by the 4th and 5th respondent but whether an order for mandamus can issue in favour of the appellants based on the facts disclosed in the case, in any event, Article 67 (1) (e) of the constitution, it is the mandate of National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress…".***

38. It was further submitted that NLC was not described as the Commissioner of Lands in the Court of Appeal case, hence NLC had the mandate to hear their dispute. To this end, the Ontulili group cited the provisions of Article 67 (2) of the Constitution. In support of these arguments, the group also relied on the cases of; **National Land Commission v Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another [2019] eKLR,** where the court of appeal stated that;

> ***"For the doctrine to be successfully invoked the following elements must suffice and it has been held that they are conjunctive rather than disjunctive. In the Kenya commercial bank Ltd vs Benjoh Amalgamated Ltd (2017) eKLR it was stated as follows; the element of res-judicata have been held to be conjunctive rather than disjunctive, as such the elements reproduced below must all be present before a suit or an issue is cleared res judicata on account of a former suit.***
>
> ***- The suit or issue was directly and substantively in issue in the former suit.***
>
> ***- That the former suit was between the same parties or parties under whom they or of any of them claim.***
>
> ***- Those parties were litigating under the same title.***
>
> ***- The issue was heard and finally determined in the former suit.***
>
> ***- The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised".***

39. On the issue of right to be heard, the Ontulili group reiterated their averment that the family of J.H Angaine was aware of the matter as there were field visits on 22nd and 24th March 2018 by NLC and that hearing notices too were issued. On this point, the Ontulili group relied on the cases of; **Mwangi Stephen Murithi vs National Land Commission and 3 others (2018) eKLR, Tom Dola & 2 Others vs. Chairman National Land Commission & 5 Others (2020) eKLR.**

Case for the 2nd interested party (Kiambogo group)

40. The case for this group is anchored on the **Replying affidavit of Paul Kinoti** sworn on **1.10.2019.** They contend that they have been living on the suit land as squatters since 1970, when the then president of the Republic of Kenya Mzee Jomo Kenyatta allowed them to settle on that land. They lived peacefully until 1986 when they were forcefully evicted by the minister of internal security. The government gave directions for the excision of 384.1 ha of land from Mt. Kenya forest vide Gazette notice no. 107 of 29.4.1975 and another excision was done for 546.2 ha of land vide Gazette notice no. 108 dated 29.4.1977 and the resultant parcels were to be given to the Kiambogo group.

41. The two resultant parcels were registered as **L.R No. 13269** and **L.R 12234.** The group carried out a balloting exercise. However J.H Angaine whom they refer to as a revered, powerful and influential minister cunningly turned against them, told them that the suit land was his and proceeded to evict them and their livestock. They were even charged with criminal offences of trespass. They sought reprieve through **Meru H.C Misc Civil Application no. 31 of 1994.** They also lodged their case relating to historical land injustices on 10.8.2016 where the hearings took place at Angaine primary school. This is when they spotted new faces.

42. After the decision of NLC was published, they realized that their claim had been hijacked by the **Ontulili group**. The **Kiambogo group** also term the **Lucy Mirigo group & 550** others as impostors who started hijacking their land in year 2004.

43. The **Kiambogo group** avers that the NLC procedurally and legally conducted the case save that the recommendation thereof should be in their favour and not in favour of **Ontulili group.**

44. In their submissions, the Kiambogo group stated that NLC has the mandate to look into present and historical land injustices as set out under Article 67 and 68 of the Constitution. The group avers that the family of J.H Angaine used their position of influence to grab the suit lands as the land was excised to benefit the squatters. They state that the issue before this court is totally different from what was decided earlier by the courts as the current Judicial Review matters relates to the decision of NLC given in 2019.

45. The group further reiterated their claim that Ontulili group had hijacked their claim. They have also termed the **4th interested parties (Mt. Kenya group)** as a split group from their members who were simply dissatisfied with the leadership of the Kiambogo group.

46. The Kiambogo group further state that the **Everest group (3rd interested parties)** are one and the same with J.H Angaine family and they are working together to deprive the squatters their land.

47. The Kiambogo group contends that this court has power and authority to determine and declare their fundamental rights hence the court should render a finding in their favour.

Case for the 3rd interested parties (the Everest group)

48. The case of these parties is premised on the **Replying affidavit of John Wahinya Karugo** sworn on **23.8.2019,** where they have joined issues with the family of J.H Angaine. Their claim to the suit land is based on purchase, that they acquired parcel nos. **20737/13** measuring 124.1 ha, **20737/14,** measuring 40.47 ha and **20737/15** measuring 14.6 ha from John Mugambi Angaine who is one of the exparte applicants in Jr 5 of 2019. They utilize these suit parcels while some are charged to family bank. They contend that these parcels are part of what was affected by the NLC decision.

49. The **Everest group** further state that the matter in dispute has been adjudicated upon by the courts all the way to the Court of Appeal hence NLC cannot purport to legally contravene, set aside or interfere with the said decisions. They also state that the family of J.H Angaine lawfully acquired the land hence they had indefeasible titles. They therefore contend that the decision of NLC was illegal unprocedural and unreasonable hence the as well as the Gazette notice no. 1995 of 1.3.2019 should be quashed.

