



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW NO. 290 OF 2016
IN THE MATTER OF LAND NATINAL COMMISSION
AND IN THE MATTER OF REGISTRATION OF LAND ACT
REPUBLIC.....APPLICANT
VERSUS
THE NATIONAL LAND COMMISSION.....RESPONDENT
HARCHARAN SINGH AND 2 OTHERS.....RESPONDENT
ROSPARCH COMPANY LIMITED.....INTERESTED PARTY
EXPARTE
TARABAN COMPANY LIMITED
JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st July, 2016, the ex parte applicant herein, **Taraban Company Limited**, seeks the following orders:

- i) An Order Of Prohibition directed against the National Land Commission prohibiting them from conducting hearings and carrying investigations and/or issuing pronunciations or determinations regarding the ex parte Applicant's title and/or interfering with its quiet possession of L.R No. 209/2759/9 (Grant No. IR 122963).**
- ii) An Order Of Certiorari to remove into this Honourable Court to quash the decision by the National Land Commission to investigate the complaint filed with the commission with regards to the exparte Applicant's title to L.R No. 209/2759/9 (Grant No. IR 122963).**
- iii) THAT costs of this application and the entire proceedings be awarded to the ex parte applicant.**

Ex Parte Applicant's Case

2. According to the applicant, it is the current registered proprietor of and the occupier of the property

known as Land Reference No.209/2759/9 (IR No. 122963) (hereinafter referred to as “the suit property”), having purchased it from the **Rospatech Limited** vide an Agreement for Sale dated 24th March 2014. Pursuant thereto, a transfer was registered at the Lands Office.

3. The applicant averred that it had built on the said property a commercial building that is now complete and ready for letting.

4. The applicant however disclosed that soon after purchasing the suit property, it received information that Harcharan, Harbasha and Jaswaran Sehmi had sued Rospatech Limited, the said seller, claiming back the land. In order to protect its interest, the applicant applied to be joined to the said suit as a Defendant which application was allowed by the court and the Plaintiffs were ordered to serve the applicant with pleadings, which they did and the company responded.

5. However on 8th June, 2016, the applicant received a letter from the Respondent, summoning its directors to a hearing that was scheduled at their offices. It was the applicant’s case that the conduct of the parallel process by the Respondent herein, the National Land Commission (hereinafter referred to as “the Commission”) amounted to abuse of process because the dispute over the property the subject matter of this inquiry is also being adjudicated upon by the Environment and Land Court at the Milimani Law Courts in Nairobi.

6. The applicant averred that despite raising the issue of the Commission’s jurisdiction, the latter insisted on proceeding with the matter and only adjourned due to the ex parte applicant’s absence but re-scheduled the hearing for 8th July, 2016. Meanwhile the case pending at the Environment and Land Court in Milimani could not take off because the claimants have failed to take any steps to have it prosecuted though the plaintiffs therein are still actively involved in it and recently appointed another advocate to conduct it.

7. The applicant reiterated that it is an abuse of legal process and oppressive to the Applicant to be subjected to court process as well as the process at the National Land Commission at the same time. In its view, the Commission ought not to insist on hearing a dispute that is already pending before the Environment and Land Court. Further, the claims the subject matter of the alleged complaint should not be considered by the Commission as it lacks jurisdiction to adjudicate over disputes over private property, and that is a preserve of the Environment and Land Court.

8. While appreciating that that the Respondent has the constitutional and statutory mandate to carry out the tasks it is carrying out, the applicant however contended that when a matter is pending before court, other quasi-judicial organs have no jurisdiction to engage in parallel investigations and adjudication of such a matter. The applicant disagreed with the Respondent’s position that the matters pending before court in ELC Number 1311 of 2014 are not the same as those pending before the Respondent for investigation. To it, the issue before the court in ELC 1311 of 2014 is whether the 1st and 2nd Defendants (the Interested Party and the Ex Parte Applicant respectively) have a good title to LR. Number 209/2757/9. On the other hand, the Respondent wants to investigate “the process and legality of the leases” in the applicant’s possession. Secondly, the prayers sought in the Plaint in ELC 1311 of 2014 include a prayer for the Defendants’ eviction from the disputed property, and in order to arrive at such an order, the Court would have to investigate the veracity of the two disputed titles. The applicant therefore was of the view that the issue sought to be investigated by the Respondent is the same issue that is before the court, which is aimed to answer the question of whose lease is the legal one between the Plaintiff’s (2nd Respondent) on the one hand and the defendants’ (the Interested Party and the Ex Parte Applicant respectively) on the other hand.

9. The applicant therefore insisted that the 1st Respondent is engaged in an endeavour where its lack jurisdiction, and any continuation of their intended investigations would amount to meddling in a suit that is pending before court.

10. According to the applicant the 1st Respondent has evinced open partisanship towards the 2nd

Respondent based on the hostility with which the applicant was confronted. The applicant disclosed that a member of the Commission advised the 2nd Respondent to withdraw the case pending in court so as to remove the impediment to the jurisdiction of the Commission.

11. The applicant insisted that the pending case can effectively resolve the legality of the two leases, so that if the Plaintiff's Lease is still legally subsisting, then the applicant would be evicted, and if the lease that he applicant holds was regularly issued, then the Plaintiff's case would be dismissed. However the intended action by the 1st Respondent would undermine the authority of the court and would be recipe for anarchy because the court case would remain pending, yet the Court should always be the final arbiter in matters as emotive as those dealing with entitlement to land. I was therefore the applicant's case that the Commission ought not to insist on hearing a dispute that is already pending before the Environment and Land Court, and the motive behind their insistence on hearing this particular matter is malicious. To the applicant, the 2nd Respondent ought to prosecute its case in the ELC, and should they wish, they can call the NLC to give evidence on their behalf.

12. It was submitted on behalf of the applicant that the **National Land Commission** is established under article 67(1), Chapter 15 and Article 248(2)(b) of the Constitution and that its functions are as provided under Article 67(2). Further functions of the Commission are provided under sections 5 (2) and 14 of the **National Land Commission Act, 2012** (hereinafter referred to as "the Act). The Environment and Land Court, on the other hand, is established under Article 162(2)(b) of the Constitution, with its jurisdiction and functions being set out under section 13 of the **Environment and Land Court Act, 2011** as a court with original and appellate jurisdiction to hear and determine all disputes in accordance with the Constitution and within the provisions of the Act and all other laws applicable in Kenya relating to environment and land. Its powers include *inter alia* to deal with all disputes relating to land administration and management. Further, the Court is also empowered to hear cases relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.

13. It was submitted the Commission, on its part, has power to gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary according to section 6(2)(a) of the **National Land Commission Act, 2012**. It is further empowered under sec 14(1) of the Act to, on its own motion, or upon receipt of a complaint from the national/County Governments, a community or individual to review all grants and dispositions of public land to establish their legality or propriety and that 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 which provides for the right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

14. It was therefore submitted that in all fairness therefore, the Commission lacks the mandate to carry out investigations and/or review the legality and propriety of lease in land parcel number LR No. 209/2759/9 (Grant No. IR 122963) where the Environment and Land Court has been approached to make a determination over the same matter. This argument was based, firstly, on the fact that the Environment and Land Court derives its judicial authority from Article 159(1) of the Constitution. Whereas it is trite that under Article 162(2)(b), the Court is mandated to hear all disputes relating to the environment and the use and occupation of, and title to land, the National Land Commission, an Independent Commission, under s.14(1) of the Act establishing it is mandated to review grants and disposition in public land. It was the applicant's case that conducting such parallel investigations premised upon a complaint by the 2nd Respondent, who contemporaneously are the Plaintiffs in Nairobi ELC No. 1311 of 2014, is prejudicial and amounts to an abuse of the legal process, principles of natural justice and fair hearing. Since the 2nd Respondent has subjected itself to the jurisdiction of the ELC, the applicant submitted that they were embarking on a fishing expedition by filing a similar complaint before the Commission.

15. It was submitted that though the Commission contends that it only became aware of the pendency of Nairobi ELC No. 1311 of 2014 vide a letter dated 21st June, 2016 from the Applicant's advocates, upon

such discovery, the only option that the 1st Respondent had was to down its tools since the Environment and Land Court is a court with original and appellate jurisdiction to hear and determine all disputes in Kenya relating to environment and land in accordance with the Constitution and with the provisions of the ***Environment and Land Court Act*** and all other laws applicable in. In support of its case the applicant relied on ***Halsbury's Laws of England*** (4th Ed.) Vol. 9 at page 350 and **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1.**

16. The applicant further relied on the decision of the Kenya Supreme Court Constitutional Application No. 2 of 2011 – **Re: The Matter of the Interim Independent Electoral Commission**, where the Supreme court had this regarding the independence and *modus operandi* of commissions and independent offices:

"...The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause'...These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the 'independence clause' does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law."

17. It was therefore the ex parte applicant's case that independence clause does not accord the Commission a *carte blanche* to conduct investigations by way of inquiry or otherwise, if the Environment and Land Court is seized of the matter.

18. With respect to the allegation that the issues being dealt with the Court are not the same as those before the Commission it was submitted that from the plaint, the 2nd Respondents, who are the Plaintiffs in ELC Case No. 1311 of 2014, aver that they are the duly registered owners and tenants of LR No. 209/2759/9 (Grant No. IR 122963); that they were illegally evicted from the aforesaid parcel of land in which they are in possession of the original lease for the suit property; that the 2nd Defendant (Ex parte Applicant) is illegally occupying the land is a trespasser and has encroached on the Plaintiff's land; and that the Defendant is using forged documents to lay claim of the suit property. On the other hand, the Commission's letter summoning the ex parte applicant required him to make representations on how he acquired the said parcel of land. The 1st respondent, in their Replying Affidavit aver that the summons were limited to inquiring into how the Ex Parte applicant was allocated and registered as the proprietor of LR No. 209/2759/9 (Grant No. IR 122963) and further determine the legality and propriety of the process and issuance of the lease.

19. To the ex parte applicant, it is clear that the issues before the Environment and Land Court and the National Land Commission are the same. This is because they all seek to investigate the legality and propriety of the process of issuance of the lease to the Defendants since the Plaintiffs contend that the 2nd Defendant used forged documents to lay claim in the property, as they were in possession of the allegedly original lease and that 2nd Defendant has been in illegal occupation of the suit land. **The Plaintiffs are yet to give evidence to substantiate their allegations of the illegal propriety of the suit land by the 2nd Defendant or even the use of forged documents to lay claim in the suit property as the suit before the ELC is yet to be heard. The Plaintiffs are still desirous of pursuing the suit as they recently appointed another advocate to take over the conduct of the suit. Therefore to subject the ex parte applicant to similar investigations conducted by the 1st Respondent is prejudicial and amounts to an abuse of the court process and flies on the face of the tenets of natural justice since there is an active case before a court of competent jurisdiction. In support of this position the ex parte applicant relied on the decision of Angote J. in High Court Miscellaneous Application No. 4 of 2013 between **Republic vs. Chairman District Alcoholic Drinks Regulation Committee & 4 others Others Ex-parte Detlef Heier & Another** in which the Learned Judge defines abuse of court process to include a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.**

20. According to the ex parte applicant, the matter before the Commission is pursuant to section 6 of the **Civil Procedure Act sub judice**. It relied on **Black's Law Dictionary 9th Edition** which defines the term "sub judice" as: "Before the Court or Judge for determination" and contended that a matter which is still pending in Court un-decided or still under consideration is *sub-judice* and relied on the decision of **Olao J**, in **Kerugoya ELC Constitutional Petition No. 7 of 2015 between Kenya Planters Co-operative Union Limited and Kenya Co-operative Coffee Millers Limited & Another** that:

"A Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words "or proceeding" in Section 6 of the Civil Procedure Act. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised."

21. To the ex parte applicant, it is not the form in which the suit is framed that determines whether it is *sub-judice* or not but rather it is the substance of the suit and submitted that from the attached pleadings, it is plain that the substantial issues before the Environment and Land Court and National Land Commission are the same. Looking at the pleadings in Nairobi ELC No. 1311 of 2014, and particularly the Plaintiff, one is able to adduce that the issues are related to propriety of LR No. 209/2759/9 (Grant No. IR 122963). It is also clear that the 2nd Respondents' lease had expired and it was subsequently allocated and registered in the name of the Interested Party who later transferred it to the ex parte applicant. In order for the court to grant any of the prayers in the suit, the ex parte applicant submitted, it shall have to establish first the legality and propriety of the lease certificates issued in question hence the conduct of the National Land Commission in purporting conducting investigation as to how the ex parte applicant acquired the suit land amounts to *sub judice*.

22. It was submitted further the Vice Chairperson of the 1st Respondent during the pendency of these proceedings made comments which were prejudicial to these and the proceedings pending before the Commission contrary to section 4(3)(a) and (b) of the Act provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person (natural or juristic), the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action and give such persons an opportunity to be heard and to make representations in that regard. In the applicant's view, it is clear from the comments of the vice chairperson to the 1st Respondent, that a decision had been reached with regards to propriety of LR No. 209/2759/9 (Grant No. IR 122963). This was regardless of the fact that that the ingredients of fairness and natural justice were not followed. Therefore the 1st Respondent exhibited bias when it made such pronouncements when in fact no hearing had been conducted.

23. The ex parte applicant therefore prayed that the orders sought herein be granted as prayed.

Interested Party's Case

24. The applicant was supported by the Interested Party, Rospatech Company Limited (hereinafter referred to as "Rospatech") based on substantially similar grounds as the ex parte applicant's.

25. According to Rospatech, all the records in the relevant government departments clearly showed that the respondent was the legally registered owner before the respondent transferred the suit properly to a different party. On or about March 2014, Rospatech entered into an agreement for sale in respect of the subject land with the ex parte applicant and upon execution of the agreement, payment of consideration, obtaining the requisite consent and execution of the transfer the subject property was transferred to the ex parte applicant.

26. According to Rospatech, after the property was transferred to the ex parte applicant, the 2nd respondents filed a suit at the Environment and Land Court at Nairobi the same being ELC Case No. 1311 of 2014 (Harcharan Singh Sehmi & 2 Others vs. Rospatech Limited). Contemporaneously, the 2nd respondents filed two applications seeking interim orders on injunction against the ex parte applicants. Similarly the ex parte applicant filed an application seeking to be enjoined in the said ELC Case No. 1311

of 2014 as a 2nd defendant which was allowed. It was averred that the said applications were first heard before the **Mutungi, J** after which the same transferred to **Gacheru, J** where it is still pending. However after the failure of the hearing to take off the matter was on 30th June, 2015, stood over generally.

27. According to Rospatech, on its directors received letters dated 8th July, 2016 from the Commission, summoning them for a hearing that was scheduled to their offices in which the issues were the same issues that had been raised in ELC Case No. 1311 of 2014 filed by the 2nd respondent and which was still pending in court.

28. It was averred that despite the objections raised on behalf of Rospatech, the Commission insisted on proceedings with the matter. However before the matter before the Commission could proceed the ex parte applicant served Rospatech with an order issued herein staying the proceedings before the Commission. Notwithstanding acknowledgement of receipt of the said on 8th July, 2016, the honourable Vice Chairperson of the Commission proceeded to make comments adverse to the ex parte applicant's interests in the suit property.

1st Respondent's Case

29. The application was opposed by the 1st Respondent Commission.

30. According to the Commission, it is a constitutional commission established under Article 67 of the Constitution and operationalized by the **National Land Commission Act 2012**, the **Land Act 2012** and the **Land Registration Act 2012**, with the special authority, objects and in particular mandated to manage and administer public land under of the Constitution.

31. It was averred that the core mandate of the Commission is provided for under Article 67(2)(1), 82(2), 1(a) and 68(c)(v)m of the Constitution, and the aforesaid legislation which is to manage public land on behalf of National and County Government among other functions. Pursuant to Article 68(c) (v) of the Constitution and section 14 (1), (3), (5), (6) of the **National Land Commission Act**, the 1st respondent is mandated to review all grants/dispositions of public land to establish their legality and propriety. It is also empowered under section 14(12) of the same Act to, on its own motion or upon receipt of a complaint either from National/County Governments, community/individual, review all grants/dispositions of public land to establish their legality or propriety.

32. In this case it was disclosed that the Commission received complaint over the issuance of a leasehold to the applicant herein, while the complainant claimed to be in possession of original leasehold to the same property. According to the Commission, preliminary investigations showed that the original leasehold expired sometimes in the year 2001 and hence the property reverted back to the government at some point. With such information it was clear that two leasehold certificates to the same property are in existence in relation to parcel No. 209/2759/9 and therefore there was need to establish the legality of the certificates in accordance to the provisions of Article 68 of the Constitution. Based on this preliminary investigation the Commission made its recommendation to conduct an inquiry into the process and legality of the leases to the property and duly informed the applicant of both the complaint and the decision to investigate. On the 8th June, 2016 the 1st respondent invited all parties to make presentation and shed light on how each acquired the suit property and obtained the ownership documents in accordance to section 14(3) of the **National Land Commission Act 2012**.

33. To the Commission, its summons were limited to inquiring how the suit land having reverted to public land upon expiry of the lease in 2001 was subsequently allocated and registered in the name of the 3rd respondent and the applicant while the original lease remained in possession of the complainant. The Commission averred that all along it was not aware of the existence of a suit filed in the Environment and Land Court until the applicant responded to the summon vide their letter of 21st June, 2016 and which suit the respondent has subsequently established that the orders sought cannot determine the legality and propriety of the lease certificates in question as the suit is merely seeking for injunctive orders.

34. According to the Commission, it was and is only interested in establishing the legality and propriety of the process and issuance of the lease after its expiry and hence prudently the applicant could have respected the summons and appear before the 1st respondent to give information and produce documents which could help in arriving at just findings for both the complainant, the applicant and the entire public. In the Commission's view, the claim by the applicant that the administrative action by the Commission in reviewing the parcels is *sub judice* to the Environment and Land Court is unfounded in law and fact, and an attempt to mislead this Hon. Court, and delay the review process of investigation and establishing the legality of the two lease certificates to the suit land. The Commission was of the view that it is clear that neither the orders sought in these proceedings nor in the pending Environment and Land Court case can conclusively resolve the legality of the two leases unless a fresh matter is filed in a competent court or the review before the 1st respondent is allowed to proceed. To the Commission, the instant application is premature, malicious and the applicant is otherwise in a panic. No administrative decision has been made to warrant issuance of the orders sought, and in any case the applicant will have an opportunity to be heard during the review proceedings. Further the Commission contends that the application is based on a misinterpretation of the law and the mandate of the Commission in view of the provisions of Article 68 of the constitution and prayed that the application be dismissed to allow it to proceed with its mandate.

2nd, 3rd and 4th Respondents' Case

35. The 2nd, 3rd and 4th Respondents similarly opposed the application.

36. According to the 2nd, 3rd and 4th respondents, they have since 7th December, 1968 been the sole registered and legitimate owners and proprietors of the suit property known as L.R. NO. 209/2579/9 (I.R. 6477) freely, peacefully and lawfully occupying the same without any interruption or disturbances. However, their lease for the suit property expired on or about 1st October, 2001 where they immediately applied for its extension and continued paying for its ground rates and ground rent religiously pending processing of the extended lease.

37. However, on 2nd October 2014 the 2nd, 3rd and 4th respondents were ruthlessly and mercilessly evicted from the suit property by the interested party and ex parte applicant, their agents, servants or employees without any court order or any justification and it was during the said eviction that the 2nd, 3rd and 4th respondents realized that the ex parte applicant and the interested party had "a title" to the property L.R. NO. 209/2579/9 although with a different I.R. No. 122963. The 2nd, 3rd and 4th respondents' case was that they never sold or transferred the ownership of the suit property to the ex parte applicant, the interested party or anyone else nor surrendered the original certificate of title to anyone else. Accordingly, they averred that the ex parte applicant and the interested party used either a fake title or an irregularly or unlawfully acquired title or voidable or void documents of title to evict the 2nd, 3rd and 4th respondents yet the suit property has never been repossessed from the 2nd, 3rd and 4th respondents by the Government of Kenya or any other authority to make the plot available for re-allocation or allotment to the ex parte applicant or interested party.

38. It was therefore averred that it is this title I.R. NO. 122963 that the National Land Commission is investigating how it was acquired or obtained by the applicant and/or the interested party. In the 2nd, 3rd and 4th respondents' view none of the prayers in the plaint seeks or asks for representation on how the subject title was acquired by the ex parte applicant therefore making the matter before the National Land Commission very different than before ELC No. 1311 of 2011.

39. The Court was therefore urged not to stop the Commission from exercising its constitutional and lawful duties by a mere claim that it summoned the ex parte applicant before it which is its constitutional mandate.

Determinations

40. I have considered the issues raised in this application.

41. According to Article 67(2)(e) of the Constitution one of the functions of the Commission is:

to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

42. Article 67(3) also empowers the Commission to perform any other functions prescribed by national legislation. Article 68(c)(v) of the Constitution empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Section 3(b) of the ***National Land Commission Act*** provides that one of the objects of the Act is to provide for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution. No doubt therefore that the ***National Land Commission Act*** is the legislation contemplated under Article 67(3) of the Constitution.

43. Section 14 of the ***National Land Commission Act***, on the other hand provides that:

(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.

(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).

44. In this case, the issue in dispute between the 2nd Respondents on one hand and the *ex parte* applicant and the interested party on the other, is how the *ex parte* applicant and the interested party acquired interests in the suit property in which the 2nd Respondents had been given a leasehold interest by the Government of Kenya which though had expired, had not been repossessed by the Government.

45. Though the Respondents contend that the Environment and Land Court is only dealing with a suit seeking orders of injunction, in my view a holistic approach must be given to the real issue in dispute before the ELC. In order for the ELC to completely and effectually adjudicate over and determine the matters before it, it is my view that it would have, as a necessity, to determine the rivalling interests between the 2nd Respondents and the *ex parte* applicant/interested party herein. It is that determination that will inform the Court on the appropriate relief to grant. There is nothing barring the National Land Commission from participating in the said proceedings in order to enable the Court arrive at a just decision.

46. Therefore from whatever angle one looks at the matter before the ELC, the issue of the validity of the respective interests of the 2nd Respondents vis-à-vis the ex parte applicant/interested party will be central to the determination of that dispute.

47. It is not in doubt that the matter before the Commission is the manner of acquisition of interest by the ex parte applicant/interested party in the suit property. To my mind, that is an issue that the ELC may if the pleadings are properly placed before it squarely deal with. One shudders to think of a scenario where the Commission finds that the interest in the suit property was not properly acquired by the ex parte applicant/interested party and proceeds to direct the Registrar to cancel the ex parte applicant's leasehold interest while the ELC declines to issue the orders sought by the 2nd interested party.

48. In my view that is scenario which must be avoided at all costs. It is my view that where a matter may be adjudicated before two Tribunals, one with limited jurisdiction such as the Commission herein and another with a much wider jurisdiction such as the ELC, prudence dictates that the Commission ought to give way to the High Court in order to avoid conflicting decisions being arrived at between an inferior Tribunal such as the Commission and a Superior Court such as the ELC.

49. Therefore while I decline to quash the proceedings before the Commission, the Commission ought to be prohibited from making a determination regarding the propriety or otherwise of the acquisition of interest by the ex parte applicant and the interested party in the suit property until the proceedings before the ELC are terminated one way or the other.

50. Before I conclude this matter, one issue that has greatly concerned this Court are the allegations made against the Vice Chairperson of the National Land Commission. It is contended that during the pendency of these proceedings and in fact after this Court issued the order staying proceedings of the Commission, the said Vice Chairperson proceeded to issue certain statements to the effect that Rospatech had no title to transfer to Tarabana Company Limited; that Rospatech had committed illegalities and that some of which were criminal in nature and that the Commission had already prepared an investigation report and indeed made their decision on the matter.

51. Since this decision is not addressing a contempt of court application, I will not make definite conclusions on the matter this stage. *Although the comments attributed to the Vice Chairperson of the Commission were not properly the subject of these proceedings since they were purportedly made subsequent to the institution of these proceedings, if the same were meant to disparage and prejudice these proceedings, the same were with due respect ill-conceived and were made in bad taste by a member of a Constitutional Commission who is bound by the national values and principles of governance which include adherence to the rule of law.* In my view, it is a principle of the rule of the law that the authority and dignity of the Court be maintained at all times and that parties and their counsel should not take actions that may be deemed to amount to an abuse of the process of Court such as by contemptuously demeaning the judicial process. *The rule of law requires that matters the subject of judicial proceedings be treated with dignity and where a Court of law has issued orders barring further proceedings in question, State or Public officers ought to refrain from making comments which may be deemed to geared towards belittling of such proceedings.*

52. In **Republic vs. The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014**, this Court stated:

“Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification.”

53. In this case I wish to remind the public in general and the executive in particular of the views expressed by **Lenaola, J**, in **Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** which views I associate myself with that:

“The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more “muscle” in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws...Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up.”

54. I similarly agree with the decision in **Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion on a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

55. The matter cannot be better expressed than in the words of **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

56. In **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 Of 2014** this Court sent a warning in the following terms:

“Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law...Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government’s Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute.”

57. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the

Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation. Court orders I must emphasise are not subject to interpretation of the executive. Only Courts of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

Order

58. In the premises the Notice of Motion dated 3rd August, 2016 succeeds and the order which commends itself to me and which I hereby grant is an order of prohibition directed against the National Land Commission prohibiting it from conducting hearings and/or issuing pronunciations or determinations regarding the ex parte Applicant's title and/or interfering with its quiet possession of L.R No. 209/2759/9 (Grant No. IR 122963) pending the determination of Nairobi ELC Case No. 1311 of 2014 - Harcharan Singh Sehmi & 2 Others vs. Rospatech Limited.

59. As the substratum of the claim remains unresolved, and as the 2nd Respondents herein were improperly joined to these proceedings as such Respondents instead of interested parties, there will be no order as to costs.

60. It is so ordered.

Dated at Nairobi this 14th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Khayega for the applicant

Mr Mutiso for Miss Masaka for the 1st Respondent

Mr Ndirangu for Mr Gichohi for the 2nd Respondent

CA Mwangi