REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISCELLANEOUS CONSTITUTIONL APPLICATION NO. 1 OF 2016

In the matter of an application under Article 165 (6) and (7) of the Constitution

and

In the matter of exercising supervisory jurisdiction over the National Land Commission's Investigations and proceedings under Article 67 (2) (E) of the Constitution and Section 14 of the National Land Commission Act, 2011 touching L.R. No. 216/8, L.R. No. 12261 and L.R. No. 12236

And

In the matter of enforcement of the applicants Rights under Article 40 and 50 of the Constitution

And

In the matter of sections 24 (a), 25 and 26 (1) of the Land Registration Act

BETWEEN

Sceneries Limited…….……..…….....Applicant

Versus

National Land Commission.....….....Respondent

And

Ngengi Muigai.....1st Interested Party

Kenya Reinsurance Corporation Ltd.....2nd Interested Party

JUDGEMENT

By an originating summons expressed under the provisions of Article 165 (6) & (7) of the Constitution of Kenya 2010 and Rules 24-30 of the constitution of Kenya (Supervisory Jurisdiction and Protection of

Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, Sceneries Limited (hereinafter referred to as the applicant) moved this court seeking several declarations/orders.

The originating summons was accompanied by a Notice of Motion seeking interim conservatory orders staying the proceedings/investigations by the Respondent which were scheduled to take place on 5th May 2016 or any day thereafter touching on L.R. No. 12236, L.R. No. 216/8 and L.R. No. 12261 until determination of the application. Interim orders were granted and on 14th September 2016 parties agreed to proceed with the hearing of the originating summons and the said orders were extended until the determination of the originating summons.

Briefly, the grounds in support of the originating summons are enumerated in the supporting affidavit of Samuel K. Macharia, a director of the applicant are inter alia that:-

i. That the Respondent is an independent and impartial tribunal within the meaning of Article 50 (1) of the constitution and it is required to afford the applicant a fair hearing, that the Respondent is charged with the investigations of the validity of titles to land by virtue of Article 67 (2) (e) of the constitution and section 14 of the National Land Commission Act[1] and make recommendations which include revocation of a title to land;

ii. Further, Articles 50 and 165 (7) mandates the Respondent to administer justice in a fair manner when investigating the validly of titles and that the Respondent is investigating unfairly, unconstitutionally and illegally the validity of the applicants former property LR. No. 12236 which he sold to the second interested party in 1997 at Ksh. 550,000,000/= and should it hold that the title was illegal, the applicant would be required to refund to the second interested party the above sum received 19 years ago.

*iii. **That** the Respondent has not made rules to govern its investigations, yet under common law it is obliged to make rules, and further that by the time the applicant learnt of the questioned proceedings, the Respondent had heard three witnesses and that the Respondent declined to supply the applicant with the proceedings and that the proceedings were commenced in 2015 without the applicants notice. It is averred that the president of the Republic of Kenya, acting through the commissioner of Lands issued to the applicant a grant on 10th July 1997 in respect of L.R. No. 12236 yet neither is the Commissioner of Lands or the Chief Land Registrar is a party to the proceedings yet their actions are being challenged.*

*iv. **That** the Respondent investigated the said titles between 15th March 2015 and March 2016 without informing the applicant or the second interested party, yet they knew they would be affected by the decision and that the proceedings in question were commenced by the first interested party through a complaint made to the Respondent by the first interested party on 23rd September 2015 but not copied to the applicant.*

v. ***That** the Respondent does not serve or summon persons affected by its proceedings rather it merely lists in the news papers the numbers of the affected titles nor does it require complainants to serve details of their complaints to persons whose titles are complained of and that the applicant was served with the complaint by the first interested party 19 years after it sold the property and by that time three witnesses had already testified.*

*vi. **That** on 7th March 2016 the applicant applied for proceedings but was not supplied with the same instead he was informed that the matter was not yet determined. He also averred that the proceedings contravened the rules of natural injustice, hence the conduct of the proceedings is illegal.*

*vii. **That** there were previous court proceedings involving the first interested party and directors of the applicant over L.R. No. 216/8 which was consolidated with L.R. No. 12261 to form the*

consolidated parcel known as L.R. No. 12236 and that until he lodged his complaint with the Respondent with regard to L.R. No. 12236; the first interested party had claimed an interest in L.R. No. 216/8 which ceased to exist in 1976, and that parcels number 216/8 and 12261 were purchased from Joreth Ltd in 1975 and consolidated into one parcel known as L.R. No 12236 and further the said parcel of land was inherited by her Excellency Mama Ngina Kenyatta who sold it in 1987 and that the first interested party has never had a valid claim to the said land.