50. In their submissions, the Everest group raised four issues for determination as follows:

(i) Whether the matter before the court is res judicata

(ii) Whether the 3rd interested party is a bonafide purchaser for value.

(iii) Whether the constitutional rights of the 3rd interested party were violated when it was not invited to the hearing leading up to the 1st respondents decision.

(iv) Whether the 1st respondent acted without authority.

51. On the issue of res-judicata, the **Everest group** submitted that the issues at hand were adjudicated upon in the **JR case No. 218/2004** consolidated with **Misc H.C application no. 71 of 2003** and in the Nyeri Court of Appeal case, **Lucy Mirigo and 550 others vs Minister of Lands and 4 others (2014) eKLR.** They contend that the court of appeal finally determined the case and hence NLC had no mandate to reopen the same.

52. On this issue of res-judicata, the Everest group relied on the provisions of **Section 7 of the Civil Procedure Act**. They also cited the case of **Joshua Ngatu vs Jane Mpinda & 3 others (2019) eKLR,** where this court made reference to **Henderson vs Henderson (1843) 67 ER 313** in which the court stated as follows;

> ***"where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case……"***

They also cited the case of **Peter Mbogo Njogu vs. Joyce Wambui Njogu & Another (2005) eKLR.**

53. The Everest group also avers that the claim is barred by Limitations of Actions Act Section 7 as well as Article 68 (c) (v) of the Constitution. Thus the NLC had no jurisdiction to receive complaints, investigate the same, review and give recommendations 7 years after the enactment of the NLC act.

54. On the issue of "*bonafide purchaser*" the Everest group reiterated their averments set out in their pleadings citing the provisions of **Section 14 (7) of National Land Commission Act** where it is provided that;

> ***"No revocation of title shall be effected against a bonafide purchaser for value without notice of a defect in the title".***

55. They have also made reference to the provisions of Section 25 and 26 of the **Land Registration Act** to buttress their claim that they have indefeasible titles. To this end, the Everest group has relied on the following authorities: **Lawrence Mukiri vs Attorney General and 4 others (2013) eKLR, Eunice Grace Njambi Kamau & Another vs Attorney General & 5 others (2013) eKLR, David Peterson Kiengo & 2 others vs Kariuki Thuo (2012) Machakos eKLR.**

56. The Everest group avers that being the owners of some of the suit parcels, it was imperative for NLC to invite them for hearing, thus their right to be heard was violated. On this point, the Everest group relied on the cases of **Petition no. 495 of 2015 Kenya Human Rights Commission vs NGO Coordination Board and 2 others (2016) eKLR** and **Julia Wanjiru Gaburia vs Sammy Ndungu Mungai & another ELC 285 of 2012.**

57. The Everest group desire that the decision of NLC be quashed as the same is illegal and unreasonable.

Case for the 4th interested party (Mt. Kenya group)

58. The case for this group is premised on the **Replying affidavit of one David Bundi M'Kaari** sworn on **11.10.2019** and the **Further Supporting affidavit of Kithinji E. M'Murungi** sworn on **29.10.2019**. The claim of the **Mt. Kenya group** mirrors that of the **Kiambogo group** in terms of the objectives of the excision of the suit parcels from Mt. Kenya forest in favour of squatters. They contend that each of the 453 families were allocated 2 – 5 acres of land where they settled in 1973. They lived peacefully on their land until 1986 when the then minister of internal security, the late J.H Angaine unlawfully and forcefully evicted them.

59. They contend that the Ontulili group are the ones who filed the case **JR 218 of 2004** and **Court of Appeal Nyeri case NO. 277 of 2011** and that this group is not the correct squatter group.

60. They further state that the issue as to how the J.H. Angaine family took the land from them was captured in the Ndungu Land Commission report which recommended the cancellation of titles, for the land to revert back to this group. They state that NLC did well to correct the historical injustice by revoking the illegal allotments to the family of J.H Angaine but that the suit land should be vested in the hands of the Mt. Kenya group.

61. In their submissions, the Mt. Kenya group framed the issues for determination as; *whether the decision by NLC is tainted with procedural propriety, illegality and irrationality and whether the said decision is res judicata to court of appeal Nyeri civil case no. 277 of 2011.*

62. The Mt. Kenya group submitted that the family of J.H Angaine was issued with the relevant notices for hearing but they chose not to attend. Citing the provisions of Article 67 (1) (e) of the constitution, it is averred that NLC had the mandate to initiate its own investigations and still come up with an appropriate redress. Thus the decision of NLC cannot be faulted. They further state that the family of Angaine have not mentioned anything about illegality, irrationality or procedural impropriety in their substantive notice of motion. That the ground cited there in only confirm that the late J.H Angaine converted the land in question which was excised and meant for squatters (the interested parties).

63. On these points the **Mt Kenya group** relied on the case of **Republic vs Public Procurement Administrative Review Board and 2 others exparte Rongo University (2018) eKLR.**

64. On the issue of res judicata, the Mt Kenya group avers that the parties in the **Nyeri case 277 of 2011** are different from the **Ontulili group**. Secondly, the NLC was not in existence in the primary suit, and that no law was cited to indicate that NLC was the successor to the commissioner of lands.

65. The **Mt. Kenya group** urges the court to dismiss the two consolidated Judicial Review suits and that the loosing parties should pay costs.

DETERMINATION

66. There is no controversy that there existed two legal notices **no's 68 of 1975** and **no. 107 of 1977** which gave rise to excision of Mt. Kenya forest to the tune of approximately 384 and 546 hectares of land which were subsequently registered as **L.R Nos. 13269** and **12234** respectively. It is also not in dispute that sometime in 1995 the aforementioned suit parcels went into the hands of J.H Angaine family.

67. It is also apparent that litigation relating to the suit lands has been in court corridors in various forms as captured by Judge Kasango in her judgment in the suit **Jr 218 of 2004**. It is also not disputed that **NLC** rendered a decision on **7.2.2019** giving rise to a **Gazette Notice of 1.3.2019** in which the suit lands were to be vested in favour of the **Ontulili group** or in the alternative the family of J.H Angaine was to compensate this group with other land equivalent to their claim.

68. This being a judicial review suit, I deem it fit to frame the issues for determination as follows:

(i) What is the scope of a Judicial Review matter?

***(ii) Whether NLC had jurisdiction to hear and render a decision in the reference no.*NLC/HL1/025/2017.**

(iii) Whether rules of natural justice were violated by NLC in relation to the Right to be heard.

(iv) What relief is available to the parties?

(v) Who should bear the costs of this suit?

The scope of Judicial Review

69. At the outset, it is extremely important to state that the proceedings before this court are in the purview of Judicial Review. In **Municipal Council of Mombasa vs Republic & Another [2002] eKLR** the Court of Appeal aptly captured the scope of Judicial Review as follows;

> ***"Judicial review is concerned with the decision -making process, not with the merits of the decision itself. ……The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant***

matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

70. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA,** the court gave an in depth analysis of what a Judicial Review application is as follows:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality…..

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

71. In the case of **Republic v Tanathi Water services board and 2 others exparte Senator Johnstone Muthama (2014) eKLR,** the court had this to say on the scope of Judicial review:

"It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits …… The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large…… Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case *(emphasize added)**. "***

72. What resonates from the above case law is that the scope of judicial review proceedings, is limited to the decision making process in relation to the decision which is being challenged. The role of the court is therefore supervisory and the court should not attempt to delve into the "*forbidden appellate approach*", see **Republic vs Public Procurement Administrative Review Board and 2 others exparte Rongo University (2018) eKLR.** Thus the court can neither hear the merits of the dispute nor re-hear the same.

73. In that regard, it is pertinent for this court to state what shall not be determined by this court. To start with, the exparte applicants in both JR No. 5 of 2019 and JR. No. 7 of 2019 have urged the court to find that the suit lands were legally transferred to them and that the decision of NLC will deprive them of their private land which is worth millions of shillings. This is however an issue which relates to the merits of the decision.

74. Secondly, the court cannot delve into the objectives of the legal notices nos.**68 of 1975** and **107 of 1977.** Thus it is not the place of these Judicial review proceedings to determine whether the initial land excised from Mt Kenya forest in the 1970s (read parcels 13269 and 12234) were ear marked for squatter occupation or whether the said lands were legally or illegally granted unto J.H. Angaine's family.

75. Thirdly, the court court cannot determine the issue of indefeasible or sanctity of title held by the exparte applicants in both suits and the Everest Group (3rd interested parties).

76. Finally, the court cannot purport to declare the rights and entitlements of the 1st 2nd and 4th interested parties (the alleged squatters) in relation to the suit lands even though the Kiambogo group have termed this court as a constitutional court with powers and authority to determine and declare such rights.

77. Having clearly set out the scope of judicial review, I will now proceed to deal with the issues of administrative process leading to the decision in question.

Jurisdiction

78. Both the **exparte applicants** in the two suits as well as the **Everest group** have claimed that NLC had no mandate to hear the dispute as the same had been adjudicated upon by the courts in **Meru H.C JR 218 of 2004** and **Nyeri Court of Appeal case 277 of 2011** hence the matter is res judicata. The Everest group has also submitted that the claim before NLC was time barred.

Res judicata

79. The question to determine on this point is whether the proceedings before NLC were resjudicata to the aforementioned cases in High Court and the Court of Appeal. The applicable law on this issue is anchored on **Section 7** of the **Civil Procedure Act,** which provides that;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".***

80. In the case of **John Florence Maritime services Limited and another vs Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR,** it was held as follows:

> ***"…Res Judicata is a subject which is not at all novel. It is a discourse on which a lot of ink has been spilt and is now sufficiently settled. We therefore do not intend to reinvent any wheel. We can, however, do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson vs Henderson (1943) 67 ER 313: …where a given matter becomes a subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case…".***

Also see the decision of this court in **Joshua Ngatu vs Jane Mpinda & 3 others (2019) eKLR.**

81. In order to determine whether the plea of resjudicata raised by the exparte applicants and the Everest group is merited, it is important to identify the parties in **Meru High Court Misc App. No. 218 of 2004**, look into the nature of the claim thereof and consider whether the dispute was finally resolved either at the primary level or in the appellate forum.

82. The parties in the primary suit **JR no. 218 of 2004** were; **Lucy Mirigo Munyi & 550 others vs. Minister for Lands & Housing 1st Respondent ,Permanent Secretary Ministry of Lands & Housing 2nd Respondent, The Commissioner of Lands 3rd Respondent, Home Grown (K) Ltd Interested party.**

83. The nature of the claim thereof is well captured from the beginning of the judgment by Judge Kasango in the case **JR No.218 of 2004**, of which I find it crucial at this juncture to extract some content thereof as follows;

> ***"The exparte applicants all 550 of them are seeking an order of mandamus to compel the respondents to settle them on land excised from Mt. Kenya Forest through legal notice no. 68 of 1975 and 107 of 1977. The information one gets from this matter from the verifying affidavit and from the statement of facts does not assist to understand the back ground of this matter. In fact, there is more information which is in the annexed documents to the verifying affidavit. Those documents relate to previous suit over the same subject matter but it is not clear if the parties in the previous case are the parties here. The previous case is High court Meru Misc. civil application no. 24 of 1995. That case was a judicial review matter where the applicants sought orders of mandamus. It was filed by six persons. The respondents were the minister of lands and housing and homegrown (K) Ltd in that case. There is yet another matter that is High court misc. application no. 71 of 2003. This latter case was filed by 138 persons. It is also a judicial review matter seeking orders of mandamus which was filed against the minster for lands and settlement alongside the commissioner of lands. I am unable to know the status of the case number 24 of 1995. The file in the case no. 71 of 2003 is attached with this file and that suit is still subsisting. The claim in all of those cases is one and the same".***

84. The court in its conclusion stated as follows:

> ***"In a matter where parties seek that they be awarded land, there is need of there to be clarity of who those parties are. More than that, if such parties file a list of their names as they have done here, they should also have indicated that they authorized one of them to bring such an action. Otherwise the list could contain imposters. Clarity is required because in this country it is not unheard of where people are included in a list of persons to be awarded land, when those people themselves do not qualify to be given such land. It is with that in mind that I emphasize there was need for clarity of claimants and those claimants also needed to have indicated that they authorized Lucy Mirigo Munyi to represent them in this action. I find that the application fails more so because there is no document in this matter indicating that the applicants are entitled to the land that was excised out of Mt. Kenya forest".***

85. When the matter went to the Court of Appeal in **Nyeri case no. 277 of 2011**, the J.H. Angaine family (current exparte applicants in JR 5 of 2019) appeared as **5th respondents** in the format of **J.H. Angaine & CO. Ltd.** The court in paragraph 27 of the judgment stated that:

> ***"The 4th and 5th respondents are not public bodies but private citizens. An order of mandamus compels a public body to exercise a duty bestowed upon it by law or to judiciously exercise a discretionary power ……..***
>
> ***To this extent the order sought by the appellants for mandamus against 4th & 5th respondents must of necessity fail as they are in capable of complying with it and they are not a public entity".***

86. In paragraph 28 thereof, the court went on to state as follows in regard to the claim against the 1st – 3rd respondents;

> ***"The appellant has not demonstrated or pointed out any specific statutory obligation that is vested upon the 1st, 2nd and 3rd respondents that has been violated. Mandamus compels performance of a statutory public duty. The evidence does not disclose any statutory public duty owed to the appellants by the 1st, 2nd and 3rd respondents. No constitutional or statutory provision has been cited that impose an obligation to be exercised in favour of the appellants. The failure by the appellants to point at any statutory duty on the part of the respondents is fatal and an order of mandamus cannot issue in the absence of a specific statutory obligation that can be enforced".***

87. In paragraph 38 of the aforementioned judgment the Court of Appeal stated thus;

> ***"The appellants also referred to article 40 (B) of the constitution wherein the protection of private property does not extend to any property that has been acquired unlawfully. It is our considered view that the issue before the high court and before this court is not whether the suit property was acquired unlawfully by the 4th and 5th respondents but whether an order for mandamus can issue in favour of the appellants based on the facts disclosed in the case. In any event, under article 67 (1) (e) of the constitution, it is the mandate of the National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress (Emphasize added)".***

88. What resonates from these two decisions? Firstly, it is clear that the issue of identity of the claimants was at the core of the determination and the dismissal of the primary suit **no 218 of 2004**. The claimants in that suit could not be identified as having authorized **Lucy Mirigo** to lodge the claim on their behalf. It is also apparent that there were other claimants in other suits as mentioned in that judgment. This happens to be the same scenario unfolding in the current proceedings.

