REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 74 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY FIDELITY COMMERCIAL BANK LIMITED

AND

IN THE MATTER OF THE NATIONAL COMMISSION ACT CHAPTER 5D LAWS OF KENYA

AND

IN THE MATTER OF THE L.R NO. 209/8873/2 NAIROBI

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF PROHIBITION

BETWEEN

REPUBLIC……..…..APPLICANT

AND

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

MUGUGA GREEN APARTMENTS

MANAGEMENT LTD……..……2ND RESPONDENT

EXPARTE:-

FIDELITY COMMERCIAL BANK

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th February, 2016, the *ex parte* applicant herein, **Fidelity Commercial Bank,** seeks the following orders:

> **1. That a judicial review order of prohibition be issued to prohibit the 1st respondent the National Land Commission from proceeding with the hearing relating to LR No. 209/8873/2 Nairobi.**
>
> **2. That the leave granted herein do operate as stay of the orders and proceedings before 1st respondent the National Land Commission relating to LR No. 209/8873/2 Nairobi.**
>
> **3. That the 1st respondent be ordered to issue the applicant with a copy of the proceedings before it.**
>
> **4. Such other order or direction as shall be considered fit for the court to grant in the circumstances of the case.**
>
> **5. That costs be provided for**

<u>*Ex Parte* Applicant's Case</u>

2. According to the applicant, on 17th May, 1989, **Orient Holdings Limited** surrendered Grant No. I.R.32789 (L.R. No. 209/8873) back to the government for subdivision and one of the sub0divisions which was surrendered to the government was then renumbered to L.R. No. 209/8873/2 and later renumbered to L.R. No. 209/12948. It was averred that in 1996 L.R. No. 209/12948 was allocated by the government to Emtol properties for a period of 99 years free from encumbrances save for a caveat that was later lifted, which allocation was done subject to Emtol Limited fulfilling all the requisite statutory requirements.

3. It was contended that Emtol Properties limited was later purchased by Amin Mohammed Banjee (Deceased) and Farida Amin Banjee through a special resolution dated 10th April, 1996. Through all this period, Emtol Properties has been paying all land rates as determined by the County Government and the lands registrar and at no time were they informed that the suit land had a problem with ownership thereof.

4. It was averred that on or about May 1989, the Residents of Muguga Green Apartments were illegally occupying the suit property that belonged to Emtol Properties by using it as a children' playground and upon realization of this, Emtol Properties Limited constructed a wall that would block access to the property.

5. It was disclosed that the applicant herein, Fidelity Commercial Bank then purchased shares in Emtol Properties Limited and consequently acquired the suit property at Kshs 6,500,000.00 on or about November 1999. In 2007, the applicant decided to develop the property and instructed Mazingira Solutions Limited to conduct an Environment Impact Assessment and draft a report on the same. On or about 25th June, 2007, the applicant received a letter from the advocates of the residents of Muguga Greens Apartment claiming that the land was illegally allocated to Emtol Properties Limited by the Commissioner of Lands. They however failed to show that the property was held in trust for the residents and also did not provide any certificate of title to prove ownership of the property. Consequently, Muguga Greens Apartments instituted a suit in ELC No. 2195 of 2007 seeking a declaration that the suit land is a public utility land and that no construction should be carried thereon, an order that the title deed issued to the applicant on 19th March, 1996 was fraudulently issued and ought to be cancelled forthwith and an order that the Commissioner of Lands be compelled to rectify the records by allocating to the plaintiff the suit property to hold in trust. The said matter, it was disclosed has been in court since 2008 to date and not concluded due to lack of proper follow up by Muguga Greens Apartments Management Limited though the same, it was deposed, was coming up for hearing on 8th March, 2016.

6. It was averred that in the year 2015, Muguga Greens Apartments Management Limited lodged a

complainant with the National Land Commission, the Respondent herein (hereinafter referred to as "the Commission") and the applicant herein was invited for hearing on 3rd December, 2016 on which day the applicant raised a preliminary objection and explained to the Commission that the matter was before the Environment and Land Court and that the commission could not hear it as it would amount to sub-judice. The Commission however disregarded the objection and stated that it had to listen to the matter.

7. It was contended that when the applicant appeared before Commission on 26th January, 2016 and 28th January, /2016, the Commission made averments that are deemed to be prejudicial as against the applicant herein including but not limited to;

a. That the commission had conducted preliminary investigations and ascertained that the land had not been legally allocated.

b. That the applicant fenced off the a land that belonged to children as a playground

c. That the applicant had frustrated Muguga Greens Apartments Management Limited in the High Court matter and that the same would not happen to the Commission

d. That the commission could not grant the applicant access to the documents that it used in conducting its preliminary investigations.

8. It was averred that despite requesting the Commission for proceedings so as to indicate to this Court the kind of pre-judicial statements that the Commission had been making over and over again, the applicant was informed that it could not be furnished with the same till the hearing before the Commission was concluded.

1st Respondent's Case

9. The application was opposed by the 1st respondent (hereinafter referred to as "the Commission").

10. According to the Commission, it is a constitutional commission established under Article 67 of the constitution and whose functions are as set out under Article 67 of the constitution and the national Land Commission Act, 2013. These functions include managing land on behalf of the National and County governments and recommending a national land policy to the national government

11. It was averred that the Commission is mandated to initiate investigations, on its own initiative or on a complaint, into present or historical injustices, and recommend appropriate redress and to review all grants or dispositions of public land to establish their property or legality.

12. The 1st respondent relied on Article 68(c)(v) of the Constitution which empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Pursuant thereto Parliament enacted the ***National Land Commission Act*** 2012, (hereinafter referred to as "the Act") which in section 14(1) thereof empowers the Commission on its own motion or upon a complaint by the national or county government, a community or an individual, review all grants or dispositions of public land to establish their property of legality. It was therefore the Commission's case that no grant or disposition of public land is exempted from its review.

13. According to the Commission, the process of reviewing grants or disputations of public land involves reviewing the manner in which public land was allotted to private persons and whether the procedure that was used to allocate public land was legal and regular. Consequently, in order to execute its mandate, the 1st respondent must review the process by which public land was allotted/granted to private persons to review under Article 68(c)(v) of the Constitution and section 14 of the National Land Commission Act.

14. It was averred that pursuant to its mandate under section 14 of the ***National Land Commission Act***, the Commission began the process of reviewing the legality of the title to the suit property upon a complaint by the residents of Muguga Green Apartments and that the matter was advertised for hearing

on 25th January, 2016 when the advocates for Muguga Green Apartments Limited appeared but Fidelity Bank was not represented. After waiting for several hours, there was no show from **Mr. Kanjama** for the applicant and the Commission adjourned the matter doe hearing to 28th January, 2016 at 10.00am on which date the applicant requested for another adjournment which was allowed and a date fixed by consent and for 18th February, 2016 despite protest by advocates for Muguga Green Apartments on the ground that the resolution of the dispute had taken a long time.

15. It was disclosed that the Applicant's advocate, **Mr. Kanjama**, engaged the Commission in an acrimonious argument and protested the review of the title No. LR 209/8873/2 and refused to yield to the Commission's request to proceed with the hearing due to the public interest in the matter. It was however averred that the advocate was given an opportunity to be heard and indeed submitted his written submissions to the Commission. According to the Commission, the Commission as a matter of procedure and pursuant to its mandate always conducts preliminary investigations internally to verify the authenticity of the allegations and upon verification of the authenticity of the claims, the Commission conducted its own investigation and established that indeed the property was allocated as a public land that was meant to be playground for the children and the children had indeed suffered for long without playground. Upon the establishment by the Commission that the property was a public land, the commission invited all the parties to a hearing which is the subject of this application.

16. It was the Commission's case that in deciding to review the said title, it acted in utmost good faith and was well within its constitutional mandate and that it was in fact, alive to, during the pendency of the review process, the national values and principles of good governance enshrined in Article 10 of the constitution. It asserted that its decision to review the title over the suit property was valid and lawful.

17. The Commission's position was that an order of prohibition stopping the Commission from proceeding with the hearing relating to L.R. No. 209/8873/2 Nairobi is pre-emptory and is a kin to a fishing expedition where the ex parte applicant has thrown a hook into the waters, unaware of the fish it will catch if any, let alone the size. Consequently, an order of prohibition would amount to usurping the Commission's constitutional mandate contrary to the separation of powers and institutional independence of the Commission guaranteed by Article 249 of the Constitution.

18. It was the Commission's case that there is no evidence that the issues in the suit before the Environment and Land Court through ELC No. 2195 of 2007 are the same as the issues before the Commission as the Court has not been furnished with the plaint which would be the only proof that proceedings with the matter by the 1st respondent would be sub judice.

19. The Commission refuted the allegations by the ex parte applicant that the Commission and its officers have been partisan and reiterated that the Commission is required by law, to review all grants and dispositions of public land to establish their propriety and legality. To the Commission, although the right to property is jealously guarded by the Constitution, Article 40(6) of the constitution provides that the protection does not extend to any property that has been found to have been unlawfully acquired. The purpose of reviewing grants and dispositions is to determine whether the disposition of public land was done lawfully and regularly. According to it, a finding by the Commission that the land in question was a public land has no bearing on hearing proceedings hence should be construed to be a breach of natural justice since the Commission is only interested in the procedure through which a public land was transferred to a private person which is well within its mandate.

20. It was contended that the Commission did not breach any rule of natural justice during the hearing and that indeed it acted *intra-vires* throughout the subject proceedings and thus its decision is lawful. Further, the Commission acted with reasonableness and addressed itself to the law and the facts before it and was alive to the provisions of Article 47 of the constitution and adhered to the principles of natural justice to ensure that the ex parte applicant was accorded a fair procedural process. In doing so, the Commission guaranteed that the ex parte applicant was not laid bare to a process arbitral in nature considering the fact that the Commission has not yet published its procedural rules. The Respondent however averred that it has no obligation to issue the ex parte applicant with a copy of the proceedings before it as it has not made its decision and the matter is still ongoing. To it, the documents sought by the applicants are public

documents which can be accessed from the Ministry of Lands, Housing and Urban Development which is the custodian of the documents sought, upon making an application in the prescribed format and upon payment of requisite government fees. However, the applicant has not demonstrated having made formal application in the prescribed format for the documents sought even to the relevant body, the custodian of the documents.

21. It was contended that pursuant to section 6(3) of the Act, the Commission, in exercise of its powers and discharge of its functions, may inform itself in such a manner as it may consider necessary, receive written or oral statements and is not bound by the strict rules of evidence, further, it is empowered, under section 6(2) (a) of the Act, to gather, by such means as it considers appropriate, any relevant information from any source including any state organ.

22. This Court was therefore urged not to interfere with the Commission's constitutional and statutory mandate unless and until the 1st respondent has performed the mandate in an unconstitutional manner. Here however the Commission was performing its constitutional and legal mandate hence this Court should not interfere with the performance therewith and was urged to only step in if and when the Commission has failed to perform its mandate or has performed its mandate in an unlawful manner or in a manner that is contrary to the Constitution and the law. The Commission asserted that it did not occasion a breach of the ex parte applicant's right under Article 47 of the Constitution through its actions during hearing and that its actions were within the Constitution and the Act.

2nd Respondent's Case

23. The application was similarly opposed by **Muguga Green Apartments Management Apartments Ltd**, improperly named in these proceedings as the 2nd Respondent rather than the interested party.

24. According to the 2nd Respondent, the applicant has deliberately refused to disclose the true position and the facts of this matter. To them, the applicant claims to be the owner of the property but the current documents indicates the applicant ceased to be the owner of the property on 29th December, 2016 when it transferred the property to another entity by the name of **Richardson Properties Limited hence** the applicant has deliberately chosen to mislead the court on the true facts of the matter and this application should be dismissed with costs.

25. It was averred that land parcel number 209/8873 Grant Number 32798 was previously owned by Orient Holdings Limited which Orient Holdings Limited constructed maisonettes which were sold to current owners/residents. The said property was subdivided in 1981 and two portions of the land were set aside to be used as a garden and a parking lot by the residents since the residents did not have adequate parking area for both residents of the estate and guests, and a playing ground for the children of the residents. In addition a strip measuring 16 Meter wide was also surrendered to the council for road widening which has already taken the thereafter. It was disclosed that out of the two parcels of land, one parcel initially referred to as L/R 209/8873/2 was eventually issued with a certificate of title number IR 68692 L.R No. 209/12948 and that the said land was surrendered for special purposes to Nairobi City Council.

26. To the interested parties, the manner in which the land that was meant to be used as a public utility was eventually allocated to **Emtol Properties Limited** and then to the Applicant and finally to the current entity namely **Richardson Properties Limited** has been challenged and the matter is currently pending hearing and determination before the Land and Environment Division of the High Court (ELC No. 2195 of 2008). It was averred that the 2nd respondent has availed to the Commission various evidence in respect of all actions that have been undertaken since 1998 to show cause on this wrongful allocation of this land but the matter has delayed due to the fact that the applicant herein has been applying for adjournment and also raising preliminary objections without any basis. To the interested parties, the Commission has the mandate to look into the issue of how the land was allocated to the applicant and the applicant if at all was allocated the land lawfully and procedurally should present its facts before the aforesaid commission.

27. It was contended that the applicant has not shown the prejudice that it will face if it were to present its facts to the commission.

28. The applicant was accused of having requested for adjournment on allegations that they were organizing their facts to be presented to the commission and the Commission on several occasions accommodated the advocate hence the allegation that the Commission is biased against the applicant has no basis at all. To the interested parties, the applicant was requested to present its facts on how it acquired the land but instead of presenting the same it brought up the issue of the case being before the High Court. It was therefore its view that the applicant should participate before the Commission and present its facts the same way it has presented the same to the High Court and if a decision is made on the same can be adopted as an award by the High Court.

Determinations

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

30. The first issue for determination is whether the applicant, having disposed of the suit property is the proper party to challenge the proceedings before the Commission. It is however clear that the Commission has deemed it fit to make the ex parte applicant a party before it. Having done so, the applicant, in my view is entitled to challenge the said proceedings by any legal means at its disposal, including by way of judicial review proceedings. Having been joined as a party to those proceedings, the applicant acquired the locus to challenge the said proceedings and any decision emanating therefrom by way of judicial review. This objection is therefore for rejection.

31. Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides as follows:

> ***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

32. It follows that this application can only be determined based on the grounds which were set out on the statement. In these proceedings, the Statement filed herein identified the following as the grounds on which the relief is sought:

> **1) That the applicants are being subjected to partisan and pre-judicial proceedings before the National Land Commission which commission has indicated its position on the present matter.**
>
> **2) That there is another suit before the Environment and Land Court, the matter is still ongoing and the National Land Commission proceedings are an abuse of the Court process.**
>
> **3) It is in the circumstances that this Honourable Court should protect the rights of the Applicant against this oppressive and draconian illegal Act by the Respondent and its officers.**
>
> **4) There is no other remedy existing in law to prohibit the Respondent from doing these illegal acts.**

33. Before dealing with these grounds, the Commission raised the issue whether this Court can, in the exercise of its judicial review jurisdiction, question the lawfulness of the Commission's action, the Commission being a constitutional commission. This submission calls for an insight into the jurisdiction of this Court. Article 165(6) of the Constitution provides that:

> ***The High Court has supervisory jurisdiction over the subordinate courts and over any person,***

body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

34. In my view, the Commission's argument if taken to its extreme conclusion may easily fall foul of Article 2 of the Constitution which provides that:

> ***(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.***
>
> ***(2) No person may claim or exercise state authority except as authorised under this Constitution.***

35. In my view, when any of the state organs steps outside its mandate, this Court will not hesitate to intervene and this was appreciated by the Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** in the following words:

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."**

36. As this Court held in **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014**:

> **"this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".**

37. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J** in **R vs. Kenya Roads Board ex parte John Harun Mwau HC Misc Civil Application No. 1372 of 2000** wherein the learned Judge stated that:

> **"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."**

38. Subsequently, the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR** stated as follows:

> **"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."**

39. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward**

Akong'o Oyugi & 2 Others [2014] eKLR where it was held that:

> **"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."**

40. **Nyamu, J** was even more blunt in his opinion in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where he expressed himself as follows:

> "**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power…This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law…The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."**

41. **Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

> **"The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."**

42. This was the view adopted by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11** the following manner:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority**

required to pass the legislation."

43. The learned Judge continued:

> **"It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."**

44. As was appreciated by **Langa, CJ** in **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19** at para 33:

> **"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."**

45. I associate myself with the positions adopted in these decisions and dare add that when any of the State Organs or State Officers steps outside its mandate, this Court will not hesitate to intervene. It is therefore my view that this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, as this application alleges a violation of the Constitution by the Commission, it is my finding that the principle of independence of the Constitutional Commissions does not inhibit this Court's jurisdiction or prohibit it

from addressing the Applicant's grievances so long as they stem out of alleged violations of the Constitution. To the contrary, the invitation to do so is most welcome as that is one of the core mandates of this Court.

46. My finding is fortified under the principle that the Constitution is the Supreme Law of this country all State Organs must function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit it to do, it cannot seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.

47. This was the position adopted by this Court in **Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR** where it was held that:

> **"In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic vs. Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530*, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp. vs Anthony Sefu Dar-es-Salaam HCCA No.19 of 1971 [1973] EA*, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law."**

48. In my view the doctrine of independence must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect the Commission's independence given by Article 249(2) only remains valid and insurmountable as long as it operates within its legislative and constitutional sphere. Once it leaves its stratosphere and enters the airspace outside its jurisdiction of operation, the Courts are then justified in scrutinizing its operations. This was the position in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR,** this Court cited the decision of the Court of Appeal in **Commission for the Implementation of the Constitution vs. The Attorney General and Another, Nairobi Civil Appeal No. 351 of 2012**and proceeded to state that:

> **"The position enunciated so succinctly by the Court of Appeal is a position we wish to associate ourselves with. The Constitution disperses powers among various constitutional organs and when any of these organs steps out of its area of operation, this court will not hesitate to state so. It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the Constitution including the determination of:**
>
> **"(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
>
> **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;"**

49. In this respect I associate myself with the decision in **In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR** that the "independence clause" does not "accord" constitutional commissions *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. I prescribe to the notion advanced by **Etienne Mureinik** in ***A Bridge to Where? Introducing the Interim Bill of Rights*** **(1994) 10 SAJHR 32,** that the Constitution instils a culture of justification, "in which *every exercise of power is expected to be justified"*.

50. I must however hasten to add that this is not a jurisdiction that the Courts would lightly invoke. In this respect I would paraphrase the position adopted by the Supreme Court of India in **Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083** at pg 1105 and hold that the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to matters pertaining to the recruitment of judicial officers in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of judicial institutions and the departments controlling them. It will be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the judicial system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice.

51. Further in **R vs. Council of Legal Education [2007] eKLR** at pg. 9, it was held that

> **"The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature".**

52. I also agree with the position adopted in **Puhlofer & Anor. vs. Hillingdon London Borough Council [1986] 1 AC 484** that:

> **"It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely."**

53. Having so warned itself, I however am of the view that where the Constitution is shown to have been or is under a threat of being defined or the law violated, the Court must undertake its Constitutional mandate and correct the wrong.

54. It must now be appreciated that the parameters of the remedies for judicial review in our constitutional set up are nolonger just common law offshoot but are a constitutional resort. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

55. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply.

56. This is the position adopted by other jurisdictions with similar constitutional edicts. In **Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)** at 33 it was held that:

> **"[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution".**

57. Here at home the position has been restated by the Supreme Court in **Communications Commission of Kenya vs. Royal Media Services Limited [2014] eKLR** when it held that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law and as a result all power of judicial review in Kenya is found in the Constitution which requires Kenyan courts to go further than ***Marbury v Madison*** in exercising its judicial review jurisdiction. Therefore it is nolonger tenable to create a two track system of judicial review one based on the Constitution and the other on common law.

58. It was contended that the Commission having concluded that the subject land was meant to be used as a children's playground, and that the applicant was occupying the same illegally, was a manifestation of bias.

59. In **Porter and Weeks vs. Magill (House of Lords) [2001] UKHL 67** it was held that:

> **"In assessing whether there had been bias, the court should take all relevant circumstances into account: The ultimate question is whether the proceedings in question were and were seen to be fair"**.

60. This test was elucidated further in the case of **Glencot Development and Design Co. Ltd vs. Ben Barrett & Son (Contractors) Ltd Reference: HT 00/401** where the High Court of Justice, Queen's Bench Division held that in considering the circumstances of the case the test is whether a fair-minded and informed observer conclude that there was a real possibility or danger that the Adjudicator was biased. In other words, the test is the issue is not whether she was in actual fact bias but whether a right thinking man [or woman] would have formed the impression that there was likelihood of bias and justice would not have been done. The same position adopted by the Court of Appeal in its majority judgement in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134** in which **Lakha, JA** it expressed himself as hereunder:

> **"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit…There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the**

case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

61. In **Omolo, JA**'s view, once it is accepted that a judge was in fact biased against a party then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic.

62. This test was elucidated further in the case of **Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd Reference: HT 00/401** where the High Court of Justice, Queen's Bench Division held that in considering the circumstances of the case the test is whether a fair-minded and informed observer conclude that there was a real possibility or danger that the Adjudicator was biased. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another *Ex parte* Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400,** it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality.

63. In **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** a three judge bench of this Court while citing **Hannan vs. Bradford City Council [1970] 2 ALL ER 69** and **R vs. Sussex Justices ex parte Cay (HLC 1924)**, expressed itself as follows:

"Section 17 (b) and (d) of the Act requires the Commission to observe the principle of impartiality and rules of natural justice. One of the tenets of natural justice is that no man can be judge in his own cause. S 25 of the Act allows the respondent, after completing an enquiry, to commence proceedings in the High Court under s 84(1) of the Constitution. Having made up their mind that the applicant had contravened the 1st interested Party's rights, the respondents should have proceeded under s 25 (b) and not taken part in the adjudication. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. We find that in the circumstances of this case, a right thinking man would have formed the impression that there was likelihood of bias and justice would not have been done. The proceedings attract the order of *certiorari* for purposes of their being quashed...The applicant complaints that their legitimate expectation of a fair trial has been thwarted because of all the reasons raised by them that there is a real likelihood of bias by the Commissioner sitting as a judge in his own cause; because the Panel as constituted is unlawful, and because the regulations are uncertain, defective and unenforceable. As we pointed out earlier, s 17 of the Act provides that Rules of Natural Justice will be observed by the respondent in the performance of its functions which include investigation of human Rights Violations. The applicant expected to be given a fair hearing and all tenets of natural justice to be observed but from our observations above, we find that the same have been flouted by the respondent by their own conduct of prejudging the applicant, being a judge in its own cause; by regulation 14 breaching Rules of Natural Justice; by the Commissioner committing errors of precedent fact. We also find that the applicant's Legitimate Expectation that they would get a fair hearing from the respondent was breached."

64. In **East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They

should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

65. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**.

66. According to Article 67(2)(e) of the Constitution one of the functions of the National Land Commission, the Respondent herein (hereinafter referred to as "the Commission") is:

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

67. I therefore agree that the Commission has power either on its own motion or pursuant to a complaint to initiate investigations into present or historical land injustices and to recommend appropriate redress.

68. 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.

69. 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).

70. It is therefore clear that the Commission is empowered, on its own motion or upon a complaint by the national or a county government, a community or an individual to review all grants or dispositions of public land to establish their propriety or legality, of course subject to Article 68(c)(v) of the Constitution which restricts its powers of review of all grants or dispositions to public land.

71. In this case the Commission have refuted the allegations of bias against them. The applicant has not exhibited any evidence to support its allegations of bias on the part of the Commission. It has instead alleged that it sought from the Commission the particulars relied upon to prove bias but the Commission declined to furnish the same. In my view the Applicant ought to have invoked the provisions of Article 35 of the Constitution to compel the Respondent to disclose the said information if the same exists. In the absence of credible evidence to that effect this Court is unable to find that the Commission's conduct amounts to bias.

72. The next issue revolves around the existence of ELC Case No. 2195 of 2007. Under section 4(5) of the Act, where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title. It is therefore clear the findings of the Commission are not mere recommendations but can lead to revocation of the proprietor's title. This was the position in **Re Pergamon Press Ltd [1971] Ch. 388,** in which the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors. The Court in dealing with the matter expressed itself as hereunder:

> **"It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.."**

73. Therefore whereas the Commission is empowered, on its own motion or upon a complaint by the national or a county government, a community or an individual to review all grants or dispositions of public land to establish their propriety or legality, of course subject to Article 68(c)(v) of the Constitution which restricts its powers of review of all grants or dispositions to public land, in carrying out its mandate the Commission is expected to do so in accordance with the Constitution and the relevant statutes. Article 47 of the Constitution as read with the provisions of the ***Fair Administrative Action Act, 2015*** requires the Commission to adhere to the principles of fairness. In other words before it condemns a person it must afford the said person a hearing on the matter. It cannot therefore arrive at a finding that the applicant acquired the subject land illegally and then purport to proceed to undertake its investigations. If it does so, its decision would be irrational and unfair and would be subject to review by this Court.

74. It is therefore my respectful view that the findings of the Commission in respect of a matter which is the subject of litigation before the Environment and Land Court ought not to be simply termed as evidence to be adduced before the said Court. To that extent I take a different view from that in **Elizabeth Nditi Njoroge vs. National Land Commission [2013] eKLR**. To the contrary the findings of the Commission are capable of being implemented by the Registrar where the Commission directs the Registrar to revoke the title.

75. It is therefore my view that in order to avoid a situation where conflicting decisions are arrived at by the Commission and the Environment and Land Court, where the subject of the two fora is the same, one set of the proceedings ought to give way to the other. In other words both proceedings ought not to be permitted to proceed at the same time if there is a possibility that conflicting decisions may be arrived at which may render the other superfluous.

76. In this case, however, as rightly pointed out by the Commission, the pleadings before the ELC are not before me. Accordingly there is no material on the basis of which I can find that the proceedings before the Commission are the same as those before the ELC.

77. Having considered the grounds upon which this application was based, I find no merit in this application.

Order

78. In the premises the Notice of Motion dated 24th February, 2016 fails and is dismissed with costs.

79. It is so ordered.

Dated at Nairobi this 7th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Otieno for Mr Kanjama for the applicant

Miss Kiarika for Mr Kimani for the 2nd Respondent

CA Mwangi