**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APP NO. 557 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI* & *PROHIBITION***

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 40 & 67 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**THE REGISTRAR OF TITLES, NAIROBI.....2ND RESPONDENT**

**THE KENYA NATIONAL HIGHWAYS AUTHORITY.....INTERESTED PARTY**

**AND**

**GEORGE KIMANI NJUKI**

**T/A CAPRI CONSTRUCTION.....*EX PARTE* APPLICANT**

**JUDGMENT**

**The Reliefs sought.**

1. The *ex parte* applicant's application dated **20th** September 2017 seeks:-

    a. ***An order*** *of Certiorari to remove into this honourable court to quash the recommendation/decision/order of the* ***1st*** *Respondent's gazette in the Kenya Gazette dated* ***17th*** *July 2017 recommending and or ordering for the revocation of the applicant's Title to Land Reference Number* ***209/14435*** *(Grant I.R. No.* ***89657****).*

*b. **An order** of prohibition to prohibit the second Respondent, employees and or servants, county officers or whoever from enforcing the decision/order of the **1st** Respondent published in the Kenya Gazette dated **17th** July 2017 in toto and in particular the revocation of the title to Land Reference Number **209/14435** (Grant I.R. No. **89657**).*

*c. **That** costs of this application and the entire proceedings be provided for and awarded to the ex parte applicant.*

**Grounds Relied upon.**

2. The crux of the *ex parte* applicant's case as far as I can discern it from the application seeking leave is that he is the registered proprietor of all that parcel of land known as LR No. **209/14435** (Grant I.R. No. **89657**), and, that, he has been in possession of the same, and, he has been paying Land Rent for the same. He is aggrieved by a Gazette Notice dated **17th** July 2017 issued by the first Respondent (hereinafter referred to as the Commission) revoking the said title, and requiring the second Respondent to effect the revocation "without following the laid down procedure in violation of the principles of natural justice and the right to be heard."

3. He also states that section **14(3)** of the National Land Commission Act[1] (herein after referred to as the act) requires the Commission to give Notice to any person who is interested and/or affected by the proceedings and/or review or disposition of a grant. He avers that no Notice was ever served upon him. He states that section **14(4)** of the Act requires that the Commission to make a determination after hearing the parties, yet, the Commission refused to accord him a chance to be heard. Additionally, he avers that he was not provided with a copy of the complaint nor was he afforded the opportunity to inspect all the relevant documents. Also, he states that he was he provided with the documents to be relied on by the Interested party, i.e. the complainant.

4. He contends that the impugned proceedings violated the provisions of the act and Article **47** of the Constitution. He avers that the Commission was unfair, biased and had a predetermined decision. Also, he states that the decision is irrational, tainted with improprieties, and, that, the Commission acted *ultra vires* the Constitution and the act.

**First Respondent's Replying Affidavit.**

5. **Tom Aziz Chavangi,** the Commission's Chief Executive Officer/Commission Secretary swore the Replying Affidavit dated **15th**November 2017. He averred that pursuant to the Commission's mandate (now lapsed) under section **14** of the Act, the Commission received a complaint from the Interested Party dated **17th** June 2014 comprising of a list of properties allegedly acquired illegally including Land Reference Number **209/14435**, the subject of this case, and, in strict compliance of its mandate, the Commission caused to be published a notice in the Daily Nation Newspaper of **17th** March 2017 inviting the affected property owners to attend a hearing at Kenya Bankers Sacco Centre, **3rd** Ngong Avenue at **10.00am**. He averred that the applicant attended the hearing and was represented by **Mr. Murage** Advocate as evidenced by the Hansard annexed to his affidavit. Also, he averred that at the hearing, **Mr. Murage** Advocate sought to be furnished with a copy of the complaint, which was furnished to him as shown by the hansard and the letter dated **30th** March 2017 annexed to the *ex parte* applicant's application.

6. **Mr Chavangi** also averred that review of Grants and disposition is not an adversarial process and all that the *ex parte* applicant was required to do was to explain how he acquired the suit land which information is readily within his possession. He averred that the *ex parte* applicant's advocate was afforded an opportunity to be heard, but he indicated that he was not ready to proceed with the hearing, hence, the Commission directed him to file written submissions on how his client acquired the land. Additionally, **Mr. Chavangi** averred that the proper cause of action is for the *ex parte* applicant was to seek damages in court, and not in this honorable court, and, in any event, the application raises issues of compulsory acquisition and ownership of land which matters fall under the Environment and Land Court. Also, he averred that the *ex parte* applicant is aggrieved by the determination of a lawful tribunal, and, the proper course of action is to appeal the decision. Further, he averred that public interest militates against granting the orders sought. Also, he averred that the *ex parte* applicant has an efficacious remedy in the Environment and Land Court by way of an appeal or a civil suit. Lastly, he averred that the decision was communicated by gazette notice number **6865.**

**Interested Party's Replying Affidavit.**

7. **Mr. Thomas Gachoki,** the Interested Party's Assistant Director, Survey Department, swore the Replying Affidavit dated **14th** November 2017. He averred that the suit property lies within a road reserve, hence, it could never have been available for allotment. He averred that the Nairobi South Structure Plan No. **42/28/85/9** of **5th** June 1985 (annexed to his affidavit) prepared by the Department of Physical Panning (Ministry of Lands and Physical Planning) which guides development and land use in the area has no indication of private property at the location of the suit property. He averred that the said plan indicated that the area in which the suit property is located was planned as a Transport Corridor, Rail and road (Embakasi-Kibera Railway and the Nairobi Southern Bypass).

8. Additionally, **Mr. Gachoki** averred that the said plan has never been amended and no Part Development Plan, a pre-requisite to any allotment and subsequent grant was ever prepared to allow for use of any portions of land within the area, as private property. Further, he averred that the suit property was not in existence when the detailed design study of the Nairobi Southern Bypass road was carried out in 1989/1990 as the title to the suit property came into existence in 1999 (as shown by a copy of the *ex parte* applicant's title).

9. He also averred that by virtue of section **14(1)** of the Act, the Commission has the mandate to, within five years of the commencement of the act, on its own motion or upon a complaint by the national or county government, a community or an individual, review all grants or disposition of public land to establish their propriety or legality and that in the exercise of the said powers, the Commission is required to 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.

10. He also averred that by dint of section **14(5)** of the Act, where the Commission finds that the title was acquired in an unlawful manner, it

directs the second Respondent to revoke the title. Further, he averred that by a letter dated **17th** June 2014, the Interested Party forwarded a list of illegal properties including the suit property to the Commission requesting guidance on the legality of the titles. He averred that by an advertisement in the Daily Nation of **17th** March 2017, the Commission issued a Public Notice of intention to hold public hearings to review various grants including the applicant's alleged property. Also, he stated that as admitted in the application, the *ex parte* applicant was aware of the Notice which indicated the date and time of the hearing. He averred that as the *ex parte* applicant admits he was duly represented by an advocate **Mr. Murage Mugo** who was afforded an opportunity to make presentations as confirmed by annexture **TG6. Mr. Gachoki** also averred that pursuant to public hearings, the Commission recommended revocation of title LR No. **209/14435** among other titles as the law provides. He also averred that by Gazette Notice number **6865** published on **17th** July 2017, the Commission communicated its decision. He averred that the said land was and is still public land and was not available for allotment, and, no steps were taken to convert the land from public to private land, hence, any title issued was unlawfully acquired.

11. Also, he averred that Judicial Review is concerned with decision making process and not the merits of the decision, and, in any event, the Commission complied with the laid down procedure and directed itself on the principles enshrined in Articles **40, 47** and **68** of the Constitution and the relevant laws, and that, it acted within its mandate. Further, he averred that the *ex parte* applicant was afforded an opportunity to make presentations but he squandered or misused it. Lastly, he averred that the Commission considered all the relevant facts and presentations and arrived at the decision to revoke the title among others.

***Ex parte* applicant's further Affidavit.**

12. The *ex parte* applicant in reply to the Commission's Replying Affidavit swore the further Affidavit dated **29th** November 2017 stating *inter alia* that by the time the impugned decision was rendered on **2nd** May 2017, the Commission's mandate had lapsed, and, that, it did not act in strict compliance with section **14** of the Act as read together with Article **47** of the Constitution since he was not served with a written complaint and documents either before or during the hearing. Further, he averred that the hansard is not a true reflection of the proceedings.

**Second Respondent's Preliminary Objection.**

13. The second Respondent filed a Notice of Preliminary Objection on **13th** February 2018 objecting to this court's jurisdiction to hear this matter citing the provisions of Articles **165(b), 162(2)(b)** of the Constitution and section **13(1)(7)** of the Environment and Land Court Act.[2]

**Issues for determination.**

14. Upon analyzing the above facts, I find that the following issues fall for determination:-

*a. Whether this Court has the jurisdiction to hear and determine this case.*

*b. Whether the ex parte applicant's right to a fair hearing was violated.*

*c. Whether the impugned decision is tainted with bias.*

*d. Whether the decision is irrational.*

*e. Whether the ex parte applicant is entitled to any of the Judicial Review orders sought.*

***a. Whether this Court has the jurisdiction to hear and determine this case.***

15. On record on behalf of the Commission is the Replying Affidavit of **Mr. Chavangi** discussed above stating *inter alia* that this application raises issues of compulsory acquisition and ownership of land which matters fall under the Environment and Land Court.

16. The second Respondent filed a Notice of a Preliminary objection dated **13th** February 2018 objecting to this court's jurisdiction citing Articles **165(b), 162(2)(b)** of the Constitution and section **13(1)(7)** of the Environment and Land Court Act.[3]

17. In her written submissions, **Miss Nyawira,** the second Respondents counsel, citing the above provisions objected to this court's jurisdiction arguing that this dispute revolves around land ownership, a matter within the exclusive jurisdiction of the Environment and Land Court. To buttress her argument, she cited *Cordisons International (K) Ltd v National Land Commission.*[4]

18. The Commission's counsel, **Mr. Mbuthia,** was equally forceful. He argued that the jurisdiction to hear this case lies with the Environment and Land Court, and, that this court's jurisdiction is limited by Article **162(2)(b)** of the Constitution. Citing section **13** of the Environment and Land Court Act,[5] he argued that before this court is a challenge to cancellation of title to property.

19. **Brenda Rao's** assault on the jurisdictional issue was that Article **162(2)(b)** of the Constitution and section **13** of the Environment and Land Court Act[6] ousts this court's jurisdiction.[7]She argued that the Commission's mandate was time bound, and its time having lapsed, any disputes arising from the process leading to the review of grants would be best handled by the Environment Land Court, and, that, where a court lacks jurisdiction, it should down its tools.[8] She argued that the crux of this dispute is ownership of land, and if the court grants the reliefs sought, it would in effect have cancelled the Interested Party's right to land, thus endorsing the *status quo* which amounts to validating the *ex parte* applicant's title. It was her submission that the court properly seized of jurisdiction is the Environment and Land Court.

20. The *ex parte* applicant's counsel **Mr. Murage's** submission on jurisdiction is captured in his words as follows:- *"the question is if the*

*matter were to be transferred to Land Court, whether the outcome would be different."* In his view, "*the answer would be no, since this case is challenging procedural propriety."* With tremendous respect to the learned counsel, he evidently misconstrued the jurisdictional assault mounted by the Respondents and Interested Party's counsels. His argument is coached as if he was responding to an application to transfer this case to the Environment and Land Court as opposed to the highly dispositive and a fundamental legal question of whether or not this court has the jurisdiction to entertain this case. In other words, he avoided to address the question whether the provisions of the Constitution cited in support of jurisdictional question oust this court's jurisdiction. Differently stated, he failed to address his mind on the correct interpretation of the provisions of Articles **162(2)(b)** and **165(b)** of the Constitution and the provisions of section **13** of the Environment and Land Court Act.[9]

21. In opting to ignore to address such a fundamental legal question and by confining his submissions on the narrow question of the effect (if any) of transferring this case to the Environment and Land Court (an issue which was not before the court), **Mr. Murage** ignored the fact that Jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. He failed to appreciate that a trial without jurisdiction is a nullity, yet this was the assault mounted against his client's case. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to the Court; *afortiori* the Court *can suo motu* raise it. In other words, the *ex parte* applicant's counsel appeared not to have appreciated the fact that by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The importance of this debate is that the limits of the court's authority is imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

22. I am alive to the fact that in general a court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Perhaps I should add that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.[10]A court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.[11]

23. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*[12] where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

> *".... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

24. A court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[13] **Article 165(1)** of the Constitution vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction 'to hear any question respecting the interpretation of the Constitution. **Article 23 (1)** provides that the High court has jurisdiction, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

25. The limitation of this courts vast powers conferred under Article **165** is to be found in Sub-Article **(5)** which states in mandatory terms that the high court **shall not** have jurisdiction in respect of matters:- ***(a)*** *reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or* ***(b)*** *falling within the jurisdiction of the courts contemplated in Article* ***162 (2) (a) & (b).*** It is a constitution edict that this court has no jurisdiction to determine matters falling under Article **162(2)(a)&(b).** But what are these matters? The answer to this question is found in the provisions of Section **13** of the Environment and Court Act,[14]an Act of Parliament enacted to give effect to Article **162(2)(b)** of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

26. The use of the word *shall* in the Article **162(2)(b)** is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[15]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[16] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

27. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

28. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.[17]The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[18] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[19] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

29. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional*

*Court*[20]had this to say:-

> *"Jurisdiction is determined on the basis of the pleadings,**[21]**… and not the substantive merits of the case… In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim …, one that is to be determined exclusively by…..{another court}, the High Court would lack jurisdiction…"*

30. Even though the *ex parte* applicant has invoked the Judicial Review jurisdiction of this court, *a close examination of the crux of his case reveals that behind this Judicial Review application is a live question of validity of his title to land in question.* The *ex-parte* applicant seeks to quash the Commission's decision in the Gazette Notice dated **17th**July 2017 recommending the revocation his Title, and, **an order** prohibiting the second Respondent from enforcing the said decision, that is, he revocation of the said title.

31. As stated above, jurisdiction can be discerned from the pleadings. To me, the reliefs sought reveal *a land dispute.* Section **13** of the Environment and Land Court Act[22] provides that:-

> *(1) The Court **shall** have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—*
>
> *(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
>
> *(b) relating to compulsory acquisition of land;*
>
> *(c) relating to land administration and management;*
>
> *(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
>
> *(e) any other dispute relating to environment and land.*
>
> *(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*
>
> *(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*
>
> *(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—*
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> *(a) interim or permanent preservation orders including injunctions;*
>
> *(b) prerogative orders;*
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> *(c) award of damages;*
>
> *(d) compensation;*
>
> *(e) specific performance;*
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> *(g) restitution;*
>
> *(h) declaration; or*
>
> (i) costs

32. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act.[23] In this regard, my view is that the intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, **title,** compulsory acquisition or **any other dispute touching on land,** then

this Court has no jurisdiction.

33. The other closely related issue is the jurisdiction of the Environment and Land Court to deal with issues relating to constitutional interpretation and enforcement of constitutional remedies especially in respect to matters which fall within the ambit of the Environment and Land Court. This is clearly provided for under Section **13 (3)** of the Act. Sub-section **7 (b)** above allows the Environment and Land Court to grant prerogative orders. It follows that the Environment and Land Court can entertain this Judicial Review application challenging the decision of the Respondent revoking its title to land and grant the prerogative reliefs sought.

34. Comparison can be drawn from the case of *United States International University (USIU) vs. Attorney General.* ***[24]*** Although the said case related to labour issues one of the issues in contention was whether or not the Employment and Labour Relations Court as created under Article **162(2)** of the Constitution has the jurisdiction to interpret the Constitution and to grant the remedies provided under Article **23** of the Constitution which remedies are clearly stated to be a sole preserve of the High Court. The court expressed himself on the said issues as follows:-

> *"45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011."* (emphasis added).

35. It is instructive to note that the Court of Appeal has also had occasion to address itself on the issue in the case of *Daniel N. Mugendi vs. Kenyatta University & 3 others*[25] where allowing an appeal and setting aside an order dismissing a suit on the finding that the Industrial Court was not possessed of jurisdiction to interpret the Constitution and to grant the remedies provided under Article **23** of the Constitution settled the issue in *toto* in respect to such matters within the jurisdiction of both the Employment and Labour Relations Court as well as those before the Environment and Land Court. The Court of Appeal expressed itself in the following words:-

> *"In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects." (emphasis added).*

36. In *Republic vs National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others* ***[26]*** the court eloquently rendered itself as follows:-

> *62. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by* ***Justice Mohammed Ibrahim*** *in* ***Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR****:*
>
> 64. *Whereas this Court had in the past entertained disputes wherein the core issue was that of jurisdiction of the National Land Commission, since the determination of the Supreme Court in Petition No.* ***5*** *of 2015-* ***Republic vs. Karisa Chengo & 2 Others*** *it has become clear that such matters ought to be dealt with by the specialized courts, when the Court expressed itself inter alia as hereunder:-*
>
> ***"it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation…Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."***
>
> *65. In this case, it is clear that even if this Court were to hear this matter the substratum of the dispute would remain unresolved. However, it is my view that the dispute herein falls squarely within the provisions of section 13(2) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicant's contended right to be heard stem from their yet to be determined interest in the suit land.*
>
> *66. In this case, I am satisfied that the dispute can be properly dealt with by the ELC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in* ***Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012****,[para. 29-30] where it was held:*
>
> ***"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework".***

*67. Similar sentiments were expressed in* ***Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others*** *in which it was held that:*

> ***"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."***

37. A High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court. But even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.

38. Where the constitution and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under the Constitution. Consequently, I find and hold that the jurisdiction of this court in this matter has been improperly invoked. The *ex parte* applicant ought to have filed this Judicial Review application in the Environment and Land Court. I find and hold that this court has no jurisdiction to entertain this case. On this ground, I dismiss this Judicial Review application.

39. However, not withstanding my finding on jurisdiction, I will proceed to examine the merits of the case.

***b. Whether the ex parte applicant's right to a fair hearing was violated.***

40. **Mr. Murage,** counsel for the *ex parte* applicant submitted that Judicial Review is concerned with decision making process[27]and argued that the Commission's Replying Affidavit dwelt with the merits and failed to address illegalities and improprieties committed before arriving at the decision, among them, failure to serve the *ex parte* applicant with a notice or summons for hearing in violation of fair trial hearing rights under Article **50** of the Constitution and section **4(3)** of the Fair Administrative Action Act.[28] To buttress his argument, he cited *Scenaries Limited v National Land Commission*[29]where the court faulted service through the News Papers.

41. He also argued that the *ex parte* applicant was not served with a complaint or documents relied upon before the hearing in violation of section **4(3)** of the Fair Administrative Action Act,[30] section **14(3)** of the Act and Article **47** of the Constitution.[31] Further, he argued that the *ex parte* applicant was not heard contrary to section **4(4)** of the Fair Administrative Action Act[32] and section **14(4)** of the act.[33]

42. In his rejoinder, **Mr. Mbuthia's**, counsel for the Commission argued that due process was given to all the parties, and, that, *ex parte* applicant was given adequate notice to make representations on how he acquired the property, that, he attended the hearing, but, elected not to file written submissions, hence, he is the author of his current situation.

43. **Miss Brenda Rao,** counsel for the Interested Party, submitted that the Commission adhered to the laid down process. She argued that vide a letter dated **17th** June 2014, the Interested Party forwarded a list of illegally acquired properties including the suit property to the Commission for consideration of review of grants. She stated that the said properties fell along the Transport Corridor (Embakasi-Kibera Railway and the Nairobi Southern By pass) as per the Nairobi South Structure Plan No. **42/28/85/9** of 1985). Further, she argued it was not land available for allotment. She submitted that the Commission issued public Notices of its intention to hold public hearings, and, that the law does not prescribe the form of the Notice nor does it require personal service, and, that the *ex parte* applicant's counsel attended the proceedings.

44. She argued out that the *ex parte* applicant's counsel engaged the Commission with irrelevant issues rather than presenting his client's case, thus, he squandered the opportunity. Further, **Miss Rao** pointed out that the *ex parte* applicant admits receiving the notice of the inquiry, and, he instructed an advocate to represent him, hence, the *ex parte* applicant was afforded sufficient opportunity in compliance with Article **47** of the Constitution.[34]

45. To buttress his argument on alleged violation of the *ex parte* applicant's rights under Articles **47** and **50** of the Constitution and section **4(3)** of the Fair Administrative Action Act,[35] the alleged failure to be served with a hearing notice and details of the complaint by the Interested Party and the alleged violation of fair trial process, **Mr. Murage** heavily relied on *Scenaries Limited v National Land Commission*[36] in which the court faulted service through the News paper. I had the benefit of deciding the said case, hence, I find it fit examine its relevancy and applicability of its facts to the instant case. I have severally stated that a case is only an authority for what it decides. The leading authority on this proposition is *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[37]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,**[38]**that "Now before discussing the case of Allen vs. Flood**[39]** and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

46. The ratio of any decision must be understood in the background of the facts of the particular case.[40] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[41] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[42]

47. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[43] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[44]To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[45] My plea is to keep the path of justice clear of obstructions which could impede it.

48. *First,* in *Scenaries Limited v National Land Commission,*[46]the land in question was subject to several previous court decisions which were not disclosed to the Commission. *Second,* the *ex parte* applicant in the said was totally unaware of the proceedings as opposed to this case where the *ex parte* applicant appeared with his lawyer. *Third,* in this case, the *ex parte* applicant was not only aware of the proceedings, but, his lawyer was given the opportunity to address the Commission. *Fourth,* the lawyer was accorded an opportunity to submit in writing but he failed to do so. *Fifth,* all that the *ex parte* applicant was required to do was to give details on how he acquired the title to satisfy the Commission on the legality of the title. It is my finding that the said decision can be distinguishable from the circumstances and facts of this case.

49. Additionally, there are two parts to the idea of procedural fairness:- The first part is that it is unfair for an administrator to make a decision that adversely affects someone without consulting him first. This idea is covered by the Latin phrase *'audi alteram partem'* – which means one should hear what the person who will be affected by the decision has to say before deciding. As stated above, the *ex parte* applicant was represented by an advocate, who was accorded a hearing. The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, *"justice must both be done and must be seen to be done."*These two elements or at least one of them would be sufficient to invalidate an administrative decision.

50. I can add that there are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.[47]

51. "Adequate notice" means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed). The information depends on the nature of the issue at hand. In the instant case, the process was investigating the propriety of the *ex parte* applicant's title. The advertisement in the News Paper clearly stated the purpose and the legal provisions. The information leading to the acquisition of the title is within the knowledge of the *ex parte* applicant. The *ex parte* applicant knew how he obtained his title. He cannot be heard to say that he required further details.

52. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. A "reasonable opportunity to make representations" can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them. In the instant case, the *ex parte* applicant's advocate was asked to make written submissions, but he failed to do so. He cannot turn round and blame the Commission.

53. An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative action must understand what is likely to happen. This will assist the person affected to respond to the action. In the instant case there is no doubt that the *ex parte* applicant was aware that the process would lead to the revocation of illegally acquired titles. He had an opportunity to demonstrate the legality (if at all) of his title. He failed to do so.

54. On the alleged violation of Articles **47** and **50** of the Constitution, guidance can be borrowed from the Court of Appeal decision in J.S.C. vs Mbalu Mutava[48]which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** of the Constitution is a distinct right from the right to a fair hearing under Article **50 (1)** of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[49] Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies. Similarly, in Dry Associates Limited vs CMA & Another **[50]** the High Court held that Article **50** applies to a court, impartial tribunal or a body established to resolve a dispute while Article **47** applies to administrative action generally. There lies the distinction.

***c. Whether the impugned decision is tainted with bias.***

55. **Mr. Murage** argued that the Commission had a pre-determined decision in that on 3**0th** March 2017, the Commission's chairperson stated that he was aware that the *ex parte* applicant had "grabbed the land" hence there was no need for him to ask for time to Respondent. He cited violation of Article **47** of the Constitution which requires the commission to adhere to the principles of fairness[51] and section **14(8)** of the act.

56. Counsels for the Respondent's did not address the allegations of bias in their submissions, except their broad submission that the process was legal. **Miss Rao,** counsel for the Interested Party argued that the procedure of Review is known to the law, and, that bias has not been demonstrated.

57. The rule against bias is one of the twin pillars of natural justice. The first pillar --the hearing rule --requires that people whose rights, interests and expectations may be affected by a decision should be given sufficient prior notice and an adequate chance to be heard before any decision is made. The bias rule is the second pillar of natural justice and requires that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice. Although the bias rule originated in the courts, and was for many centuries applied only to courts and judges, it has now become a rule of almost universal application. The rule against bias applies to a vast range of decision-makers including tribunals,[52] statutory authorities, government ministers, local councils, inquiries, and even private arbitrators.[53]

58. As the bias rule has expanded to include a great range of decision-makers it has also become more flexible. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[54] There are many similar judicial pronouncements which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias -- that of the fair minded and informed observer.[55] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making.

59. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[56] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial.

60. The High Court of Australia explained that *"Bias, whether actual or apparent, connotes the absence of impartiality."* Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[57] The evidence here is that the Development Plans show that the land was a road reserve. This evidence has not been rebutted. There is nothing to show how the land (if at all) was converted into private land. In short, it cannot be said that the Commission could not be swayed by such evidence.

61. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias. [58] Again, there is nothing to show that the Commission did not approach the issue with an open mind.

62. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the *actual* views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the *possible* views and behavior of the decision-maker.[59] Each form of bias also requires differing standards of evidence.[60] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. A court need only be satisfied that a fair minded and informed observer *might* conclude there was a real *possibility* that the decision-maker was not impartial.[61]

63. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[62]The Lords also made clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair minded observer would take account of the circumstances of the case at hand.[63]

64. It is of course a well settled principle of law that before a court can nullify a decision on the ground of bias, there must be proved, to the satisfaction of the court that there was in the case such a real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication. As to what real likelihood of bias will suffice in this regard, one has to be guided by common sense and by certain legal principles which the courts have from time to time laid down as applicable in this type of case.

65. I find useful guidance in *R v Justices of Queen's court**[64]*** where it was held:-"By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was real likelihood of bias. I do not think that the mere vague suspicion of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds - was reasonably generated but certainly mere flimsy, elusive, morbid suspicion should not be permitted to form a ground of " decision."

66. The onus rests upon the person alleging bias to establish this allegation on review. He can do so either by showing–that bias was clearly actually displayed; or that, in the circumstances, there was a real possibility of bias. The danger of bias or the suspicion of bias must be a real one and must not be remote, fanciful, flimsy, far-fetched or entirely speculative. There is a need to establish a link between the conduct alleged to form the basis of the allegation of bias and one of the parties to the litigation.

67. In applying this test, the courts must take into account both particular facts suggestive of bias and the cumulative effect of factors such as the way in which the entire proceedings were handled.[65] The *ex parte* applicant's basis for the alleged bias is premised on his allegation that it was alleged that he had grabbed the land in question. Whereas no effort was made to substantiate the said allegation, the nature of the proceedings before the court were that the propriety of the process leading to the acquisition of the title was under question. The legality of the *ex parte* applicant's title was under challenge. The burden was upon him to explain how he acquired the title and whether it was legally acquired. That being the nature of the proceedings in question, I find and hold that the statement complained of (if at all it was uttered as

alleged), in the context of the nature of the proceedings cannot be said to have prejudiced the applicant nor can it influence a reasonable mind to rule against the *ex parte* applicant had he demonstrated the legality of his title. The allegation of bias raised in this case fail to satisfy the tests for bias discussed herein above.

***d. Whether the decision is irrational.***

68. The *ex parte* applicant's counsel's contention is that the decision is irrational, hence, should be reviewed.

69. In a recent decision of this court,***[66]*** I observed that Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[67] which provides that:-*" A court or tribunal under subsection (1) may review an administrative action or decision, if- the administrative action or decision is not rationally connected to- the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator."*

70. Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* stated that *:-**[68]** "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

71. In applying the test of rationality, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.[69] I have carefully examined the impugned decision. Applying the above test, I find that the *ex parte* applicant has not demonstrated that the decision is not rationally connected to the purposes stipulated in the Constitution and the enabling legislation and the material before the Commission.

***e. Whether the ex parte applicant is entitled to any of the Judicial Review orders sought.***

72. M**r. Murage's** argument, as I understood it is that the *ex parte* applicant is challenging the process, hence, this matter falls within the scope of Judicial Review jurisdiction.

73. **Mr. Mbuthia** argued that a Gazette notice is not a decision capable of being quashed, hence, *certiorari* cannot issue. Also, he argued, that the decision has been implemented, hence, the orders sought have been overtaken by events since the construction of the road has been concluded and the road is in use. He also argued that there is no known mechanism in law for reversing compulsory acquisition once the same has taken place and that an aggrieved party can only sue for damages, which is the only remedy available under Article **40** of the Constitution, subject to Article **40(6)** which divests any unlawfully acquired property from constitutional protection. He urged the court to be careful not to craft an order that would be in vain or would perpetuate an illegality by quashing the revocation of title and vesting ownership of a public road to a private person.

74. **Mr. Mbuthia** also argued that the only orders that can issue are for compensation within the meaning of sections **127** & **128** of the Land Act[70] and section **13** of the Environment and Land Court Act[71] upon hearing *viva voce* evidence and assessing quantum based on valuation reports, and, that, the issue of compensation is a disputed fact which makes it unsuitable for determination by this court, thus, the most efficacious remedy for the *ex parte* applicant is to file civil suit for compensation.

75. **Mr. Mbuthia** relied on *Saghsni Investment Limited v Officer In Charge, Nairobi Remand and Allocation Prison*[72] and *Livingstone Kunini Ntutu v Minister for Lands & 4 Others*[73]whereby it was held that Judicial Review is not the most efficacious remedy where the process under which a title was obtained is in dispute. He argued that review of grant and disposition essentially delves into the manner in which a title was made and the conversion process of land from public to private land, and, that, a civil suit is best suited to resolve the matter. Also, he argued that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.[74]

76. **Miss Brenda Rao,** counsel for the Interested Party argued that the commission is mandated, pursuant to Article **67** of the Constitution and section **14(1)** of the act to initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and, to recommend appropriate redress. She cited *Sanghani Investment Limited v Officer in Charge Nairobi Remand & Allocation Prison*[75] in which the court held that the matter involved ownership of land, and rights to occupy land and there would be need to allow *viva voce* evidence and cross examination of witnesses which is not available in Judicial Review proceedings. She also argued that Judicial Review remedies are discretionary and ought to be granted where they represent the most efficacious resolution of the dispute.[76] She also argued that the Commission's mandate is couched in mandatory terms and was time bound, and, that, it made its decision based on the information before it.

77. The functions of the National Land Commission under Article **67 (2) (e)** of the Constitution include ***(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.*** Article **61 (2)** of the constitution classifies land in Kenya as Public, Community or Private. Article **62** of the Constitution defines Public land consists of:-

> ***"62. (1) Public land is—***
>
> ***(a)land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;***
>
> ***(b)land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;***

***(c)land transferred to the State by way of sale, reversion or surrender;***

***(d) land in respect of which no individual or community ownership can be established by any legal process;***

***(e)land in respect of which no heir can be identified by any legal process;***

***(f)all minerals and mineral oils as defined by law;***

***(g)government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;***

***(h)all roads and thoroughfares provided for by an Act of Parliament;***

***(i)all rivers, lakes and other water bodies as defined by an Act of Parliament;***

***(j)the territorial sea, the exclusive economic zone and the sea bed;***

***(k)the continental shelf;***

***(l) all land between the high and low water marks;***

***(m)any land not classified as private or community land under this Constitution; and***

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

***(i) in force at the effective date; or***

***(ii) enacted after the effective date."***

78. Article **64** of the Constitution defines private land as:-

***"64. Private land consists of —***

***(a) registered land held by any person under any freehold tenure;***

***(b) land held by any person under leasehold tenure; and***

***(c) any other land declared private land under an Act of Parliament."***

79. Section **14** of the National Land Commission Act[77] provides that:-

*(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****.*

80. In my view, by dint of the constitutional and statutory provisions cited above, for the Respondent to invoke its jurisdiction, the land must be public land within the above definition, or the land must have been public land that was converted to private land. If the land was originally public land which was converted to private land, then it falls within the constitutional and statutory mandate of the National Land Commission. Section **14** of the Act provides for review of grants and disposition of public land as per Article **68(c)(v)** of the Constitution. There is nothing before me to negate the Respondent's assertion that the land was public land designated as a Transport Corridor. Instead of brandishing a copy of his title, the *ex parte* applicant had a duty to demonstrate how he acquired the title, and, whether the process was lawful.

81. Under Section **14** of the Act 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 fulfill this responsibility by querying the process under which public land was converted to private land, (if there is evidence that the land was once public land and converted to private land). Other than brandishing a copy of a title, the *ex parte* applicant was extremely silence on whether and how if at all the land was converted into private land.

82. It is common ground that Article **40(6)** of the Constitution is explicit that the constitutional rights to protection to private property does not extend to any property that has been found to have been unlawfully acquired. This provision underscores the reason why it was imperative for the *ex parte* applicant to demonstrate the legality of the process under which he acquired his title. Had he done so, he would have perfectly been entitled to the constitutional protection offered by Article **40** of the Constitution. But from the facts and circumstances of this case, the legality of the process under which he acquired his title is in question. The Physical Development Plan for the area were never amended nor was there evidence of change of user which are pre-requisites for issuance of the title. This question alone extinguishes the *ex*

*parte* applicant's claims. He cannot be heard to question the legality of the process invalidating his "title."

83. Alternatively, if the *ex parte* applicant's case is that he holds a valid title, then, what is before the court would be a question of ownership of land, a dispute purely for the Environment and Land Court and not for this Court to determine. I rest my case.

84. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

85. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[78]*:-

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

86. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it. I have highlighted above the constitutional and statutory provisions authorizing the process in question. It has not been shown that this power was not exercised as provided for under the law. It has not been proved or even alleged that the Commission acted outside its powers. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

87. *Certiorari* issues to quash a decision that is *ultra vires*.[79] Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

88. The *ex parte* applicant also seeks an order of *prohibition*. The writ of *prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A *prohibiting* order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a *prohibiting* order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

89. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

90. *First*, the *ex parte* applicant denies being informed about the proceedings, yet there is evidence to the contrary showing that he was aware. His lawyer attended, and claims to have applied for details, yet, the nature of the process and the clear provisions of the law were stated in the News Paper advertisement. The advertisement was clear that what was in issue was the process leading to the issuance of the *ex parte* applicant's title. Instead of taking the cue and explain how he acquired his title, he opted to engage the Commission in a misguided exchange.

91. *Second*, the lawyer was asked to file submissions. Again, in another misguided move, he declined to render submissions. Such conduct would make it inappropriate for a Judicial Review court to prefer a lenient exercise of discretion even if the *ex parte* applicant had demonstrated grounds.

92. *Third,* Article **40(6)** of the Constitution is clear that the constitution does not protect illegally acquired properties. Thus, even if the court were to fault the process under challenge, it will be reluctant to quash it where it is evident that that a title to public land was procured illegally. This court cannot sanitize an illegal process.

93. *Fourth*, he who comes to Equity must come with clear hands. The *ex parte* applicant's conduct before the Commission and the misrepresentation before this court that he was not "heard" contrary to the hansard which shows otherwise is also a relevant consideration while exercising discretion if the grounds for the orders had been established. This is because this court hoists high the need for a litigant and or his advocate to be candid in presentation of their cases and leave it to the court to decide.

94. *Fifth*, since the grant of the orders or *certiorari*, *mandamus* and *prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that the land is public land as per records presented to this court, it has never been converted into private land, and even if it was, then that would present an ownership dispute, which is outside this court's jurisdiction. This court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership of the property or legality of the *ex parte* applicant's title which is outside this court's jurisdiction.

95. *Sixth*, there is the question is public interest. The land is said to be part of Transport Corridor designated for a public road (which has already been done and is in use) and a rail way line. This public interest dimension prevails over the *ex parte* applicants private and personal interest and would militate against exercising discretion in his favour even if he had established grounds for the grant of the orders. Lastly, public interest calls for the need for this court to exercise caution, care and circumspection in the exercise of its discretion.

96. *Seventh*, in *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*[80] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.[81] It is beyond argument that the question whether the land was public land and if it was converted to private land and the legality of the process and the manner in which the applicant acquired his title will require submission of evidence and cross examination to test the veracity of the evidence. This can only be done in a forum where the litigating parties have an opportunity to present their evidence and also test the evidence of their opponents by way of cross examination.[82] This cannot be achieved in a Judicial Review case. It is an established common law principle that Judicial Review does not deal with contested matters of fact which require oral evidence to be proved.

97. In view of my analysis and findings herein above, the conclusion becomes irresistible that the *ex parte* applicant's application has no merits. Consequently, I dismiss the Notice of Motion dated **20th** September 2017 with costs to the Respondents and the Interested Party.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **17th** day of **January** 2019

**John M. Mativo**

**Judge.**

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[1] Act No. 5 of 2012.

[2] Act No. 19 of 2011.

[3] Act No. 19 of 2011.

[4] {2017}eKLR.

[5] Act No. 19 of 2011.

[6] Act No. 19 of 2011.

[7] Citing *Oerri Abiri v Samuel Nyangau Nyanchama & 2 Others* Civil Appeal No. 25 of 2014 {2014}eKLR.

[8] Citing *Peter Gichuki Kingara v Independent Electoral and Boundaries Commission & 2 Others*

[9] Act No. 19 of 2011.

[10] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

[11] The Supreme Court *in the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 (unreported).

[12] {1989} KLR 1.

[13] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[14] Act No. 19 of 2011.

[15]*Dr Sanjeev Kumar Tiwari*, *Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2 ).

[16] Ibid.

[17] *Subrata vs Union of India* AIR 1986 Cal 198.

[18] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[19] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[20] *In* the matter between *Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[21] *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[22]Act No. 19 of 2011.

[23] Act No. 19 of 2011.

[24] {2012} eKLR.

[25] {2013} eKLR.

[26]{2018} eKLR.

[27] Citing *Li Wen Jie & 2 Others v Cabinet Secretary Interior and Co-ordination of National Government*, Pet N. 354 of 2016.

[28] Act No. 4 of 2015.

[29] {2017}eKL.

[30] Act No. 4 of 2015.

[31] To buttress his argument, counsel also cited *Scenaries Limited v National Land Commission, ibid.*

[32] Act No. 4 of 2015.

[33] Citing *Scenaries Limited v National Land Commission-Ibid,* in which the court referred to *Mbaki & Others v Macharia & Another* {2005}EA

[34] Citing *Russel v Duke of Norfork* {1949} 1 All ER cited in *Compar Investments Ltd v National Land Commission & 3 Others*{2016}eKLR.

[35] Act No. 4 of 2015.

[36] {2017}eKL.

[37] MANU/SC/0047/1967

[38] {1901} AC 495

[39] {1898} AC 1

[40] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[41] Ibid

[42] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[43] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr*. (Citing Lord Denning).

[44] Ibid.

[45] Ibid.

[46] {2017}eKL.

[47] Section 6 of the Act.

[48] {2015}eKLR.

[49] Ibid.

[50]{2012}eKLR .

[51] Citing *Republic v National Land Commission & Another ex parte Fidelity Commercial Bank,* Judicial Review No. 74 of 2016.

**[52] Groves, M. "The Rule Against Bias" {2009} UMonashLRS 10, citing Cheung v Insider Dealing Tribunal [2000] 1 HKLRD 807; Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187 (HL); *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER (HL); *Grant v Teacher's Appeals Tribunal (Jamaica)* [2006] UKPC 59. The rule also clearly extends to public sector disciplinary tribunals and their proceedings. *See*, eg, *Rowse v Secretary for Civil Service* [2008] HKCFI 549; [2008] 5 HKLRD 217 and *Lam Siu Po v Commissioner of Police* [2007] HKCA 461; [2008] 2 HKLRD 27.**

[53] Ibid

[54] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[55]*Minister for Immigration and Multicultural Affairs Ex p Jia* (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); Bell v CETA (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[56] *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": *Shrager v Basil Dighton Ltd* [1924] 1 KB 274 at 284.

[57] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[58] *Anderton v Auckland City Council* [1978] 1 NZLR 657 at 680 (SC NZ); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

**[59] Groves, M. "The Rule Against Bias" [2009] UMonashLRS 10**

[60] Ibid

[61] This expression of the bias test was suggested by the English Court of Appeal in Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in Porter v Magill [2001] UKHL 67; [2002] 2 AC 357. The Australian test, ..., also adopts an objective assessment and will be satisfied if there is a "possibility" that the decision-maker might not be impartial: *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 345.

[62] [1993] UKHL 1; [1993] AC 646 at 670.

[63] *Porter v Magil* [2001] UKHL 67; [2002] 2 AC 357.

[64] {1908}1 l.R. 285 294

[65] *see R* v *Foya 1963(3) SA 459 (FS); Crow* v *Detained Mental Patients Special Board 1985(1) ZLR 202 (H) and Austin & Anor* v *Chairman, Detainees' Review Tribunal & Anor 1986 (4) SA 281 (ZS).*

[66] *Republic v Public Procurement Administrative Review Board ex parte Trippex Construction Company Limited & another* JR No 605 2015.

[67] Act No. 4 of 2015.

[68] *2000 (4) SA 674 (CC)* at page 708; paragraph 86.

[69] *Trinity Broadcasting (Ciskei) v ICA of SA* 2004(3) SA 346 (SCA) at 354H- 355A Howie P

[70] Act No. 6 of 2012.

[71] Act No. 19 of 2011.

[72] {2007}1EA 354.

[73] {2014}eKLR.

[74] *Republic v Commissioner of Lands ex parte Somkem Petroleum Company Limited* {2005}.

[75] {2007}eKLR.

[76] Citing *Naimisha Somchand Shah v Resident Magistrate, Mombasa & 3 Others* {2007}eKLR.

[77] Act No. 5 of 2012.

[78] {2014} eKLR.

[79] See *Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others* {2011} eKLR.

[80] {2016}eKLR.

[81] See *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[82] See *Kinyanjui Kamu vs George Kamau Njoroge* {2015}eKLR and *Rose Ayuma Musawa vs Mathias Onyango Tabuche* {2016}eKLR