89. The Mt Kenya group have in point 31 of their submissions urged the court to find that the Ontulili group is different from Lucy Mirigo group. They are however blowing hot and cold at the same time on this issue since in paragraph 16 of the affidavit of David Bundi, they claim that the 550 people who filed the suit JR No.218 of 2004 were the Ontulili Mt Kenya Forest Squatters (Ontulili group)! Going by the averments made by the Ontulili group vide the replying affidavit of Patrick Muriuki Kirigia in paragraph 4 and 9, I have no doubts that **Ontulili group** is one and the same as **Lucy Mirigo** group. This revelation however does not meet the criteria that *"the former suit was between the same parties or parties under whom they or any of them claim)* and that *"those parties were litigating under the same title".*

90. As already stated herein, the primary suit failed inter-alia because there was no clarity on who the claimants were. Going further, I must add that the family of J.H Angaine does not appear to have been in the picture in the primary suit. The NLC too which is at the center of the current proceedings came to be on 2.5.2012 through the National Land Commission Act no. 5 of 2012. It follows that the said entity (NLC) was none existent when both the primary and the appeal suits were filed.

91. An argument has been advanced by the Everest group in their submissions that the predecessor of NLC was the Commissioner of Lands who were the 3rd Respondent in the two former suits. However, NLC is an independent Commission which was established under Article 67 of the 2010 Constitution and was operationalized through the National Land Commission Act no.5 of 2012. To this end, NLC through the affidavit of one Edmond Gichuru particularly in paragraph 6 to 9 has given a historical perspective of what heralded the birth of the entity known as NLC. It was because the legal land regimes existing before the 2010 constitution had failed to address the question of historical land injustices. The Mt Kenya group in their submissions have correctly pointed out this issue when they stated that some of the historical land injustices that were meant to be remedied by Article 67 of the Constitution were actually created by the Commissioner of lands.

92. The second issue discernible from the two former suits is that the subject matter in those suits was different from what was lodged before the NLC. The Court of Appeal in its judgment had stated that what was before the primary suit as well as in the appeal case was not whether the suit property was acquired unlawfully by the 4th and 5th respondents *(read the current exparte applicants in both JR 5 and 7 of 2019)*, but whether an order of mandamus could issue in favour of the claimants, and the decision of the court of appeal was that the said claimants could not get redress through a judicial review suit for an order of mandamus. The Court of Appeal also recognized that NLC is the entity which has the mandate to investigate the question of historical land injustices.

93. The provisions of **Section 67 (2) (e) of the Constitution** stipulates that:

> ***"The functions of the National Land Commission are ……to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress".***

94. **Section 15 (1) (2) (3) and (4) of the National Land Commission Act** stipulates that:

> ***"Pursuant to Article 67 (3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress".***

95. It is clear that the claim lodged before the NLC related to historical land injustice which claim had neither been tabled, nor determined by the two former suits. It therefore follows that the matter at hand is distinguishable from the **Robert Mutiso Lelli vs National Land commission & 3 others (supra)** case cited by both the current exparte applicants. This is because in the **Robert Mutiso case**, one of the issues for determination was *"whether the National Land Commission had jurisdiction or power to conduct proceedings or review of titles when the disputes on ownership of the impugned titles were pending before a court of competent jurisdiction…"* and the court ruled that NLC had no jurisdiction to hear and determine a matter which was pending before a competent court.

96. From the foregoing analysis, it is clear that the question of historical land injustice was not addressed before the former suits **nos. 218 of**

2004 and **277 of 2011.** It follows that the said question of historical land injustice raised before the NLC by Ontulili group and which the Kiambogo and Mt. Kenya group are riding on could not and was indeed not adjudicated upon in the former suits. If anything, the Ontulili group appears to have been buoyed to turn to NLC by the wordings in the Court of Appeal judgment at the end of paragraph 38.

97. All in all, I find that the proceedings before NLC do not meet the criteria of resjudicata as set out in the cases of **John Florence Maritime services Limited and another vs Cabinet Secretary for Transport and Infrastructure and 3 others** (supra), **Henderson vs Henderson (1843) 67 ER 313** cited in **Joshua Ngatu vs Jane Mpinda & 3 others** (supra), and **National Land Commission v Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another** (supra)**.** I therefore find that NLC had the requisite jurisdiction to hear and determine the claim before it.

Limitation

98. The **Everest group (3rd interested party)** is the one which has raised the issue of limitation, averring that NLC had no mandate of reviving and investigating the complaint 7 years after the enactment of the NLC Act. However this issue was only raised in their submissions and not in their pleadings *(read replying affidavits).*

99. The provisions of **Order 2 Rule 4 of the Civil Procedure Rules** stipulate that:

> ***"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation (emphasize added) or any fact showing illegality— (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raises issues of fact not arising out of the preceding pleading".***

100. In the case of **Dakianga Distributors (K) Ltd vs Kenya seed company Limited (2016) eKLR,** the court of appeal made reference to a quote in the Malawi supreme court case of **Malawi railways limited vs Nyasulu (1998) MWSC 3** where the importance of pleadings were enunciated as follows:

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings… for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation….".***

101. In the case of **Gichinga Kibutha vs Caroline Nduku 92018) eKLR**, **Judge G. Kemei** stated that:

> ***"It is therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue (Emphasize added). It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.***

102. The proceedings herein do not relate to a plaint, but the substantive motions as well as the responses of the parties are what amounts to pleadings herein. In the Supreme Court case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR,** the court considered the replying affidavit as the basic pleading when it stated that

> ***"A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect."***

103. By raising the issue of limitation at the submissions stage, the Everest group is actually inviting the court to investigate the matter and establish when the complaint was lodged. The other interested parties (Ontulili, Kiambogo and Mt. Kenya groups) have no platform of giving a response to the allegation. In short, the issue raised by the Everest group is an ambush and flies against the provisions of Article 50 (1) of the constitution.

