



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 56 OF 2018 (JR)

REPUBLICAPPLICANT

VERSUS

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

CHIEF LAND REGISTRAR2ND RESPONDENT

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

AND

DAKAWOU TRANSPORTERS LIMITED.....EX-PARTE APPLICANT

AND

RAPHAEL MUSYOKA NDETI (*Suing on behalf of the Estate of*

PETER NZUKI NDETI).....INTERESTED PARTY

JUDGMENT

1. In the Notice of Motion dated 26th November, 2018, the Ex-parte Applicant (*the Applicant*) has sought for the following orders of Judicial Review:

a. That this Honourable Court be pleased to issue an order of certiorari for the purposes of quashing the decision of the 1st Respondent and quashing the Gazette Notice Number 11710 of 9th November, 2018.

b. That this Honourable Court be pleased to issue an order of mandamus to compel the 1st Respondent to procure the immediate notice cancelling the Gazette Notice Number 11710 of 9th November, 2018.

c. That this Honourable Court be pleased to issue an order of prohibition to prohibit the 1st Respondent or its servants, agents, employees or anyone else claiming to derive such authority from the Respondent from reviewing or purporting to have the jurisdiction to review the ownership in relation to relation to L.R. No. 337/1208.

2. The Application is supported by the Statutory Statement and the Verifying Affidavit of the Ex-parte Applicant. In the Affidavit, the Ex-parte Applicant's Director deponed that the Ex-parte Applicant is the registered proprietor of land known as L.R. No. 337/1208 (*the suit property*); that the Ex-parte Applicant purchased the suit property, through its subsidiary company, Oil City Limited, from Athi Paper Mills Ltd and that after settling all the outstanding rates and the purchase price, Athi Paper Mills refused to surrender exclusive possession of the suit property to the Ex-parte Applicant's subsidiary company.

3. According to the Ex-parte Applicant, on 12th October, 2010, its sister company sued Athi Paper Mills Limited; that on 14th December, 2010, the court ordered that the Ex-parte Applicant's subsidiary company was entitled to exclusive and unimpeded right of vacant possession and occupation of the suit property and that in the Task Force Report on Irregular Appropriation of Public Land in Athi River, it was indicated that L.R. No. 337/1208 is owned by Oil City Limited, the Ex-parte Applicant's then subsidiary.

4. It is the deposition of the Ex-parte Applicant's Director that the Ex-parte Applicant's subsidiary company transferred the suit property to the Ex-parte Applicant; that the Ex-parte Applicant has been in possession of the suit property since the year 2012 and that the Ex-parte

Applicant entered into an Agreement with Daniel Mutinda to fence the suit property.

5. According to the Ex-parte Applicant's Director, in the year 2017, the government compulsorily acquired part of the suit property; that the National Land Commission awarded to the Ex-parte Applicant Kshs. 89,396,888 as compensation and that on 13th August, 2014, the late Peter Nzuki Ndeti petitioned the National Land Commission seeking revocation of titles for L.R. Nos. 337/1884, 337/1645 and 337/1208.

6. It is the Ex-parte Applicant's case that without being accorded a hearing, the 1st Respondent revoked the Ex-parte Applicant's Title Deed vide Gazette Notice Number 11710 of 9th November, 2018; that the 1st Respondent disregarded Article 47 and 50 of the Constitution and Section 4 of the Fair Administrative Actions Act and that in upholding an allotment letter over a registered interest, the 1st Respondent acted unlawfully.

7. The Ex-parte Applicant's Director further deponed that the suit property is not public land; that Section 14(1) of the National Land Commission Act restricts the Commission's mandate to reviewing all grants and dispositions of public land within five (5) years from the commencement of the Act and that the operations of the National Land Commission commenced in the year 2012.

8. The Ex-parte Applicant's Director finally deponed that the 1st Respondent did not have jurisdiction under Section 15 of the National Land Commission Act to deal with the suit property as a historical land claim.

9. The 1st Respondent's Director of Legal Affairs deponed that pursuant to Article 68 (c) (v) of the Constitution and Section 14 of the National Land Commission Act, the 1st Respondent has the mandate to review all grants and dispositions of public land either on its own Motion or upon receipt of a complaint and that the said mandate includes reviewing how land that was initially public land was converted and registered as private land.

10. The 1st Respondent's Legal Officer deponed that under Section 12 of the Land Act, the 1st Respondent is the allocating authority of public land; that the proceedings in respect to the suit property were conducted within the requisite five (5) years period and that the 1st Respondent rendered its decision on 28th April, 2017 before the lapse of its mandate.

11. According to the 1st Respondent, it received a complaint from the Interested Party alleging that they (*the family of the late Peter Ndeti*) are the allottees of L.R. No. 337/1208; that the 1st Respondent invited, through a public notice appearing in the Star Newspaper and the Standard Newspaper of 4th August, 2014 and 19th January, 2015 respectively, all Interested Parties for a hearing on 29th August, 2014 and 13th February, 2015 at the ACK Bishop Annex, 7th Floor, Nairobi and that on 29th August, 2019, the Interested Party, through their advocate, appeared before the 1st Respondent and made extensive submissions regarding the disputed parcel of land.

12. It is the 1st Respondent's case that the Ex-parte Applicant's representatives attended the said proceedings but elected not to file their written representations and that the 1st Respondent, having reviewed the legality of the grant over the suit property, prepared and rendered its determination dated 28th April, 2017.

13. According to the 1st Respondent's Director of Legal Services, the 1st Respondent's determination directed the Chief Land Registrar to revoke the title issued to Onesmus Kimani Ngunjiri and the subsequent transfers; that the said determination was gazetted vide Gazette Notice dated 9th November, 2018; that the said determination has since been implemented and that there is nothing left to prohibit or quash by way of Judicial Review.

14. The 1st Respondent's Director of Legal Affairs deponed that no evidence of the allocation of the suit land to Onesmus Kimani Ngunjiri exists; that there is no evidence of any transfer from Onesmus Kimani Ngunjiri to Athi Paper Mills Limited and that there is no evidence of a transfer from Athi Paper Mills to Oil City Limited.

15. According to the 1st Respondent's Director's deposition, the Ex-parte Applicant acquired a title that was *void ab initio*; that the Ex-parte Applicant is not a purchaser for value without notice; that at the time the land was purportedly allocated to the Ex-parte Applicant, the land was not available for allocation and that no evidence has been adduced by the Ex-parte Applicant to prove that the 1st Respondent acted unreasonably, *ultra vires* or in an unlawful manner.

16. The Attorney General filed Grounds of Opposition in which he averred that the revocation of the grant was done in accordance with Section 14(1) and 14(5) of the National Land Commission Act; that the right to own property provided for under Article 40 of the Constitution is not absolute and that the Application does not disclose any reasonable cause of action against the 2nd and 3rd Respondents.

17. The Interested Party deponed that he is one of the administrators of the Estate of the late Peter Nzuki Ndeti; that on 28th April, 2017, the 1st Respondent found that L.R. No. 337/1208 was properly allocated to the late Peter Nzuki Ndeti and that prior to arriving at its decision, the 1st Respondent had, through a formal advertisement in the newspapers, invited all affected persons to appear before it.

18. The Interested Party deponed that proof of title can only be achieved through a formal hearing process; that the suit land, which was public land, was lawfully allocated for a term to the late Peter Nzuki and that the Ex-parte Applicant never contested the jurisdiction of the 1st Respondent when it appeared before it.

19. The Interested Party finally deponed that the Ex-parte Applicant has not demonstrated under what authority the persons who assigned or sold to them the subject property assumed ownership of the same and that the indefeasibility of title is not absolute especially where title was

obtained through fraud and or misrepresentation.

Submissions:

20. The Ex-parte Applicant's advocate submitted that the Ex-parte Applicant is the third registered owner of land known as L.R. No. 337/1208; that the first proprietor, Athi Paper Mills Limited entered into an Agreement for the sale of the suit property with the Ex-parte Applicant, a sister company of Oil City Limited, before the suit land was transferred to the said Oil City Limited.

21. Counsel submitted that in interpreting the mandate of the 1st Respondent under the Constitution and the National Land Commission Act, the suit property is held by a private entity under leasehold tenure and that the suit property does not fall under the purview of Section 14(1) of the National Land Commission Act because it was not unalienated government land at the effective date of the Constitution.

22. While relying on the Supreme Court's Advisory Opinion in Advisory Opinion Reference 2 of 2014, the matter of the **National Land Commission (2015) eKLR**, the Ex-parte Applicant's counsel submitted that the object behind creating the National Land Commission was for the restoration of illegally acquired public land to the public and to uphold public interest.

23. On the issue of whether the 1st Respondent acted *ultra vires* in revoking the Ex-parte Applicant's title, counsel submitted that a *bona fide* purchaser for value without notice has a unique position viz-a-viz the power of the 1st Respondent to revoke grant and disposition of public land; that it is crucial to establish whether the Ex-parte Applicant is a *bona fide* purchaser for value without notice and that the Ex-parte Applicant has met all the tests for a *bona fide* purchaser for value without notice.

24. On the issue of the legality of the gazette notice, counsel submitted that the impugned gazette notice was published by the 1st Respondent on the 9th November, 2018; that the powers of the 1st Respondent to recommend for revocation of the Ex-parte Applicant's title should have been exercised within five (5) years of the commencement of the National Land Commission Act and that the said power came to an end by the beginning of May, 2017. According to counsel, the impugned gazette notice was issued more than one (1) year and seven (7) months from the date of the lapse of the 1st Respondent's mandate to review grants. Counsel relied on the decision of **Republic vs. National Land Commission & 3 Others Ex-parte Samuel Githinji Mbugua & 5 Others (2018)**.

25. The Ex-parte Applicant's counsel submitted that 1st Respondent's decision was an illegality because it acted outside its jurisdiction; that according to the title document, there is no proprietor by the name Onesmus Kimani Ngunjiri and that in any event, the 1st Respondent was not accorded a fair hearing.

26. The Ex-parte Applicant's advocate finally submitted that the Interested Party waited for more than twenty two (22) years since the title was registered to bring a claim before the 1st Respondent; that the Interested Party opted to collude with the 1st Respondent to deprive the Ex-parte Applicant its title and that the 1st Respondent exercised a considerable degree of unreasonableness in reaching its determination which resulted in the deprivation of the title to the Ex-parte Applicant.

27. In his submissions, the Interested party submitted that under Section 14 of the National Land Commission Act, the 1st 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.

28. Counsel submitted that 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 1st Respondent and that the 1st Respondent is allowed by law to enquire into unlawfully acquired public land.

29. The advocate for the Interested Party submitted that review of grants and dispositions of public land by the 1st Respondent entails the 1st Respondent analyzing the process under which public land was converted to private land; that the impugned decision subject to these proceedings was made in the year 2017, well before the mandate of the Commission had expired and that the Commission acted within its jurisdiction.

30. Counsel submitted that in Judicial Review proceedings, the court is called upon to consider the process used to arrive at a decision and not the merit of the decision; that the Ex-parte Applicant was given an opportunity to appear before the Commission and make representations and that the Commission took into account the representations of the Ex-parte Applicant.

Analysis and findings:

31. What is before me is an Application for orders of Judicial Review. In the Application, the Ex-parte Applicant (*the Applicant*) is seeking for an order of certiorari for the purpose of "*quashing the decision of the 1st Respondent and quashing the Gazette Notice number 11710 of 9th November, 2018.*"

32. From the pleadings and the submissions before me, the issues that arise for determination are these:

a. Whether the 1st Respondent had jurisdiction to determine the dispute between the Applicant and the Interested Party;

b. Whether the 1st Respondent's determination was illegal, unlawful and unreasonable;

c. Whether the 1st Respondent acted ultra vires in directing the 2nd Respondent to revoke the Applicant's title.

33. The 1st Respondent draws its mandate from Article 67 of the Constitution. One of the functions of the 1st Respondent under Article 67(2) (a) of the Constitution is to manage public land on behalf of the national and county governments. Article 67(3) of the Constitution provides that the National Land Commission may perform any other functions prescribed by National Legislation.

34. Article 68(c) (v) of the Constitution provides that Parliament shall enact legislation to enable the review of **all** grants or dispositions of public land.

35. Section 14(1) of the National Land Commission Act tasks the 1st Respondent with the mandate to review all grants and dispositions of public land. The said Section states as follows:

“14. Review of grants and dispositions:

(1) Subject to Article 68 (c)(v) of the Constitution, the

Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

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

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

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

36. The Ex-parte Applicant's counsel submitted that the suit property is land held by a private entity under leasehold tenure and does not fall under the purview of Section 14(1) of the Act. According to the Ex-parte Applicant's counsel, the jurisdiction of the 1st Respondent is only in respect to land which was unalienated government land at the effective date of the Constitution.

37. The Ex-parte Applicant's counsel further submitted that the object of creating the 1st Respondent was for the restoration of illegally acquired public land to the public and to uphold public interest, and that it is only this court that has the mandate of resolving disputes between private entities regarding private land.

38. The law, and in particular Article 68(c) (v) of the Constitution and Section 14(1) of the National Land Commission Act grants the 1st Respondent the mandate to review all grants in respect to public land, with a view to establishing their propriety or legality. The said provisions of the law mandate the 1st Respondent to look into all dispositions of public land to determine if the said dispositions were legal or not.

39. The Black's Law Dictionary, 10th Edition, has defined “*disposition*” as follows:

“The act of transferring something to another's care or possession, especially by deed or will; the relinquishing of property.”

40. From the above definition, it is obvious that the 1st Respondent's mandate under Article 68(c) (v) of the Constitution and Section 14 of the National Land Commission Act includes reviewing all transfers (*dispositions*) in respect of land that was initially public land, either to individuals or corporations, and determine the legality of the same. Indeed, the issue of whether the review includes grants registered in the names of private persons prior to the promulgation of the 2010 Constitution or not was addressed by this court in the case of **Republic vs. National Land Commission, Ex-parte Holborn Properties Limited (2016) eKLR** as follows:

“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. 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. It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title.”

41. In the case of *Compar Investments Limited vs. National Land Commission & 3 others (2016) eKLR*, Lenaola J. (as he was then) held as follows:

“Despite the fact that the Petitioner’s land is currently classified as private land because it holds a 99 years’ leasehold tenure over the same, I do not think that fact alone bars the 1st Respondent from inquiring into its propriety. I say so because, all land in Kenya belongs to the Republic hence the leasehold title held by the Petitioner. The suit property has a history which history tells the procedure of its alienation and hence its legality or otherwise. The Government has powers to alienate its land and grant it to private individuals in forms of grants or leases...But suppose I am wrong in making that finding, I would still arrive at the same conclusion given the provisions of Section 14(1) of NLC Act which allows the 1st Respondent, on its own motion or through a complaint lodged by an individual or a community, to review a grant. KURA in its letter dated 5th June, 2013 lodged a complaint to the 1st Respondent over the suit property and requested it to investigate the title of the Petitioner over the suit property and that was a sufficient reason for NLC to act under the law.”

42. The analysis of the law and the decisions of the courts shows that the 1st Respondent has the mandate of looking into the procedures that were followed (or not followed) in the allocation of public land to individuals, before and after the promulgation of the 2010 Constitution. If the correct procedure was not followed in the allocation of public land, then the 1st Respondent is mandated to direct the Registrar of Lands to revoke such grants.

43. Considering that the 1st Respondent has the mandate of managing public land on behalf of the National and County Government, the 1st Respondent, after reviewing grants or disposition of what was initially public land, can recommend to the Registrar to allocate such land to the rightfully allottee, be it a private individual or a State organ.

44. The Ex-parte Applicant herein has not denied that the government is the head lessor in respect of land known as L.R. No. 337/1208. That being the case, the 1st Respondent had the mandate to look into the process that was followed in allocating the said to either the Ex-parte Applicant or its predecessor in title.

45. Indeed, the law allows the 1st Respondent to not only recommend to the Registrar to revoke such a title, but to allocate the same to the rightful allottee, if there was another allottee in the first place.

46. The next issue I will deal with is whether in exercising its mandate, the 1st Respondent acted unlawfully, illegally and unreasonably. While dealing with this issue, I am guided by the decision of the Court of Appeal in the case of *Suchan Investment Limited vs. The Ministry of National Heritage & Culture & Others (2016) eKLR*, in which the court held as follows:

*“55. An issue that was strenuously urged by the respondents is that the appellant’s appeal is bad in law to the extent that it seeks to review the merits of the Minister’s decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (1) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in *R v Home Secretary; Ex parte Daly* [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.”*

47. The *ratio decidendi* of the above decision is that there is a shift towards merit consideration in Judicial Review Applications. According to the court, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review.

48. However, while reviewing the merit of the impugned decision, the Court of Appeal held that “the reviewing court has no mandate to substitute its own decision for that of the administrator.” The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

49. The dispute in respect of land registered as L.R. No. 337/1208 commenced when the Interested Party’s late father, Peter Nzuki Ndeti, lodged a complaint with the 1st Respondent.

50. According to the complaint by the late Mr. Peter Nzuki, he was the rightful owner of L.R. No. 337/1208, amongst other parcels of land, which had been fraudulently and illegally allocated to the Ex-parte Applicant. The said complaint by the Interested Party was made pursuant to the provisions of Section 14 of the National Land Commission Act. The letter of complaint by Mr. Ndeti’s advocate has been annexed on

the Affidavit of the 1st Respondent's Director of Legal Affairs.

51. According to both the Ex-parte Applicant and the 1st Respondent, the 1st Respondent invited, through a public notice appearing on 4th August, 2014 in the Star Newspaper and 19th January, 2015 in the Standard Newspaper, all interested parties for hearings on various parcels of land on 29th August, 2014 and 13th February, 2015 at the ACK Bishop Annex 7th Floor, Nairobi. The copies of the said notices have been annexed on the Affidavits of the parties herein.

52. The list of attendees shows that the Ex-parte Applicant was represented during the said hearings. Indeed, the Ex-parte Applicant's Director has deponed that the Ex-parte Applicant appointed the firm of Garane & Associates Advocates to represent it. The said firm of advocates filed a response. The response that the Ex-parte Applicant's advocate filed, in response to the Interested Party's complaint, has been annexed on the Ex-parte Applicant's Director's Affidavit.

53. The Ex-parte Applicant's Director deponed that the *"1st Respondent herein basing its decision on the aforementioned documents revoked the Ex-parte Applicant's title vide the Gazette Notice number 11710 of 9th November, 2018."*

54. The documents that the Ex-parte Applicant submitted to the 1st Respondent vide their letter dated 29th February, 2016, which letter and documents were received by the 1st Respondent, are the same documents that the Ex-parte Applicant is relying on in these proceedings to impugn the 1st Respondent's decision made on 28th April, 2017 and gazetted on 9th November, 2018.

55. The Ex-parte Applicant has deponed that Athi Paper Mills Limited was the first registered owner of the suit property; that the Ex-parte Applicant purchased the property through its then subsidiary company, Oil City Services Limited, from Athi Paper Mills; that the Ex-parte Applicant paid all the outstanding rates and rent which was deducted from the purchase price and that when Athi Paper Mills Limited refused to surrender possession of the land, its subsidiary filed a suit in court.

56. The first document that the Ex-parte Applicant has annexed on its Affidavit is a grant for 99 years for L.R. No. 337/1208. The said grant shows that Athi Paper Mills Limited was registered as the proprietor of the land on 5th October, 1994 and was issued with the Grant I.R 63528/1. The said Grant was transferred to Oil City Limited on 2nd December, 2009.

57. The title shows that L.R. No. 337/1208 was transferred from Oil City Limited to the Ex-parte Applicant on 31st July, 2012. To support the transfers mentioned above, the Ex-parte Applicant has exhibited an undated Agreement between Athi Paper Mills Ltd (*sic*) and the Ex-parte Applicant.

58. The Ex-parte Applicant has also annexed on its Affidavit a Complaint that was filed in Machakos HCCC No. 214 of 2010 in which Oil City Limited sued Athi Paper Mills Limited. Although the Complaint was filed on 21st October, 2010, the parties entered into a consent on 14th December, 2010 in which the said Athi Paper Mills Limited in which Athi Paper Mills Limited conceded to be *"evicted"*, together with its servants, from L.R. No. 337/1208.

59. The complaint that was forwarded to the 1st Respondent by the Interested Party is captured in its advocate's letter dated 13th August, 2014. According to the said letter, the Interested Party stated that he is the rightful owners of L.R. No. 337/1208; 337/1645; 337/4775; 337/1884; 337/973; 337/1868 and 337/4777.

60. In response to the complaint that the Interested Party's advocate filed with the 1st Respondent, the Ex-parte Applicant's advocate informed the 1st Respondent as follows:

"Our client informs us that on 16th April, 2009, the property was purchased by its then subsidiary company, Oil City Limited (previously, known as "Oil City Services Limited") from Athi River (sic) Paper Mills Limited. Our client through Oil City Limited agreed to settle all outstanding rates and rent on account of Athi River (sic) Paper Mills and the same was to be deducted from the purchase price. (Enclosed herewith is the Agreement for Sale over the property between Athi River Paper Mills and Oil City Services Limited correspondence between Athi River (sic) Paper Mills Limited and Dakawou Transporters Limited)."

61. During the hearing, the Interested Party informed the 1st Respondent that he was allocated the said parcels of land by the then National and Local Government for purposes of carrying out irrigation and quarry works; that he was in possession of the Minutes of the then Nairobi Eastern Rural District Council meeting held on 27th July, 1967 and that the said Minutes allowed the allocation of unsurveyed plots to him.

62. The other documents that the Interested Party forwarded to the 1st Respondent included: a copy of the Soil and Water Conservation Certificate; a copy of the Application for water permit dated 2nd February, 1986; a copy of the letter dated 10th April, 1986 from the Athi River Urban Council; a copy of the letter dated 16th August, 1986 from the Water Apportionment Board; a copy of the map showing the several parcels of land he was allocated and a copy of the plan showing the amalgamation of plots 1, 3 and 4.

63. The other documents that the Interested Party forwarded to the 1st Respondent, and which have been annexed on the Ex-parte Applicant's Director's Affidavit, include: Letters of Allotment for unsurveyed Plot No. 3A Athi River measuring 12.6 Ha and unsurveyed Plot No. 3B Athi River measuring 1.6 Ha.

64. The Interested Party informed the 1st Respondent that the only reason the Commissioner of Lands allocated him and his wife an aggregate of 14 Ha only was because the rest of the land had been fraudulently re-allocated to other persons and that the files in respect to the

other portions of land got lost.

65. According to the Interested Party, the Commissioner of Lands fraudulently re-allocated and subsequently issued title to the land comprised in the Letters of Allotment of 2nd June, 1998 being L.R. Nos. 337/4777 and L.R. No. 337/4775 to one Apex Steel Limited on 10th May, 2011 and 22nd March, 2011.

66. The deliberations of the 1st Respondent in respect of the suit land (337/1208) are contained in its Report dated 27th August, 2014. That Report is titled as follows:

“National Land Commission Review of Grants and Disposition Public hearing held at KICC-Lenana Hall on Friday 27th August, 2014 at 9.00 a.m.”

67. The Report further shows that the hearings on the said date were conducted by five (5) Commissioners of the 1st Respondent, six (6) advocates from the 1st Respondent and a lead counsel.

68. The record of the 1st Respondent shows that Mr. Gitonga advocate appeared for the Interested Party in respect of L.R. Nos. 337/1208, 1645, 4775, 1884, 973, 1868 and 4777.

69. In his opening remarks, Mr. Gitonga advocate informed the Commission as follows:

“A map of the area showing the fraudulent sub-division and subsequent re-allocation of the land has been provided and it indicates that the land measuring about 21 Hectares, has since been sub-divided into seven (7) plots....”

The seven plots are:

- ***Plot one, that is L.R. No. 337/973 measuring 8 Ha,***
- ***Plot two, L.R. No. 337/4777, measuring 5.32 Ha,***
- ***Plot three, L.R. No. 337/1868 measuring 3.512 Ha,***
- ***Plot four, L.R. No. 337/3212 measuring 1.804 Ha,***
- ***Plot five, L.R. No. 337/1884 measuring 2 Ha;***
- ***Plot six, L.R. No. 337/1645***
- ***Plot seven, L.R. No. 337/1208 measuring 1.116 Ha...”***

70. The record shows that the Commissioners of the 1st Respondent allowed Mr. Vincent Ndeti to testify on behalf of P.N. Ndeti and Brothers in respect to the complaint. The said Mr. Ndeti also produced before the Commissioners several documents in support of their claim, including letters of allotment, maps and evidence of payments of the requisite stand premium. Those documents have been exhibited in the Ex-parte Applicant's Affidavit.

71. In its determination dated 28th April, 2017, signed by the 1st Respondent's Vice-chair, the 1st Respondent made a finding in respect of L.R. No. 337/1208 as follows:

“During the hearing counsel for the Claimant submitted the following documents to the Commission:

- 1. Copy of Minutes of the meeting of the Nairobi Eastern Rural District Council held on or about 27th July, 1967, allocating various parcels of land to various people for use including the Claimant for cultivating and quarry.***
- 2. Copy of Minutes of the meeting of the visit by the District Commissioner and District Officer Central Division to parcels of land allocated including that of the Claimant in Kisumu Ndogo and KMC Dam.***
- 3. Copy of the Minutes of the meeting of the visit by the District Commissioner and District Officer Central Division in which the Claimant was advised by the former to apply for water rights at the Ministry of Water as well as Soil and Water Conservation Certificate.***
- 4. Copy of a Soil and Water Conservation Certificate issued by District Agricultural Officer, Machakos District.***
- 5. Copy of Application dated 2nd February, 1986 for water permit by the Claimants to Athi Catchment Board.***
- 6. Copy of letter dated 10th April, 1986 from Athi River Urban Council to the Water Apportionment Board authorizing***

use of land for irrigation.

7. Copy of letter dated 10th July, 1986 from District Water Engineer, Machakos asking for Title Deed or authority from Athi River Urban Council to the Claimant allowing them to use the land for irrigation.

8. Copy of letter dated 11th August, 1986 from Athi River Urban Council to the Secretary of the Water Apportionment Board confirming the Claimant had an unsurveyed plot measuring about 21 hectares used for irrigation and quarry and which is situated at KMC Dam along Mombasa Road and that the Council has no objection to the Claimant being issued with water permit for irrigation purposes but not to interfere with the bordering Council dam and sewerage water.

9. Copy of the map of unsurveyed plot of the area described in (8 above).

10. Copy of the map showing sub-division of a parcel of land into 7 plots as shown below:

i. Plot 1 – L.R. No. 337/973 - 8.00 Ha

ii. Plot 2 – L.R. No. 337/4777 - 5.232 Ha

iii. Plot 3 – L.R. No. 337/1868 - 3.512 Ha

iv. Plot 4 – L.R. No. 337/3212 - 1.804 Ha

v. Plot 5 – L.R. No. 337/1884 - 2.0 Ha

vi. Plot 6 – L.R. No. 337/1645 - 2.05 Ha

vii. Plot 7 – L.R. No. 337/1208 - 1.116 Ha

Total 23.714 Ha

11. Copy of map showing the 7 plots of land described in (10 above)

12. Copy of a plan showing amalgamation of plots 1, 3 and 4 described in paragraph 10 above to create a Plot No. 337/4775.

13. Copy of letters of allotment dated 2nd June, 1998 issued by Commissioner of Lands for the following:

a. Unsurveyed Plot No. 3A Athi River measuring 12.6 Ha to Peter Nzuki Ndeti – No. 244171.

b. Unsurveyed Plot No. 3B Athi River measuring 1.6 Ha to Elizabeth Nzili Nzuki – No. 244133.

14. Copies of correspondence between Claimants and the Ministry of Lands including payment receipts No. 3343149 for Peter Nzuki Ndeti for Plot No. 3A dated 6th September, 2013 Ch. No. 044584 and receipt No. 3343150 for Elizabeth Nzili Nzuki for Uns Resd. Plot No. 3B – Athi River dated 6th September, 2013 Ch. 044584.

15. Copies of letter dated 3rd July, 2014 for Claimant.

16. Copies of letter dated 25th September, 2010 from CLAO Central recommending Claimants make late payment for L.R. No. 337/99 Uns. Residential Plot 3A and Uns. Plot No. 32 Athi River.

17. Copies of letter dated 13th January, 2012 Ref. 244133/33 from Commissioner of Lands requesting Claimants to make payment for allotment to enable processing of their title for Uns. Residential Plot 3B Athi River.

18. Copies of letter dated 3rd July, 2014 from Claimants to the Director of Physical Planning regarding a compliant of irregular issuance of PDPs which have not been approved.

19. Copy of letter from Director of Physical Planning dated 9th July, 2014 Ref. No. PDP/8/XXIII (44) to the Chairman, National Land Commission indicating:

20. PDP No. NRB/8/92/4 was approved, development plan for industrial use of L.R. No. 337/1208.

21. PDP No. NRB/8/91/5 was approved, development No. 85 for industrial use.

22. PDP No. NRB/8/91/15A was approved, development plan No. 95 for industrial use.

23. PDP No. NRB/8/89/6A was not approved for industrial use of L.R. No. 337/1645. (Director recommends revocation).
24. PDP No. NRB/8/90/5 was not approved for industrial use. Director of Physical Planning recommended revocation. (See copy of letter)
25. Copy of letter dated 10th March, 2011 from Apex Steel Ltd to Commissioner of Lands requesting to be allocated L.R. No. 337/4775 for expansion of steel/plastic factory, the said land being government land.
26. Copy of letter of allotment dated 24th March, 2011 Ref. GL/11/2166 addressed to Apex Steel Ltd in respect of Uns. Industrial Plots 'A' and 'B' – Athi River Township, Authority File No. 132251/2.”

72. In its penultimate paragraph, the 1st Respondent found as follows:

“Legal Analysis and Determination

27. The property had been allocated to Elizabeth Nzuki Ndeti family and was not available for allocation to the Respondent.
28. There was a moratorium in place restricting disposal of land by any Local Authority and the National Government.
29. The Director of Physical Planning having reviewed the Part Development Plan attached to the letter of allotment observed that the same was not properly approved. There is no approved PDP. Note that approved PDP No. 85 Ref. PDP NRB/891/5 of 12th June, 1991 fails to correlate with the shape reflected in Deed Plan for L.R. No. 337/1208.
30. All the area surveyed as L.R. No. 337/1208 measuring five decimal three two (5.232) Ha has no approved PDP.
31. The SPRO report in the file ascertained that the same had been earlier committed and not available for allocation.
32. The Commissioner issued authority to the Claimants to make late payment for the allotment letter to enable processing of the title. The Claimant has indicated that her failure to accept the offer and pay for the same was occasioned by the fact that the files went missing hence they were not able to process payment and the grant.
33. The title currently held by Onesmus Kimani Ngunjiri and subsequent transfers should be revoked and the Claimants be allowed to continue their quiet possession of their property without the interference from the Respondents.”

73. The 1st Respondent then went ahead to direct the Chief Land Registrar to revoke the title issued to the Ex-parte Applicant.

74. It is discernable from the determination of the 1st Respondent and the proceedings that the Ex-parte Applicant was given an opportunity to be heard on the process it followed to acquire the grant in dispute. Indeed, the 1st Respondent did not only consider the documents that the Ex-parte Applicant furnished it, but also gave the Ex-parte Applicant an opportunity to be heard.

75. The Ex-parte Applicant did not produce any document before the 1st Respondent to show how Athi Paper Mills Limited came to own the land, before it purportedly transferred the same to its sister company, Oil City Limited. Indeed, the Ex-parte Applicant did not even attempt to examine and question the documents that were in possession of the 1st Respondent showing that the suit land had already been allocated to the Ndetis before a Grant was issued to Athi Paper Mills Limited.

76. That being the case, I am of the view that the recommendation by the 1st Respondent to Chief Land Registrar to revoke the title in respect of L.R. No. 337/1208 and allocate the same to the Ndetis considered all the relevant factors and was proportional, reasonable, lawful and legal.

77. The Ex-parte Applicant’s counsel submitted that the 1st Respondent acted *ultra vires* in revoking the title of a *bona fide* purchaser for value without notice. Counsel relied on the provision of Section 14(7) of the National Land Commission Act which provides as follows:

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

78. The Court of Appeal in *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 others (2017) eKLR*, in determining who a *bona fide* purchaser for value without notice is cited the case of *Katende vs. Haridar & Company Limited (2008) 2 E.A 173* where the Court of Appeal held as follows:

“For a purchaser to successfully rely on the bona fide doctrine, ... he must prove that:-

- a. he holds a Certificate of Title;**

b. he purchased the property in good faith;

c. he had no knowledge of the fraud;

d. he purchased for valuable consideration;

e. the Vendors had apparent valid title;

f. he purchased without notice of any fraud;

g. he was not party to any fraud.”

79. The 1st Respondent found as a matter of fact that there was no approved Part Development Plan in respect to the land which was registered in favour of Athi Paper Mills Limited, which was later transferred to the Ex-parte Applicant's sister company, Oil City Limited. If indeed the Ex-parte Applicant, or its sister company, had perused the records held at the land's registry before the purported purchase, then it would have known that the allocation of the land to one Onesmus Kariuki was not legal.

80. The Ex-parte Applicant did not provide any evidence to show that it purchased the suit property for value. Indeed, there is no evidence of the purported payment of Kshs. 16,000,000 to the Athi Paper Mills Limited for the land. What is even more curious is that although the Agreement of Sale is between the Ex-parte Applicant and Athi Paper Mills Limited, the suit property was transferred to an entity known as Oil City Services Limited on 3rd December, 2009 and not the Ex-parte Applicant. The Ex-parte Applicant only got registered as the proprietor of the land in the year 2012.

81. Furthermore, although the Sale Agreement between the Vendor and the Ex-parte Applicant shows the purchase price to be Kshs. 16,000,000, the Transfer that was entered into between the Vendor and the Ex-parte Applicant's purported sister company shows the value of the land to be Kshs. 8,000,000, and not Kshs. 16,000,000.

82. These discrepancies go a long way to show that the transaction between the Ex-parte Applicant and the Vendor was entered into in bad faith. The issue of the Ex-parte Applicant being an innocent purchaser for value does not therefore arise.

83. The last issue that the Ex-parte Applicant raised is that the Respondent cannot purport to review any grant or disposition of public land after the expiry of its mandate under Section 14 of the National Land Commission Act.

84. Indeed, under Section 14(1) of the Act, the 1st Respondent was required, within five (5) years of the commencement of the Act, to review all grants or disposition of public land to establish their propriety or legality.

85. The evidence before me shows that the 1st Respondent rendered its decision on 28th April, 2017. That is the date that the 1st Respondent directed the Chief Land Registrar to revoke the allocation of the suit land to Onesmus Kimani (*the purported initial allottee*) and the subsequent transfers.

86. The date of commencement of the Act was 2nd May, 2012. The 1st Respondent's mandate to review grants and dispositions in respect of public land therefore ended on or about 1st May, 2017. Although the decision of the Commission was gazetted on 9th November, 2018, the impugned decision is dated 28th April, 2017. That is the date that the 1st Respondent rendered its decision.

87. For the reasons I have given above, I find the Notice of Motion dated 26th November, 2018 to be unmeritorious. The Notice of Motion dated 26th November, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE