REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 60 OF 2018

TINEK LIMITED.....1ST PETITIONER

ABDINOOR SHARIFF AHMED.....2ND PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE REGISTRAR OF TITLES.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....5TH RESPONDENT

AND

KHALIF KURIE HERIS.....1ST INTERESTED PARTY

ENGEN KENYA LIMITED.....2ND INTERESTED PARTY

PETER NZUKI.....3RD INTERESTED PARTY

JUDGMENT

Introduction:

1. In the Petition dated 29th November, 2018, the Petitioners averred that through an Agreement of Sale dated 20th December, 2004, the 2nd Purchaser purchased land known as L.R. No. 337/1645 measuring 5 acres *(the suit land)* from the 1st Petitioner for Kshs. 5,000,000; that the 2nd Petitioner conducted due diligence before purchasing the suit land and that the 2nd Petitioner agreed to have the shares of the 1st Petitioner transferred to him and his wife from the Shareholders and Directors of the 1st Petitioner.

2. According to the Petitioners, the Application for the change of user of the suit land from inoffensive industrial to residential cum-commercial was made in July, 2004; that the same was approved by the 4th Respondent on 17th December, 2007 and that in the year 2008, the 1st Petitioner had the suit land sub-divided after the 2nd Interested Party requested to be leased a portion of the suit land to run a petrol station.

3. It is the Petitioners' case that the suit land was sub-divided into 18 parcels of land; that the mother title was surrendered to the Ministry of Lands and that the 2nd Interested Party obtained a lease in respect to one of the sub-divisions, being L.R. No. 337/3838. According to the Petitioners, the 1st Petitioner sold portions numbers L.R. No. 337/3823, 3832, 3833, 3835, 3836 and 3837 to the 1st Interested Party.

4. The Petitioners averred that at no time were they informed by the 2nd -4th Respondents that the title of the suit property had any defect and that it was only in the year 2016, through a notification dated 21st January, 2016, that the 1st Respondent invited the 1st Petitioner to attend a

hearing on 27th January, 2016 whereby the 3rd Interested Party had lodged a complaint with the 1st Respondent in respect of the suit property.

5. According to the Petitioners, they were not heard by the 1st Respondent on 27th January, 2016 due to time constraints; that the next hearing was scheduled for 4th November, 2016 where the Petitioners raised a Preliminary Objection indicating that the 1st Petitioner is a *bona fide* Purchaser for value without notice of a defect of title and that the hearing was once again postponed because the 3rd Interested Party was bereaved.

6. The Petitioners have averred that the Petitioners kept following up on the case; that on 9th July, 2018, the Petitioners, through their advocate, did a letter seeking to know the status of the case; that in October, 2018, the 2nd Petitioner went to the 1st Respondent's office and met the Vice-Chairperson, who upon calling Wavinya Ndeti, who is related to the 3rd Respondent, informed him that he should discuss the case with the said Ndeti and that the 1st Respondent's Vice-Chairperson assured the 2nd Petitioner that a hearing had not been conducted.

7. The Petitioners averred that they later on learnt that a Gazette Notice No. 11714 of 9th November, 2018 was published to the effect that the 1st Respondent had directed the 2nd Respondent to revoke the title held by the 1st Petitioner; that the Petitioners were never notified of the decision that was made on 28th April, 2017 by the 1st Respondent and that even the 3rd Interested Party was not aware of the decision of 28th April, 2017.

8. The Petitioners averred that the 1st Respondent was aware of the existence of the sub-division of the suit property and even made an Award dated 23rd January, 2018 in favour of the 1st Petitioner to facilitate the acquisition of L.R. No. 337/3838 for purposes of construction of the Athi River Machakos turn-off (A109) Road.

9. The Petitioners finally averred that the 1st Respondent acted illegally and in violation of the rules of natural justice and the right to a fair hearing and that the 1st Respondent failed to appreciate that the 1st Petitioner is a *bona fide* Purchaser for value without notice of defect of title.

10. In its prayers, the Petitioners have sought for the following orders:

> ***a. This Honourable Court be pleased to issue an order of certiorari to remove into this court to quash the Gazette Notice No. 11714 published on 9th November, 2018 by the 1st Respondent recommending the 2nd Respondent to revoke the 1st Petitioner's title to the suit property known as Land Reference No. 337/1645 that has been sub-divided into 18 titles namely: L.R. No. 337/3821, 337/3822, 337/3823, 337/3824, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3832, 337/3833, 337/3834, 337/3835, 337/3836, 337/3837 and 337/3838.***
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> ***b. A permanent injunction be and is hereby issued restraining the 1st Respondent from interfering with peaceful and quiet possession of the 1st Petitioner's properties known as L.R. No. 337/3821, 337/3822, 337/3823, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3833, 337/3834, 337/3838 that resulted from the sub-division of L.R No. 337/1645.***
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> ***c. An order of prohibition be and is hereby issued forbidding the 1st Respondent by itself, its agents, employees and any other persons whomsoever or howsoever acting on, with and or under its instructions from conducting any further review or action in respect of all that parcel formerly known as L.R. No. 337/1645 and the resultant sub-divisions registered as L.R. No. 337/3821, 337/3822, 337/3823, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3833, 337/3834, and 337/3838 registered in the name of the 1st Petitioner.***
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> ***d. The 1st Respondent and the 5th Respondent be and are hereby directed to proceed and enforce an award of Kshs. 197,985,519 contained in its letter dated 23rd January, 2018 in favour of the 1st Petitioner with respect to the property known as L.R No. 337/3838.***
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> ***e. . A declaration that the 1st Petitioner is a duly registered owner of L.R. No. 337/1645, and the resultant sub-divisions, with an indefeasible title.***
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> ***f. In the alternative, the 1st, 2nd, 3rd, and 4th Respondents be and are hereby ordered to compensate the 1st Petitioner for loss of suit property and the resultant sub-divisions measuring approximately undeveloped 3 acres at the market rate or the rate of Kshs. 41,601,756 contained in award contained in the 1st Respondent's letter dated 23rd January, 2018 which makes a total sum of Kshs. 322,790,787 inclusive of L.R. No. 337/3838.***
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> ***g. The Respondents do bear the costs of this Petition jointly and/or severally.***

11. In reply, the 1st Respondent's Director of Legal Affairs deponed that pursuant to Article 68(c) (v) of the Constitution and Section 14 of the National Land Commission Act, the 1st Respondent is mandated to review all grants and dispositions of public land, either on its own Motion or upon receipt of a complaint.

12. The 1st Respondent's Director deponed that the review of grants and dispositions of public land entails the 1st Respondent analyzing the process under which public land was converted to private land and make findings of the legality or regularity of the grants in question; that the 3rd Interested Party filed a complaint with the 1st Respondent in which they claimed to be the rightful owners of land comprised in L.R.

Nos. 337/1208; 337/1645; 337/4775; 337/1884; 337/973; 337/1868 and 337/447 and that the 1st Respondent invited all Interested Parties for a hearing in respect to the said portions of land.

13. The 1st Respondent's Director deponed that during the hearing, the 3rd Interested Party submitted that he has been in actual occupation and possession of the suit land since 1960; that the Allotment Letters in respect to the suit property were issued in favour of Peter Nzuki Ndeti and Elizabeth Nzili Ndeti and that the allottees could not process the necessary payments for the Allotment Letters because the files went missing from the lands registry.

14. The 1st Respondent's Director of Legal Affairs narrated the numerous supporting documents that the 3rd Interested Party presented to the 1st Respondent and that on 27th January, 2016, the firm of Maondo and Mulanya Advocates represented by C.S. Maondo and Geoffrey appeared before the 1st Respondent on behalf of the Petitioners and the 2nd Interested Party for the review proceedings.

15. According to the 1st Respondent, on 17th February, 2016, the 1st Respondent was informed that the Petitioners had filed Nairobi High Court Petition No. 57 of 2016 seeking to stay the Review proceedings and that on 12th October, 2016, the 1st Petitioner filed written submissions before the 1st Respondent claiming to have been allocated the suit land vide Grant Number I.R 60729 dated 18th October, 1993.

16. The 1st Respondent's Director of Legal Affairs deponed that the 1st Respondent did not present any documents on the initial allocation, including the Letter of Allotment, authority to allocate and the approved Part Development Plan and that the 1st Petitioner did not give any explanation on how the allocation was made to them despite the previous allocation of the suit land to the 3rd Interested Party.

17. It is the 1st Respondent's case that it made the following key findings: that the subject parcel being L.R No. 337/1645 had been allocated to Elizabeth Nzuki Ndeti's family and hence not available for allocation to the 1st Petitioner; that there was a moratorium in place restricting the disposal of land by any Local Authority and the National Government; that the Director of Physical Planning found that the allocation of L.R No. 337/1645 to the 1st Respondent was not approved and that the Purported PDP No. 85 Reference number NRB/891/5 of 12th June, 1991 did not correlate with the shape reflected in the Deed Plan number 337/1645.

18. According to the 1st Respondent's Director of Legal Affairs, the other findings of the 1st Respondent were: that all the area surveyed as L.R. No. 337/1645 measuring 5.232 hectares has no approved Part Development Plan and that the Report from the Senior Planning Records Office (SPRO) ascertained that L.R. No. 337/1645 had been committed and not available for allocation.

19. Furthermore, it was the position of the 1st Respondent that the then Commissioner of Lands issued authority to the family of Peter Nzuki Ndeti to make late payments of the Allotment Letters to enable them process the title in respect of the suit land and that the title held by the 1st Petitioner should be revoked and the family of Peter Nzuki Ndeti, the 3rd Interested Party, be allowed quiet possession of the suit land.

20. The 1st Respondent's Director of Legal Affairs deponed that the Petitioners did not furnish the 1st Respondent with evidence to prove that they were in fact *bona fide* Purchasers; that public interest litigation outweighs private interests and that the 1st Respondent complied with the provisions of the Constitution, the Fair Administrative Action Act and the National Land Commission Act.

21. The 5th Respondent's Surveyor deponed that the 5th Respondent is a State Corporation established under the Kenya Roads Act; that L.R. No. 337/3838 is located along Athi River-Machakos turn-off currently under construction; that this parcel of land resulted from the sub-division of L.R No. 337/1645 which was done in the year 2008 and that the 1st Respondent issued a notice of intention to acquire 0.4209 Ha of L.R No. 337/3838 vide Gazette Notice No. 9536 of 29th September, 2017.

22. According to the 5th Respondent, vide its letter dated 22nd February, 2018, the 5th Respondent forwarded a schedule of compensation listing the 1st Petitioner as the beneficiary of Kshs. 197,985,519; that the 5th Respondent is yet to transfer the said funds as recommended by the 1st Respondent and that the 1st Respondent in its determination directed the 2nd Respondent to revoke the titles held by the 1st Petitioner.

23. The 5th Respondent's Director deponed that the 5th Respondent has no mandate to compulsorily acquire land; that it is the 1st Respondent's mandate to compulsorily acquire land and to also determine the issue of ownership of land and that the 1st Respondent has not issued to the 5th Respondent with a Notice to take possession and that the 5th Respondent is yet to release the Award or compensation because of the current dispute.

24. The 5th Respondent's Surveyor finally deponed that the 5th Respondent is willing and ready to release the compensation to the rightful owner of the suit property after the dispute has been resolved by this court.

25. The 1st Interested Party deponed that he is the registered proprietor of parcels of land known as L.R No. 337/3823, 337/3833, 337/3834, 337/3835, 337/3836 and 337/3837; that he purchased the said parcels of land from the 1st Petitioner and that the said parcels of land are a sub-division of L.R No. 337/1645, which sub-division was approved before the titles were issued in 2010.

26. The 1st Interested Party deponed that after conducting official searches through his advocates, the mentioned sub-divisions were registered in his name in the year 2014; that he applied for and was issued with approvals to develop the land and that he was shocked when on 9th November, 2018, he saw communication in Gazette Notice No. 11714 of 9th November, 2018 directing the Chief Land Registrar to revoke the titles on the ground that the allocations were not supported by any Part Development Plans.

27. It was the 1st Interested Party's case that prior to the Gazette Notice of 9th November, 2018, he was not invited to any hearing by the 1st Respondent; that the title of L.R No. 337/1645 was surrendered by the 1st Petitioner for purposes of sub-division and ceased to exist after the said sub-division and that the 1st Respondent irregularly conducted investigations on title to L.R. No. 337/1645 when new titles and new owners were already in existence.

28. According to the 1st Interested Party, Article 47 of the Constitution provides that if a right or fundamental freedom of a person is likely to be adversely affected by an administrative action, the person has a right to be given written reasons for the action; that the 1st Respondent did not issue him with reasons for the determination; that to date, he has not been supplied with written reasons for the alleged determination and that the Petitioners acquired the suit property lawfully.

29. The 1st Interested Party deponed that the determination of the Petitioners' title was not done within five (5) years as required by the law and that while the 1st Respondent has stated that it conducted hearings on 29th August, 2014 and 13th February, 2015, the 1st Respondent wrote to the 1st Petitioner on 21st January, 2016 notifying the Petitioners to attend a hearing in respect of L.R No. 337/1645.

30. In his Replying Affidavit, the 2nd Interested Party's Managing Director deponed that the 2nd Interested Party leased L.R. No. 337/1645 from the 1st Petitioner and set up a fueling station along the Nairobi- Mombasa Highway; that the 1st Petitioner sub-divided L.R. No.337/1645 into 18 portions and that the land which the fueling station stood on became L.R. No. 337/3838.

31. According to the 2nd Interested Party, its interest on title 337/3838 is for the unexpired term of the Lease which runs until the year 2023; that it has expanded in excess of Kshs. 46 million on the suit property and that the 2nd Interested Party was surprised when on 22nd January, 2016, it received a notice from the 1st Respondent inviting it to attend a public hearing in respect of the suit property on 27th January, 2016.

32. The 2nd Interested Party's Managing Director deponed that it is only when their advocate attended the hearing that he was informed that the hearing was in respect of L.R. No. 337/1645 which had been going on for two years and that the 1st Respondent directed that the 3rd Interested Party's complaint be heard on 7th February, 2016.

33. The 2nd Interested Party's Director deponed that the complaint came up for hearing on 4th November, 2016 when the 1st Petitioner's advocate challenged the jurisdiction of the 1st Respondent by way of a Preliminary Objection and that on that day, neither the 3rd Interested Party nor his advocate were in attendance.

34. The 2nd Interested Party's Director deponed that the 1st Respondent's Vice Chairperson informed them that the 3rd Interested Party's family member, Hon Wavinya Ndeti, had called her and informed her that she was bereaved; that they were informed by the said Vice-Chair that the 1st Respondent will issue a fresh hearing notice and that after the sitting of 4th November, 2016, they have never been invited for a hearing.

35. The 2nd Interested Party's Director finally deponed that they were surprised to learn in the Gazette Notice of 9th November, 2018 that the 1st Respondent had cancelled the title for L.R No. 337/1165; that the complaint was heard ex-parte and that the 1st Respondent delivered a Ruling in a manner designed to deprive the 1st Petitioner and that 2nd Interested Party of their rights to a fair hearing and fair administrative action.

36. The 2nd Interested Party's Director finally deponed that L. R. No. 337/1645 and the ensuing sub-divisions are private property pursuant to Article 64 of the Constitution; that the 1st Respondent has no jurisdiction to entertain disputes regarding private land and that the 1st Respondent acted *ultra vires* its constitutional and statutory powers.

37. The 3rd Interested Party's Legal Administrator finally deponed that this court does not have the requisite jurisdiction to entertain the present dispute; that the crux of the Petition is a violation of the fundamental rights and freedoms of the Petitioners by the 1st Respondent and that in arriving at its decision, the 1st Respondent was acting as a quasi-judicial body in exercise of its constitutional and statutory mandate.

38. According to the 3rd Interested Party, the Petitioners should have either filed an Appeal or Judicial Review proceedings and that this court cannot find that a judicial body exercising quasi-judicial authority has acted in violation of the fundamental rights and freedoms of a party.

39. The 3rd Interested Party deponed that before arriving at the decision directing the Chief Land Registrar to revoke the title for L.R. No. 337/1645 *(the suit property)* held by the Petitioners, the 1st Respondent published and invited all affected parties to appear before it on the question of ownership of the suit property; that the Petitioners had an opportunity to appear before the 1st Respondent to respond to the Petition that had been filed by the 3rd Interested Party and that the Petitioners did appear before the 1st Respondent and made representation.

40. According to the 3rd Interested Party, this court cannot uphold the Petitioners' title as the legitimate and true title to the suit property by way of a Petition and that the allegation by the Petitioners that the 1st Respondent's officers were in communication with the 3rd Interested Party's Administrators is not true.

41. The 3rd Interested Party deponed that the Petitioners have conceded in the Petition that they were accorded an opportunity to be heard by the 1st Respondent; that the Petitioners have conceded that the title they are having is defective and are instead blaming the State agencies for the defect and that the suit property was allocated to the 3rd Interested Party way back in the 1960s.

42. The 3rd Interested Party finally deponed that the Petitioners have not demonstrated under what authority the person who assigned to them the subject property assumed ownership of the land and that indefeasibility of title is not absolute.

Submissions:

43. The Petitioners' advocate submitted that one of the Petitioners' grievance is that the 1st Respondent violated the Petitioners' fundamental rights under Article 40, 47 and 50 of the Constitution by directing that the Petitioners' title for L.R. No. 337/1645 already sub-divided be cancelled.

44. Counsel submitted that it is this court that has the jurisdiction to determine if the actions of the 1st Respondent were constitutional or not and that the jurisdiction of this court is limited to disputes contemplated under Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act.

45. Counsel submitted that under Section 13(7) of the Environment and Land Court Act, this court has the powers to issue prerogative orders, declaratory orders and compensation; that prerogative and declaratory orders have been sought in the current Petition and that this court can intervene in matters pertaining to the breach of constitutional rights. Counsel relied on the decisions of ***Daniel Mugendi vs. Kenyatta University and 3 Others (2013) eKLR; David Ramogi & 4 Others vs. The Cabinet Secretary, Ministry of Energy and Petroleum & 7 Others (2017) eKLR*** *and* ***Nightshade Properties Limited vs. Registrar of Titles, Mombasa & Another (2017) eKLR.***

46. The Petitioners' advocate submitted that the 2nd Petitioner purchased L.R No. 337/1645 measuring approximately 5 acres from the 1st Petitioner for Kshs. 5,000,000; that the 2nd Petitioner took over possession of the land in the year 2004 and that the land was vacant as at the time of the said purchase.

47. After obtaining the approval of change of user, the Petitioners' advocate submitted that the land was sub-divided into several portions *(18 in total)* and that the 1st Petitioner constructed a Petrol Station on a portion of L.R. No. 337/1645 which it later leased to the 2nd Interested Party. Counsel submitted that the 2nd Petitioner sold six (6) sub-divisions to the 1st Interested Party.

48. All along, it was submitted, the Respondents never informed the Petitioners that the title to the suit property had any defect in the course of sub-division and change of user and that it was not until 21st January, 2016 when the 1st Petitioner got a notification from the 1st Respondent inviting it to attend a hearing on 27th January, 2016 in respect of the 3rd Interested Party's claim.

49. According to counsel, the Petitioners attended the hearing on 27th January, 2016 but because of the time constraint, they could not be heard; that the matter was scheduled for mention on 4th November, 2016 when the Petitioners raised a Preliminary Objection and that the matter was adjourned indefinitely.

50. The Petitioners' counsel submitted that the allegation by the 3rd Interested Party that the suit land was allocated to the 3rd Interested Party's family are baseless; that the 1st Respondent relied on the 1967 documents which were not signed and that the documents shows that the 3rd Interested Party was merely given permission to use the land for irrigation in 1986.

51. Counsel submitted that the Letters of Allotment in possession of the 3rd Interested Party do not refer to the suit property and that the Allotment Letters issued to the 3rd Interested Party were issued on 2nd June, 1998 way after the initial allotment of L.R No. 337/1645 had been issued on 9th March, 1990. Counsel submitted that in any case, the 3rd Interested Party cannot recover the suit land due to limitation of time.

52. The Petitioners' counsel submitted that the Petitioners were not given a hearing by the 1st Respondent contrary to the provision of Section 4(4) of the Fair Administrative Actions Act; that the Petitioners were not given notices for the hearings of 29th August, 2014 and 13th February, 2015 and that no Minutes have been produced to prove that there was a hearing on the said dates. Counsel relied on the case of ***Robert Mutiso Lelli vs. The National Land Commission (2017) eKLR.***

53. The Petitioners' counsel submitted that the 1st Respondent purported to make a decision on 28th April, 2017 and published the same on 9th November, 2018 long after its mandate had expired; that it was not open for the 1st Respondent to take any further step until its mandate was renewed and that it is common knowledge that the mandate of the 1st Respondent was not renewed after it expired on 2nd May, 2017. Counsel relied on the case of ***Samuel Githagi Mbugua & 5 Others (2018) eKLR.***

54. Counsel submitted that the 1st Respondent, in an attempt to circumvent the law, backdated the determination to read 28th April, 2017 so as to appear it acted within its mandate; that in a letter dated 9th July, 2018, the 1st Respondent informed the Petitioners that the matter was still pending and that the 1st Respondent recommended for the revocation of the suit land after its mandate had expired.

55. The Petitioners' counsel submitted that the 1st Respondent acted in breach of Section 14(7) of the National Land Commission Act which states that the revocation of title cannot issue as against a *bona fide* Purchaser for value and that the 3rd Interested Party never raised or proved fraud against the 2nd Petitioner.

56. The Petitioners' counsel finally submitted that to the extent that the 1st Respondent's Senior Officer was in communication with a member of the 3rd Interested Party's family member, it undermined the right to a fair hearing and that the Petition should be allowed.

57. The 1st Respondent's counsel submitted that the Petitioners have not stated what rights, if any, have been violated, how they have been violated and the specific constitutional provisions that have been infringed by the 1st Respondent.

58. The 1st Respondent's counsel submitted that the 3rd Interested Party filed a complaint regarding the allocation of L.R No. 337/1645, among other parcels of land; that the complaint was that the Petitioners had fraudulently acquired the land and sought for the intervention of the 1st Respondent and that pursuant to the provisions of Section 14(3) of the National Land Commission Act, Article 47 and 50 of the Constitution, the 1st Respondent invited all the Interested Parties for hearings at its ACK Bishop Annex Office.

59. The 1st Respondent's advocate submitted that the 1st Respondent afforded both the Petitioners and the Interested Parties herein an opportunity to participate in the proceedings before it; that after hearing all the parties, the 1st Respondent found that the Part Development Plan with respect to L.R. No. 337/1645 was never approved and that the Petitioners have not availed to this court an approved Part Development Plan.

60. Counsel submitted that the Petitioners cannot purport to have buildings on some of the sub-divided plot for a Development Plan that was never approved; that an unapproved Part Development Plan cannot confer legal title on a party and that when a party fraudulently conveys property to a *bona fide* Purchaser, the ensuing title is null and void. Counsel relied on the case of ***Kenya Anti-Corruption Commission vs. Ahmed Karama Said & 2 Others (2011) eKLR.***

61. The 2nd Interested Party's advocate submitted that the suit property was allocated to the 1st Petitioner on 1st March, 1990; that the 1st Petitioner's Director sold the Company to the 2nd Petitioner and Sadia Sharif on 19th July, 2007 and that the suit property and the Company were thus acquired by the current shareholders of the 1st Petitioner for value.

62. Counsel for the 2nd Interested Party submitted that after negotiating with the Directors of the 1st Petitioner, the 2nd Interested Party leased the suit property for a period of ten (10) years from 1st February, 2008; that the term of the Lease was re-negotiated and the Lease term was extended to the year 2023 and that during the term of the Lease, the 1st Petitioner informed the 2nd Interested Party of its intention to sub-divide the land. It was after the said sub-division that the fuel station operated by the 2nd Interested Party was found to occupy L.R. No. 337/3838.

63. Counsel submitted that the 1st Petitioner was lawfully allocated L.R. No. 337/1645 which was later sub-divided; that the 2nd Interested Party has extensively developed the portion of the suit land it leased to the tune of Kshs. 36,400,000 and that the suit properties are private land. Counsel submitted that neither the Constitution nor the statute grants the 1st Respondent any right, power or jurisdiction to investigate or determine rights in respect of private land.

64. The 2nd Interested Party's advocate submitted that the 2nd Interested Party was surprised when on 22nd January, 2016, they received a notice from the 1st Respondent inviting them to attend a public hearing with regard to the suit property and that when they attended the hearing on 27th January, 2016, the 2nd Interested Party's Director and his advocate were informed that the proceedings in regard to the suit property had been going on for two (2) years. Counsel submitted that the hearing was adjourned to 17th February, 2016.

65. Counsel submitted that they were served with the 3rd Interested Party's complaint on 5th February, 2016; that they later learnt that another public hearing had been scheduled through the press for 27th February, 2016 and that when the matter came up again for hearing on 4th November, 2016, the hearing of the complaint did not proceed because the 1st Petitioner's advocate filed a Preliminary Objection challenging the jurisdiction of the 1st Respondent.

66. It was the submissions of the 2nd Interested Party that on 4th November, 2016, when the complaint was called out for hearing, neither the complainant nor their advocate were present in court. Counsel submitted that the Chair of the session, who was also the Vice-Chairperson of the 1st Respondent, informed them that she had communicated with one of the 3rd Interested Party's family members, Wavinya Ndeti, who informed her that she was bereaved; that the said Vice-Chair of the 1st Respondent informed them that the complaint will be heard on another date and that they were never served with a hearing notice.

67. The 2nd Interested Party's advocate submitted that the complaint was heard ex-parte; that the 2nd Interested Party was deprived of his right to a fair hearing and fair administrative action and that whilst hiding behind its overall mandate, the 1st Respondent delved into investigations regarding a dispute between private persons.

68. The 3rd Interested Party's advocate submitted that while arriving at its decision, the 1st Respondent was acting as a quasi-judicial body exercising some level of judicial authority over the matter; that the 1st Respondent sent out public invitation to members of the public notifying them of a complaint in respect of L.R. No. 337/1645 and that the Petitioners were aware of the said notices and filed their response.

69. Counsel submitted that in its decision, the 1st Respondent outlined the representation by the Petitioners in respect to the complaint; that the Petitioners were not able to give any explanation as to how the allocation of L.R No. 337/1645 was made despite the existing allocation to the 3rd Interested Party and that due process was indeed followed by the 1st Respondent in arriving at a determination on the true ownership of the impugned parcel of land.

70. Counsel submitted that the determination of the 1st Respondent was made on 28th April, 2017 well within the five (5) years period when the mandate of the Commission had not expired; that the Gazette Notice is not the challenged decision and that if communication of the decision is made late by the Government Printer, such a delay cannot be visited upon a successful party in the proceedings. Counsel

relied on the case of ***Robert N. Gakuru & Others vs. County Council of Kiambu & Another and Catholic Diocese of Moshi vs. Attorney General (2000) 1 EA 25.***

71. On the issue of the jurisdiction of the 1st Respondent, counsel submitted that Section 14 of the National Land Commission Act *(NLC Act)* grants the 1st Respondent the power to review grants in respect of all public land within five (5) years with a view of establishing their propriety or legality.

72. Counsel relied on the case of ***Compar Investments Limited vs. National Land Commission & Others (2016) eKLR***, where it was held that where the land in question was originally public land, the 1st Respondent can exercise jurisdiction and conduct a review of the ownership of the land. The 3rd Interested Party's counsel submitted that one cannot pass a better title than he has and that the recourse for an innocent party is as against the person who transferred the land to him.

73. Counsel submitted that the 3rd Interested Party is the legitimate and lawful owner of L.R No. 337/1645; that the 3rd Interested Party has been in actual possession of the land since 1960 and that the 1st Respondent took into account the documents and representations made by the parties in arriving at its determination.

Analysis and findings:

74. In the Petition before this court, the 2nd Petitioner has averred that it purchased land known as L.R No. 337/1645 measuring approximately 5 acres *(the suit property)* from the 1st Petitioner in the year 2004; that the purchase of the land by the 2nd Petitioner was by way of purchase of shares in the 1st Petitioner's Company and that the 2nd Petitioner took possession of the suit land in the year 2004.

75. Despite being in possession of the suit land, it is the Petitioners' and the 1st and 2nd Interested Parties' case that on 9th November, 2018, in the Gazette Notice No. 11714, the 1st Respondent directed the 2nd Respondent to revoke the title for L.R No. 337/1645 held by the 1st Petitioner. In the Petition, the Petitioners have sought for the following orders:

> ***a. This Honourable Court be pleased to issue an order of certiorari to remove into this court to quash the Gazette Notice No. 11714 published on 9th November, 2018 by the 1st Respondent recommending the 2nd Respondent to revoke the 1st Petitioner's title to the suit property known as Land Reference No. 337/1645 that has been sub-divided into 18 titles namely: L.R. No. 337/3821, 337/3822, 337/3823, 337/3824, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3832, 337/3833, 337/3834, 337/3835, 337/3836, 337/3837 and 337/3838.***
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> ***b. A permanent injunction be and is hereby issued restraining the 1st Respondent from interfering with peaceful and quiet possession of the 1st Petitioner's properties known as L.R. No. 337/3821, 337/3822, 337/3823, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3833, 337/3834, 337/3838 that resulted from the sub-division of L.R No. 337/1645.***
>
> ***c. An order of prohibition be and is hereby issued forbidding the 1st Respondent by itself, its agents, employees and any other persons whomsoever or howsoever acting on, with and or under its instructions from conducting any further review or action in respect of all that parcel formerly known as L.R. No. 337/1645 and the resultant sub-divisions registered as L.R. No. 337/3821, 337/3822, 337/3823, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3833, 337/3834, and 337/3838 registered in the name of the 1st Petitioner.***
>
> ***f. The 1st Respondent and the 5th Respondent be and are hereby directed to proceed and enforce an award of Kshs. 197,985,519 contained in its letter dated 23rd January, 2018 in favour of the 1st Petitioner with respect to the property known as L.R No. 337/3838.***
>
> ***g. A declaration that the 1st Petitioner is a duly registered owner of L.R. No. 337/1645, and the resultant sub-divisions, with an indefeasible title.***
>
> ***h. In the alternative, the 1st, 2nd, 3rd, and 4th Respondents be and are hereby ordered to compensate the 1st Petitioner for loss of suit property and the resultant sub-divisions measuring approximately undeveloped 3 acres at the market rate or the rate of Kshs. 41,601,756 contained in award contained in the 1st Respondent's letter dated 23rd January, 2018 which makes a total sum of Kshs. 322,790,787 inclusive of L.R. No. 337/3838.***
>
> ***i. The Respondents do bear the costs of this Petition jointly and/or severally.***

76. From the pleadings and the evidence before me, the issues that arise are as follows:

> ***a. Whether the Petition is validly before this court.***
>
> ***b. What is the jurisdiction of the 1st Respondent and this court.***
>
> ***c. Whether the Petitioners, the 1st and the 2nd Interested Parties were granted a fair hearing by the 1st Respondent.***
>
> ***d. Whether the 1st Petitioner's title is valid.***

e. Whether the Petitioners, 1st and 2nd Interested Parties are bona fide purchasers of the suit property.

f. Which orders should be issued by the court.