Attached to the applicants affidavit are documents in support of the sale to the second interested party. It is also averred that the first interested party's claim is premised on opinion provided by a one Anthony Macharia, a former criminal Investigations officer. The applicant further avers that the power of the applicant is limited to investigating what was formerly called government land and that the land in question is not public land and that the dispute ought to be adjudicated by the Environment and Land Court.

The applicant annexed court documents confirming existence of previous litigation touching on the land a fact the first interested party did not disclose to the Respondent. Paragraphs 52 to 55 of the affidavit dwell on the source of bad blood between the first interested party and the applicants directors. It is also averred that the initial arrangement was for the directors of the applicant and the first interested party to buy shares in the applicant company and the agreement was that if one of them was unable to raise the funds, his share would be bought by the remaining directors. He stated that the first interested party was unable to raise the purchase price, hence he never became a shareholder in the applicant company.

It is also averred that Mama Ngina Kenyatta only supplied the transfer/title of L.R. No. 216/8 which was used to transfer the land and the reasons why she did not avail the title for L.R. No. 12236 were that she was unaware that in 1976, two years prior to his death, her late husband had arranged for the consolidation of L.R. No. 216/8 and L.R. No. 12261 creating L.R. No. 12236 and that he died before title for L.R. No. 12236 was issued. The title was issued on 10th July 1997.

It is also averred that in 1989, the first interested party, learnt that the land had been transferred and registered a caveat claiming to be a shareholder in the applicant company and that the applicant continued paying rates and applied for change of user from agricultural to residential. In 1991, the applicant filed HCCC No 4232 of 1991 seeking removal of the caveat. In 1992 the first interested party obtained an injunction to restrain the applicant from dealing with L.R. No. 216/8 and in July 1996 HCC No. 4232 of 1991 and 6542 of 1991 were consolidated and referred to arbitration but the arbitration stalled in early 1998 and that the first interested party has never challenged the validity of the title through court action and that the court ordered in case no. 4232 of 1991 that the status quo to be maintained and the said order has never been set aside.

It is also averred that in March 1998, the applicant filed civil suit no. 55 of 1998 seeking orders to restrain the arbitrators from proceeding with the arbitration. It is also averred that the first interested party is also litigating on the validity of L.R. No. 12236 in court and before the Respondent.

On 20th July 2016, the first interested party filed a replying affidavit in which he averred that he is one of the shareholders in the applicant company, that the second interested party is party to the fraudulent sale, that the applicant fully participated in the proceedings before the Respondent and even filed a memorandum and submissions and that the prayers sought are misconceived.

The second interested party filed a replying affidavit on 14th July 2016 sworn by Jadiah Mwarania, the managing director of the second interested party who avers inter alia that the second interested party is the registered proprietor L.R. Nos. 12236, 216/8 and 12261 having bought the same from the applicant herein, that the second interested party was never notified of any complaints against it concerning the land in question but only learnt of the proceedings vide a notice in the Daily Nation of 22nd January 2016, and upon attending they requested to be supplied with the necessary pleadings filed by the parties, that the second interested party has never been served with the complaint filed by the first interested party, that the second interested party's advocate raised an objection stating that there were court cases in court touching on the property but the Respondent declined to listen to the objection. He also averred that they

were not supplied with witness statements nor were they allowed to cross-examine the witnesses, that the Respondent is acting contrary to section 14 of the National Land Commission Act[2]and Articles 40, 47 and 60 of the constitution and that the current value of the property is to the tune of Six Billion Shillings.

The Respondent in an affidavit sworn by Brian Ikol filed on 4th August 2016 states that it is mandated to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety and in exercise of this function it operates as a quasi-judicial body within the full meaning of Article 169 (1) of the constitution and the procedure for carrying out this mandate is clearly set out under section 14 of the National Land Commission Act[3] (hereinafter referred to as the act). The process entails analyzing the process under which public land was converted to private land and making findings on the legality of the grants in question and under section 14 (3) of the act it is a requirement that the Respondent gives every person who appears to have an interest notice and opportunity to appear before it and inspect any relevant documents, and that it is a standard operating procedure that the Respondent publishes hearing dates in the dailies for maters scheduled for hearing, hence this matter appeared in the daily nation on 7th November 2015. He avers that the Respondent complied with the provisions of Article 50 of the constitution an section 14 (3) of the act referred to above and that the applicants have severally been represented in the process as evidenced by annexure **BI 1** of the affidavit.

He avers that investigations revealed that the title was fraudulently obtained, and that by the time the Respondent was served with the orders issued on 3rd May 2016, the Review of Grants and disposition Committee of the Respondent had already concluded the deliberations and was in the process of preparing the report a copy of which is annexed to the affidavit.

The applicant through a Replying affidavit of Samuel K. Macharia filed on 3rd September 2016 dismisses the contents of the above replying affidavit as false and misrepresenting the truth. He avers that whether or not a person is a shareholder of a company is a matter for the court to determine and insisted that that the first interested party's claim is statute barred, that the issue is res judicata, that the issue of the alleged fraud was determined in the case of Macharia & Others vs A.G. & Others,[4] and that the alleged fraud was also raised in S.K. Macharia & Others vs. A.G. & Others,[5] and that he was only served with the complaint in April 2016 and that the first interested party and his witness testified in the applicants absence, and reiterated that no notice was served upon him the applicant.

Also on record is a further affidavit by Samuel K. Macharia filed on 5th September 2016 in which he states inter alia that the report by a Mr. Gathaita a retired police officer did not mention that there was previous litigation, namely, Macharia & Another vs A.G. (supra) in which the court indicted the said report and stopped criminal prosecution premised on the same and that the said report was made to deceive the first Respondent and that by publishing or preparing the ruling exhibited to the affidavit of Mr. Ikol, the Respondent flouted this court's order made on 3rd May 2016 and that the applicant was only represented in the proceedings from 15th March 2016 and that the petitioner had intended to call witnesses and by the time the ruling in question was rendered, the applicant had not been supplied with proceedings and that the mode of service adopted by the Respondent was improper[6] and that the procedure in question was unfair[7] and that the 1963 constitution affirmed that all grants made during the colonial period were valid and reiterated the historical origin of the land enumerated by a one James Kamwere, the surveyor who consolidated the parcels of land in question.

Counsels for all the parties filed detailed written submissions which I have considered. The applicants counsel reiterated this courts powers under Article 165 of the constitution to supervise any person, body or authority exercising judicial or quasi-judicial function and if the court is satisfied that there was a breach of fair hearing, the court can declare the proceedings to be null and void[8]and upon review the court has powers to make such orders as may be necessary to meet the ends of justice. Counsel also submitted that under Article 67 (2) (e) of the constitution, the Respondent has no powers to make final determinations but only recommendations to other bodies which may take the necessary action and that the court has powers to declare null and void the purported determination made by the Respondent.[9] Counsel for the applicant also cited the courts powers to issue orders of mandamus[10]and submitted that

courts and quasi-judicial bodies must apply rules of natural justice in default, their decisions would be null and void. Counsel also submitted that where there are no rules of procedure for a quasi-judicial body, the body must make its own rules[11]and since the Respondent did not make rules, its entire proceedings are a nullity. Also counsel submitted that failure to serve documents on the applicant and failure to afford the applicant opportunity to present his witnesses vitiates the decision[12] and urged the court to allow all the reliefs sought in the originating summons.

Counsel for the Respondent submitted that upon receipt of a complaint, the Respondent carried on preliminary investigations and in carrying out its statutory mandate commenced review of the grant and disposition process, that the Respondent has a standard established procedure in place through advertising and informing the general public and that the petitioner was afforded sufficient notice and insisted that it acted within the constitutional provisions and urged the court to dismiss the petition.

Counsel for the first interested party cited lack authority by the two directors of the applicant to file this suit[13] and also submitted that adequate notice was served and insisted that the applicants affidavits were filed without leave and asked the court to dismiss the application.

Counsel for the second interested party urged the court to allow the originating summons citing lack of jurisdiction on the part of the Respondent on grounds that the land in question is private land, hence a private dispute,[14] and also submitted that the Respondent failed to observe the rules of natural justice and insisted that the Respondent flouted section 14 of the Act and Article 50 of the constitution[15]and urged the court to allow the petition.

In his submissions in Reply to the Respondents submissions, the applicants counsel maintained that the Respondent had no power to review the grants in question, that the mandate in question is limited to public land, that allegations of fraud must be specifically pleaded and proved and that where a suit is instituted by majority of shareholders, then no resolution is required[16] and further a resolution could also be filed before the matter is heard[17] and further counsel submitted that the applicants affidavits were all filed with leave of the court.

I now turn to the issues raised in this case the first being the first interested party's failure to disclose to the Respondent that there were previous court proceedings touching on the land in question. In fact the case numbers provided by the applicant and documents annexed to the applicants affidavits confirm that indeed the parties had engaged in numerous court battles. There is a court judgment stopping criminal prosecution instituted against Samuel K. Macharia premised on the report by the retired police officer which report appears to have been relied upon heavily by the Respondent. To me, the omission by the first interested party to disclose to the Respondent the existence of previous court cases touching on the land is not only a serious omission, but an act of bad faith aimed at withholding necessary information from the Respondent, yet he expected it to arrive at a fair decision on his complaint.

I am fully aware in exercising judicial review powers, I am not sitting on appeal and my role is to examine the legality or propriety of the challenged decision. Talking about propriety, I would be failing in my solemn duty if I do not mention that it is settled law that a person who approaches the Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his/her knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner****[18]*** by Viscount Reading, Chief Justice of the Divisional Court.

A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[19]The first interested party was under a solemn duty to bring to the attention of the Respondent the above information and leave it to the court to determine the merits or otherwise of his

complaint.

The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the first interested party, but also to any additional facts which he would have known if he had made inquiries. The question that inevitably follows is whether the non-disclosure was innocent, in the sense that the fact was not known to the first interested party or that its relevance was not perceived. In my view, the non disclosure in this case was not innocent at all but deliberate and such conduct cannot be entertained by a court of law. I find that the above conduct amounted to non-disclosure of material information and renders the propriety of the challenged decision open to question.

On the issue of *res judicata,* as Somervell L.J. stated in *Greenhalgh v Mallard* [20] it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. Clearly, the issues now raised by the applicant touch on the same land, hence the first interested party was not only under a duty to disclose the details of previous litigation, but to provide evidence of the determination or status of each case for the Respondent to satisfy itself that the issues before it were not *res judicata*. A decision arrived at in a matter that has been decided before by a competent court is open to legal challenge and is obviously tainted with illegality and or abuse of court process.

On jurisdiction **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to '*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened*' and the jurisdiction '*to hear any question respecting the interpretation of the Constitution.'* **Article 23** which also touches on jurisdiction of the High court provides that; *"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."* It would also follow that the High Court has jurisdiction to discharge functions falling under **Article 165** of the Constitution.

Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." Article 165 (7) provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

On the scope of the jurisdiction of this court under Article 165 (6) & (7) of the Constitution I strongly opine that one of the fundamental principles in this regard is the issuing of prerogative orders in the form of writs of *certiorari, mandamus and prohibition.* Such writs can be availed only to stop, quash, remove, adjudicate on the validity of judicial acts. The expression "judicial acts" includes the exercise of *quasi-judicial* functions by administrative bodies or other authorities or persons obliged to exercise such functions. Atkin, L.J. thus summed up the law on this point in *Rex v. Electricity Commissioners**[21]*

> *"Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."*

In granting a writ of *certiorari* the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person.[22]

The supervision of the superior court exercised through writs of *'certiorari'* goes on two points, as has been expressed by Lord Sumner in *King vs. Nat Bell Liquors Limited.**[23]*** One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of *'certiorari'* could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

'Certiorari' may lie and is generally granted when a court, a tribunal or a body has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the court or tribunal or body itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances.[24]

Such writs as are referred to above are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to me that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.[25] The foregoing passage indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of *'certiorari.'*

In *Minerva Mills Ltd. vs. Union of India*,[26] the court held that "the power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality." I am of the view that if there is one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review, and it is un-questionably, to my mind, part of the basic structure of the constitution. The High Court's supervisory jurisdiction in relation to lower judicial agencies, is a recognized practice in Kenya; one indeed founded on the express terms of the Constitution of Kenya, 2010, Article 165(6) of which thus provides: "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

The meaning of the term 'supervision' has not been formally set out; and thus its essence is to be drawn from the lexicon. The Concise Oxford English Dictionary thus defines the word 'supervise' as to "observe and direct the execution of (a task or activity) or the work of (a person)."

Judicial review is a form of court proceeding, usually in the Administrative Court in which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. It is only available where there is no other effective means of challenge. Judicial review is concerned with whether the law has been correctly applied, and the right procedures have been followed. In order to succeed the claimant will need to show that either: A public body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so.

Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[27]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[28]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

The issue that inevitably follows is whether or not the manner in which the Respondents conducted the challenged proceedings amounted to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the

substantive rights of the individuals.

'Natural Justice' is an expression of English common law. In *Local Government Board v. Arlidge,**[29]* Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."* As early 1906, the Judicial Committee[30] observed that the principle should apply to every tribunal having authority to adjudicate upon matters involving civil consequences.

In the United States of America, the expression 'natural justice' as such, is not so frequently heard of since due process of law is guaranteed by the Constitution whenever an individual's life, liberty or property is affected by State action. In *Snyder v. Massachussets,*[31] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a *"principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*."

In India the principle is prevalent from the ancient times.[32] In this context, para 43 of the judgment of the Supreme Court in the case of *Mohinder Singh Gill v. Chief Election Commissioner*,[33] may be usefully quoted:-

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

One principle of natural justice is that no man should be condemned unheard or that both sides must be heard before passing any order. A man cannot incur the loss of or liberty for an offence by a judicial proceeding until he has a fair opportunity of answering the case against him. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[34] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law**[35]* says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

Natural justice has been described as "fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair."[36]Its rules have been traditionally divided into two parts*: Audi alteram partem*– the duty to give persons affected by a decision a reasonable opportunity to present their case. Nemo *judex in cau sa sua debet esse*– the duty to reach a decision untainted by bias. "Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it."[37]

Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to

have decisions affecting their rights, interests, or privileges made using a fair, impartial, and

open process which is appropriate to the statutory, institutional, and social context of the decision being made.[38]

Notice of the Hearing. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. The notice must be communicated to the interested party, preferably in writing.[39] In addition to specifying the date and place of the hearing, the notice must be sent in a timely manner (i.e., sufficiently in advance of the hearing), adequately describing the relevant facts and allegations so that a party may respond to them and outlining who will be present at the hearing, what the hearing will entail and the possible effects the decision may have on the rights and interests of the person.[40] What constitutes adequate notice will depend upon the complexity of the matter and whether an urgent decision is essential. In the present case, the Respondent states that they have an established procedure which they adopt, a procedure that involves publishing information in a local daily and even then only the Land Reference number is published. To me that does not constitute sufficient notice. I humbly beg to disagree with the mode of service employed by the Respondent. It does not in my view qualify to be "adequate notice" that complies with the principles of natural justice.

In *R.vs. Ontario Racing Commissioners*,[41] Mr. Justice Haines emphasized that a notice that complies with the principles of natural justice means:-

> *"a written notice setting out the date and subject-matter of the hearing, grounds of the complaint, the basic facts in issue and the potential seriousness of the possible result of such hearing."*

In the event that the procedure or purpose of the inquiry is changed, the body may be required to send a new notice to the parties.[42]Failure to give proper notice does not respect the rules of natural justice[43]and will result in the invalidation of the decision.[44]

The right to be heard requires not only that the party concerned be given prior notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient information to prepare his/her case. As to the disclosure of information, this implies that the party concerned be apprised of reports and documents in the body's possession that may be prejudicial to his/her case. He/she should at least have access to all the information the tribunal or body relied upon when it made its decision. [45]That information should also be disclosed in due time since the party must have sufficient time to prepare for the hearing.

I have carefully analyzed the facts of this case. I note that no notice was served upon the applicant or the second interested party. Details of the complaint were not availed to them in advance, yet their rights were bound to be affected by the decision. The alleged publishing of Land Reference numbers in a local daily is in my view not proper notice. I find no difficulty in concluding that the Respondents violated the rules of natural justice by failing to serve the applicant with adequate notice and details of the complaint and on this ground alone, I am inclined to allow the originating summons before me.

Article 50 of the Constitution provides 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.*
>
> (2) *Every accused person has the right to a fair trial, which includes the right-…*
>
> (3) *If this Article requires information to be given to a person, the information shall be given in language that the person understands.*

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 applicants case succeeds.

The right to fair administrative action in Kenya is now enshrined as a fundamental right under ***Article 47*** of the Constitution, which provides as follows:

> *"47(1) Every person has a 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, that person has the right to be given written reasons for the action.*

Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[46]

Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In *Onyango v. Attorney General*,[47] ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."*

And in *Mbaki & others v. Macharia & Another*,[48] at page 210, the Court stated as follows:-

> *"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

Section 4 of the Fair Administrative Act[49] re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

Subsection 4[50] further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

The petitioner was never supplied with details of the complaint or afforded an opportunity to face the complainant and cross-examine him on the complaints and adduce evidence to rebut the allegations. The manner in which the proceedings were undertaken is a clear breach of the well established rules of natural

justice, totally unfair, illegal, oppressive and an infringement on the rights of the petitioner who is constitutionally entitled to a decision that is procedurally fair and just. The decision is likely to affect the petitioner adversely and as such it is entitled to a fair process.

To a reasonable observer, Respondent acted in a manner that demonstrated failure to adhere to the principles of natural justice, biasness and gross unreasonableness. As **Sedley J** put it in *R vs Somerset CC Ex parte Dixon(COD)*[51]:- *"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."*

*I*n the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others,*[52] *Chaskalson, J*

> *"Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution."*

Article 67 (2) (e) of the constitution and section 5 of the Act stipulates the functions of the National Land Commission which included *inter alia* to *"to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."*

Form the above provision, it is clear that the Respondent is mandated to investigate and recommend appropriate redress. From its report dated 26th July 2016 annexed to the affidavit of Brian Ikol, the Respondent purported to render "a determination" as opposed to a "recommendation." The Black's Law Dictionary defines "determination" as "a final decision by a court or administrative agency." Article 67 (2) cited above is clear and overrides the provisions of section 14 (4) of the act which provides that "after hearing the parties in accordance with subsection (3), the Commission shall make a determination." It is my humble view that under Article 67 (2) (e) of the constitution, the Respondent can only **"recommend appropriate redress"** but cannot purport to make a **"determination"** which is a final decision. On this ground alone, I find that the decision in question is tainted with illegality because the Respondent rendered a "determination" as opposed to a "recommendation" as provided under the constitution, which is the supreme law of the land.

It is also important to recall that the purported determination is dated 26th July 2016 yet on 3rd May 2016 this court issued orders staying the proceedings/investigations before the first respondent and further the said orders were extended on 14th September 2016 until the determination of the originating summons. There is nothing to show that the Respondent was not aware of the said orders, and above all, in the affidavit of Brian Ikol at paragraph 21, it is admitted that by the time the order was served, "deliberations had been concluded and the Respondent was in the process of preparing its report." In his own words, they were in the process of preparing the report. My understanding is that the report was not ready as at "then" and in obedience of the court order, the Respondent ought to have downed its tools at that point in time. One wonders why and how the Respondent went head to prepare the determination. To me, this is unacceptable and flagrant breach of courts orders and manifests bad faith on the part of the Respondent.

Section 14 (2) of the Act provides that 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). Counsel for the applicant submitted that the Respondent has failed to enact rules to guide its operations. This has not been refuted. Evidently, by failing and or refusing to make rules to govern its operations, the Respondent has flouted the provision of section 14 (1) & (2).[53] To me this brings into question the procedural propriety of the entire process, hence the legality of the decision. To the extent that the Respondent has ignored the clear provisions of the law in carrying on the proceedings in question.

The question that falls for determination is, whether the use of the word "shall" is expressing an instruction, a command, or an obligation. Judicial power or power granted to bodies exercising judicial functions including *quasi judici*al bodies as contradistinguished from the power of the laws, has no existence. Courts, Tribunals and bodies exercising judicial power are the mere instruments of the law, and can will nothing. When they are said to exercise a power, it is a mere legal power emanating from the statute, a power to be exercised in discerning the course prescribed by the ; and, when that is discerned, it is the duty of the court or the Tribunal to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge or Tribunal, but it is always exercised for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.***[54]*** I find that the will of the law as expressed in sections 14 (1) & (2) cited above is clear. The Respondent is required to make rules to guide its operations. Failure to do so is a clear breach of the law.

As the Connecticut Supreme Court observed,[55] "[t]he use of the word "shall," though significant, does not invariably create a mandatory duty because statutes must be construed as a whole to ascertain legislative intention. But sometimes it does. So the question remains, when does the word "shall," mean "shall," and when does it not? There are different factors to consider. The Court has said "[i]t is of course difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but, of all the rules mentioned, the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matter material or immaterial – to matter of convenience or of substance."[56] To me, rules of procedure are of great essence in guiding the conduct of the proceedings and by conducting the proceedings in question without rules of procedure, the Respondent violated the law and the proceedings in question and decisions are tainted with illegality.

Regarding the judicial review orders sought by the applicant, the following often quoted passage from the Ugandan case of *Pastoli v.Kabale District Local Government Council and Others****[57]*** remains relevant in determining such a reference.

> *"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 or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...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 failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.*

Broadly, in order to succeed in a case of this nature, the petitioners are required to demonstrate either:- ***(a)*** *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or* ***(b)*** *a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.* The benchmark decision on this principle was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd* vs *Wednesbury Corporation*[58]:-

> *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfill their function of administering justice according to

law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. I emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal".**

b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute **'irrationality"** or **'perversity'** on the part of the decision maker. The onus is on the applicant to establish irrationality or perversity. I am afraid from the material presented before me, this onus has not been discharged.

Article 23 (1) of the constitution specifically sets out the remedies that the High Court can issue in cases of violation of fundamental rights and these include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of the law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights, an orders of compensation and an order of judicial review.

I have carefully evaluated the material before the court and I am persuaded that the applicant has demonstrated sound grounds for the court to grant the reliefs sought. First, the applicant and the second interested party have demonstrated beyond doubt that they were not served with details of the complaints against them in advance, yet the decision was bound to adversely affect them, that they were not served with notice to attend the proceedings as required, that the notice allegedly published in the news papers was not proper service, the applicant and the second interested party were not afforded an opportunity to defend themselves and cross-examine the complainant or his witnesses.

I also find that the trial flouted all the known principles of natural justice. A decision arrived at in total breach of the rules of natural justice is *ultra vires* null and void and cannot be allowed to stand. I am also satisfied that the first interested party wilfully and or deliberately withheld crucial information from the Respondent in that he failed to disclose that there were several previous court cases touching on the same property. The impugned decision is in my view unreasonable and is tainted with illegality in that it was purportedly rendered in total breach of a court order and further against the constitutional provision which requires the Respondent to render a recommendation as opposed to a determination. The constitution clearly talks of a recommendation and its provisions prevail over the provisions of the Act which talks of a determination. The absence of rules contrary to the provisions of the act and the common law render the proceedings the subject of this judgement arbitrary and un predictable.

I therefore find that the applicant has proved its case to the required standard. Consequently, I find for the applicant and make the following declarations/orders:-

*a) **That** the proceedings before the National Land Commission touching on investigations of L.R. No. 216/8, L.R. No. 12261 and L.R. No 12236 are tainted with illegality hence the same are hereby declared null and void for all purposes.*

*b) **That** the Respondent be and is hereby ordered to immediately and not later than **60 (sixty) days** from the date of this order to make rules as provided for under section 14 (1)& (2) of the Act for the better carrying of its functions under Articles 67 and 68 of the constitution of Kenya 2010 and further I order that the said rules must conform to the provisions of Articles 47 and 50 of the constitution of Kenya 2010 .*

*c) **That** further a declaration be and is hereby issued that the applicant herein and any party potentially affected adversely by the proceedings in question was entitled to be personally served with the complaints lodged with the Respondent and all notices of the proceedings and was also entitled to Respond and submit memoranda and submissions in opposition to the complaints and had a right to participate fully in the proceedings, and non observance of the foregoing rendered the proceedings in question a nullity.*

*d) **That** a declaration be and is hereby issued that the proceedings touching on investigations of the validity of title number L.R. No. 12236 and L.R. No. 216/8 and L.R. No. 12261inculding the purported determination dated **26th July 2016** be and are hereby declared null and void for all purposes.*

*e) **That** an order of certiorari be and is hereby issued to quash the entire proceedings/ruling and or the determination dated **26th July 2016** emanating from or touching on investigations of the validity or otherwise of title number L.R. No. 12236 and L.R. No. 216/8 and L.R. No. 12261.*

*f) **That** an order of mandamus be and is hereby issued compelling the Respondent to undertake the review of propriety and legality and or investigations in respect of L.R. No. 12236, L.R. No. 216/8 and L.R. No. 12261 in accordance with the law.*

***g) That** the Respondent and the first interested party do pay the costs of these proceedings to the applicant/petitioner and the second interested party.*

Orders accordingly. Right of appeal 30 days

Dated at Nairobi this __**23rd**_____day of____**February**_____2017

John M. Mativo

Judge

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[1] Act No. 5 of 2012

[2] Act No. 5 of 2012

[3] Ibid

[4] {2001} KLR 448

[5] High Court Misc 356 of 2000

[6] See Mohame vs Bakari, Court of Appeal {2005}2KLR 196

[7] See De Souza vs Tanga Town Council {1961} EA 377

[8] See Mecol Ltd vs The Hon. A. G. HCC Misc App No. 1784 of 2004

[9] See Judicial Service Commission vs The Speaker of the National Assembly HC Pet No 518 of 2013

[10] See Kenya Nationl Examinations Council vs R. C.A. Civ. App No. 266 of 1996 & G.P Shah vs A.G. CA NBI Civ. App No. 24 of 1985

[11] See The State vs Employment of Appeal Tribunal }1871}IL RM 36 and Judge of the High Court and Another vs Nguni {2007}2 EA 201

[12] See Roberts vs Parole Booard {2005}UKHL 45

[13] See Bactlab Ltd vs Bactlabs EA Ltd & 5 Others {2012}eKLR & E.A. Portland Cement Ltd vs Capital Markets Authority & 4 Others {2014}eKLR

[14] See R vs National Land Commission & Another {2015}eKLR & Josephpine Onyango vs NLC & 3 Others {2015}eKLR

[15] See Stephen Nendela vs County Assembly of Bungoma & 4 Others {2014}eKLR and Nkatha Joy Farida Mbaabu vs Kenyatta University {2016}eKLR and R vs N.L.C. {2015}eKLR

[16] See Marshall's Valve Gear Co Lt vs Manning Wardle & C {1909}1 Ch 267

[17] See Canvas Manufacturing Ltd vs Silcock NBI HCCC No. 791 of 1994 & Mavuno Industries Ltd & 32 Others vs Keroche Industries Ltd {2012}eKLR

[18] {1917} 1 KB 486

[19] Brinks-Mat Ltd vs Elcombe {1988} 3 ALL ER 188

[20] (1) (1947) 2 All ER 257

[21] 1924-1 KB 171 at p.205 (C)

[22] Per Lord Cairns in – ‘Walsall’s Overseers v. L. & N. W.Rly. Co (1879) 4 AC 30 at p. 39 (D)

[23] (1922) 2 AC 128 at p. 156 (E)

[24] See‘Halsbury, 2 nd edition, Vol. IX, page 880.

[25] See Veerappa Pillai v. Raman and Raman Ltd, AIR 1952 SC 192 at pp. 195-196 (I)

[26] (1980) 3 S.C.C. 625. For a critical account see Upcndia Baxi, "A Pilgrim^ Progress : The Basic Structure Revised**, in Courage, Craft and Contention : The Supreme Court in the Eighties 64-110 (1985).

[27] Article 47(1) of the Constitution of Kenya, 2010

[28] Article 47(2) of the Constitution of Kenya, 201

[29] {1915} AC 120 (138) HL

[30] {1906} AC 535 (539), Lapointe v. L'Association

[31] {1934} 291 US 97(105)

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

[33] AIR 1978 SC 851

[34] (1980), at page 161

[35] (1977) at page 395

[36] Wiseman v. Borneman [1971] A.C. 297

[37] Kanda v. Government of the Federation of Malaya, [1962] A.C. 322, 337, as quoted by the Alberta Court of Appeal in R. v. Law Society of Alberta, (1967) 64 D.L.R. (2d) 140, 151 (Alta C.A.).

[38] David Phillip JONES and Anne S. de VILLARS, Principles of Administrative Law (4th edition), Thomson Carswell, 2004, p. 251.

[39] Ridge v. Baldwin [1964] A.C. 40

[40] Wong v. University of Saskachewan , 2006 SKQB 405

[41]R. v. Ontario Racing Commissioners (1969) 8 D.L.R. (3d) 624 at 628 (Ont. H.C.)

[42] Confederation Broadcasting Limited v. Canadian Radio-Television and Telecommunications Commission

[1971] S.C.R. 906 at 922).

[43] Supermarchés Labrecque v. Flamand, [1987] 2 S.C.R. 219

[44] Cardinal c. Kent, [1985] 2 R.C.S. 643; Wong v. University of Saskachewan, 2006 SKQB 405

[45] S.E.P.Q.A. v. Canada (C.C.D.P.), [1989] 2 S.C.C. 897.

[46] Kioa v West (1985), Mason J

[47] *{1986-1989} EA 456*

[48]*{2005} 2 EA 206*

[49] Act No. 4 of 2015

[50] Ibid

[51]{1997} Q.B.D. 323

[52] *(CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674*

[53] See The State (Irish Pharmaceuticl Union) vs Employment of Appeal Tribunal {1871} ILRM and Judge of the High Court and Another vs Nguni {2007}2E.A 201

[54]Chief Justice John Marshall in Osborn V. Bank of the United States, 22 U. S. 738 {1824}.

[55] *Tramontano v. Dilieto,*192 Conn. 426, 434-34 (1984).

[56] *Gallup v. Smith, 59 Conn. 353, 358 (1890); see Engle v. Personnel Appeal Board, 175 Conn 127, 130 (1978).*

[57] *{2008} 2 EA 300*

[58] {1948} 1 K. B. 223, H.L.