104. In light of the foregoing analysis, the issue of limitation raised by Everest is disregarded. Nevertheless, I find it necessary to point out that limitation on claims lodged before NLC starts to run from 21st September 2016 going by the provisions of **Section 38** of **THE LAND LAWS AMENDMENT ACT OF 2016.** In the case of **Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others,** the Court of Appeal stated that ;

> ***"The Constitution does not define what historical injustice is. However, Section 15 (2) of the National Land Commission Act as amended by Section 38 of the Land Laws (Amendment) Act No. 28 of 2016 defines historical injustice. The commencement date of the Land Laws (Amendment) Act is 21st September 2016. Section 15(3) (e) of the National Land Commission Act as amended introduces a limitation period of five years for claims relating to historical land injustice. A claim on historical injustice shall not be entertained after a period of five years from the date of commencement of the Land Laws (Amendment) Act".***

Rules of natural justice

105. The exparte applicants in both suits as well as the Everest group claim that they were not notified of the proceedings before NLC. It is not disputed that the proceedings conducted by NLC were exparte, where only the **Ontulili group** was represented by their advocate as well as their secretary (Patrick Muriuki). NLC contends that they duly invited the family of J.H Angaine via the notice of 20.4.2018 for the hearing of 10.5.2018 and the notice of 20.7.2018 for the hearing of 2.8.2018. That the aforementioned notices to the family of J.H Angaine were issued through one Baptisa John Mugambi Angaine. The family of J.H Angaine aver in their submissions that none of them is known as Baptisa John M. Angaine. If the family of J.H Angaine was keen on this rebuttal, nothing could have been easier than to state so in their pleadings. The contents of the affidavit of Elizabeth Kaliuntu Angaine do not make any reference to the specific issue of service upon Baptista John M. Angaine. Similarly John Mugambi Angaine the 2nd exparte applicant in JR No. 5 of 2019 is mute on the issue of notification.

106. Notwithstanding the general denial of notice captured in paragraph 21, 22 and 23 in the affidavit of Elizabeth Kaliuntu Angaine, this court still has an obligation to examine the issue as to whether the rules of natural justice were violated when the proceedings were conducted exparte before NLC.

107. While citing the case of **Kenya Revenue Authority vs. Menginya Salim Murgani (supra),** NLC claims that decision making bodies are masters of their own procedures and are only required to achieve some degree of fairness appropriate to the task**.** However, I find that in all circumstances, the rules of natural justice have to be observed.

A scrutiny of the relevant notices of 20.4.2018 and 20.7.2018 indicate that the family of J.H Angaine was addressed as follows:

> ***"Family of late Hon. J.H Angaine Attn Baptisa John Mugambi Angaine"***

There is no postal address, physical address or any other form of address. How then did these notices land in the hands of J.H Angaine's family? It is not lost to this court that as per paragraph 20 of the replying affidavit of NLC sworn by Edmond Gichuru on 15.10.2019, NLC talks of having notified the family of J.H Angaine on two occasions, but on page 3 in the body of their determination, NLC talks of having invited the family of J.H Angaine on three occasions!

108. In the case of **Catherine Muthoni Kiriungi & another vs Chairman Land Adjudication and Settlement Officer, Tigania East central division & 3 others (2017) eKLR,** the court was dealing with a situation where the claimants (Catherine and her son David) had challenged the decision of an adjudication body on the basis that they were denied a hearing. The court held that:

> ***"From this analysis, it becomes clear that the appellant's right to be heard before they could be divested of ownership of the said property was denied them. This was against the rules of natural justice which is one of the cardinal fundamental rights that are inherent in every human being".***

109. In the case of **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR,** the court stated as follows;

> ***"The issue of a notice is a key component of due process. In Kenya Anti-corruption Commission v Lands Limited and Others Nairobi Misc. App. 583 of 2006 the court noted, "Constitutional provisions are procedural safeguards aimed at ensuring due process before any right to property can be taken away and also incorporating the right of hearing. The right of hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of the Constitution must be implied in every Act especially, the right to due process and it cannot be taken away. Constitutional rights cannot be taken away without due process"***.

110. In **Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board [2016] eKLR,** the court pointed out that;

> ***"A person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached"***

111. I am not persuaded that NLC complied with the law in terms of notifying the family of J.H Angaine regarding the hearing in the reference no. **NLC/HLI/025/2017** in line with the dictates of **Article 47 (2) of the Constitution** and **Section 4 (3) of the Fair Administrative Action Act.**

112. In regard to the case of **Flamingo horticulture Ltd** (exparte applicants in JR 7 of 2019) and the **Everest group**, there is not the slightest evidence of notification upon them. NLC has stated that in their decision, they gave an alternative remedy in the form of restitution as they took cognizant of the fact that the subject land owned by the estate of J.H Angaine had changed hands to third parties. Even in their decision, NLC captured the fact that a ground visit by parliamentary committee on 12.6.2018 had revealed that the suit land was under cultivation by private companies. Thus NLC was aware of existence of third party claimants on the suit land. NLC has not demonstrated the efforts it undertook to notify these third parties of the proceedings it was to conduct.

113. **Article 47 (1) (2) of the Constitution** provides that:

"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".

114. Equally Section 4 of the **Fair Administrative Action Act** provides that:

"Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair".

115. **Section 14 (3) of the National Land Commission Act** provides that:

"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".

116. It is quite apparent that again NLC did not comply with the statutory provisions set out herein in respect of the exparte applicant in JR 7 of 2019 and the Everest group. I therefore find that NLC violated the rules of natural justice in denying the exparte applicants and other affected parties an opportunity to be heard. This court is not saying that NLC must issue notices to everyone who has an interest in the land, but such notices must be issued to those whose interest, the commission is aware of.

Relief

117. What relief is available to the parties? As pointed out earlier, this is a judicial review matter and the court cannot delve into the issue of validity of titles held by the exparte applicants and other purchasers of the suit land. Similarly, the court cannot pronounce as to who is the rightful squatter claimant in so far as the competing groups, (Ontulili, Kiambogo and Mt. Kenya) are concerned.

118. As stated earlier in the introductory part of this judgment, this court did give directions to the effect that the sentiments of the parties would be given due consideration in the final verdict – **see proceedings of 17.11.2020. Mr. Kiety** for the **2nd -4th respondents** was the first one to give his comments as follows;

"In this case JR no. 5 and JR No. 7, I am proposing that the matter on the issues in both suits be taken back to the National Land commission and upon being taken back, all parties be ordered to appear before the NLC and in the meantime, we can have a stay in both files. And upon appearing before NLC, a report be filed before the court. The reason being that this is in public interest as there are multiple parties in this case and the issue relates to historical injustice. So the 1st respondent would be able to accommodate all parties. It would be just that all parties go back to NLC. I have floated this proposal to the other colleagues where some agreed and some did not".

119. The sentiments of **NLC** were advanced by **Mr. Wambugu** as follows;

"I am for a similar opinion. This court rightfully stated that all parties be on board. May court see our determination? The determination was very specific and the decision affected exparte applicant in Jr No. 5 and the 1st Interested party in Jr No. 5 and the Interested parties in JR no. 7. So the decision was based on the parties who had approached the court. In the interest of justice, we are ready to re-investigate the matter with the inclusion of these parties who have been enjoined by the court so that everyone ventilates their sentiments".

120. **Mr.Mwiti** for the **Ontulili group** had stated as follows;

"I confirm that we discussed and I associate myself with the sentiments of Mr. Kiety and Mr. Wambugu's submissions. We are actually the ones who went to National Land Commission and the decision was in our favour. Our proposal is that we have a stay of proceedings herein, we go back to NLC and be heard again. We are apprehensive on the order of quashing the decision of NLC because the exparte applicant might move the court to seek conservatory orders against the work of NLC hence derailing, the work of NLC".

121. **Mr. Thangicia** for **Kiambogo group** expressed himself as follows;

"I am also in agreement with the sentiments of Kiety and Wambugu to the extent that we have the matter stayed in the public interest. I strongly agree with Mr. Mwiti's clients so the proper order is stay of these proceedings since even our interested party is before the commission".

122. **Mr. Atheru** for the **Mt Kenya group** likewise expressed himself in the following words;

"I am also in that group supporting the application by Mr. Kiety alongside those of Mr. Wambugu, Mr. Mwiti and Mr. Thangicia. This is because the 1st respondent is the one with the constitutional mandate to solve all the issues. Even if this court proceeds with the main motion the orders which eventually may be given may not determine rights of the parties especially the interested parties. By going to 1st respondent, no party will be prejudiced at all. Everyone will have an opportunity to present their case including the exparte applicants. Proceeding with this matter is an academic exercise so may these proceedings be stayed to avoid mischief

awaiting the report by the 1st respondent".

123. **Mr Kiogora Arithi** for the exparte applicants in JR.no.5 of 2019 **(J.H. Angaine family)** expressed himself as follows;

> "*We oppose the matter going back to NLC because the court had given directions that case proceeds and that is what we came for, to proceed on merits. Secondly, it is the exparte applicants who moved the court. So we shall be prejudiced if case goes back to NLC yet NLC knows what it did. Thirdly, this matter has been dealt with by High Court and even Court of Appeal. So where was jurisdiction of 1st respondent. Our prayers are clear so the proposal is not tenable. May case be heard".*

124. **Mr. Molo** for the **Everest group (3rd interested party)** stated thus;

> **"***I associate myself with sentiments of Mr. Kiogora because the respondents and interested parties are actually giving the 1st respondent a chance to evaluate the decision of the 1st respondent. The decision was put in the Kenya gazette. They should have the decision quashed and we go back to NLC. Once that decision was made, it became a subject matter before this court. We are told that all parties, will get a fresh opportunity but they are not citing the provisions of the law they are relying on. Once a decision is made by a body the court has to make a determination. The 1st respondent wants to conduct further investigations and we are saying that no investigations were conducted. To allow the matter to go back to 1st respondent, the 3rd interested party is not likely to get justice because the 1st respondent has made up his mind. So may case be heard on its merits today. In the unlikely event that you find it fit to refer the matter back to 1st respondent, then the 1st Respondent's decision should be quashed".*

125. **Mr. Riungu** for the exparte applicants in JR no.7 of 2019 **(Flamingo Horticulture (K)Ltd)**, expressed himself as follows;

> **"***I associate myself with the sentiments of Mr. Mola and Mr. Kiogora. The exparte applicants have not been listened to. Judicial Review usually are brought by the Republic. So Mr. Kiety is representing the Republic. This matter has been before the court in High Court and Court of Appeal. Our argument is that the NLC did not have jurisdiction to hear the case. Once the court realizes that NLC did not have jurisdiction and we say it did not have it, then there is no point in taking matter back to NLC. NLC made a decision which we are challenging. It is as if they have discovered they made an error. If we go back there, the exparte applicants will not get justice. This court has the time to deal with the dispute at hand. May case be heard as earlier directed by the court. All the people who say that they go back to NLC none has mentioned what is to happen to the legal notice which has not been stayed. If NLC has realized the mistake it did, then any party can go back to NLC. So going back to NLC is prompting our JR cases through back door. May case proceed in court".*

126. The rejoinder by **Mr. Wambugu for NLC** was that;

> "*The commission did not make any mistake. We were only trying to build a conversation on how to handle the dispute. The court admitted the interested parties to this court because it knew about their stake. On the issue that case was in High Court or Court of Appeal, this is going into the merits of the case. Judicial Review is about decision making process. The 1st respondent holds a neutral position. So we were only trying to identify the dispute. The 2nd interested party's (Kiambogo) claim is already before the commission as per their indication".*

127. This court has already heard the dispute at hand and has pronounced itself on the issue of jurisdiction, whereby the court has made a finding that the question of historical land injustice was not heard in the two previous suits and that NLC has a constitutional and statutory mandate to hear the question of historical land injustice. Further, the court has already made a finding that the claim before NLC was not properly heard as the exparte applicants and Everest group were not duly or properly notified of the proceedings.The NLC is also ready to hear the dispute afresh with the inclusion of all concerned parties.

128. The court has also taken into consideration that there is not 1 not 2 but already 3 groups claiming to be the real or actual squatters but only one group was apparently heard before the NLC. Further, the court has considered that even the group which apparently worn the case before the NLC, (Ontulili group) is agreeable to the matter being re-heard afresh. I would also wish to debunk the sentiments expressed by Mr. Molo counsel for the Everest group that once NLC made the decision, it became the subject matter before this court, hence the court is the one to make the final determination. The true position which is well captured in the "*scope of judicial review*" in this judgment is that the court's concern only relates to the decision making process and not the merits of the decision made on 7.2.2019 by NLC. Thus the actual dispute regarding the claim of ownership of the suit land will remain unresolved by this court.

129. I also find that there is no basis for the exparte applicants and the Everest group to state that they will not get justice before NLC or that the said entity has made up its mind against them.

130. The decision whether or not to grant judicial review remedies is discretionary, the Court will no doubt look at the efficacy of the remedy sought- See **Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR.** In **George Arab Muli Mwalabu v Senior Resident Magistrate Kangundo & 2 others; Festus Mbai Mbonye (Interested Party), [2019] eKLR, Odunga J** while quoting ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270** stated that;

> **"*The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)… are all discretionary……. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the***

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

131. In light of the foregoing analysis, I find that the best way to resolve the impasse is to have the dispute heard afresh by the National Land Commission with the participation of all the parties.

Costs

132. Costs follow the event,but again a court has the discretion in awarding the same; See G**ideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR.** In the instant case, this court does not wish to identify any party as the looser or winner at this stage of proceedings. After all, the court has already given directions for the dispute to be heard afresh. In such circumstances, I deem it fit that parties bear their own costs in the two suits.

133. **FINAL ORDERS**

(1) The National Land Commission is directed to hear the dispute afresh with the participation of all the parties herein and in accordance with the law, within a given period of 12 months.

(2) In the intervening period, the decision of NLC in Reference No. NLC/HL1/025/2017 dated 7.2.2019 and the Gazette Notice of 1.3.2019 are hereby stayed for a period of 12 months to await the outcome of the NLC decision.

(3) Once the NLC arrives at a fresh verdict, then its determination of 7.2.2019 and the Gazette notice of 1.3.2019 will cease to have any effect.

(4) In the event that no decision is made by NLC within a period of 12 months, then the stay orders in respect of the decision of 7.2.2019 and the Gazette notice of 1.3.2019 shall lapse and the decision is to be implemented to its logical conclusion.

(5) Each party to bear their own costs of the suits.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 12.4.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE