REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC.JR.APPL. NO. 40 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

REPUBLIC..APPLICANT

AND

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

ELOSE MUKAMI KIMATHI.......................................2ND RESPONDENT

EVELYNE WANJUGU KIMATHI................................3RD RESPONDENT

MIRIAM NYAWIRA KIMATHI..................................4TH RESPONDENT

(The 2nd to 4th Respondents are sued

as officials of MUKAMI KIMATHI FOUNDATION)

EX-PARTE: KINGSWAY INDUSTRIAL PARK LIMITED

JUDGMENT

Background.

At all material times, the ex-parte applicant, KINGSWAY INDUSTRIAL PARK LIMITED (hereinafter referred to only as “Kingsway”) was known as REAL INDUSTRIAL PARK LIMITED (hereinafter referred to only as “Real”). Real was incorporated on 14th July, 1993. Real changed its name to Kingsway on 22nd June, 2010 and was issued with a certificate of change of name by the Registrar of Companies on the same date. As at the time of change of name, Real owned all that parcel of land known as L.R No. 209/11289, I.R. 52219 situated in the City of Nairobi and measuring 4.598 hectares or thereabouts (hereinafter referred to only as “the suit property”). Real had acquired the suit property from a company known as ABISHEK INVESTMENT LIMITED (hereinafter referred to as “Abishek”) on 27th September, 1996 at a consideration of Kshs. 66,000,000/-. As a result of change of name of Real to Kingsway, the suit property was for all intents and purposes owned by Kingsway. In other words, Real and Kingsway were one and the same company.

On 15th February, 2017, the 1st Respondent wrote to among others, Abishek and Real summoning them to appear before the 1st Respondent on 9th March, 2017 and make representation on how they acquired the suit property. In the letter, the 1st Respondent indicated that it had received an application from Mukami Kimathi Foundation represented by the 2nd to 4th Respondents (hereinafter referred to only as “the Foundation”) to be allocated the suit property and that upon carrying out investigation, it discovered that the suit property was allocated to Abishek and Real without due process having been followed. Before the said letter dated 15th February, 2017, the 1st Respondent had exchanged various correspondence with the advocates on record for Kingsway in which the 1st Respondent had pointed out what it considered as discrepancies in the titles that had been issue to Abishek and Real in respect of the suit property. The 1st Respondent had invited the said advocates to a hearing in which the said advocates were expected to respond to the alleged discrepancies. From the material on record, it appears that the said advocates never attended the hearings that had been scheduled prior to the summons of 15th February, 2017.

The application before the Court:

Pursuant to the leave that was granted on 31st May, 2018, Kingsway (hereinafter referred to as "the Applicant") filed a Notice of Motion application dated 8th June 2018 seeking the following orders;

1. An Order of Prohibition do issue against the 1st Respondent, whether by its officials, servants, agents, officers, successors, assigns, or persons acting through them prohibiting them from entertaining, hearing, or in any manner dealing with the 2nd to 4th Respondents' application to be allocated the Applicant's property being L.R No.209/11289(the suit property), or in any manner proceeding with the purported inquiry into the manner in which the Applicant procured the said property, or conducting proceedings in respect of the property to wit L.R.No. 209/11289(the suit property) in any manner whatsoever.

2. An Order of Prohibition do issue prohibiting the Respondents jointly and severally and through their agents, servants, officers, associates, successors, personal representative or an any person acting through them from in any way determining, interfering or dealing with the Applicant's title to private parcel of land known as L.R No. 209/11289(the suit property).

3. An Order of Certiorari to issue to bring into the High Court the 1st Respondent's decision contained in the 1st Respondent's Letter of the 15th of February, 2017 seeking to commence proceedings to have the Applicant's title to its property to wit L.R No.209/11289(the suit property) revoked and/or allocated to the 2nd to 4th Respondents, and to quash the said decision or any other decision /proceedings of the 1st Respondent concerning the Applicant's title to private land registered in its name as L.R No. 209/11289(the suit property).

4. Costs be awarded to the Applicant.

The Applicant's case.

The application was argued by way of written submissions. The Applicant relied on its statutory statement dated 11th April, 2017. The Applicant also relied on the verifying affidavit, further affidavit and further further affidavit sworn by Manish Ramniklal Shah on 11th April, 2017, 25th April, 2017 and 8th November, 2019 respectively. Finally, the Applicant relied on its written submissions dated 14th January, 2020. The Applicant averred that it was the registered proprietor of the suit property and that the 1st Respondent in concert with the 2nd to 4th Respondents purportedly on behalf of Mukami Kimathi Foundation (the Foundation) had hatched a fraudulent scheme to unfairly revoke the Applicant's title and deprive it of the suit property.

The Applicant averred further that the suit property was private property and as such the 1st Respondent had no jurisdiction over it by virtue of article 62(1)(a) and 64(b) of the Constitution of Kenya. The Applicant averred that the Foundation applied to the 1st Respondent to be allocated the suit property and that they had communicated at length and in depth about the proposed allotment and that the hearing of the Applicant in relation to the review of its title to the suit property was a mere formality. The Applicant averred that the revocation of the Applicant's title and allocation of the property to the Foundation was a predetermined conclusion.

The Applicant averred that the basis on which the Foundation applied to the 1st Respondent to be allocated the suit property was that the 1st Respondent had purportedly carried out investigations and concluded that the Applicant's title was procured irregularly, albeit without any reference to the Applicant making the said conclusion by the 1st Respondent unconstitutional and in breach of the provisions of the Fair Administrative Action Act, 2015. The Applicant averred that it was neither given a notice of the said investigation nor a report on the outcome thereof.

The Applicant averred that the decision by the 1st Respondent that the Applicant's title was procured irregularly was communicated to it through a letter dated 15th February, 2017 in which the 1st Respondent stated that upon investigation, it emerged that the suit property was allocated to the Applicant without due process being followed. The Applicant averred further that the purported investigations by the 1st Respondent appeared to have been conducted not by the 1st Respondent but by the 2nd to 4th Respondents as they purported to have all the background information on the property. The Applicant averred that the 2nd to 4th Respondents had even directed the 1st Respondent to revoke the Applicant's title to the suit property on account its alleged forgery. The Applicant averred that it was summoned by the 1st Respondent to appear before it on 9th March, 2017 for a hearing to determine the validity of the Applicant's title to the suit property.

The Applicant averred that disputes over title to private land falls out of the jurisdiction of the 1st Respondent by virtue of Article 162 (b) of the Constitution. The Applicant averred that the 1st Respondent's power to review grants and dispositions of land was limited to public land as provided for under Article 62 of the Constitution. The Applicant submitted that in purporting to review the title of the suit property, the Applicant was acting outside its constitutional mandate which should not be permitted by the court. The Applicant averred further that the dispute that was before the 1st Respondent was over title to private land and as such only the Environment and Land Court established under Article 162(2) of the Constitution 2010 had jurisdiction to determine the same.

The Applicant averred further that the 1st Respondent was biased against it and that this was shown by the 1st Respondent's act of entertaining an application by the Foundation for allocation of the suit property while the property was still registered in the Applicant's name presuming that it has already reverted back to the state. The Applicant averred that the conduct of the Respondents violated the rules of natural justice, the Applicant's right to fair administrative action and the Applicant's constitutional rights as enshrined in Articles 24,40 and 47 of the Constitution 2010.

The Applicant averred further that the 1st Respondent's power to review grants and disposition of public land was limited to 5 years from the

date of commencement of the National Land Commission Act, 2012. The Applicant contended that any review carried out after the expiry of the 5-year period stipulated under section 14(1) of the National Land Commission Act would be void. The Applicant averred that the Respondents were aware of a civil suit that was pending in the High Court namely HCCC No. 43 of 2011, Real Industrial Park Limited *v* Kingsway Industrial Park Limited concerning the suit property and that depriving the Applicant of the title to the property would render the said court proceedings nugatory.

The Applicant cited several authorities in support of its case including; Municipal Council of Mombasa *v* Republic & Umoja Consultants Ltd, Civil Appeal No.185 of 2001, Council of Civil Servants Unions *v* Minister for the Civil Service (1985) AC 2, Republic *v* National Land Commission exparte Holborn Properties Ltd [2016]eKLR, Republic *v* Commissioner for Co-operatives exparte Kirinyaga Tea Growers [1999] 1EA 245, Republic *v* National Land Commission & 2 others Exparte Biren Amrital Shah[2019]eKLR, Sceneries Limited *v* National Land Commission [2017]eKLR and Beatrice Wanjiru Kimani *v* Evanson Kimani Njoroge, Civil Appeal No. 79 of 1998[1995-1998] 1 E.A 134.

The 1st Respondent's case:

The 1st Respondent relied on the replying affidavit sworn on 20th November, 2018 by its Deputy Director, Legal Affairs and Enforcement, Brian Ikol, and written submissions dated 9th September, 2020.

The 1st Respondent averred that Section 14 of the National Land Commission Act, 2012 granted it power to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety and also gives the procedure for carrying out the mandate. The 1st Respondent averred that in exercise of its review powers, it operates as a quasi-judicial body within the meaning of Article 169(1) of the Constitution.

The 1st Respondent averred that the suit property was referred to it for investigation because the property had three (3) titles in the names of various parties. The 1st Respondent averred that the first title was in the name of Real Industrial Park Limited(Real), the second title was in the name of Abishek Investment Limited(Abishek) while the third one was in the name of Bridge House Enterprises Limited. The 1st Respondent averred that the titles held by Real and Abishek were similar. The 1st Respondent averred that it was impossible for a legally acquired parcel of land to have two similar titles. The 1st Respondent averred that anomalies and irregularities were apparent on the said titles which required investigation. The 1st Respondent averred that it had power to review the various grants in respect of the suit property to determine their propriety or legality. The 1st Respondent submitted that review of grants of public land entailed the carrying out of an analysis of the process under which such public land was converted to private land and making findings on the legality of the grants in question. In support of this submission, the 1st Respondent cited Republic *v* National Land Commission Exparte Krystalline Salt Limited [2015] eKLR, Republic *v* National Land Commission Ex-parte Holborn Properties Limited [2016] eKLR and Mwangi Stephen Muriithi *v* National Land Commission & 3 Others [2018] eKLR.

The 1st Respondent cited section 23(3) (e) of the Interpretation and General Provisions Act, Chapter 2 Laws of Kenya and submitted that since it had already commenced review proceedings in respect of the suit property, it had power to conclude the same despite the fact that its mandate to review grants and dispositions of public land under the National Land Commission Act, 2012 has since lapsed.

The 2nd, 3rd and 4th Respondents' case:

The 2nd to 4th Respondents responded to the Applicant's application through a Replying affidavit sworn by the 3rd Respondent, Everlyn Wanjugu Kimathi on 28th March, 2019. The 2nd to 4th Respondents did not file submissions. The 2nd to 4th Respondents averred that they were officials of Mukami Kimathi Foundation (the Foundation). The 2nd to 4th Respondents averred that the Foundation is a registered society in Kenya and that it made an application to the former Cabinet Secretary, Ministry of Lands, Prof Jacob Kaimenyi through a letter dated 1st Februry,2016 to be allocated the suit property.

The 2nd to 4th Respondents averred further that upon investigations, the said former cabinet secretary found that the suit property had three (3) titles. The 2nd to 4th Respondents averred that on account of that finding, the said cabinet secretary directed through a letter dated 11th August, 2016 that the file relating to the suit property be handed over to the 1st Respondent for review of the grants in respect of the suit property under section 14 of the National Land Commission Act and Article 67(2) (e) of the Constitution. The 2nd to 4th Respondents averred further that they did due diligence on the suit property and found anomalies and discrepancies thereby called upon the 1st Respondent to have the title in respect thereof revoked. The 2nd to 4th Respondents averred that the Applicant had never owned the suit property and that the documents presented to court by the Applicant were not supported by documents in the custody of the Ministry of Lands and the 1st Respondent, hence the Foundation's request to be allocated the suit property.

Determination:

From the material on record, the following in my view are the issues arising for determination in the application before the court:

a) Whether the 1st Respondent had jurisdiction to review the title/s in respect of the suit property.

b) Whether in purporting to conduct a hearing to review the title in respect of the suit property, the 1st Respondent acted in violation of the rules of natural justice and infringed on the Applicant's right to fair administrative action and fair hearing.

c) Whether the 1st Respondent can continue with the review of the title for the suit property after the lapse of its review mandate.

d) Whether the Applicant is entitled to the reliefs sought.

e) Who is liable for the cost of the application?

Judicial review is now a constitutional, statutory and common law remedy. Section 4 of the Fair Administrative Action Act, 2015 provides as follows:

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

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."

Section 7 of the Act provides as follows:

"7. (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's

case;

(b) a mandatory and material procedure or condition prescribed by an

empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

i. the purpose for which it was taken;

ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.”

Section 11 of the Act provides as follows:

“11(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs and other monetary compensation."

Section 12 of the Act provides that:

"This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice."

As mentioned earlier in this judgment, the applicant has sought orders of Prohibition and Certiorari. In the book, H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

"The quashing order and prohibiting order are complementing remedies, based upon common law principles …..A quashing order issues to quash a decision which is ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future."

In Kenya National Examination Council *v* Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

"…. prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land…. Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."

It is on the foregoing principles and statutory provisions that the Applicant's application before the court would be considered.

Whether the 1st Respondent had jurisdiction to review the title/s in respect of the suit property.

The 1st Respondent was established under section 67 of the Constitution of Kenya which also spelt out some of its functions. Article 68 of the Constitution directed Parliament to enact legislation providing for among others the review of all grants or dispositions of public land to establish their propriety or legality. The National Land Commission Act, 2012 was enacted pursuant to the provisions of Articles 67(3) and 68 of the Constitution. Pursuant to Article 68(c) (v) of the Constitution, the 1st Respondent was given power under the National Land Commission Act, 2012(hereinafter referred to only as "the Act" where the context so permits) to review grants and dispositions of public land. Section 14 of the Act provides as follows:

14. (1) Subject to Article 68 (c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

The Applicant had contended that the 1st Respondent's review powers were limited to public land and as such the 1st Respondent had no jurisdiction to review the title for the suit property which was private land. It is common ground that once public land is alienated to a private entity or person, it becomes private land. See, section 9(2) of the Land Act, 2012. I am in agreement with the 1st Respondent that the powers conferred upon it by section 14 of the National Land Commission Act, 2012(the Act) were intended to enable it examine the propriety and legality of alienation of public land for private use. It follows therefore that the 1st Respondent could only review titles for public land that had already been alienated and as such converted to private land. I have considered the cases that were cited by the parties in support of their rival positions on this issue. I am in agreement with the observation that was made by W.Korir J. in Republic *v* National Land Commission & another, Exparte Muktar Saman Olow[2015] eKLR in which he stated that:

"47. Under Section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent."

In Republic *v* National Land Commission, Ex parte Holborn Properties Limited (supra), that was cited by both parties, the court after reviewing several policy documents that informed the establishment of the 1st Respondent stated as follows:

"54. It is clear from the history that gave rise to the establishment of the National Land Commission that the Respondent's mandate was not only to review grants or dispositions of public land that were issued after the effective date of the Constitution, but also those allocations over public land that were done even before the promulgation of the Constitution in the year 2010.

55. Although it is true, as submitted by the Applicant's counsel, that for the first time, the 2010, Constitution comprehensively defined at Article 62 what public land entails, the same Constitution recognises the fact that there were other definitions of "public land" even before its promulgation in the year 2010.

56. I say so because the Constitution has defined "public land" in Article 62 (1) (n) (i) as follows: -

"62 (1) Public land is-

(n) any other land declared to be public land by an Act of Parliament-

(i) in force at the effective date;"

57. Having recognised the fact that even before it defined in detail what "public land" entailed there still existed "public land", the review of grants or dispositions of public land to establish their property or legality was retrospective.

58. The body that was to be given the mandate to review such grants or dispositions by Parliament was not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before. That is what the Kenyan people wanted as discerned from the Ndung'u Commission Report and the National Land Policy, which preceded the Constitution.

59. Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.

60. I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done."

I am in agreement with the 1st Respondent that it had jurisdiction to review the various titles that existed in respect of the suit property including that which was held by the Applicant for their propriety or legality. Since the suit property was public land before it was alienated for private use, the process of alienation of the same was subject to review by the 1st Respondent under section 14 of the National Land Commission Act, 2012. Due to the foregoing, I disagree with the contention by the Applicant that the 1st Respondent had no jurisdiction to

review the title for the suit property because it was private land. I am also not in agreement with the Applicant that the 1st Respondent was out to determine the ownership of the suit property. The correspondence before the court exchanged between the parties is clear that the 1st Respondent's concern was what it claimed to be the anomalies in the various titles it claimed to have been issued in respect of the suit property. The suit property having been public land before alienation, it was within the 1st Respondent's jurisdiction to investigate and make a finding on the legality of the process through which the alleged multiple titles were issued.

Whether in purporting to conduct a hearing to review the title in respect of the suit property, the 1st Respondent acted in violation of the rules of natural justice and infringed on the Applicant's right to fair administrative action and fair hearing.

The Applicant contended that the revocation of its title to the suit property was a foregone conclusion in that the 1st Respondent had already carried out investigation in concert and conspiracy with the 2nd to 4th Respondents without involving it and had made a determination that the suit property was allocated to the Applicant without due process. The Applicant contended further that the 1st Respondent was biased against it and that it was taking directions from the 2nd to 4th Respondents. The Applicant had contended that it was not given notice of the investigations that were being conducted by the 1st Respondent neither was it supplied with the report on the outcome of the same. In Attorney General *v* Ryath [1980] AC 718 at page 730, Lord Diplock stated that:

> **"It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority".**

In Harlsbury's Laws of England, 4th Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

> **"Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo judex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication."**

Sections 14(3) of the National Land Commission Act, 2012 that I have reproduced above provides that the 1st Respondent in exercise of its review powers was supposed to give every person who had an interest in the grant or disposition the subject of its review a notice of such review and an opportunity to appear before it and to inspect any relevant documents. Section 8 of the same Act also reproduced above provides that in exercise of its review powers, the 1st Respondent was to be guided by the principles set out under Article 47 of the Constitution which provides as follows:

> **47. (1) Every person has the right to administrative action that is**
>
> **expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is**
>
> **likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

I am satisfied from the material before the court that the Applicant was accorded fair hearing and fair administrative action by the 1st Respondent. As far back as March, 2016, the 1st Respondent informed the Applicant that it had resolved to investigate the grant held by the Applicant in respect of the suit property. In the 1st Respondent's letter dated 28th March, 2016 to the Applicant's advocates, the 1st Respondent highlighted what it considered as anomalies on the various titles that had been issued in respect of the suit property including that held by the Applicant. In the letter, the 1st Respondent invited the Applicant to appear and be heard during the said investigations on 6th April, 2017(sic). From the material on record, the Applicant declined to participate in the said investigation by the 1st Respondent. The 1st Respondent had power to carry out investigations relating to the acquisition of public land on its own motion or on a complaint by a third party.

The Applicant having been given a notice of the said investigation and an opportunity to appear and be heard on the matter and having failed to attend the hearing cannot be heard to complain that the investigation was carried out without its involvement and that he was not given a report on the outcome of the said investigations. I wonder why the Applicant would require a report of the investigations that it refused to participate in. The 1st Respondent's duty in my view was to notify the Applicant of the investigations and to give it an opportunity to make representation. The Applicant was accorded both.

The summons that were issued to the Applicant by the 1st Respondent on 15th February, 2017 which gave rise to the present proceedings was in my view another opportunity that was given to the Applicant to appear before the 1st respondent and make representation on the review of the title of the suit property before any adverse decision was made against it. I am unable to see anything wrong with the statement by the 1st Respondent in that summons to the effect that the 1st Respondent had carried out investigations and had made a finding that due process was not followed in allocation the suit property to the applicant. The Applicant had been notified of the investigations and refused to participate in the same. It was however being given an opportunity to be heard before a decision was made whether or not to revoke its title.

Due to the foregoing, I am not persuaded that the 1st Respondent failed to observe rules of natural justice or that the Applicant was not accorded a fair hearing. When the Applicant came to court, the 1st Respondent had not made a decision to revoke the Applicant's title. What was in its possession were findings of an investigation that it had carried out. The 1st Respondent had not indicated that it would revoke the

applicant's title based on the said findings. If that was the case, I believe there would have been no need of summoning the Applicant to appear and be heard. It is my finding that the process that was initiated by the 1st Respondent was procedurally fair and that none of the provisions of the Fair Administrative Action Act or the Constitution were violated by the 1st Respondent.

Whether the 1st Respondent can continue with the review of the title for the suit property after the lapse of its review mandate.

This issue was not raised as a ground for the review sought. I am therefore not supposed to base my decision on the same. It was raised by the parties in the submissions. If I was to determine it, my opinion on the same is as follows: There is no dispute that the 1st Respondent had power under section 14 of the National Land Commission Act, 2012 (the Act) on its own motion or upon a complaint to review all grants or dispositions of public land to establish their propriety or legality. It is also not in dispute that that mandate has since come to an end. The 1st Respondent has argued that it can still continue with the review of grants or dispositions of public land in respect of complaints that were pending before it when its mandate under section 14 of the National Land Commission Act expired.

I am of the view that the 1st Respondent cannot purport to review any grant or disposition of public land after the expiry of its mandate under Section 14 of the Act whether such review is pursuant to a new complaint or a complaint that was pending as at the time its mandate expired unless Parliament extends its mandate under that section of Act. In my view, if it was the intention of Parliament to empower the 1st Respondent to continue processing complaints pending before it after the expiry of its mandate, it would have provided for such eventuality in the Act.

In the absence of such provision in the Act, the 1st Respondent would be exercising powers it does not have if it purports to continue with review of grants and disposition of public land after the expiry of its mandate. Parliament provided for the extension of the 1st Respondent's mandate under section 14(9) of the Act. If the 1st Respondent had pending reviews or investigations at the expiry of its mandate, that would have been a proper basis for seeking extension of its mandate under section 14(9) of the Act. However, until the extension is granted by Parliament, the 1st Respondent must lay down its tools with regard to the exercise of the powers that were granted to it under the said section of the Act. For the foregoing reasons, I disagree with the advocate for the 1st Respondent that the 1st Respondent can continue to process the complaints over grants and disposition of public land that were pending before it after the lapse of its review mandate.

I am not persuaded that the 1st Respondent's power to undertake such exercise is saved by the provisions of sections 26 as read with section 23(3) (e) of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya as argued by the 1st Respondent. The investigations that were pending after the expiry of the 1st Respondent's review mandate could be saved under the said provisions of the Interpretation and General Provisions Act only if there was no contrary intention in the National Land Commission Act, 2012 (the Act). I am of the view that it was the intention of Parliament that the 1st Respondent discharges its review mandate within 5 years from the date of commencement of the Act with liberty to the 1st Respondent to apply for extension. That intention is expressed clearly in the Act. The provisions of section 23(3)(e) of the Interpretation and General Provisions Act do not therefore apply. I am of the view that Parliament could not have provided the 1st Respondent with the extension window if the 1st Respondent could continue reviewing grants and dispositions of public land without such extension.

In view of the foregoing, I am in agreement with the Applicant that the 1st Respondent would be acting without jurisdiction if it purports to continue with the review of the title held by the Applicant over the suit property after the expiry of its review mandate.

Whether the Applicant is entitled to the reliefs sought.

From my findings above, the Applicant has failed to establish the grounds upon which its application was brought. The Applicant is therefore not entitled to the reliefs sought in its application.

Who is liable for the costs of the suit?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. In this case, the Applicant has failed in its claim against the Respondents. The Applicant shall therefore bear the costs of the suit.

Conclusion:

In conclusion, I hereby dismiss the Applicant's Notice of Motion dated 8th June, 2018 with costs to the Respondents.

DELIVERED AND DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

Ms. Kamau for the Applicant

Ms. Masinde for the 1st Respondent

N/A for the 2nd to 4th Respondents

Ms. C. Nyokabi - Court Assistant