



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC(JR) MISC.APPLICATION NO.7 OF 2019

REPUBLIC.....APPLICANT

VERSUS

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

THE CHIEF LANDS REGISTRAR.....2ND RESPONDENT

AND

KIBIRGEN KIMAIYO.....1ST INTERESTED PARTY

ABDI SITIENEL.....2ND INTERESTED PARTY

ELIAS BUSIENEL.....3RD INTERESTED PARTY

KIPSANG MASAI.....4TH INTERESTED PARTY

JOHN KISUGUT TOO.....5TH INTERESTED PARTY

SYLVESTER ARAP CHOGE.....6TH INTERESTED PARTY

PHILIP SAWE TANUI.....7TH INTERESTED PARTY

AND

HON. JUSTICE (RTD) PHILIP KIPTOO TUNOI.....EX-PARTE APPLICANT

JUDGMENT

The *ex parte* Applicant herein, Hon. Justice (Rtd) Philip Kiptoo Tunoi (hereinafter “the Applicant”) moved this court through a Notice of Motion dated 4th April, 2019 seeking the following reliefs;

- a) AN ORDER OF CERTIORARI do issue to remove into this Honourable Court for the purposes of its being quashed the proceedings and the determination /recommendation /order dated 7th February, 2019 of the 1st Respondent in respect of Complaint No. NLC/HLI/046/2017 with respect to Land parcel No. 8409/1.
- b) AN ORDER OF CERTIORARI do issue to remove into this Honourable Court for the purpose of its being quashed item Serial No.4 in Kenya Gazette Notice No. 1995 published in Kenya Gazette Vol. CXXI-No. 27 on 1st March, 2019 in its entirety in so far as it purports to publish the determination and/or recommendations of the 1st Respondent dated 7th February, 2019.
- c) AN ORDER OF PROHIBITION is hereby issued against the 2nd Respondent, his agents/assigns/representative/principals or any person acting on his behalf from acting upon/implementing and/or enforcing the determination dated 7th February, 2019 and gazette vide Kenya Gazette vol. No. CXXI-No. 27 Gazette Notice No.1995 at Item Serial No.4 in any manner adverse to the

ownership/proprietorship and/or possessory rights of the Applicant in the Land Titles exercised from L.R 8409/1

d) Costs of this application be provided for.

The application is supported by the affidavit and a verifying affidavit sworn on the same day by Hon. Justice (RTD) Philip Kiptoo Tunoi. The applicant states that the facts leading to the present claim are that in the year 1975, the Applicant obtained by way of purchase 400 acres in a parcel of land known as L.R .No.8409/1 and was subsequently issued with a title document.

It was the applicant's case that the said parcel of land was subsequently subdivided into two parcels namely: Tembelio/Elgeyo Border Block S (Kaptukutuk 'A') 1 registered in the name of the Applicant and Tembeleo/Elgeyo Border Block S (Kaptuktuk 'A') 2 registered in the joint names of the Ex-parte Applicant and his wife, Elizabeth Jepchumba Tunoi.

The Applicant further stated that sometime in the year 1983, the interested parties who are members of Kaptuktuk Farm Limited (a limited liability company) commenced a law suit being Eldoret HC Civil Case No. 34 of 1983 against the Applicant touching on the above named properties. The case was subsequently determined and the applicant retained 400 acres comprised in title number LR No. 8409/1.

The applicant stated that since 1990 he together with his family have occupied and developed the subject properties without any interruption, however, vide a letter dated 28th March 2013, the interested parties, without any basis or justifiable cause and in total disregard of the Court's determination in Eldoret HC Civil Case No. 34 of 1983, lodged a complaint before the 1st Respondent's Historical Injustices Committee (hereinafter referred to as the Committee).

According to the Applicant, vide a letter dated 16th January 2014 submitted a comprehensive reply together with bundle of documents. The Applicant subsequently lodged a Notice of Preliminary Objection dated 27th March 2018 contending that the committee lacked jurisdiction on the following grounds:

- a) That the matter is *res judicata* since the issues had been fully determined in Eldoret HC Civil Case No. 34 of 1983 and the determination of the court acted upon.
- b) The issues raised did not meet the criteria set out in Section 15 of the National Land Commission Act as amended by Section 38 of the Land Laws Amendment Act, 2016.
- c) A number of the interested parties had earlier on instituted another case upon land parcel ,L.R No. 9624 in the High Court Civil case no. 427 of 1997 which case was still being actively litigated upon in Eldoret and which case the Applicant was a potential witness

Counsel for the Applicant submitted that following the Notice of Preliminary objection which had been lodged, the Applicant pressed for the Preliminary Objection to be dispensed with at the very start of the proceedings. That the Preliminary objection was heard on 3rd May 2018 after which the Committee directed that the ruling would be delivered on notice.

It was counsel's submission that the Applicant learnt through Gazette vol. No. CXXI - No.27-Gazette Notice No.1995 published on 1st March 2019 that a determination had been made on 7th February 2019 without prior notice that proceeded to dismiss the Applicant's preliminary objection.

Counsel submitted that the Committee went on to determine the claim without any further hearing or reference to the parties and made the following recommendations:

- a) That the Chief Land Registrar should revoke all titles resulting from the subdivision of the 400 acres excised from L.R. NO. 8409/1 and revert the same to members of Kaptuktuk Farm Limited.
- b) In the alternative the Claimants should seek compensation from the Respondent for their 400 acres of L.R. NO. 8409/1 at the current market price.

Counsel listed the following issues for determination:

- a) Whether the 1st Respondent had jurisdiction to entertain the claim.
- b) Whether the 1st Respondent observed the rules of natural justice while handling the claim.
- c) Whether the Ex-parte Applicant is entitled to the relief sought

On the first issue as to whether the 1st Respondent had jurisdiction to entertain the claim, Counsel submitted that Section 15 (a) of the National Land Commission Act as amended by the Land Laws (Amendment) Act is clear that a historical claim may only be admitted, registered and processed by the Commission if it meets the following criteria-

- a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;

- b) the claim has not or is not capable of being addressed through the ordinary court system on the basis that—
- i . the claim contradicts a law that was in force at the time when the injustice began; or
 - ii . the claim is debarred under section 7 of the Limitation of Actions Act, (Cap. 22) or any other law;
- c) the claimant was either a proprietor or occupant of the land upon which the claim is based;
- d) no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and
- e) it is brought within five years from the date of commencement of this Act.

Counsel therefore submitted that the Applicant brought to the 1st Respondent's attention the fact that the claim presented before it over ownership of L.R No. 8409/1 had been determined in his favour vide Eldoret HCCC No. 34 of 1983 which case had been filed by Kaptukutuk Farm Limited, whose members comprised of the interested parties herein and which decision had never been appealed against to date.

That the Applicant further pointed out that there was also another suit , Eldoret HCCC No.427 of 1997 over the same subject matter (L.R No. 9624 and L.R No. 8409/1) which was pending determination before the High Court. That the existence of these two cases was acknowledged by the interested parties herein on pages 33, 35 and 37 of the Replying affidavit filed on 8th May 2019.

Ms Odwa for the Applicant submitted that despite the red flag being raised as to the 1st Respondent's jurisdiction to handle a matter which was already actively in court, the 1st Respondent still proceeded to hear the matter and make a determination in contravention of the law governing its operations which was ultra vires.

Counsel cited the case of **ROBERT MUTISO LELLI AND CABIN CREW INVESTMENTS LTD VERSUS NATIONAL LAND COMMISSION AND 3 OTHERS [2017]eKLR** where the court held as follows:

“From the facts of this case, in my humble view, the National Land Commission was acting arbitrarily and abusing its powers under the law. The court acknowledges that the National Land Commission is an independent commission under the Constitution but the powers and functions vested in it under several statutes including the National Land Commission Act and Article 68 of the Constitution are not absolute powers. Those powers must be exercised within the confines of the law.

What this court sees in the NLC from the facts of these two cases is an institution that has ran amok, competing for power and jurisdiction conferred on competent courts of law established under the Constitution.

Once there is a suit pending before a competent court and the NLC or its predecessor is a party, and the proceedings are either pending determination or have been fully determined by that court, the NLC cannot purport to hear and determine an inquiry touching on the same dispute.

Therefore, whereas I need not over emphasis that the National Land Commission has power under Section 14 of the National Land Commission Act derived from Article 68 of the Constitution to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute.

It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court's jurisdiction by taking upon itself the mandate of hearing and determining the dispute.

In my humble view, therefore, the National Land Commission exceeded its jurisdiction in taking over proceedings pending before a court of competent jurisdiction and in purporting to hear and determine the same when National Land Commission was a party to those proceedings. It cannot, therefore, be said that the ex parte applicants came to court because they had an unfavourable outcome before National Land Commission and or that they refused to appear before the National Land Commission to make representations concerning the legality of their respective titles.

What the Kenya Medical Training College and National Land Commission should have done in circumstances where there were pending court proceedings is to apply for stay of court proceedings pending determination of the inquiry by the National Land Commission, if they believed that the National Land Commission was the appropriate forum for resolving the dispute and the court would then be the last resort, especially where the NLC is not a party to those proceedings.

Counsel further relied on the case of **REPUBLIC VERSUS NATIONAL LAND COMMISSION AND 3 OTHERS EX-PARTE SAMUEL GITHEGI MBUGUA AND 5 OTHERS [2018]eKLR**

As to whether the respondent could proceed with the review of the said grants and dispositions in respect of the suit properties at the instance of the 1st interested party while there were pending proceedings that had been instituted by the 1st interested party before this court touching on the same subject matter, I am in agreement with the ex parte applicants that it would amount to an abuse of judicial process for the respondent to engage in such exercise. I am of the view that once a court of competent jurisdiction is seized of a matter, the court must be given an opportunity to pronounce itself on such matter before any other or further proceedings

relating to the same matter are considered.

It is clear from the foregoing that it was not the intention of the legislature that the respondent becomes a substitute for the court in the adjudication of historical land injustices. The role of the respondent is supposed to be complementary. The respondent does not have exclusive power to adjudicate on historical land injustices. It is the 1st interested party who filed a suit in court (ELC No. 557 of 2009) challenging the ex parte applicants' titles over the suit properties. What this means is that the 1st interested party's claim over the suit properties is capable of being addressed through the court system and as such the claim cannot be entertained by the respondent under section 15 of the Act as it does not meet the criteria set out above.

I am of the view that it is not open to the 1st interested party to move both the court and the respondent to adjudicate on the same subject matter. I am not persuaded by the respondent and the interested parties' arguments that the 1st interested party's complaints before the respondent and before this court are different. I am of the view that the 1st interested party has to make an election. If it wishes to pursue its claim before the respondent, it should withdraw its suit which is pending before this court."

Counsel urged the court find that the 1st Respondent exceeded its powers and quash its decision.

On the second issue as to whether the 1st respondent observed the rules of natural justice while handling the claim, counsel relied on Article 47 of the Constitution of Kenya which provides that every person has a right to a fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. This is further provided for under Section 4 of the **Fair Administrative Action Act, 2015** and section 14 of the **National Land Commission Act, 2012**.

Counsel submitted that it is the Applicant's case that he was not given an opportunity to be heard on the main claim before the decision by the 1st Respondent recommending the revocation of his title was made. This was evidenced by the Hansard recordings as per the Applicant's Supplementary affidavit sworn on 3rd April 2019 and pages 21-65 of the Replying affidavit filed on 8th May 2019) which clearly revealed that the proceedings held by the 1st Respondent was mainly to address the preliminary objection raised by the Applicant and not on the substantive claim presented by the interested parties.

It was counsel's submission that it is clear from the proceedings of 3rd May 2019 that the parties would be given an opportunity to be heard on the main claim after the preliminary objection was determined as evidenced by the proceedings of the Hansard report of the same date particularly at pages 62-64 of the Replying affidavit filed on 8th May 2019.

Further that the Applicant was not summoned for a hearing on the main claim and no evidence has been presented before this Honourable court showing that there were subsequent proceedings thereafter after the preliminary objection was determined.

Counsel therefore submitted that the 1st Respondent flouted the rules of natural justice by failing to afford the Applicant with an opportunity to be heard on the substantive claim and as such its decision should be quashed. Counsel relied on the case of **SCENERIES LIMITED VERSUS NATIONAL LAND COMMISSION [2017] eKLR** where the court held as follows:

"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. In this regard, the respondent's complaints are that it was not informed of the complaints against it nor was the applicant supplied with details of the complaint filed by the first interested party; and that the applicant was not given adequate time to present his defence; that the applicant was not accorded an opportunity to call witnesses, in fact the findings annexed to the replying affidavit filed by the Respondent show that the matter was determined without affording the applicant the opportunity to call its witnesses. I find that the above constitutional provisions were violated, and again, on this ground, the applicant's case succeeds."

Counsel further submitted that the 1st Respondent was in contravention of Section 6 of **the Fair Administrative Action Act, 2015** and its own procedure where it made a determination of the case on 7th February 2019 without giving the Applicant notice of the delivery of the said decision. That the Applicant learnt of the 1st Respondent's decision through the Kenya Gazette close to a month after the decision of which the 1st Respondent refused to avail the proceedings and decision despite the Applicant requesting for the same given that the Gazette Notice was silent on the reasons behind the decision.

Counsel submitted that it should be noted that the 1st Respondent did not file any response challenging the application before this Court, therefore the claim against them is unopposed.

Ms. Odwa submitted that as regards the responses filed by the Interested parties, the same mainly dwelt on the merits of the claim that was before the 1st Respondent and not whether due procedure was followed which is what this court is being called upon to determine.

Counsel cited the case of **Republic v Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] eKLR** where the court borrowed the principles contained in the Supreme Court practice 1997 vol 53/1-14/6 which state:-

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to be substituted by law the decision in the matter in question."

Further in the case of Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 P 1173. Justice Nyamu went further to quote the commentary made by Lord Bringham who stated as follows:

“The Court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty itself of usurping power.”

Counsel therefore submitted that the proceedings are proper before the court as opposed to the submissions on the interested parties that the Applicant ought to have appealed against the decision and not filed a judicial review application. That Judicial review is one of the avenues provided in law to challenge the decision making process.

Ms Odwa submitted that the Applicant is entitled to the orders sought in the application for an order of certiorari to remove into this Honourable Court for the purpose of its being quashed the proceedings and the determination/recommendation/order dated 7th February, 2019 of the 1st Respondent in respect of complaint No. NLC/HLI/046/2017 with respect to Land parcel No. 8409/1.

1ST TO 7TH INTERESTED PARTIES/RESPONDENTS SUBMISSIONS.

The 1st to 7th interested parties filed submissions and gave a brief background to the case which has already been enumerated above. It was their case that they lodged a historical land injustice claim with the National Land Injustice claim through Centre for Human Rights and Democracy pursuant to section 15(3)(a)(g) of the National Land Commission Act against the Ex parte applicant on the 24th October, 2013 which was admitted and processed as NLC/HLI/046/2017.

They relied on the replying affidavit filed in this case and stated that at the heart of the interested parties complaint and or claim was that the Ex parte Applicant fraudulently transferred and or acquired 400 Acres of their Kaptuktuk farm comprising of L.R NO.9624 and L.R NO.8409/1 when the Ex parte applicant was hired by the interested parties to act as their conveyancing Advocate at the time they were purchasing the impugned parcels in 1974.

According to the interested parties that in 1974 they approached the Honorable Justice(Rtd) Tunoi who was then practicing in the firm of Nyairo& company Advocates, to be their lawyer and to assist in the purchase of the suit parcels comprising I-R NO.9624 AND L.R NO. 8409/1 from Goberdas Vakatram Kaptuktuk farm ltd paid all the agreed legal fees, interest, rates and the farm at kshs.l ,350,000/= as agreed through the following sources:-

- a) Contribution of members.
- b) Sale of farm machinery;
- c) Barclays international limited loans; and
- d) Delivery of wheat from Kenya Farmers Association.

The Interested parties stated that after parties appearing before the Commission on diverse dates and the historical land injustice following the due process of law made a recommendation on the 7th , February, 2019 as follows:-

- a) That the chief land Registrar should revoke all titles resulting from the subdivision of 400 Acres excised from LRNO.8409/I and revert the same to members of Kaptuktuk Farm Limited.
- b) In the alternative, the claimants should seek compensation from the respondent for their 400 Acres of I-R NO. 8409/1 at current market price.
- c) That should the claimants apply to the chief justice, the commission prays that the chief justice show kindness to the claimants and allow the reopening of the case out of time since section 15(3)(11) of the National Land Commission Act 2012 as amended by section 38 of the laws amended Act waives restrictions of section 7 of the limitations Actions Act in respect of historical land injustices claim.

The IPs listed the following issues for determination of the court:

- a) Whether the National Land Commission who is the 1st respondent had the jurisdiction to entertain the claim or otherwise.
- b) Whether the 1st respondent observed the rules of Natural justice while handling the claim.

On the first issue as to whether the NLC had jurisdiction to entertain the claim, they submitted that the dispute was a historical land injustice claim with the National Land Injustice claim through Centre for Human Rights and Democracy pursuant to section 15(3)(a)(g) of the National Land Commission Act against the Ex parte applicant on the 24th October 2013 which was admitted and processed as NLC/HLI/046/2017. The same is permitted pursuant to the provisions of the Constitution Article 67 (2).

It was their submission that the proper forum to investigate claims of historical land injustices lies with the National Land Commission and present recommendation. IPs cited the case of **CHIEF LAND REGISTRAR & 4 OTHERS VS. NATHAN TIROP KOECH & 4 OTHERS**, to emphasize the point of jurisdiction. That the Court rejected that contention where the court held as follows:

" On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. Our conviction stems from our reading of Article 67(2) (e) of the Constitution. The Article provides that the NLC can investigate "present or historical" land injustices. We lay emphasis on the word "present." If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so.

Our view is fortified by Section 15 (3) (b) of the National Land Commission Act which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice. "

The interested parties submitted that the NLC carrying out investigation as alleged is not sub judice as alleged by the Ex parte applicant and cited the case of **Republic v National Land Commission & another [2018]eKLR** where the court held that:

From the above provisions of law, the Court finds that the National Land Commission has powers to investigate any alleged historical land injustice and make any appropriate recommendation. In doing so the National Land Commission can hold inquiries for purposes of carrying out the above stated investigations. It does not mean that by carrying an investigation and inquiry, the National Land Commission has already concluded that the land in issue was acquired irregularly or there is any historical injustice. It may just be an alleged historical injustice and after the investigation and inquiry, the said Commission may come up with appropriate recommendation that might assist in unlocking the dispute herein.

The IPs submitted that it was within the mandate of NLC to investigate and inquire into the historical land injustices and make recommendations. They further contended that whereas Article 40 of the Constitution protects the right to property, this protection/ right does not extend to title founded on an unlawful acquisition.

On the second issue as to whether the 1st respondent observed the rules of Natural justice while handling the claim, the IPs submitted that natural justice being a cornerstone to fair hearing, the interested parties/ respondents clearly demonstrates that parties including the applicant appeared before the NLC on various diverse dates and the Ex parte applicant cannot feign ignorance about the fact that on 3rd May 2018 the commission before all parties including the Ex parte applicant hinted that it would combine the hearing of the PO and the substantive complaint and issue an informed decision noting that because the claimants were all advanced in age and 2 interested parties are deceased, to which the Ex parte applicant did not object as per the interested parties annexure marked "EBI " under paragraph 1 page 4 of the Hansard record dated 3rd May, 2018.

Further that if the Applicant was aggrieved he should have filed an Appeal in the High Court as provided for under Rule 29 Historical Land Injustices Claims Rules . The IPs urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

From the onset it should be noted that the 1st Respondent the National Land Commission and the 2nd Respondent the Chief Land Registrar were served with the pleadings but did not file any responses.

On 18th February 2020, Mr. Odongo, Counsel for the 2nd respondent the Chief land Registrar informed the court that he had looked at the application and was of the view that orders sought are directed against the Interested parties and therefore did not wish to participate.

The interested parties had filed an application dated 22nd May 2019 seeking to enjoin Thomas Rugut, Julius Tirop and Nyairo and Company Advocates as parties for purposes of production of information/evidence which would help the court in just determination of this suit. The application was heard and the court rendered a ruling dismissing the same on 26th September 2019.

I have considered the application, the responses and the submissions by Counsel and the 1st to 7th interested parties and I am of the view that the issues for determination are as to whether the 1st respondent had jurisdiction to entertain the claim and if so whether it acted ultra vires, whether it observed the rules of natural justice while handling the claim. Lastly whether the Applicant is entitled to the orders sought.

On the first issue as to whether the NLC had jurisdiction to handle the claim by the IPs, Section 15 of the NLC Act provides as follows:

15. Historical land injustices

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

(2) For the purposes of this section, a historical land injustice means a grievance which—

- a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
- b) resulted in displacement from their habitual place of residence;
- c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated;
- d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and
- e) meets the criteria set out under subsection 3 of this section

The above section provides for what historical land injustices are and it qualifies the criteria to be met before a claim can be considered as a historical injustice Sub section 3 provides as follows

3. A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria—

- (a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;
- (b) the claim has not or is not capable of being addressed through the ordinary court system on the basis that—
 - (i) the claim contradicts a law that was in force at the time when the injustice began; or
 - (ii) the claim is debarred under section 7 of the Limitation of Actions Act, (Cap. 22) or any other law;
- (c) the claimant was either a proprietor or occupant of the land upon which the claim is based;
- (d) no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and
- (e) it is brought within five years from the date of commencement of this Act.

Counsel for the applicant submitted that the applicant brought to the attention of the court that that the subject matter of the dispute had been determined in Eldoret HCCC No.34 of 1983 and was also the subject matter of Eldoret HCCC No. 427 of 1997 which was yet to be determined. I am guided by the case of **In the case of Robert Mutiso Lelli and Cabin Crew Investments Ltd v National Land Commission & 3 others [2017] eKLR** where the court held;

“Once there is a suit pending before a competent court and the NLC or its predecessor is a party, and the proceedings are either pending determination or have been fully determined by that court, the NLC cannot purport to hear and determine an inquiry touching on the same dispute.

Therefore, whereas I need not over emphasize that the National Land Commission has power under Section 14 of the National Land Commission Act derived from Article 68 of the Constitution to review titles and dispositions to public land to establish the legality of the titles, that power is not absolute.

It must be exercised within the confines of known legal boundaries. Where a court of law is already seized of a dispute of ownership of the disputed land, the National Land Commission must exercise restraint. It can only avail evidence before the court of law hearing the dispute, to demonstrate that the title was illegally and or irregularly acquired, and not to oust the court’s jurisdiction by taking upon itself the mandate of hearing and determining the dispute.”

It is on record and acknowledged that the cases mentioned exist by both the applicant and the interested parties. Upon perusal of pages 33,35 and 37 of the replying affidavit filed on 8th May 2019 it is evident that the interested parties acknowledged the existence of these cases despite not mentioning the case numbers in their testimony.

The National Land Commission has clear mandate on the matters that it can investigate make inquiries and make recommendations as per the law. The NLC must adhere to the mandate and the rules provided therein in order not to cause confusion and injustice. When a matter has already been handled by the court or it is pending before the court, the NLC does not have the mandate to hear and make recommendations unless the court has referred the matter to it for arbitration or expert evidence. I find that the NLC acted ultra vires in hearing and giving recommendations on a matter that had been heard and determined by a competent court.

Section 15 3(b) of NLC Act vindicates the Applicant which provides that the claim must not have been or is not capable of being addressed through the ordinary court system on the basis that the claim contradicts a law that was in force at the time when the injustice began; or the claim is debarred under section 7 of the Limitation of Actions Act, (Cap. 22) or any other law.

On the second issue as to whether the 1st respondent NLC observed the rules of natural justice while handling the claim, the applicant contended that the 1st respondent did not accord him a fair trial as the main claim was heard and a decision delivered without his knowledge.

The proceedings in the Hansard report at pages 62-64 of the replying affidavit filed on 8th May 2019 indicate that the 1st respondent made it clear to the parties that they would be given an opportunity to be heard on the main claim. The interested parties relied on annexure 'EB1' under paragraph page 1 page 4 of the Hansard record dated 3rd May 2018 wherein at page 24 of the replying affidavit it is indicated that the parties initially agreed to have both the PO and the main claim heard as the parties were of an advanced age. However, at page 64 and 65 it is evident that the 1st respondent decided it would be better if the PO was determined first. Further, it stated that the parties would be notified of further proceedings. There is no evidence that has been tabled to prove that the applicant was notified of the main hearing or of the date of the delivery of the decision by the 1st respondent.

The above indicates that the applicant was not accorded a fair trial as the main hearing was heard and a decision delivered without his knowledge.

On the issue whether the applicant is entitled to the orders sought, I am guided by the case of **Municipal Council of Mombasa...Vs... Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

In other words the court is concerned with the process that the National Land Commission used to arrive at the decision and the recommendations. The court is not concerned with the merits and the recommendations that the National land Commission made. Further the court is not privy to the details and the evidence adduced during the hearing of the complaint and therefore cannot make a determination as this would amount to an appeal from the decision of the Nation Land Commission. That is not the purpose of judicial review.

In the case of **Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA Justice Kasule held at 300 at pages 300-304 that:**

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

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

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi...Vs...Secretary of State for the Housing Department (1990) AC 876”.

I find that the 1st respondent threw the rules of natural justice in respect of a fair trial out of the window therefore occasioning injustice to the applicant. The court has to exercise discretion which is dependent on various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit. Discretion must be exercised in accordance with sound and reasonable judicial principles.

The issue of discretion being exercised in accordance with reasonable judicial principles as was held in the **King’s Bench in Rookey’s Case** which stated as follows:-

“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

We should also note what judicial review orders entail as was stated in the case of **Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996**, where the Court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of

jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not. However, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128..”

From the above case and the facts of the application it is evident that the applicable order is an order of *certiorari* which can quash a decision already made as an order of *certiorari* will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.

I have considered the available evidence and the written submissions by the parties and come to the conclusion that the Ex parte applicant’s application dated 4th April 2019 has merit and is therefore allowed as prayed. I therefore make the following specific orders.

a) AN ORDER OF CERTIORARI is hereby issued removing into this Honourable Court for the purposes of its being quashed the proceedings and the determination /recommendation /order dated 7th February, 2019 of the 1st Respondent in respect of Complaint No. NLC/HLI/046/2017 with respect to Land parcel No. 8409/1.

b) AN ORDER OF CERTIORARI is hereby issued removing into this Honourable Court for the purpose of its being quashed item Serial No.4 in Kenya Gazette Notice No. 1995 published in Kenya Gazette Vol. CXXI-No. 27 on 1st March, 2019 in its entirety in so far as it purports to publish the determination and/or recommendations of the 1st Respondent dated 7th February, 2019.

c) AN ORDER OF PROHIBITION is hereby issued against the 2nd Respondent, his agents/assigns/representative/principals or any person acting on his behalf from acting upon/implementing and/or enforcing the determination dated 7th February, 2019 and gazette vide Kenya Gazette vol. No. CXXI-No. 27 Gazette Notice No.1995 at Item Serial No.4 in any manner adverse to the ownership/proprietorship and/or possessory rights of the Applicant in the Land Titles exercised from L.R 8409/1

d) The 1st Respondent and the 1st to 7th interested parties to pay costs of the suit.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE