REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 461 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF *CERTIORARI* AND *PROHIBITION*

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26,

LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010.

AND

IN THE MATTER OF THE RELOCATION OF TENANTS FROM BLOCKS A,B & C

TO OTHER BLOCKS-DECANTING ESTATE DATED 20TH SEPTEMBER, 2016

FROM THE MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT

AND

IN THE MATTER OF PRINCIPLES OF PROPORTIONALITY AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF PART 111 OF THE FAIR ADMINISTRATIVE ACTION, 2015

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE PRINCIPLE SECRETARY, MINISTRY OF TRANSPORT,

HOUSING AND URBAN DEVELOPMENT.......................RESPONDENT

AND

SOWETO RESIDENTS FORUM CBO.................*EX PARTE* APPLICANT

JUDGMENT

The Parties.

1. The *ex parte* applicant, Soweto Residents Forum CBO is a Community based Organization registered under the Ministry of Labour, Social Security Services. It brings these proceedings on behalf of its members who are residents of the Soweto Zone of the Kibera Slum area within the City of Nairobi.

2. The Respondent is the **Principle Secretary, Ministry of Transport, Housing and Urban Development.**

The factual matrix

3. The facts relied upon are enumerated in the substantive application dated **19th** October 2016, the supporting Affidavit of **Janerose Wanjiku Kutolo** annexed thereto, and, the application seeking leave, the supporting affidavit and statutory statement annexed thereto. **M/s Kutolo** avers that the *ex parte* applicant was created by some of the residents of Kibera Slums in the Soweto Area of the Kibera Slums to advocate for better human rights and social justice for its members.

4. She further averred that on **14th** August 2009 the Ministry of Housing informed the residents of Kibera that there was to be a major development of the infrastructure of the Kibera area which development required them to move from their informal houses to other houses as the ministry developed the Kibera area. She averred that they were led to believe that the relocation was for a temporary period to allow the Ministry to construct modern houses where their informal houses were, and, that, they would be given first option to occupy the modern houses once complete. She averred that they were led to believe that they would be given the first option to occupy the modern houses, hence, they moved to Decanting Estate near Langata Women's Prisons.

5. **M/S Kutolo** also averred that upon relocating, the Ministry issued them with a letter and and enumeration card. She averred that that some of the new houses have been completely occupied by some Kibera residents and by strangers. Further she averred that the area they currently occupy belongs to the Prisons Department and that they are apprehensive that the said Department may take steps to evict them. She avers that sometimes in June 2014, the Ministry commenced eviction proceedings against them. Further, she averred that the court in Pet No. **304** of 2015 ordered that the Kenya National Commission on Human Rights to oversee and ensure that only genuine residents are given the new Kibera houses. She averred that pursuant to the said order, meetings were held between the residents and the Ministry whereby it was agreed that no further relocation was to be effected until a proper audit was conducted.

6. Additionally, she averred that the houses they occupy are in dire need of repair, sanitation problems, security, water and garbage collection, and that they received a letter from the Respondent dated **20th** September 2016 to the effect that they were to move from Block **A, B, & C** and be relocated to other blocks, hence, they are fearful that if they move as requested, they shall not be allowed back into the other blocks.

Legal foundation of the application.

7. The *ex parte* applicant's case is that the Respondent violated their rights to a Fair Administrative Action, and, that, no consultation was carried out between themselves and the Respondent over the intended action.

8. That the letter dated **20th** September 2016 was in bad faith and that it introduced conditions which were not part of the original terms

The Reliefs sought.

9. The *ex parte* applicant prays for the following orders:-

> a. An order of *Certiorari* to quash the decision by the Respondent to demand the removal of all residents from Blocks **A, B** and **C** of the Decanting Estate vide the Respondent's letter dated **20th** September 2016.
>
> b. An order of *Prohibition* to prohibit and restrain the Respondent whether by themselves, employees or anybody whomsoever from forcing the eviction of any and or all the residents of Blocks **A, B** & **C** of the Decanting Estate.

Respondent's Relying Affidavit.

10. **Charles W. Sikuku,** the Director, Slum Upgrading Department, Ministry of Transport, Infrastructure, Housing and Development swore the Replying Affidavit dated **7th** April 2017. He averred that the *ex parte* applicants have no *locus standi* to bring these proceedings because they are not in the list of residents who were supposed to occupy the vacated units in Blocks **D-S** as per the Ministry letter dated **20th** September 2016. He further averred that vide the Memorandum of Understanding (MOU) made on **26th** November 2010 between the Government of Kenya and Soweto East Zone **A** Residents village, the residents of Soweto **A** agreed *"to move at will to Kibera Decanting Site or any other alternative place privately sourced for them to pave way for construction at Soweto East Village"* hence the relocation of tenants from blocks **A, B & C** to other blocks is clearly within the **MOU.**

11. **Mr. Sikuku** averred that this case does not disclose breach of Fair Administrative Action as alleged because **4(3)(a)** of the Fair

Administrative Action Act[1] provides for "prior and adequate notice of the nature and reason for the proposed administrative action," and, that, this was done vide the letter of **14th** August 2009. He also averred that the Residents of Block **A, B** & **C** were consulted on the relocation that was to take place with effect from **1st** October 2016 vide a letter dated **20th** September 2016 and, that, the relocation had been agreed upon after continuous consultation with the applicants who wanted their premises to be renovated. Further, he averred that no strangers took possession of the vacant houses as alleged.

12. Upon analyzing the facts presented by the parties sand their respective advocates submissions, I find that the following issues distil themselves for determination:-

> *a. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.*
>
> *b. Whether the impugned decision was tainted by procedural impropriety.*
>
> *c. Whether the impugned decision is tainted with illegality.*

a. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

13. **Dr. Khaminwa,** the *ex parte* applicant's counsel submitted that the Respondent created a legitimate expectation to the *ex parte* applicants that once the construction of the modern houses were completed, they would be the first ones to be relocated into the new houses. To buttress his argument, **Dr. Khaminwa** cited *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*[2] where the Supreme Court stated that:-

> *"Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."*

14. He submitted that in flagrant violation of the expectation, the Respondent proceeded to allocate the new modern houses to persons who are strangers without duly considering the *ex parte* applicants' who were the *bona fide* residents at Soweto area. He further submitted that legitimate expectation ought not be frustrated because it is the root of the constitutional principle of the Rule of Law which requires predictability and certainty in government dealings with the public. Additionally, **Dr. Khaminwa** submitted that the Respondent denied the applicants their legitimate expectation to a fair administrative action since their concerns were not taken into account and that there were no consultations between the parties on how they would be resettled.

15. **Mr. Munene,** counsel for the Respondent did not address this particular issue.

16. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[3]*** at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*
>
> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

17. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.

18. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[4] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification", **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

19. Additionally, statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.

20. Applying the legal tests discussed above to the facts and circumstances of this case, the Respondent's position as stated in the Replying Affidavit of **Mr. Sikuku** is that the *ex parte* applicants have no *locus standi* to bring these proceedings. The contestation here is that they are not in the list of residents who were to supposed to occupy the vacated units in Blocks **D-S** as per the Ministry's letter dated **20th** September 2016. **Mr. Sikuku** further refers to a Memorandum of Understanding between the residents and the Ministry and avers that the relocation was undertaken within the **MOU.** A copy of the **MOU** and a list of the affected residents is annexed to his affidavit.

21. The counter argument advanced by the Respondent is a serious assault on the *ex parte* applicants case. It raises serious doubts on the validity of their claim to the Right to Legitimate expectation. For the court to determine whether or not the *ex parte* applicants are *bona fide* residents, it will be required to determine contested issues of fact which can only be resolved after hearing oral evidence which is outside the purview of Judicial Review proceedings. Differently put, it amounts to inviting this court to determine a strictly civil dispute or contested issues of fact without hearing oral evidence. Such a determination falls totally outside the province of Judicial Review proceedings.

22. Judicial review is concerned with the decision making process and not merits. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*[5] 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.[6] The issue whether the *ex parte* applicants are *bona fide* residents can only be determined 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.

23. The second ground upon which the *ex parte* applicants claim for legitimate expectation collapses can be distilled from the documents in support of their case. Exhibit **JWK3** at paragraph **(a)** *states "all willing persons in Zone **A** who were enumerated in 2004/2005 and were verified in June/July/August this year with the exception of those falling within the railway reserve....."* It was important for the *ex parte* applicants to bring themselves within the category referred in this letter and satisfy the court that they were verified or that they fall within the exception. This omission dents their case. For the court to establish indeed they fall into this category, it will require to determine issues of fact which require evidence. Judicial Review only deals with legality, irrationality, or procedural impropriety. For the purposes of the issue under consideration, legitimate expectation cannot arise under such circumstances.

24. True, the *ex parte* applicant has annexed annexture **JW5** and a letter dated **27th** October 2009. The veracity of this exhibit can only be determined by way of oral evidence. The *ex parte* applicant ought to have filed a civil claim as opposed to Judicial Review which is determined on know grounds of law. Additionally, out of all the members of the *ex parte* applicant, only one person has exhibited the enumeration card. The status of all the members remains unclear if at all they were enumerated as stated.

25. Recalling the requirements for legitimate expectation discussed earlier I am not persuaded that the *ex parte* applicants have demonstrated the existence of a representation which is “clear, unambiguous and devoid of relevant qualification;” and, an expectation which is reasonable in the sense that a reasonable person would act upon it, and, that the expectation was induced by the decision-maker and, lastly, that, it was lawful for the decision-maker to make such representation. The phrase "devoid of qualification" is worth noting. It is pregnant with meaning. For the ex parte applicants to qualify as *bona fide* residents, hence claim legitimate expectation, they must satisfy all the requirements and pass the verification set by the Respondents. This court cannot in these Judicial Review proceedings determine whether they satisfy the laid down requirements. Again, to make such a determination, the court will require to hear oral evidence.

b. Whether the impugned decision was tainted by procedural impropriety.

26. **Dr. Khaminwa** submitted that power must be exercised in accordance with the rules of Natural Justice. To fortify his argument, he cited *Onyango Oloo v Attorney General*[7] and submitted that the principles of Natural Justice concern procedural fairness and ensure that a decision is reached by an objective decision maker, maintaining procedural fairness. He submitted that the *ex parte* applicants were not accorded a chance to express their views before taking away any further steps prejudicial to them.

27. **Mr. Munene,** the Respondent's counsel cited *Pastoli v Kabale District Local Government Council & Others*[8] in which it was held that *"procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking the decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."*

28. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

29. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

30. The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by Tribunals can be judicially challenged on grounds that the administrative decision does not comply with the above mentioned basic requirements of legality.

31. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First,* legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The

requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision. *Second,* no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias. *Third,* no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work. *Fourth,* statutes often require that decisions made under them to be supported by reasons.

32. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service****[9]*** to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[10]

33. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[11] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice", is a form of procedural impropriety.[12]

34. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo judex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side").[13] The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.[14]

35. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[15] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge or person or body who decided it.

36. However erroneous the judgment may be in law or whatever injustice that erroneous judgment may inflict, the erroneousness or injustice of the judgment does not make the judgment contrary to natural justice. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal or Government Officer denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings.[16]

37. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[17]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[18]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

38. In *Local Government Board v. Arlidge,**[19]*** Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." (Emphasis added)* In *Snyder v. Massachussets*,[20] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a *"principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*."

39. In India the principle is prevalent from the ancient times.[21] In this context, para 43 of the judgment of the Supreme Court[22] may be usefully quoted:-

> *"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system." (Emphasis added)*

40. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[23] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law**[24]*** says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

41. As Sir William Wade in his Administrative Law put it "Natural justice is concerned with the exercise of power, that is to say, with the

acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected."[25]

42. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[26]

43. What does fairness require in the present case? The standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.[27]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[28] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used “fairness” as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on “wrongful” or “mistaken” assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

44. I find comfort in the Court of Appeal decision in J.S.C. vs Mbalu Mutava**[29]** which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1)(2)** 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.**[30]** Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

45. Applying the principles discussed above to this case, I note that **annexture JWK3** referred to earlier reads *"as you are aware, the Government of Kenya in collaboration with stake holders, especially the affected communities, has been implementing slum improvement...." In Kibera these activities commenced in Zone A of Soweto East Village, through various consultative meetings with affected community, it has been well explained that the u grading will entail complete re-development of Zone A...."*

46. A casual reading of the above excerpt and indeed the language of the entire letter leave me with no doubt that there was prior discussions at the various stages. This position is echoed by the Replying Affidavit which shows that the affected persons were not only involved, but a **MOU** was signed. I find no material to support the assertion that the *ex parte* applicants rights to Natural justice were violated.

c. Whether the impugned decision is tainted with illegality.

47. **Dr. Khaminwa** cited Captain *Geoffrey Kujoga Murugi v The AG*[31] and argued *certiorari* is designed to prevent abuse of power and that it will issue if a decision is made without or in excess of power.[32] He further cited Republic *Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji & 9 Others**[33]***in which the court set out the parameters of the remedy of *prohibition* and argued that *prohibition* is issued to restrain an unlawful action.

48. **Mr. Munene's** submission dwelt on the scope of Judicial Review proceedings, namely, that Judicial Review is concerned with the decision making process and not the merits of the decision. To fortify his argument, he cited *Pastoli v Kabale District Local Government and Others.*[34] He submitted that the *ex parte* applicant has not laid down any basis to warrant the grant of the orders of *certiorari* and *prohibition*.[35] He also argued that the *ex parte* applicant seeks to challenge the merits of the decision.[36]

49. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of “want of legality.”

50. The most obvious example of illegality is where a body acts beyond the powers which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

51. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body or a Government Official actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are ‘legally relevant of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust.’ An illegality can also occur where a body exercised a power which was within its functions but exceeded the scope of power that is legally conferred to it.

52. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. Consequently, the legality of an administrative decision or a decision of a Tribunal can be challenged on the grounds that discretion is abused or improperly exercised by administrator or the Tribunal.

53. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

54. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

55. Two critical issues flow from the foregoing section. *First,* whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Respondent. *Second,* judicial oversight is necessary to ensure that decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.[37] What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

56. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. The action or decision complained of must conform to the statutory provisions and must pass the Constitutional muster. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano****[38]*** the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> *a.* ***Illegality****- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be* ***"illegal".*** *Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b.* ***Fairness****- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*
>
> *c.* ***Irrationality and proportionality****- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute* ***'irrationality"*** *or* ***'perversity'*** *on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of* **Lord Green** *in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****[39]****:-*
>
> *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

57. The provisions conferring mandate upon the Respondent must be read in the context of not one but three different imperatives. The *first* is to enable the Ministry to effectively carry out its specially identified statutory mandate and to implement government policy of providing decent housing. The Constitution and the act clearly envisages an important and active decisional role for the Ministry to perform its functions through the application of the law. *Second,* the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the Ministry's decisions affects the *ex parte* Applicant, the Ministry is obliged **not** to act unfairly. The impugned decision must accordingly be construed so as to promote respect for the Bill of Rights. A *third* dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body.[40]Put differently, it could not have been the intention of the legislature to contemplate a situation whereby the Ministry would act in such a manner as to violate or trump or trivialize a citizens' constitutional rights.

58. Guided by the foregoing tested legal principles and applying the same to the circumstances of this case, I find that as evidenced by the annextures relied upon by the *ex parte* applicant, there were discussions and or deliberations involving the Ministry and the affected persons. There exists a **MOU** and a clear plan for relocation. Those identified were relocated. The Ministry in exercise of its mandate planned to re-develop the area in question and took appropriate measures to re-locate those identified to an alternative settlement. I find no breach of the law or illegality in the manner in which the exercise was undertaken. Differently stated, the impugned decision has not been shown to be illegal or *ultra vires* or outside the functions of the Respondent. Judicial Review is not an appeal and the Court is not concerned with the merits of the decision.

59. The *ex parte* applicant seeks an order of *certiorari*. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. Perhaps I should add that the Respondent is vested with powers to make the impugned decision. No abuse of such powers has been alleged or proved. It has not been shown that the power was not exercised as provided for under the law. It has not been proved or even alleged that the Respondent 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.

60. The adjective of the word lawful is **(a)** allowed or permitted by law; not contrary to law: a lawful enterprise. **(b)** recognized or sanctioned by law; legitimate, **(c)** appointed or recognized by law; legally qualified, **(d)** acting or living according with the law; law-abiding.[41] Allowable or permissible by being in conformity with laws, principles, regulations, statutes, etc., meant to govern or regulate a particular activity or conduct. It also means legal and legitimate.[42] The *ex parte* applicant did not demonstrate the unlawfulness of the impugned

decision.

61. 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.

62. 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, for example where the applicant has unreasonably delayed in applying for judicial review, 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.

63. In view of my analysis of the facts and the law herein above, it is my conclusion that the *ex parte* applicant has not demonstrated that the impugned decision is tainted with illegality nor has the ex parte applicant established any grounds for the court to grant the Judicial Review orders sought. Consequently, I dismiss the *ex parte* applicant's Notice of Motion dated **19th** October 2016 with no orders as to costs. For avoidance of doubt the order of stay granted on **30th** September 2016 is hereby discharged.

Orders accordingly.

Dated at Nairobi this 1st day of February 2019

John M. Mativo

Judge

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[1] Act No. 4 of 2015.

[2] SC Petition Nos. 14, 14A, 14B & 14C of 2014.

[3] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.

[4] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and another v Szymanski 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65.

[5] {2016}eKLR.

[6] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[8] {2008} 2 EA 300.

[9] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[10] Ibid.

[11] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.*

[12] Supra, note 18.

[13] Supra, Note 20, at p 342.

[14] Ibid, page 313.

[15] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[16] As for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross-examined, or cases of that kind (1897) 18 N.S.W.R. 282, 288 (S.C.).

[17] Article 47(1) of the Constitution.

[18] Article 47(2) of the Constitution.

[19] {1915} AC 120 (138) HL

[20] {1934} 291 US 97(105)

[21] We find it Invoked in Kautllya's Arthashastra.

[22] In the case of *Mohinder Singh Gill v. Chief Election Commissioner*,AIR 1978 SC 851

[23] (1980), at page 161.

[24] (1977) at page 395.

[25] 6th Ed at pages 570.

[26] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[27] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[28] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[29] {2015}eKLR

[30] Ibid.

[31] Civil Application No. 293 of 1993.

[32] Citing *Republic v The County Council of Nakuru ex parte Genesis Reliable Equipment & Others* JR App No. 74 of 2010 and *Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji & 9 Others*, Civil Appeal No. 266 of 1996.

[33] Ibid.

[34] {2008} 2 EA 300.

[35] Citing *Halsburys Laws of England*, Fourth Edition, Reissue Volume Page 137 para 128 & *Kenya National Examination Council V Republic ex parte Geoffrey Gathenji Njoroge & Others*{1997} eKLR.

[36] Citing *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* {2002} eKLR.

[37] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[38] JR No 17 B of 2015.

[39] {1948} 1 K. B. 223, H.L.

[40] Article 50 (1).

[41] http://www.dictionary.com/browse/lawful

[42] http://www.businessdictionary.com/definition/lawful.html