



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC PETITION NO. 1028 OF 2015**

**IN THE MATTER OF ARTICLE 22(1) & (2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24 AND 25 OF THE COUNSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 47, 50, 60(1) (B), 232 AND 249 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**APEX STEEL LIMITED.....PETITIONER**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF**

**LAND, HOUSING & URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**WAVINYA NDETI.....1<sup>ST</sup> INTERESTED PARTY**

**COMMERCIAL BANK OF AFRICA LIMITED....2<sup>ND</sup> INTERESTED PARTY**

**NIC BANK LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**RAPHAEL MUSYOKI NDETI.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

At all material times, the Petitioner was and still is the registered proprietor of all those parcels of land known as L.R No. 337/4775(Grant No. I.R 129188) and L.R No. 337/4777(Grant No. I.R 129751/1) (hereinafter together referred to as “the suit properties” and separately as “Plot No. 337/4775” and “Plot No. 337/4777” respectively). Plot No. 337/4775 came about following amalgamation of three parcels of land namely, L.R No. 337/973, 337/3212 and 337/1868 which the Petitioner acquired for valuable consideration on 21<sup>st</sup> December, 2010, while Plot No. 337/4777 was allocated to the Petitioner by the Government of the Republic of Kenya on 24<sup>th</sup> March, 2011. The suit properties were at all material times charged to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties by the Petitioner to secure loans of various amounts in local and foreign currencies that were advanced by the said Interested Parties to the Petitioner.

On 28<sup>th</sup> January, 2014, the 1<sup>st</sup> Respondent wrote to the Petitioner informing the Petitioner that it had received complaints from the families of Peter Nzuki Ndeti and Elizabeth Nzili Nzuki regarding Plot No. 337/4777. The 1<sup>st</sup> Respondent stated in the letter that the families of Peter Nzuki Ndeti and Elizabeth Nzili Nzuki were claiming that Plot No. 337/4777 was allocated to Peter Nzuki Ndeti for the first time in 1967 and that on 2<sup>nd</sup> June, 1998, the said allocation was renewed and the property allocated to Peter Nzuki Ndeti and Elizabeth Nzili Nzuki as two plots under separate letters of allotment of the same date.

The 1<sup>st</sup> Respondent informed the Petitioner that pursuant to its mandate to review grants and dispositions of public land, it had lodged investigations into the legality and propriety of the title held by the Petitioner in respect of Plot No. 337/4777. The 1<sup>st</sup> Respondent requested the Petitioner to furnish it with information on how it acquired the property to assist it in its investigations. Prior to this letter from the 1<sup>st</sup> Respondent, the Petitioner had received complaints from among others the 1<sup>st</sup> Interested Party regarding the ownership of Plot No. 337/4777 and had entered into some form of settlement with her.

On 5<sup>th</sup> August, 2014, the 1<sup>st</sup> Respondent published a notice in a local newspaper of its intention to review titles for various parcels of land including those of the suit properties and called for representations and memoranda from the public. The Petitioner through its advocates presented a memorandum to the 1<sup>st</sup> Respondent in response to that notice and also attended plenary sessions of the 1<sup>st</sup> Respondent at which the complaints regarding the Petitioner’s titles to the suit properties were heard. The last plenary session took place on 13<sup>th</sup> February, 2015. On 30<sup>th</sup> September, 2015, the 1<sup>st</sup> Respondent wrote to the 3<sup>rd</sup> Respondent informing him that following a review of the titles for the suit properties held by the Petitioner, it had found that the same were acquired unlawfully and directed the 3<sup>rd</sup> Respondent to revoke the same. The 1<sup>st</sup> Respondent enclosed in the letter, a copy of the decision it had made in the matter. It is this decision by the 1<sup>st</sup> Respondent and its direction to the 3<sup>rd</sup> Respondent to revoke the Petitioner’s titles to the suit properties that prompted the filing of the petition herein.

The Petitioner brought this petition on 16<sup>th</sup> October, 2015 seeking the following reliefs;

1. A declaration that the Petitioner is the registered proprietor of the suit properties.
2. A declaration that the 1<sup>st</sup> Respondent’s power to review grants under section 14 of the National Land Commission Act, 2012 is limited to public land and does not extend to private land.
3. A declaration that the suit properties are private land and that the purported review proceedings that were conducted by the 1<sup>st</sup> Respondent and the determination that was made in respect thereof were undertaken without jurisdiction and as such null and void.
4. A declaration that the 1<sup>st</sup> Respondent violated the Petitioner’s right to fair administrative action and fair hearing protected under the Constitution.
5. A declaration that the 1<sup>st</sup> Respondent breached the Petitioner’s legitimate expectation that its title to the suit properties could only be declared unlawful as by law provided.
6. A declaration that the 1<sup>st</sup> Respondent breached the Petitioner’s right to property protected under the Constitution.
7. A declaration that the 1<sup>st</sup> Respondent infringed and/or violated the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties’ right to property, fair hearing and fair administrative action.
8. A declaration that the decision by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> September, 2015 that was forwarded to the Petitioner and the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent’s chairman was illegal, irregular, unprocedural, unconstitutional and void for all intents and purposes.
9. A declaration that in the absence of guidelines and regulations envisaged under sections 79(2) and 79(4) of the Land Registration Act, 2012, the 3<sup>rd</sup> Respondent could not revoke registered titles.
10. An order of certiorari to quash the said decision by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> September, 2015.
11. An order of prohibition prohibiting the 3<sup>rd</sup> Respondent from revoking or lodging a caution or caveat or restriction of any nature on the titles of the suit properties.
12. An injunction restraining the Respondents from interfering with the Petitioner’s proprietorship of or title to the suit properties.

13. General damages for loss and inconvenience.

14. Exemplary damages against the 1<sup>st</sup> Respondent for breach of the Petitioner's fundamental rights.

15. Costs of the petition and interest.

The petition was brought on the grounds set out on the face thereof and on the supporting affidavit and further affidavit of NEIL NATHWANI sworn on 15<sup>th</sup> October, 2015 and 3<sup>rd</sup> June, 2016 respectively. The Petitioner filed further affidavits in support of the petition sworn by ISAAC A. MACHUKA and ZABLON AGWATA MABEA on 1<sup>st</sup> April, 2016 and 22<sup>nd</sup> April, 2016 respectively. In the petition, the Petitioner averred that the 1<sup>st</sup> Respondent's decision of 30<sup>th</sup> September, 2015 was illegal, unconstitutional and arbitrary and that the same was made in bad faith in violation of the Petitioner's fundamental rights guaranteed and protected by the Constitution.

The Petitioner averred that the suit properties were not public land and as such were not within the purview of the 1<sup>st</sup> Respondent's review jurisdiction under section 14 of the National Land Commission Act, 2012. The Petitioner averred further that even if the 1<sup>st</sup> Respondent could review the titles for the suit properties, under section 14(7) of the said Act, the 1<sup>st</sup> Respondent was prohibited from revoking a title held by a bona fide purchaser for value without notice of the defect in the title. The Petitioner averred that it was a bona fide purchaser of Plot No. 337/4775 for value without notice of any defect in its title and as such the title for the property could not be revoked by the 1<sup>st</sup> Respondent.

The Petitioner averred that in its determination, the 1<sup>st</sup> Respondent made a finding that the Petitioner had acquired the suit properties unlawfully because the suit properties had been allocated to the family of the 1<sup>st</sup> Interested Party on 2<sup>nd</sup> June, 1998 before the Petitioner acquired the same. The Petitioner averred that the letters of allotment that were the basis of that finding concerned only Plot No. 337/4777 which was allocated to the Petitioner and not Plot No. 337/4775 which the Petitioner acquired for valuable consideration without notice. The Petitioner averred that, that finding had no basis as concerns Plot No. 337/4775. The Petitioner averred further that, the 1<sup>st</sup> Respondent found the said letters of allotment suspect and that the same were not accepted until 2013 but still went ahead to rely on the same.

The Petitioner averred that in relying on suspect and unaccepted letters of allotment to disturb the Petitioner's registered and legally protected interest in the suit properties, the 1<sup>st</sup> Respondent violated and/or infringed the Petitioner's right to equal protection and benefit of the law guaranteed under Article 27 of the Constitution. The Petitioner averred further that the 1<sup>st</sup> Respondent had an obligation to give the Petitioner notice of the complaints that had been raised in respect of the titles held by the Petitioner over the suit properties. The Petitioner averred that the only notice that was served upon it related to a complaint concerning Plot No. 337/4777 and that even for this parcel of land, the Petitioner was not furnished with any document in support of the complaint. The Petitioner averred that no notice of complaint was served in respect of Plot No. 337/3775 neither was any document furnished in relation to the property. The Petitioner averred that as a result of these irregularities, the documents that were relied on by the 1<sup>st</sup> Respondent in its decision of 30<sup>th</sup> September, 2015 were not supplied to the Petitioner to respond to before the decision was made. The Petitioner averred that it was denied an opportunity to respond to the complaint that was raised against it in relation to Plot No. 337/3775 thereby violating its right to fair administrative action and fair hearing protected under Articles 47 and 50 of the Constitution as read with section 14 of the National Land Commission Act, 2012.

The Petitioner averred further that the 1<sup>st</sup> Respondent was aware of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' interests in the suit properties but failed to give them opportunity to protect their interests in the suit properties before the determination of 30<sup>th</sup> September, 2015 was made. The Petitioner averred that this omission violated the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' right to property, fair hearing and fair administrative action. The Petitioner averred further that it had a legitimate expectation that the 1<sup>st</sup> Respondent would make its determination on the complaints that it had received within a reasonable time after hearing the parties. The Petitioner averred that by delaying the determination for over one year, the 1<sup>st</sup> Respondent breached its legitimate expectation that the determination would be made within a reasonable time. The Petitioner averred further that the 1<sup>st</sup> Respondent's unsigned and unsealed determination dated 30<sup>th</sup> September, 2015 was irregular, unprocedural, unlawful and unconstitutional and its authenticity was questionable.

The Petitioner averred further that in the absence of guidelines and regulations that were to stipulate the manner in which the 3<sup>rd</sup> Respondent was to revoke titles upon recommendation by the 1<sup>st</sup> Respondent, the 3<sup>rd</sup> Respondent had no power to revoke titles as envisaged by section 14(5) of the National Land Commission Act, 2012 as read with sections 79(2) and 79(4) of the Land Registration Act, 2012.

The Petitioner averred that owing to the Respondents' unconstitutional, illegal, arbitrary, oppressive, capricious, unfair and unreasonable acts aforesaid, the Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had suffered loss and damage. The Petitioner averred that unless the reliefs sought were granted, the Petitioner's rights highlighted above which were guaranteed under the Constitution and those of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties would continue to be infringed and violated by the Respondents. The Petitioner averred that there was a suit pending before this court between the Petitioner and members of the family of the 1<sup>st</sup> Interested Party which concerned trespass to the suit properties.

In his affidavits in support of the Petition, NEIL NATHWANI narrated how the Petitioner acquired the suit properties and produced a number of documents to prove the Petitioner's ownership of the suit properties. The affidavits sworn by ISAAC A. MACHUKA and ZABLON AGWATA MABEA supported the Petitioner's petition and challenged the claim by the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties to the suit properties. ZABLON AGWATA MABEA who was a former Commissioner of Lands stated that Plot No. 337/4777 was allocated to the Petitioner regularly and that as at the time of the allocation, the said parcel of land was not committed because the person to whom the parcel of land had earlier been allocated had not accepted the offer. He stated that the said earlier offer that had lapsed was cancelled before the parcel of land was allocated to the Petitioner. ISAAC A. MACHUKA was a Principal Land Administration officer with the Ministry of Lands, Housing and Urban Development. He was said to be the person who had signed the letters of allotments dated 2<sup>nd</sup> June, 1998 in favour of Peter N. Ndeti who was a relative of the 1<sup>st</sup> Interested Party and in respect of whose estate the 4<sup>th</sup> Interested Party is the administrator and that of Elizabeth Nzili Nzuki. In his affidavit filed in support of the petition, ISAAC A. MACHUKA denied signing the said letters of allotment. He termed the said letters of allotment as forgeries and fraudulent. He stated that the said letters of allotment did not

bear any specific authority under which they were issued.

The petition was supported by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed a replying affidavit sworn by Gordon Ochieng on 13<sup>th</sup> May, 2016. Gordon Ochieng was a Principal Land Administration officer with the Ministry of Lands, Housing and Urban Development based at Ardhi House, Nairobi. He stated that the suit properties were public land and that after they were alienated, they became private land. He reiterated the contents of the petition on how the suit properties were acquired by the Petitioner. He stated that Plot No. 337/4777 was allocated to the Petitioner after the previous allottees failed to accept the offers that had been made to them in respect of the plot. He stated further that the allocation of the parcels of land that were amalgamated to give rise to Plot No. 337/4777 was lawful and that the amalgamation of the same was also done in strict compliance with the law. He stated that at the time of alienation of the suit properties there was no evidence that the said properties had been alienated to any other person and that no payment had been received for any such allocation.

The 2<sup>nd</sup> Interested Party filed a replying affidavit sworn by its Legal Officer, JACKSON NYAGAH KINGORI on 24<sup>th</sup> November, 2015. In the affidavit, JACKSON NYAGAH KINGORI adopted the contents of the petition and the affidavit sworn in support of the petition by NEIL NATHWANI. He added that after due diligence and risk assessment, the 2<sup>nd</sup> Interested Party advanced to the Petitioner various financial facilities on the security of Plot No. 337/4775. He stated that Plot No. 337/4775 was not one of the parcels of land whose titles were listed for review in the 1<sup>st</sup> Respondent's notice to the public dated 5<sup>th</sup> August, 2014. He stated that the 2<sup>nd</sup> Interested Party was aggrieved with the proceedings that were conducted by the 1<sup>st</sup> Respondent on 29<sup>th</sup> August, 2014 and 13<sup>th</sup> February, 2015 as concerns Plot No. 337/4775 and the determination that was made by the 1<sup>st</sup> Respondent on 30<sup>th</sup> September, 2015. He stated that the 1<sup>st</sup> Respondent had no jurisdiction to review dispositions of land that occurred prior to the promulgation of the Constitution of Kenya 2010 on 27<sup>th</sup> August, 2010 and furthermore, the 1<sup>st</sup> Respondent's power of review was limited to public land. He stated that the 1<sup>st</sup> Respondent had no power to review the disposition of Plot No. 337/4775 because the alienation took place prior to 27<sup>th</sup> August, 2010 and the same was not public land. He stated further that the 1<sup>st</sup> Respondent also violated not only the Petitioner's right to property, fair administrative action and fair hearing but also the rights of the 2<sup>nd</sup> Interested Party. He stated that the 1<sup>st</sup> Respondent had a duty to ascertain and notify all those who were likely to be affected by its proceedings and decision of the existence of the same and to provide them with all documents and information that were in its possession to enable them respond to the complaints. He stated that the 2<sup>nd</sup> Interested Party was neither notified of the proceedings nor given an opportunity to appear before the 1<sup>st</sup> Respondent to respond to the complaints that had been raised concerning the Petitioner's title to Plot No. 337/4775 in which the 2<sup>nd</sup> Interested Party had proprietary interest recognised in the definition of property under Article 260 of the Constitution. He stated further that the Petitioner had indefeasible title over Plot No. 337/4775 and that in directing that the Petitioner's title be revoked, the 1<sup>st</sup> Respondent violated the Petitioner's and the 2<sup>nd</sup> Interested Party's right to property and equal protection of the law.

He stated further that the 1<sup>st</sup> Respondent's decision was unreasonable and irrational in the circumstances. He stated that the 1<sup>st</sup> Respondent misdirected itself in law, acted without jurisdiction, failed to observe rules of natural justice and failed to consider matters which it was bound to consider before making a decision. He stated that the 1<sup>st</sup> Respondent also took into consideration irrelevant matters. He stated that the proceedings of the 1<sup>st</sup> Respondent conducted on 29<sup>th</sup> August, 2014 and 13<sup>th</sup> February, 2015 and its determination of 30<sup>th</sup> September, 2015 were unconstitutional and ought to be quashed by the court.

The 3<sup>rd</sup> Interested Party filed a replying affidavit sworn by its Legal Services Manager, HENRY MAINA on 20<sup>th</sup> November, 2015. In the affidavit, the 3<sup>rd</sup> Interested Party's said Legal Services Manager, stated that the 3<sup>rd</sup> Interested Party had granted to the Petitioner loan facilities of various amounts in 2011 and 2015 on the security of among others the suit properties. He stated that the 3<sup>rd</sup> Interested Party advanced the said loan facilities to the Petitioner after undertaking due diligence and confirming that the Petitioner held a good and indefeasible title to the suit properties. He stated that the total loan owed by the Petitioner to the 3<sup>rd</sup> Interested Party which was secured by among others the suit properties stood at Kshs. 1,783,410,865.46 as at 26<sup>th</sup> October, 2015.

He stated further that the 1<sup>st</sup> Respondent's public notice issued on 5<sup>th</sup> August, 2014 of its intention to review the titles for the suit properties held by the Petitioner was not brought to the attention of the 3<sup>rd</sup> Interested Party although the 1<sup>st</sup> Respondent was aware of the 3<sup>rd</sup> Interested Party's interest in the suit properties. He stated that the 1<sup>st</sup> Respondent proceeded to make a determination on the said review on 30<sup>th</sup> September, 2015 without notice to the 3<sup>rd</sup> Interested Party and without giving it an opportunity to be heard.

He stated that under section 14(3) of the National Land Commission Act, 2012, the 3<sup>rd</sup> Interested Party was entitled to be given a notice by the 1<sup>st</sup> Respondent of the proceedings that it was undertaking concerning the suit properties. He stated that the 1<sup>st</sup> Respondent's determination that recommended the revocation of the titles for the suit properties held by the Petitioner without notice to the 3<sup>rd</sup> Interested Party was capricious and a blatant violation of the 3<sup>rd</sup> Interested Party's right to property. He stated that the said determination was also contrary to the rules of natural justice and a violation of the 3<sup>rd</sup> Interested Party's right to fair administrative action and fair hearing guaranteed under the Constitution and the National Land Commission Act, 2012.

He stated further that the 1<sup>st</sup> Respondent had no jurisdiction to review the titles for the suit properties and as such its decision was *ultravires* its powers. He stated further that in its determination, the 1<sup>st</sup> Respondent misapprehended the law, misdirected itself as to the facts of the case and disregarded the evidence that was placed before it and thereby fell into error. He stated that unless the orders sought by the Petitioner were granted, the 3<sup>rd</sup> Interested Party stood to suffer great loss.

The petition was opposed by the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Interested Party. The 1<sup>st</sup> Respondent opposed the petition through a replying affidavit sworn by BRIAN IKOL, its Deputy Director, Legal Affairs and Enforcement. The 1<sup>st</sup> Respondent contended that the suit properties were public land and as such the titles thereof were within the purview of its review jurisdiction. The 1<sup>st</sup> Respondent averred that in 2013, it received complaints from Peter N. Ndeti and the estate of Elizabeth Nzili Nzuki through their advocates. The 1<sup>st</sup> Respondent averred that in the said complaints, Peter N. Ndeti and the estate of Elizabeth Nzili Nzuki claimed that their parcels of land known as Unsurveyed

Residential Plot No. 3A Athi River and Unsurveyed Plot No. 3B Athi River had been unlawfully allocated to the Petitioner although they had remained in occupation thereof. The 1<sup>st</sup> Respondent averred that on receipt of these complaints, it wrote to the Petitioner requesting it to provide information on how it acquired the suit properties. The 1<sup>st</sup> Respondent averred that in compliance with constitutional and statutory requirements, it also issued a notice to the public in a daily newspaper on 19<sup>th</sup> January, 2015 informing all interested parties of its intention to review the grants in respect of the suit properties. The 1<sup>st</sup> Respondent averred that the form in which it was required to issue a notice was not prescribed in the National Land Commission Act, 2012.

The 1<sup>st</sup> Respondent averred that pursuant to its letter to the Petitioner and the public notice aforesaid, the Petitioner submitted written representation to the 1<sup>st</sup> Respondent and also appeared before the 1<sup>st</sup> Respondent through its advocates and made lengthy oral submissions. The 1<sup>st</sup> Respondent averred that its investigations established that the suit properties had been allocated to the Peter N. Ndeti and Elizabeth Nzili Nzuki and as such the same were to be available for further allocation to the Petitioner and the persons from whom the Petitioner purchased one of the plots. The 1<sup>st</sup> Respondent averred that the titles for the suit properties were defective and that the Petitioner acquired the same with the said defects. The 1<sup>st</sup> Respondent averred that the defects in the titles for the suit properties could have been discovered by the Petitioner with the exercise of due diligence. The 1<sup>st</sup> Respondent averred that in its decision, it considered the interests of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties who chose not to appear before the 1<sup>st</sup> Respondent despite having been invited to do so on two occasions. The 1<sup>st</sup> Respondent averred that it formed the opinion that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had other remedies against the Petitioner apart from the securities they had over the suit properties.

The 1<sup>st</sup> Respondent averred further that it was the duty of the Petitioner to notify the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties of the proceedings before the 1<sup>st</sup> Respondent in which it participated through its advocates. The 1<sup>st</sup> Respondent averred further that, it sent out notices on two occasions inviting all interested parties to appear before it and make representations. The 1<sup>st</sup> Respondent denied that the Petitioner was a bona fide purchaser of the suit properties without notice of the defects in their titles. The 1<sup>st</sup> Respondent averred that Article 40 of the Constitution does not accord protection to properties that have been acquired unlawfully. The 1<sup>st</sup> Respondent averred that since the Petitioner's titles to the suit properties were unlawfully acquired, the Petitioner was divested of any constitutional protection accorded under Article 40 of the Constitution. The 1<sup>st</sup> Respondent averred that the Petitioner's rights must be balanced against that of the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties. Regarding the allegation that it made its determination after inordinate delay, the 1<sup>st</sup> Respondent contended that the law did not prescribe the time within which was supposed to make determinations. The 1<sup>st</sup> Respondent averred that the merit of its decision could not be challenged in these proceedings and that the Petitioner should have brought a normal civil suit to ventilate the issues raised in the petition. The 1<sup>st</sup> Respondent contended that the petition raised no constitutional issues and that the same was an abuse of the process of the court.

The 1<sup>st</sup> Interested Party did not respond to the petition. The 4<sup>th</sup> Interested Party opposed the petition through his replying affidavit sworn on 18<sup>th</sup> March, 2016 that he had filed in opposition to the application for conservatory orders. The 4<sup>th</sup> Interested Party stated that he was a son and a personal representative of the estate of Peter Nzuki Ndeti (deceased). The 4<sup>th</sup> Interested Party reiterated the contents of the affidavit sworn by Brian Ikol on behalf of 1<sup>st</sup> Respondent regarding the complaint that was lodged by Peter Nzuki Ndeti with the 1<sup>st</sup> Respondent concerning the allocation of the suit properties to the Petitioner and the investigations that were carried out by the 1<sup>st</sup> Respondent on that complaint and its decision on the same. The 4<sup>th</sup> Interested Party stated that the Petitioner's titles to the suit properties were not indefeasible the same having been found by the 1<sup>st</sup> Respondent to have been acquired unlawfully. The 4<sup>th</sup> Interested Party averred that the decision by the 1<sup>st</sup> Respondent was made in compliance with the law and after due process. The 4<sup>th</sup> Interested Party averred that the developments on the suit properties the cost of which had been put by the Petitioner at Kshs. 3billion were undertaken by the petitioner in breach an order that was issued by this court in a separate suit between the parties namely, ELC No. 917 of 2013. The 4<sup>th</sup> Interested Party averred further that the securities that were created over the suit properties by the Petitioner in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were also created in breach of the said court order and as such did not deserve the protection of law. The 4<sup>th</sup> Interested Party denied that the Petitioner's constitutional rights were violated by the 1<sup>st</sup> Respondent. The 4<sup>th</sup> Interested Party denied the Petitioner's allegation that the determination by the 1<sup>st</sup> Respondent was unsigned and unsealed. He annexed to his affidavit a signed copy of the 1<sup>st</sup> Respondent's determination dated 30<sup>th</sup> September, 2015.

The 4<sup>th</sup> Interested Party denied that the suit properties were private land and as such their titles were not amenable to review by the 1<sup>st</sup> Respondent. The 4<sup>th</sup> Interested Party averred that contrary to the allegation in the Petition that the petitioner had no notice of the complaint in respect of L.R No. 337/4775, the proceedings of the 1<sup>st</sup> Respondent showed that the petitioner had notice of the complaint in respect of both L.R No. 337/4777 and L.R No. 337/4775 and that the petitioner responded to complaints in respect of both parcels of land in writing and orally through submissions by its advocates. The 4<sup>th</sup> Interested Party averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were notified of the review proceedings through the public notices that the 1<sup>st</sup> Respondent had issued. The 4<sup>th</sup> Interested Party averred further that the Petitioner also had an obligation to notify the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties of the said proceedings. The 4<sup>th</sup> Interested Party averred that the Petitioner was estopped from alleging that the 1<sup>st</sup> Respondent had failed to issue the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties with notices of its intention to review the titles for the suit properties. The 4<sup>th</sup> Interested Party averred further that the Petitioner having acquired invalid titles, it could not claim to be a bona fide purchaser of the suit properties for value without notice of the defects in the said titles. With regard to the deed of settlement that the 1<sup>st</sup> Interested Party entered into with the Petitioner, the 4<sup>th</sup> Interested Party averred that the 1<sup>st</sup> Interested Party was not a bona fide representative of Peter Nzuki Ndeti deceased and as such the deceased was not bound by the said settlement.

The 4<sup>th</sup> Interested Party averred that the said deed of settlement nevertheless confirmed that the Petitioner was aware of the interest of the late Peter Nzuki Ndeti in the suit properties. In conclusion, the 4<sup>th</sup> Interested Party averred that the decision that was made by the 1<sup>st</sup> Respondent on 30<sup>th</sup> September, 2015 that the Petitioner's titles to the suit properties were acquired illegally and that the same should be revoked was not illegal, unconstitutional and void as alleged by the Petitioner. The 4<sup>th</sup> Interested Party averred that the decision was made lawfully pursuant to Article 68 of the Constitution and section 14 of the National Land Commission Act, 2012.

The petition was heard by way of written submissions. The Petitioner, the 1<sup>st</sup> Respondent, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the 2<sup>nd</sup> Interested Party, the 3<sup>rd</sup> Interested Party and, the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties filed their submissions on 21<sup>st</sup> November, 2019, 12<sup>th</sup> September, 2018, 26<sup>th</sup> February, 2019, 1<sup>st</sup> March, 2019, 6<sup>th</sup> March, 2019 and 9<sup>th</sup> December, 2019 respectively. I have considered the petition together with the affidavits filed by the Petitioner in support thereof. I have also considered the affidavits filed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties in support of the petition. I have also considered the affidavits by the 1<sup>st</sup> Respondent and the 4<sup>th</sup> Interested Party in opposition to the petition. Finally, I have considered the submissions by the parties' respective advocates and the authorities cited in support thereof. The parties did not file in a court a statement of agreed issues for determination by the court. From the petition and the affidavits filed by the parties, the issues arising for determination on this petition can be summarised as follows;

1. Whether the 1<sup>st</sup> Respondent had jurisdiction to review the titles for the suit properties to establish their propriety or legality.
2. Whether the 1<sup>st</sup> Respondent had jurisdiction to direct the 3<sup>rd</sup> Respondent to revoke the titles held by the Petitioner in the suit properties.
3. Whether the 1<sup>st</sup> Respondent violated the Petitioner's and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' right to fair administrative action and fair hearing.
4. Whether the decision by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> September, 2015 was unlawful, null and void.
5. Whether the 1<sup>st</sup> Respondent's determination dated 30<sup>th</sup> September, 2015 was arbitrary, oppressive, capricious and unreasonable.
6. Whether the Petitioner is entitled to the reliefs sought in the petition.
7. Who is liable for the costs of the petition.

Whether the 1<sup>st</sup> Respondent had jurisdiction to review the titles for the suit properties to establish their propriety or legality.

Before considering this issue, I wish to deal with a related issue that was raised by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties concerning the competency of this petition. The 1<sup>st</sup> Respondent and the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties had contended that the petition did not raise any constitutional issue. In C N M v W M G [2018] eKLR, the court stated as follows on what constitutes a constitutional issue:

**“21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81(CC)* in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak (2001)(1)SA 912(CC)* notes that:-**

***“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”***

I am satisfied that the petition herein raises constitutional issues. The issues raised concern the interpretation of the Constitution and the National Land Commission Act, 2012 as concerns the powers of the 1<sup>st</sup> Respondent which is a creature of the Constitution and the exercise of such powers. On the issue of the 1<sup>st</sup> Respondent's jurisdiction, the 1<sup>st</sup> Respondent was established under section 67 of the Constitution of Kenya which also spelt out some of its functions. Article 68 of the Constitution directed Parliament to enact legislation providing for among others the review of all grants or dispositions of public land to establish their propriety or legality. The National Land Commission Act, 2012 was enacted pursuant to the provisions of Articles 67(3) and 68 of the Constitution. Pursuant to Article 68(c) (v) of the Constitution, the 1<sup>st</sup> Respondent was given power under the National Land Commission Act, 2012(hereinafter referred to only as “the Act” where the context so permits) to review grants and dispositions of public land. Section 14 of the Act provides as follows:

**14. (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.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

The Petitioner had contended that the 1<sup>st</sup> Respondent's review powers were limited to public land and as such the 1<sup>st</sup> Respondent had no jurisdiction to review the titles for the suit properties which were private land. It is common ground that once public land is alienated to a private entity or person, it becomes private land. See, section 9(2) of the Land Act, 2012. I am in agreement with the 1<sup>st</sup> Respondent that the powers conferred upon it by section 14 of the National Land Commission Act, 2012(the Act) were intended to enable it examine the propriety and legality of alienation of public land for private use. It follows therefore that the 1<sup>st</sup> Respondent could only review titles for public land that had already been alienated and as such converted to private land. I have considered the many cases that were cited by the parties in support of their rival positions on this issue. I am in agreement with the observation that was made by W.Korir J. in Republic v National Land Commission & another, Ex parte Muktar Saman Olow[2015] eKLR in which he stated that:

**“47. Under Section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent.”**

I am also not in agreement with the Petitioner that 1<sup>st</sup> Respondent's review powers were limited to grants or dispositions of public land that took place after the promulgation of the Constitution of Kenya, 2010. I am of the view that if that was the intention of the legislature, it would have been stated expressly in the Constitution or the National Land Commission Act, 2012. In Republic v National Land Commission, Ex parte Holborn Properties Limited [2016] eKLR, Angote J. after reviewing several policy documents that informed the establishment of the 1<sup>st</sup> Respondent stated as follows:

**“54. It is clear from the history that gave rise to the establishment of the National Land Commission that the Respondent's mandate was not only to review grants or dispositions of public land that were issued after the effective date of the Constitution, but also those allocations over public land that were done even before the promulgation of the Constitution in the year 2010.**

55. Although it is true, as submitted by the Applicant's counsel, that for the first time, the 2010, Constitution comprehensively defined at Article 62 what public land entails, the same Constitution recognises the fact that there were other definitions of “public land” even before its promulgation in the year 2010.

56. I say so because the Constitution has defined “public land” in Article 62 (1) (n) (i) as follows:-

**“62 (1) Public land is-**

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

**(i) in force at the effective date;....”**

57. Having recognised the fact that even before it defined in detail what “public land” entailed there still existed “public land”, the review of grants or dispositions of public land to establish their property or legality was retrospective.

58. The body that was to be given the mandate to review such grants or dispositions by Parliament was not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before. That is what the Kenyan people wanted as discerned from the Ndung'u Commission Report and the National Land Policy, which preceded the Constitution.

59. 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.

60. 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.”**

I am in agreement with this interpretation of the law on review of grants by the 1<sup>st</sup> Respondent. Since the suit properties were public land before they were alienated for private use, the process of alienation of the same was subject to review by the 1<sup>st</sup> Respondent under section 14 of the National Land Commission Act, 2012. Due to the foregoing, I disagree with the contention by the Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties that the 1<sup>st</sup> Respondent had no jurisdiction to review the titles for the suit properties for their propriety or legality.

Whether the 1<sup>st</sup> Respondent had jurisdiction to direct the 3<sup>rd</sup> Respondent to revoke the titles held by the Petitioner in the suit properties.

The petitioner had contended further that even if the 1<sup>st</sup> Respondent had jurisdiction to review the titles for the suit properties, it had no power to direct the 3<sup>rd</sup> Respondent to revoke the title for L.R No. 337/4775 because, unlike L.R No. 337/4777 that was allocated to the Petitioner, L.R No. 337/4775 was purchased by the Petitioner for valuable consideration without notice of any defect in the title thereof. It is not in dispute from the material that was placed before the 1<sup>st</sup> Respondent and that has also been placed before this court that the L.R No. 337/4775 came about as a result of amalgamation of three parcels of land that were purchased by the Petitioner from persons who already had titles in respect thereof. The titles for the three parcels of land were issued on 29<sup>th</sup> May, 1990 (L.R No.337/973), 8<sup>th</sup> March, 1994 (L.R No.337/1868) and 11<sup>th</sup> February, 2004 (L.R No. 337/3212). The material that was placed before the 1<sup>st</sup> Respondent that has also been placed before this court shows that the Petitioner acquired the three parcels of land for valuable consideration. Section 14(7) of the National Land Commission Act provides that even where the 1<sup>st</sup> Respondent found that a title to land was issued irregularly or illegally, it was not supposed to order revocation of the title if the same was held by a person who acquired the property through purchase for value without notice of the defect in the title. I have reviewed the proceedings of the 1<sup>st</sup> Respondent and some of the material that was placed before it. I have also perused its determination dated 30<sup>th</sup> September, 2015.

I have noted from the oral and written submissions that the Petitioner made before the 1<sup>st</sup> Respondent that the fact that L.R No. 337/4775 was an amalgamation of three parcels of land that were purchased by the Petitioner was expressly put forward. However, in the 1<sup>st</sup> Respondent's determination, there was no mention at all of this fact. It appears as if all the submissions and evidence that was presented by the Petitioner regarding this parcel of land was ignored. In its findings, the 1<sup>st</sup> Respondent claimed that L.R No. 337/4775 was allocated to “one Neil Nathwani of Apex Steel Ltd in 2011 as Uns. Industrial plots ‘A’ and ‘B’ Vide letter of allotment Ref. No.132251/4 dated 24<sup>th</sup> March, 2011. The plots were merged (A and B) and title processed as L.R. No. 337/4775 file used is reference 132251.” There was totally no evidence before the 1<sup>st</sup> Respondent to support that finding.

The 1<sup>st</sup> Respondent and the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties submitted at length that the Petitioner was not a bona fide purchaser of L.R No. 337/4775 and as such could not seek protection under section 14(7) of the National Land Commission Act. No such submission was made before the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent did not make any finding on the issue. Having considered the material that was placed by the Petitioner before the 1<sup>st</sup> Respondent on how it acquired L.R No. 337/4775, I am satisfied that the Petitioner was an innocent purchaser of L.R No. 337/4775 without notice of defect if there was any in its title. As I have shown above, two of the parcels of land that were amalgamated to form L.R No. 337/4775 were acquired by those who sold the same to the Petitioner even before the alleged Plot ‘A’ and Plot ‘B’ were allocated to Peter Nzuki Ndeti and Elizabeth Nzili Nzuki respectively on 2<sup>nd</sup> June, 1998. No evidence was placed before the 1<sup>st</sup> Respondent showing that the Petitioner had notice or could have had notice with due diligence of Peter Nzuki Ndeti's and Elizabeth Nzili Nzuki's alleged interest in any of the three parcels of land that gave rise to L.R No. 337/4775 when it purchased it. The evidence that was placed before the 1<sup>st</sup> Respondent and before this court shows that Peter Nzuki Ndeti and Elizabeth Nzili Nzuki had not even accepted and paid for the allotment of the said Plot No. ‘A’ and Plot “B” as at the time when L.R No. 337/4775 was registered in the name of the Petitioner on 1<sup>st</sup> April, 2011. It is trite that a letter of allotment that has not been accepted and paid for cannot create an interest in land. In *Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others* [1997] eKLR, the Court stated as follows:

**“Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”** (emphasis added)

In *Rukaya Ali Mohamed v David Gikonyo Nambacha & another* Kisumu HCCC No. 9 of 2004 that was cited by the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties, the court stated as follows:

**“... once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”** (emphasis added)

From the above, it is doubtful if Peter Nzuki Ndeti and Elizabeth Nzili Nzuki had any valid interest in L.R No. 337/4775 that the Petitioner was expected to take note of. I am satisfied that the Petitioner was an innocent purchaser of L.R No. 337/4775 without notice of any defect in its title and as such its title could not be revoked by the 1<sup>st</sup> Respondent. As rightly submitted by the Petitioner, section 14(7) of the National Land Commission Act, 2012 prohibited the 1<sup>st</sup> Respondent from taking such action. The 1<sup>st</sup> Respondent's direction to the 3<sup>rd</sup> Respondent to revoke the Petitioner's title to L.R No. 337/4775 was therefore contrary to section 14(7) of the National Land Commission Act, 2012 and as such illegal, null and void.

Whether the 1<sup>st</sup> Respondent accorded the Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties fair administrative action and fair hearing.

Sections 14(3) and (8) of the National Land Commission Act, 2012 provides as follows:

**(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.**

**(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.**

Article 47 (1) and (2) of the Constitution provides that:

**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.**

I am satisfied from the proceedings of the 1<sup>st</sup> Respondent that the Petitioner was accorded fair hearing and fair administrative action by the 1<sup>st</sup> Respondent save as I will mention later in this judgment. The evidence before the court shows that the Petitioner was given notice of the complaints by the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties and was accorded reasonable opportunity to respond to the same in writing and also to appear before the 1<sup>st</sup> Respondent and give oral testimony if it wished. The Petitioner made use of these opportunities. The Petitioner responded to the complaints in writing and also appeared before the 1<sup>st</sup> Respondent and made oral submissions. After hearing the parties, the 1<sup>st</sup> Respondent made a decision in writing and gave reasons for its decision. I am in agreement with the Petitioner that the 1<sup>st</sup> Respondent delayed in making the determination. The delay in my view was not inordinate in the circumstances in which the 1<sup>st</sup> Respondent was operating to amount to a violation of the Petitioner's constitutional right to fair hearing and fair administrative action.

The Petitioner had contended that the notice that was served by the 1<sup>st</sup> Respondent did not mention L.R No. 337/4775 and that even for L.R No. 337/4777, the 1<sup>st</sup> Respondent did not furnish the Petitioner with the documents in support of the complaints to enable it prepare adequately to respond to the same. I am not in agreement with these contentions. The written memorandum that was presented by the Petitioner to the 1<sup>st</sup> Respondent covered both L.R No. 337/4775 and L.R No. 337/4777. In its oral submissions, the Petitioner also referred to both L.R No. 337/4775 and L.R No. 337/4777. This leaves no doubt that the Petitioner was aware that the complaints by the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties touched on both properties. I agree that the initial letter that was sent to the Petitioner did not mention L.R No. 337/4775. However, public notices that were issued by the 1<sup>st</sup> Respondent mentioned the 1<sup>st</sup> Respondent's intention to review the titles for both properties. This would explain the Petitioner's response to the complaints that covered both properties. I am unable therefore to see any prejudice that may have been suffered by the Petitioner for the initial omission to notify it of the complaint regarding L.R No. 337/4775. With regard to the documentation in support of the complaints, the Petitioner had an opportunity to call for the same. I have noted from the proceedings before the 1<sup>st</sup> Respondent that the Petitioner took up the issue with the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent directed that it be furnished with the necessary documents. Again, I am not satisfied that the Petitioner was prejudiced at all in the preparation of its defence to the complaints by the failure of the 1<sup>st</sup> Respondent to furnish it with the documents in support of the complaints.

With regard to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, I am in agreement that in view of their interest in the suit properties whose titles were being reviewed by the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent had an obligation under Section 14(3) of the National Land Commission Act, 2012 to give them notice of its intention to review the titles for the suit properties. Before sending out a notice of the complaints to the Petitioner, the 1<sup>st</sup> Respondent must have conducted a search on the titles for the suit properties to ascertain the status thereof. The search must have revealed the securities in the form of charges that had been created by the Petitioner in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to secure the loans that had been advanced by the said Interested Parties to the Petitioner. As at the time the 1<sup>st</sup> Respondent reviewed the titles for the suit properties and directed that the same be revoked, the same were charged to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to secure loans in excess of Kshs. 3 billion that were advanced by the said interested parties to the Petitioner. The said decision by the 1<sup>st</sup> Respondent had the effect of nullifying not only the titles held by the Petitioner but also the securities that had been created by the Petitioner in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had a right and legitimate expectation that they would be heard before their securities were nullified.

The obligation to notify the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties of the review proceedings was placed upon the 1<sup>st</sup> Respondent by law. The Petitioner's private obligation under the charges it created in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to notify them of such proceedings could not absolve the 1<sup>st</sup> Respondent of its constitutional and statutory obligation to give every person likely to be affected adversely by its decision a hearing before the decision is made. The fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had other remedies against the Petitioner was also not a reasonable excuse to deny them an opportunity to be heard before an order was made nullifying their securities. Due to the foregoing, it is my finding that the 1<sup>st</sup> Respondent violated the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' right to fair hearing and fair administrative action guaranteed under Articles 47 and 50 of the Constitution and section 14(3) of the National Land Commission Act, 2012.

Whether the decision by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> September, 2015 was unlawful, null and void.

The Petitioner had contended that the determination that was made by the 1<sup>st</sup> Respondent on 30<sup>th</sup> September, 2015 was unsigned and unsealed and as such the same was null and void. The determination by the 1<sup>st</sup> Respondent on the review of the titles of the suit properties dated 30<sup>th</sup> September, 2015 which is annexed to the Petitioner's affidavit in support of the petition does not bear the signature of its

Chairman. It is on account of this that the Petitioner had contended that the said determination was unlawful as it was not signed and sealed. In his replying affidavit, the 4<sup>th</sup> Interested Party annexed the same determination duly signed by the Chairman. In its affidavit in support of the Petition, the Petitioner has not stated where it obtained the unsigned copy of the 1<sup>st</sup> Respondent's determination. The same appears to have originated from the 3<sup>rd</sup> Respondent. I have noted from the Petitioner's said affidavit that the 3<sup>rd</sup> Respondent responded on 6<sup>th</sup> October, 2015 to the 1<sup>st</sup> Respondent's letter forwarding the said determination to it for action. In the letter, the 3<sup>rd</sup> Respondent did not mention at all that the determination by the 1<sup>st</sup> Respondent was not signed. I do not think that this is something that the 3<sup>rd</sup> Respondent would have overlooked as there was no way he could have acted on an unsigned determination. I have also noted that the 3<sup>rd</sup> Respondent has not mentioned in his response to the petition that the determination that was sent to it for action by the 1<sup>st</sup> Respondent was unsigned and unsealed. Since the source of a copy of the determination which is annexed to the Petitioner's affidavit in support of the petition is unknown and there is before court a signed determination by the 1<sup>st</sup> Respondent that was not challenged by the Petitioner, I find no merit in the Petitioner's claim that the 1<sup>st</sup> Respondent's determination was not signed. I therefore hold that the 1<sup>st</sup> Respondent's determination dated 30<sup>th</sup> September, 2015 was not null and void for want of signature and seal.

Whether the 1<sup>st</sup> Respondent's determination dated 30<sup>th</sup> September, 2015 was arbitrary, oppressive, capricious and unreasonable.

I have held above that the 1<sup>st</sup> Respondent had jurisdiction to review the titles for the suit properties and that the Petitioner was given a fair hearing in terms of being notified of the complaints and being given an opportunity to appear before the 1<sup>st</sup> Respondent to defend itself. Looking at the dispute in totality however, I am of the view that this is not a dispute that the 1<sup>st</sup> Respondent should have taken on. I am of the considered view that the power that was given to the 1<sup>st</sup> Respondent to review grants and dispositions of public land was intended to be used in the public interest and to enable the public to recover public land that had been irregularly or unlawfully alienated. The power was not meant at all to be used to settle private disputes. The fact that the National Land Commission Act, 2012 provided that the 1<sup>st</sup> Respondent could exercise its review jurisdiction "*on its own motion or upon a complaint by the national or a county government, a community or an individual*," (emphasis added) in my view cannot be interpreted to mean that the 1<sup>st</sup> Respondent could entertain disputes between private parties over alienated government land. In my view what was meant by the foregoing was that any person could move the 1<sup>st</sup> Respondent to review alienation of public land which he considered to be irregular or illegal.

There is no doubt that in this case, the 1<sup>st</sup> Respondent was not reviewing the titles for the suit properties so as to recover the properties for the public. The 1<sup>st</sup> Respondent presided over a land ownership dispute between the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties' families on the one hand and the Petitioner on the other hand. In its determination, the 1<sup>st</sup> Respondent held that the suit properties were owned by the families of the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties and ordered that the titles held by the Petitioner be revoked so that the said families could continue with possession of the suit properties. I am of the view that the 1<sup>st</sup> Respondent overstepped its mandate and ventured into the jurisdiction of this court which it was not well equipped to discharge. This has clearly come out in the determination by the 1<sup>st</sup> Respondent. There was completely no evidence or material before the 1<sup>st</sup> Respondent on the basis of which the 1<sup>st</sup> Respondent could have held that the suit properties belonged to the families of the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties instead of the Petitioner. The 1<sup>st</sup> Respondent confused and mixed up the evidence that was presented before it in relation to L.R No. 337/4775 and L.R No. 337/4777 thereby arriving at a totally baseless and unreasonable decision. The 1<sup>st</sup> Respondent also failed totally to consider the response that was put forward by the Petitioner to the complaints that had been made against it thereby negating the constitutional and statutory requirement of a fair hearing before a review of a grant or disposition of public land is carried out under section 14 of the National Land Commission Act.

The 1<sup>st</sup> Respondent failed to address itself to the fact the purported letters of allotment to Peter Nzuki Ndeti and Elizabeth Nzili Nziki in respect of the suit properties had time limits within which the offers were to be accepted and payment made. The 1<sup>st</sup> Respondent also failed to note that as at the year 2011 when the suit properties were registered in the name of the Petitioner, Peter Nzuki Ndeti and Elizabeth Nzili Nziki had not accepted and paid for the said allotments which were made to them 13 years earlier in 1998. The 1<sup>st</sup> Respondent also failed to note that when Peter Nzuki Ndeti and Elizabeth Nzili Nziki purportedly paid for the said allotments in 2013, the parcels of land in respect of which the payments were being made were non-existent. The most glaring and profound error that was made by the 1<sup>st</sup> Respondent was to ignore the fact that L.R No. 337/4775 was not allocated to the Petitioner but was purchased by the Petitioner from third parties. For the foregoing reasons, I am in agreement with the contention by the Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties that the decision of the 1<sup>st</sup> Respondent was so irrational and unjust that a court of law cannot allow it to stand and to that extent, the 1<sup>st</sup> Respondent violated the Petitioner's right to a fair hearing and fair administrative action guaranteed under Articles 47 and 50 of the Constitution.

Whether the Petitioner is entitled to the reliefs sought in the petition.

The Petitioner has sought several reliefs in the petition. It is not disputed that the Petitioner is the registered proprietor of the suit properties. The Petitioner's titles in respect of the suit properties have not been lawfully revoked. The Petitioner is in the circumstances entitled to the declarations sought in prayers (a) and (b) of the petition. For the reasons that I have given earlier in the judgment, the Petitioner is not entitled to the declarations sought in prayer(c), (d), (e) and (j) of the petition. Prayers (g), (h) and (k) of the petition were not established and as such the same are not for granting. Prayers (f) and (i) of the petition have been established and is for granting. The court having found that the 1<sup>st</sup> Respondent violated the Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties right to fair administrative action and fair hearing and that the decision of the 1<sup>st</sup> Respondent was irrational, unlawful, null and void, the Petitioner is entitled to prayers (l), (m) and (n) of the petition. The Petitioner did not adduce any evidence showing that it suffered loss or damage as a result of the decision by the 1<sup>st</sup> Respondent to revoke its titles for the suit properties. In its submissions, the Petitioner claimed a sum of not less than Kshs. 2,000,000/- as general damages. The Petitioner did not lay any basis for this claim. There was also no evidence that the 1<sup>st</sup> Respondent behaved or conducted itself in such a manner as to attract exemplary damages. For the foregoing reasons, the claims for general and exemplary damages in prayers (o) and (p) of the petition have not been proved and as such the Petitioner is not entitled to the same.

Who is liable for the costs of the petition?

As a general rule, costs follow the event unless for good reason, the court orders otherwise. In this case, the Petitioner has succeeded in its claim against the Respondents and the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties. The Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties shall have the costs of the Petition which shall be paid by the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties.

Conclusion:

In conclusion, I hereby enter judgment for the Petitioner against the Respondents in terms of prayers (a), (b), (f), (i), (l), (m), and (n) of the petition dated 15<sup>th</sup> October, 2015. The Petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties shall have the costs of the petition to be paid by the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties which I assess at Kshs. 500,000/- for the Petitioner and Kshs. 200,000/- for each of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties exclusive of court fees and other disbursements which shall be taxed by the taxing officer of the court.

**Delivered and Dated at Nairobi this 19<sup>th</sup> Day of June 2020**

**S. OKONG'O**

**JUDGE**

**Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Kivindyoo h/b for Mr. Ochieng Oduol for the Petitioner

Ms. Masinde for the 1<sup>st</sup> Respondent

Mr. Kamau for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Mr. Gitonga for the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties

Mr. Dar for the 2<sup>nd</sup> Interested Party

Ms. Mungai h/b for Ms. Mburu for the 3<sup>rd</sup> Interested Party

Ms. C. Nyokabi-Court Assistant