77. To answer the above issues, the facts of this dispute must be put into context. The 1st Petitioner, Tinek Limited, was incorporated on 2nd August, 1993. According to the documents annexed on the 2nd Petitioner's Affidavit, the 2nd Petitioner purchased parcel of land known as L.R. No. 337/1645 from the 1st Petitioner vide an Agreement dated 20th December, 2004. The purchase price in the sale agreement was indicated as Kshs. 5,000,000 which was to be paid in instalments.

78. The 2nd Petitioner has averred that after entering into the Agreement of 2nd August, 1993 with the 1s Petitioner, they agreed to have the shares of the 1st Petitioner's then Directors and shareholders transferred to him and his wife without the need of transferring the land to the 2nd Petitioner and that the transfer documents in respect to the shares were duly registered at the Companies' registry. The land therefore remained in the name of the 1st Petitioner despite the change of the Directors and Shareholders.

79. According to the copy of the title that was exhibited by the 1st Petitioner, the Grant Number I.R. 60729 with L.R. No. 337/1645 measuring 2.050 Ha *(5.125 acres)* was registered in favour of the 1st Petitioner on 18th October, 1993. The title shows that the entire land was leased to the 2nd Interested Party on 26th February, 2008.

80. In the year 2008, and with the consent of the 2nd Interested Party, the entire parcel of land was sub-divided into eighteen (18) plots, running from L.R. Nos. 337/3821-3838. It is the case of the Petitioners and the 2nd Interested Party that the 2nd Interested party continued leasing L.R No. 337/3838, on which land he had constructed a fuel station known as Zehra Petrol Station. The 2nd Interested Party's Lease in respect of L.R No. 337/3838 is to run until the year 2023.

81. Other than leasing L.R. No. 337/3838 to the 2nd Interested Party, it was argued by the Petitioners and the 1st Interested Party that the 1st Petitioner sold to the 1st Interested Party L.R. Nos. 337/3823-3837, and that all along, the 2nd -4th Respondents did not inform the Petitioners that L.R. No. 337/1165 *(the mother title)* had any defects.

82. The Petitioners and the 2nd Interested Party have stated in their pleadings that on 21st January, 2016, they received communication from the 1st Respondent inviting them to attend a hearing on 27th January, 2016; that the 3rd Interested Party had lodged a complaint with the 1st Respondent in respect to the suit property and that they duly attended the hearing slated for 27th January, 2016.

83. Both the Petitioners and the 2nd Interested Party have claimed that the hearing of 27th January, 2016 never took place. According to the Petitioners, the hearing was adjourned to 4th November, 2016, on which date they raised a Preliminary Objection on the jurisdiction of the 1st Respondent to hear the dispute.

84. On the other hand, the 2nd Interested Party's claim is that the matter was adjourned to 17th February, 2016; that on 17th February, 2016, they were informed that the 3rd Interested Party's family member was bereaved and that the matter was adjourned to 4th November, 2016.

85. The Petitioners and the 2nd Interested Party averred that the last time the complaint came up for mention was on 4th November, 2016. According to the Petitioners, when they raised a Preliminary Objection, the complaint was adjourned without being heard. It is the position of the Petitioners and the 2nd Interested Party that the 1st Respondent informed them that they will serve them with a hearing notice, which was never done.

86. The Petitioners have exhibited a letter dated 9th July, 2018 in which their advocate inquired from the 1st Respondent *"the status of this matter as the same has never proceeded since we raised a Preliminary Objection in 2017."* According to the Petitioners, an officer of the 1st Respondent indicated on their letter dated 9th July 2018 that the matter had not been heard, and that the same was awaiting the renewal of the term of the 1st Respondent.

87. While waiting for the hearing of the dispute, it was the averment of the Petitioners and the 2nd Interested Party that they were shocked to discover that the title in respect of L.R. No. 337/1645 had been revoked vide a Gazette Notice No. 11714 of 9th November, 2018 without giving them a hearing.

88. According to the Petitioners, the 1st Respondent was well aware of the existence of the 1st Petitioners title to the suit property and even made an Award dated 23rd July, 2018 in favour of the 1st Petitioner for a sum of Kshs. 197,985,519 to facilitate the acquisition of L.R No. 337/3838 for the purpose of construction of a second carriageway of Athi River -Machakos turn-off Road Project.

89. The 1st Respondent's case is that the 3rd Interested Party filed a complaint with the 1st Respondent together with written submissions; that the 3rd Interested Party's claim was that is owns L.R. Nos. 337/1208; 337/1645; 337/4775; 337/1884; 337/973; 337/1868 and 337/477 and that 3rd Interested Party sought for the intervention of the 1st Respondent to redress the illegality perpetrated by the Petitioners

90. According to the 1st Respondent, the firm of Maondo and Mulanya advocates appeared before the 1st Respondent on behalf of the Petitioners and the 2nd Interested Party; that on 17th February, 2016, the 1st Respondent was informed that the Petitioners had gone to court and filed Petitioner No. 57 of 2016 in the High Court at Nairobi seeking to stay the proceedings and that on 12th October, 2016, the 1st

Petitioner filed written submissions claiming to have been allocated the subject land.

91. It is the 1st Respondent's case that the 3rd Interested Party produced several documents showing how they utilized the disputed land since 1960, and how they were allocated the land. I shall refer to the documents produced by all parties in a short while.

a. Whether the Petition is validly before the court

92. The 3rd Interested Party's advocate submitted that in arriving at its determination, the 1st Respondent was acting as a quasi-judicial body; that a Constitutional Petition cannot be brought against a quasi-judicial body alleging violation of rights and freedoms of a party before it and that the Petitioners should have either filed an Appeal or a Judicial Review Application. Counsel relied on the Indian case of ***Naresh Shridhar Mirajkar & Others vs. State of Maharashtra & Another*** and ***Parbhani Transport vs. The Regional Transport, Petition Number 110 of 1959.***

93. Counsel submitted that a determination on ownership of the subject title can only be made upon a formal hearing of the matter by the court in an Appeal and not through a Constitutional Petition; that a Constitutional Petition can only be filed for purposes of curing injured rights and freedoms and that the Petitioners are yet to establish their proprietary interest in the suit land.

94. According to the 3rd Interested Party, the Petitioner cannot do so in a Petition and that the jurisdiction of this court in enforcing the Bill of Rights is limited to making a determination whether a right has been infringed or threatened with infringement.

95. One of the grievances of the Petitioners is the alleged act of the violation of their rights under Articles 40, 47 and 50 of the Constitution by the 1st Respondent when it directed the 2nd Respondent to revoke its title. Article 40 (1) of the Constitution provides as follows:

> ***"Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya."***

96. On the other hand, Article 47 (1) of the Constitution stipulates that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, while Article 50 provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

97. Indeed, according to the Petitioners and the 1st and 2nd Interested Parties, their right to own property in any part of the country has been violated by the 1st Respondent's direction to have their titles cancelled and that having not been afforded a fair hearing, the 1st Respondent breached both Articles 50 and 47 of the Constitution. It is in that respect that the Petitioners and the Interested Parties are seeking for the issuance of an order of certiorari and declaratory orders.

98. Article 22 of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The mode of instituting proceedings to enforce the Bill of Rights is by way of a Petition.

99. Once a Petition to enforce the Bill of Rights is filed, like in the instant case, Article 23(3) provides the remedies that are available to a Petitioner, which include: a declaration of rights; an injunction; a conservatory order; an order of compensation and an order of Judicial Review.

100. The Environment and Land Court Act, which establishes this court, grants this court the jurisdiction to issue prerogative orders; award damages; compensation; specific performance; restitution; declarations; and costs (see section 13 (7) of the ELC Act).

101. To the extent that the Petitioners have prayed for a declaration that their rights have been breached by the 1st Respondent, and for an order of certiorari, which is a Judicial Review order, I find that the Petition is validly before this court.

b. The jurisdiction of the National Land Commission

102. The Petitioners submitted that the National Land Commission does not have jurisdiction to determine a dispute between private entitles; that the Petitioners and the 1st and 2nd Interested Parties, being *bona fide* purchasers for value, the 1st Respondent did not have jurisdiction to direct the Registrar to revoke the Petitioners' title and that the actions of the 1st Respondent were ultra vires the Constitution and the National Land Commission Act.

103. The 1st Respondent draws its mandate from Article 67 of the Constitution. One of the functions of the 1st Respondent under Article 67(2) (a) of the Constitution is to manage public land on behalf of the national and county governments.

104. Article 67(3) of the Constitution provides that the National Land Commission may perform any other functions prescribed by the National Legislation. Article 68(c) (v) of the Constitution provides that Parliament shall enact legislation to enable the review of *all* grants or dispositions of public land.

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

"14. Review of grants and dispositions:

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

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

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

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

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

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

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

106. This court had an occasion to determine the mandate of the 1st Respondent viz-a-viz the provision of Article 68(c) (v) of the Constitution and Section 14(1) of the National Land Commission Act. In the case of ***Republic vs. National Land Commission and Others Ex-parte Dakawou Transporters Limited (2020) eKLR***, the court held as follows:

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

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

> ***"Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land. I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done. It is therefore not true that once land falls under the purview of the definition of "private land", the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title."***

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

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

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

107. I still hold the view, as I did in the above case, that the mandate of the 1st Respondent *(before it lapsed in the year 2017)* was to examine the procedure that was followed by the then allocating bodies, in the allocation of public or un alienated government land to individuals or entities, and establish if the law was followed or not.

108. Indeed, the mandate of the 1st Respondent to review *all* grants or dispositions of public land, with a view of establishing their propriety, came about after the Ndungu Report on illegally acquired public land, and after the complaints by the public of how the previous government regimes had allocated un alienated government land, in what was pejoratively referred to as *"land grabbing"*.

109. During the Constitution making process and the formulation of the National Land Policy, 2009, it was agreed that due to the magnitude of the phenomenon of *"land grabbing"*, a specialized body be established to examine all grants that had been issued with a view of establishing those that had been issued illegally, and have the same revoked.

110. The said review was to be in respect of all grants, which could only have been issued to private persons. To deal with the menace of the illegally issued grants/titles over government land, the National Land Policy, 2009, proposed as follows:

> ***"62. The Land Act shall provide, under the National Land Commission, for the establishment of***
>
> > ***"a. …***
> >
> > ***b. A Land Titles Tribunal to determine the bona fide ownership of land that was previously public or trust land."***

111. Although the National Land Policy, 2009 proposed for the establishment of a Land Titles Tribunal to deal with the menace of *"land grabbing"*, which is the same proposal that the Ndungu Lands Commission had proposed, Parliament saw it fit to give this mandate to the 1st Respondent. So as to expedite the process of reviewing all grants to establish their propriety, Parliament gave to the 1st Respondent a time line of five (5) years to do so.

112. It is with the above background of the problem pertaining to the allocation of public land to legal persons that had bedeviled this country for many years, that the 1st Respondent went about the issue of reviewing grants which were in private hands, either on its own motion, or by way of a complaint. Indeed, the law allowed the 1st Respondent to direct the Registrar to revoke any title that it found to have been acquired in an unlawful manner. This mandate lapsed on 1st May, 2017, which was five (5) years from the time when the National Land Commission Act came into force.

113. The contention by the Petitioners and the 1st and 2nd Interested Parties that the 1st Respondent did not have jurisdiction to handle the dispute between themselves and the 3rd Interested Party is therefore not true. The Constitution and the National Land Commission Act did not confine the 1st Respondent to reviewing a particular kind of grants. They had the mandate to review all grants, whose head lessor is the government, and make appropriate orders. That was the intention of Parliament and the framers of the Constitution.

114. The mandate of the 1st Respondent to review all grants in respect of land which was previously public land, with a view of establishing their propriety or legality, excludes Trust Land/Community Land, which had been included in the National Land Policy, 2009. Therefore, the 1st Respondent's mandate could not be extended to the reviewing of Title Deeds and Certificates of Leases issued in respect of Trust Land, under the Trust Land Act *(repealed)* and the Community Land Act.

115. Related to the mandate of reviewing grants by the 1st Respondent is the claim alleging historical land injustices. Under Section 15(3) (c) of the National Land Commission Act, a historical land claim may be admitted by the 1st Respondent if *"the claimant was either a proprietor or occupant of the land upon which the claim is based"*. After hearing a claim for historical land injustice by any claimant, the 1st Respondent was mandated to recommend for restitution; compensation*;* resettlement on an alternative land *et al.*

116. The mandate of the 1st Respondent to review all grants in respect of public land and claims of historical land injustice is a shared mandate by the 1st Respondent and the courts. In the case of ***Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others (2018) eKLR***, the Court of Appeal held as follows:

> ***"If the National Land Commission had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the National Land Commission and not courts of law. This would prima facie render the Environment and Land Court redundant. We do not think this was intended to be so… 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…"***

117. The above holding also applies to the mandate of the 1st Respondent of reviewing all grants, vis-a-vis the jurisdiction of this court, save to state that where a matter has been filed in this court challenging the issuance of a grant, the 1st Respondent cannot at the same time purport to review such a grant.

118. However, an individual can still file such a claim in this court, or the Magistrate's Court, notwithstanding the mandate of the 1st Respondent. As I have stated above, the intention of Parliament and the framers of the Constitution was to establish a body which will fast track the *"cleaning up"* of the land registry of all the illegally acquired public land, including unalienated government land, that had been alienated to private entities unlawfully.

119. The Petitioners have annexed a grant which was registered in the name of the 1st Petitioner on 18th October, 1993. The grant is a leasehold of 99 years and the head lessor is the government. The suit land was therefore government/public land before the same was purportedly allocated to the 1st Petitioner and registered as LR No. 337/1645 and a grant issued.

120. That being so, the 1st Respondent had the jurisdiction to review the Petitioner's grant to establish how it was issued to the 1st Petitioner. Consequently, the 1st Respondent had the jurisdiction to hear and determine the complaint by the 3rd Interested Party, and I do so find.

c. Whether the Petitioners, the 1st Interested Party and the 2nd Interested Party were given a fair hearing by the 1st Respondent

121. The Petitioners' case is that on 21st January, 2016, the 1st Petitioner was notified of a hearing slated for 27th January, 2016 whereby the 3rd Interested Party was claiming that L.R No. 337/1635 was illegally allocated to the 1st Petitioner. According to the Petitioners, they attended the hearing on 27th January, 2016 but the hearing did not proceed due to constraint of time. The complaint was then slated for 17th February, 2016.

122. It is the Petitioners' case that on 17th February, 2016, neither the complainant nor his advocate was in court. The complaint was again adjourned. The Petitioners have exhibited a Mention Notice that they were served for 4th December, 2016. On the said date, it is the Petitioners' case that they raised a Preliminary Objection on the jurisdiction of the 1st Respondent.

123. However, they were not heard on 4th December, 2016 by the 1st Respondent. Instead, they were told that a fresh hearing notice will issue. These chronology of events was supported by the 2nd Interested Party who was also represented during the said three occasions that the complaint came up for hearing. The 1st Interested Party, who has stated that he bought some of the sub divisions of LR No. 337/1645, did not attend any of the hearings.

124. The 1st Respondent's position is that on 27th January, 2016, the Petitioners and the 2nd Interested Party were represented when the matter came up for hearing; that on 17th February, 2016, the 1st Respondent was informed that the Petitioners had filed Petition No. 57 of 2016, High Court, Nairobi in which they sought to stay the proceedings and that on 12th October, 2016, the 1st Petitioner filed written submissions before the Commission.

125. The submissions purportedly filed by the 1st Petitioner on 12th October, 2016 have neither been exhibited by the 1st Respondent nor the Petitioners. Indeed, the 1st Respondent, other than annexing the attendance sheets that were signed by attendees, has not exhibited any evidence, in the form of proceedings, to show that the Petitioners and the 1st and 2nd Interested Parties were heard, either by way of written submissions or by oral evidence.

126. Although in its decision, the 1st Respondent has stated that it considered the submissions of the Petitioners, it should have annexed on the Affidavit either the proceedings or a copy of the Petitioners' submissions. It never did either of the two.

127. The right to a fair hearing and an administrative action that is procedurally fair cannot be emphasized. Article 47 of the Constitution provides as follows:

> ***"47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> ***(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-***
>
> ***(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
>
> ***(b) promote efficient administration."***

128. Article 50 on the other hand complements Article 47 as follows:

> ***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

129. In the case of ***Pastoli vs. Kabale District Local Government Council & Others (2008) 2 EA 300***, the court held as follows:

> ***"…. Procedural impropriety is when there is a 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 or to act with procedural fairness towards one to be affected by the decision…"***

130. In ***Republic vs. The Honourable The Chief Justice of Kenya & Others Ex-parte Moijo Mataiya Ole Keiwua,*** HCMA No. 1298 of

2004, the court held as follows:

> ***"…The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individual or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which whose decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken… As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated…."***

131. In ***De Souza vs. Tanga Town Council (1961) E.A 377,*** the court held as follows:

> ***"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."***

132. Considering that the Petitioners and the 1st and 2nd Interested Parties have deponed that they were never heard, whether by way of submissions or orally, the 1st Respondent should have shown that indeed the Petitioners and the Interested Parties were heard.

133. Having failed to exhibit the proceedings showing how the Petitioners and the Interested Parties were heard, this court finds that the Petitioners, the 1st Interested Party and the 2nd Interested Parties were not afforded an opportunity of presenting their case before the 1st Respondent made its decision.

134. The decision of the 1st Respondent was tainted by procedural impropriety in that the Petitioners and the 1st and 2nd Interested Parties where not afforded an opportunity of being heard before the decision was made. That decision should therefore be quashed by this court.

The validity of the Title for L.R. No.337/1645

135. In the Petition before this court, the Petitioners have sought for a declaration that the 1st Petitioner is the duly registered owner of L.R. No. 337/1645 and the resultant sub-divisions, with an indefeasible title. The 1st Petitioner has also prayed that the 1st and 5th Respondents be directed to enforce an Award of Kshs. 197,985,519 in favour of the 1st Petitioner with respect of L.R No. 337/3838 and an order prohibiting the 1st Respondent from conducting any further review in respect of L.R. Nos. 337/1645 and the resultant sub-divisions registered as L.R. No. 337/3821-3838.

136. In the alternative, the Petitioners have prayed that the 1st, 2nd, 3rd and 4th Respondents be ordered to compensate the 1st Petitioner for loss of the suit property and the resultant sub-divisions at the market rate or at the rate of Kshs. 41,601,756 per acre making a total sum of Kshs. 322,790,787, inclusive L.R No. 337/3838.

137. The above declarations can only issue if the court is satisfied that the tittle that the 1st Petitioner is holding, together with the resultant sub-divisions, was issued lawful. This is the requirement of Article 40(6) of the Constitution which provides that the right to protection of property does not extend to any property that has been found to have been unlawfully acquired.

138. Article 40(6) of the Constitution has been the turning point in countering the often held belief that once a title is issued, like in this case, the same is absolute and indefeasible. Indeed, even before the promulgation of the Constitution, courts had held that where a tittle is issued fraudulently or illegally, the same cannot be protected by the law. One such case is ***Republic vs. Minister for Transport & Communication & 5 Others, Ex parte Waa Ship Garbage Collector & 15 Others (2006) 1 KLR (E & L) 563*** where Maraga J. *(as he was then)* held as follows:

> ***"Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of indefeasibility of a Tittle Deed…"***

139. In the case of ***Chemei Investments Limited vs. The Attorney General & Others Nairobi Petition No. 94 of 2005***, the court held as follows:

> ***"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility."***

140. In ***Milan Kumarn Shah & 2 Others vs. City Council of Nairobi & Another, HCCC No. 1024 of 2005***, the court state as follows:

> ***"We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated that to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."***

141. In ***Henry Muthee Kathurima Vs Commissioner of Lands & Another (2015) eKLR,*** the Court of Appeal held as follows:

"We have considered the provisions of Section 26 of the Land Registration Act in light of the provision of Article 4o (6) of the Constitution and it is our considered opinion that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by the provision of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility of title is inapplicable to the extent that title to the property was unlawfully acquired."

142. In the case of ***Redcliff Holdings Limited Vs Registrar of Titles & 2 others (2017) eKLR,*** the Court of Appeal held as follows:

"The Judge further appreciated the import of Article 40 of the Constitution which protects the rights of property that is lawfully acquired, thus a title under Section 23(1) of the Registration of Titles Act is no longer held sacrosanct by hook, line and sinker as it was under the Australian Law of Torrens Systems especially when there are allegations of illegalities or irregularities in acquisition of title. In this respect the Judge went on to cite the case of Mureithi & 2 Others vs. Attorney General & Others, Nairobi HCMA No. 158 of 2005 (2006) 1 KLR where the courts even before the promulgation of the Constitution, appreciated that the mere fact that a person had title to land did not mean that such title could not be questioned."

143. The 1st Petitioner exhibited the Grant for L.R. No. 337/1645 that was issued to it by the President on 18th October, 1993. In the Affidavit in support of the Petition, the 2nd Petitioner did not state if the 1st Petitioner was the initial allotee of L.R. No. 337/1645, and if so, if it was issued with a Letter of Allotment before the Grant was issued to it. Instead, the 2nd Petitioner stated how he purchased the shares in the 1st Petitioner and then sub-divided the suit land into 18 portions in the year 2008.

144. When the 1st Respondent's Director of Legal Affairs filed a Replying Affidavit in which he stated that the 1st Petitioner never exhibited any documents on the initial allocation of the suit land, including the letter of allotment; authority to allocate the land and the approved Part Development Plan (PDP), the 2nd Petitioner filed a Further Affidavit in which he introduced a letter of allotment in the name of Lucy Njeri Mwangi.

145. The Letter of Allotment in the name of Lucy Njeri Mwangi dated 19th March, 1990, accompanied with a Part Development Plan number 39711/XVI/292A shows that the said Lucy Njeri Mwangi was to pay a stand premium of Kshs. 217,215 for an unsurveyed plot in Athi River Town.

146. The 1st Respondent has denied that L.R. No. 337/1645 was allocated to the 1st Petitioner. The 1st Respondent has further stated that the 1st Petitioner did not have an approved Part Development Plan. In his letter to the 1st Respondent, the officer at Lands, while addressing the issue of an area measuring 24.405 Ha in Mavoko, which allegedly includes where the suit land is situated, stated as follows:

"This plot was re-allocated to Lucy Njeri Mwangi vide Letter of Allotment No. 39711/XVI/112 of 9th May, 1990. Authority to allocate appears suspicious and fake and the plot has no approved Part Development Plan. The plot has a Petrol Station on site. This plot belongs to Ndeti family and should be nullified in accordance to Section 14 of the National Land Commission Act 2012."

147. The process of allocation of government land was stated by this court in the case of ***Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR.*** In the said case, this court held as follows:

"130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Company Limited vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013."

148. While dismissing the Appellants' appeal in the case of ***Nelson Kazungu Chai & 9 others Vs Pwani University College (2017) eKLR***, the Court of Appeal held as follows:

"Worth noting as well is that no Part Development Plan was produced to back the Appellants' claim that due process had been followed as alleged."

149. While introducing the Letter of Allotment in the Further Affidavit, the 2nd Petitioner did not state at all the relationship between the 1st Petitioner's title and the Letter of Allotment that was issued to Lucy Njeri Mwangi or the relationship between the 1st Petitioner and Lucy Njeri Mwangi.

150. In the Memorandum of Registration of Transfer of Lands annexed on the 2nd Petitioner's Further Affidavit, it shows that the suit land was transferred directly from the President, and not Lucy Njeri Mwangi, to the 1st Petitioner, on 21st October, 1993. If that is the position, where is the Letter of allotment that gave rise to the Grant that was registered in favour of the 1st Petitioner? Put it differently, was L.R. No. 337/1645 lawfully alienated in favour of the 1st Petitioner?

151. In the case of ***Munyu Maina vs Hiram Gathiha Maina [2013] eKLR,*** the Court of Appeal stated as follows:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

152. The importance of the letter of allotment in the acquisition of government land was restated in the case of ***Swaleh Mohamed Waziri & 3 others Vs Houd Mohmoud Athman & another (2020) eKLR*** by the Court of Appeal as follows:

"The respondents' who did not appear in court or testify had annexed copies of their title documents to the replying affidavit of the 1st appellant. Distinctly missing from their documents were letters of allotment, and receipts evidencing payments of stand premium charges and related fees. It is clear that, instead of title to the subject land being issued to the 1st respondent, who had paid the required sums, and was therefore the bonafide allottee, titles were issued to the titleholders, who had neither been allocated the subject land by the Commissioner of Lands, and nor had they paid any stand premiums in respect of the subject land.

Essentially, a crucial step in the land allotment process was omitted in the titleholders' case leading to the conclusion that the titles they acquired were not legally established, while the 1st respondent who, by virtue of his having paid the stand premiums and survey fees and subsequently acquired rights to own the land, was deprived of ownership the subject land, which was a violation of his rights. This is why, the learned judge stated;

> ***"The titles that were issued to the 3rd to 10 respondents have no basis at all. In the absence of evidence to show the process that was followed before the titles were issued to the 3rd to 10th respondents, I find that the same were not obtained lawfully."***

We agree. As was the learned judge, we too are satisfied that on a balance of probability the 1st respondent discharged the burden of proving that he was the beneficial owner of the subject land, and the learned judge was right to grant the orders sought."

153. The evidence before me shows that the 1st Petitioner did not have a letter of allotment and an approved Part Development Plan. Indeed, there is no evidence to show that the 1st Petitioner paid the requisite stand premium in the letter of allotment that was purportedly issued to one Lucy Wangari or at all.

154. The 1st Petitioner did not also inform this court the relationship it had with the said Lucy Wangari in respect to the suit property, or even the letter of authority that the person who surveyed the land had before surveying L.R. No. 337/1645.

155. Indeed, Petitioners' case becomes even more perilous by the evidence produced by the 1st Respondent and the 3rd Interested Party showing that the same land that the Petitioners are claiming had already been allocated to 3rd Interested Party. It was therefore incumbent on the 1st Petitioner to show that it had either bought the suit land from the initial allotee before a Grant was issued in its favour, or that it was actually allocated the suit land, obtained an approved Part Development Plan and paid the requisite stand premium. That burden of proof was never discharged by the Petitioners.

156. In a nutshell, the evidence before me shows that the Grant that was issued to the 1st Petitioner was issued illegally and the same is void. In ***Macfoy vs. United Africa Co. Ltd (1961) 3 All ER, 1169*** Lord Denning held as follows:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

157. Although the Petitioners, the 1st and 2nd Interested Parties have stated that they are innocent purchasers for value, the titles they are holding emanate from a void title. In the case of ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR*** the Court of Appeal held as follows:

> ***"A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration…But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law."***

158. The Court of Appeal in the ***Arthi Highway case*** *(supra)* further held as follows:

> ***"68. The doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests…bona fide purchaser.***
>
> ***69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof."***

159. There was no evidence, in the form of sale agreements and payment of the purchase price, to show that the Petitioners and the 1st and 2nd Interested Parties were *bona fide* purchasers for value. Even if they were, the title that the 1st Petitioner was holding was a nullity. The 1st Petitioner did not therefore have any title to pass to the 2nd Petitioner or the 1st and 2nd Interested Parties.

Final orders:

160. I am of the view, and I so find, that the 1st Respondent's process of arriving at its decision of 28th April, 2017 and published in the Gazette Notice number 11714 of 9th November, 2018, was unprocedural, and the same be, and is hereby quashed.

161. The Petitioners prayed for a declaration that the title for L.R. No. 337/1645 and the subsequent sub-divisions are valid titles and that the 1st Petitioner is a duly registered owner of L.R. No. 337/1645, and the resultant sub-divisions, with an indefeasible title. The Petitioners also prayed for an order directing the 1st and 5th Respondents to proceed and enforce an Award of Kshs. 197,985,519 for L.R No. 337/3838, which is a sub division of L.R No. 337/1645.

162. In the alternative, the Petitioners prayed that the 1st, 2nd, 3rd, and 4th Respondents be ordered to compensate the 1st Petitioner for loss of L.R No. 337/1645 and the resultant sub-divisions at the market rate or at the rate of Kshs. 41,601,756 per acre contained in the Award contained in the 1st Respondent's letter dated 23rd January, 2018, making a total sum of Kshs. 322,790,787

163. Having found the titles for L.R No. 337/1645 and the subsequent sub-divisions to be void, it follows that the Petitioners and the 1st and 2nd Interested Parties are not entitled to either the suit land or compensation. Indeed, it would be remiss of me to leave the titles for L.R No. 337/1645 and L.R No. 337/3821 - 3838 on public record.

164. For those reasons, I make the following orders:

a. An order of certiorari to remove to this court and quash the decision of the 1st Respondent dated 28th April, 2017 and the Gazette Notice No. 11714 published on 9th November, 2018 by the 1st Respondent be and is hereby issued.

b. The Petitioners' title to Land Reference number 337/1645 and the subsequent titles namely: L.R. Nos. 337/3821-3838 (both inclusive) are hereby declared null and void and are cancelled forthwith.

c. A declaration that the 1st and 5th Respondents be directed to enforce an award of Kshs. 197,985,519 contained in the letter of 23rd January, 2018 in favour of the 1st Petitioner with respect to property known as L.R. No. 337/3838 be and is hereby declined.

d. A declaration that the 1st Petitioner be compensated for the loss of the suit property and the resultant sub-divisions to the tune of Kshs. 322,790,787 be and is hereby declined.

e. Each party to bear its/his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE