



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 53 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI**

AND

**IN THE MATTER OF ARTICLES 2,10,19,20,21,22,23,40,47,64(B), 67 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF
KENYA AND IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURES RULES**

AND

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015 SECTIONS 7,8,9,10
AND 11**

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

REPUBLICAPPLICANT

VERSUS

1. THE NATIONAL LAND COMMISSION}

2. CHIEF LANDREGISTRAR.....RESPONDENTS

JUDGMENT

1. On 10th February 2016, Honourable Korir J granted to the exparte applicant herein Joseph Kariuki Iregi leave to institute Judicial Review proceedings seeking for judicial review orders of Certiorari and Prohibition against the respondent, the National Land Commission.

2. The said order of leave also directed that the substantive notice of motion be filed within 14 days from 10th February 2016.

3. On 23rd February 2016 the ex parte applicant filed the substantive notice of motion which is dated 22nd February 2016 seeking for the following Judicial Review orders:

i. That an order of certiorari to remove to this Honourable court for the purposes of quashing and to quash the decision of the respondent to revoke titles deeds over Nairobi/Block 82/8866, Nairobi /Block 82/8867 and Nairobi/Block 82/8868;

ii. An order of prohibition to issue directed to the National Lands Commission from cancelling, revoking and or in any manner unlawfully interfering with the applicant's properties being title numbers Nairobi/Block 82/8866, Nairobi /Block 82/8867 and Nairobi/Block 82/8868 respectively.

4. The application is grounded upon the facts set out in the statutory statement and verifying affidavit accompanying the application for leave and a supporting affidavit sworn by the ex parte applicant Joseph Kariuki Ileri on 22nd January 2016.

5. The ex parte applicant's case is that he is the registered proprietor of leasehold interest in Nairobi/Block 82/8866, Nairobi /Block 82/8867 and Nairobi/Block 82/8868 originally known as Nairobi Bloc 82/4292 and that he was initially a tenant in common with Joseph Kangethe Nyaga vide a certificate of lease issued on 19th July 1995. That on 26th October 1999 the said Joseph Kangethe Nganga transferred his leasehold interest in the said original title to the ex parte applicant.

6. That the ex parte applicant intended to develop the said plot in 2008 hence he sought for development approvals from the Chief Engineer Ministry of Roads as the plot was bordering Outering Road. He also sought for approval from Kenya Power & Lighting since the said plot also bordered Kenya Power & Lighting company way leave.

7. That the ex parte applicant received communication of no objection from the Chief Engineer Roads on 4th July 2008 and from Kenya Power & Lighting Company on 5th September 2008 respectively.

8. That on 26th September 2008 the then City Council of Nairobi issued the ex parte applicant with a Bill of Plans Inspection fee and the said building plans were approved by the Director of City Planning on 5th June 2009. That the applicant then applied for subdivision of the original title into three portions and on 9th June 2010 he was issued with a provisional approval by Karuri F.G. on behalf of the then Commissioner of Lands.

9. That later on 19th February 2010 the ex parte applicant submitted an application for development permission to the then City Council of Nairobi through Dr George N. Njuguna the Physical Planner and that the ex parte applicant was issued with a notification of approval of development permission over subdivision of the original title No. Nairobi Block/4292.

10. That on 24th September 2010 the Town Clerk for the then City Council of Nairobi wrote no objection to approval for subdivision to the Commissioner of Lands and on 15th October 2010 the applicant was issued with a subdivision certificate by the Director of City Planning and Architecture. That it was upon issue of certificate of subdivision that the ex parte applicant was issued with a leases for the three parcels named herein.

11. That the ex parte applicant then fully developed the said plots which developments now house several tenants including a supermarket, banking institution and other establishments.

12. That vide gazette notice No. 307/11/1/2016 the Secretary/CEO of the National Land Commission purportedly revoked title numbers subject of these proceedings claiming jurisdiction under the powers of the Commission to review titles.

13. That the National Land Commission has no power to review or revoke titles to private land but only to public land as stipulated in Section 14(1) of the National Land Commission Act. That the National Land Commission has breached the Rules of natural justice, has acted ultra vires and that it has acted with malice since it never accorded the ex parte applicant any opportunity to appear before it to inspect documents of ownership prior to the making of the decision to revoke the titles to the three parcels of land.

14. That in view of the above, the respondent unilaterally violated the applicant's rights under the Constitution to own and enjoy property and that the respondent's action amounts to unfair administrative action.

15. The ex parte applicant therefore urged the court of grant the prayers sought.

16. As there was no appearance and or reply to these proceedings, the applicant urged the application orally before me on 7th November 2016 with Miss Wangari relying on her client's pleadings, affidavits and written submissions filed in court on 15th March 2016.

17. Counsel for the ex parte applicant framed one issue for determination which is, whether the 1st respondent lawfully placed the revoked title numbers being the applicant's property.

18. I shall in considering that single issue combines the written submissions with counsel's oral submissions.

19. The ex parte applicant through his advocate submitted that the parcels of land in question being private land, the National Land Commission had no jurisdiction to review titles to the said parcels and or revoke them, and that the action of reviewing and revoking the said titles is in violation of and ultra vires Sections 62 and 67 of the Constitution which make a clear distinction between private and public land and the extent of the powers of the National Land Commission. It was further submitted that the decision of the National Land Commission was tainted with illegality.

20. It was also submitted that prior to review and revocation of the said titles, the applicant was never accorded an opportunity to be heard contrary to the provisions of Article 47(2) of the Constitution. Further, that no reasons for the decision to revoke the titles was ever given to the applicant.

21. Reliance was placed on the case of **Pashito Holdings & Another v Ndungu & 2 Others [1997] e KLR** where the Court of Appeal held that the rule of *audi alterum partem* is a rule of natural justice and an indispensable requirement of justice that the party who made the decision shall hear both sides, giving each an opportunity of hearing what is urged against him.

22. Further reliance was placed on **Re Bivac International SA (Bureau veritas) [2005] 2 EA** where it was held that the right to be heard is an important cornerstone of any legal structure.

23. The applicant further submitted that the review and revocation of his titles to land without according him an opportunity to be heard was in violation of his constitutional right to property and to be protected from arbitrary deprivation of property that he lawfully owns, as stipulated in Article 40 of the Constitution.

24. According to the applicant, sanctity of title is protected under the Constitution and Section 26 of the Land Registration Act and that the applicant having legally acquired the lands in question and proceeded to develop the parcels, no person or body or authority had the mandate to deprive him of those titles of ownership and occupation other than through constitutional means which include compulsory acquisition with compensation at hand; reversion of leasehold interest to the Government after expiry of the lease; transfer or; surrender of the leases, as stipulated in Section 9 (c) of the Land Act; or where the leases were acquired illegally or through fraud or misrepresentation which he contended, was not the case here.

25. The applicant submitted that what he is challenging is the process through which the review and revocation of his titles was carried out leading to an illegal decision, and not the merits of that decision, as was held in various decisions including **Commissioner of Lands v Hotel Kunste Ltd CA 234 of 1995; Sanghani Investments Ltd V Officer In Charge Nairobi Remand & Allocation Prison [2007] 1EA 354; Ezekiel Musango Mutisya v National Land Commission & 6 Others [2014] e KLR; Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd CA 185/2001; JR334/2014 Republic Vs National Land Commission exparte Krystalline Salt Ltd [2015] e KLR** and in the latter case, it was submitted that the court granted Judicial Review orders of certiorari on the grounds that the respondent acted in excess of its jurisdiction when it ordered for excision of the portion of the applicant's land and held that the respondent acted without jurisdiction; and that it had breached the Rules of natural justice by failing to accord the applicant a hearing before making the decision.

26. Further reliance was placed on **Kuriki Greens Ltd Vs Registrar of Titles [2011] eKLR** where the petitioner's titles were revoked through a Kenya Gazette Notice. Honourable Musinga J (as he then was) held that the nullification of the petitioner's titles was unconstitutional, null and void.

27. The applicant also relied on **Isaac Gathungu Wanjohi & Another V Attorney General & Others[2012] e KLR** where Majanja J declared a Gazette Notice that nullified the petitioner's title as null and void because the decision had been made without the requisite jurisdiction. It was submitted that a similar decision was reached by the court in **Republic vs Land Registrar, Kakamega District & Another exparte Kito Pharmaceuticals & 2 Others [2013] e KLR**.

28. On the purview of Judicial Review, reliance was placed on the decision by **Lord Diplock in Council of Civil Services Union V Minister for Civil Service[1985] A.C 374**.

29. It was further submitted that the Chief Land Registrar's position in this suit would be to correct the records and remove the revocation against each of the titles to reflect this court's orders in line with the Land Registration Act, 2012.

30. Relying on **Republic Vs Institute of CPA of Kenya Exparte Vipochandra Bhatt T/a Bhatt & Company Nairobi HCMA 285/2006**, counsel for the exparte applicant submitted that the manner in which the respondent acted was irrational, capricious and arbitrary and in bad faith. The applicant's counsel therefore prayed for the orders sought in the Notice of Motion with costs.

Determination

31. I have carefully considered the notice of motion dated 22nd February 2016 and the supporting statutory statement, verifying affidavit, supporting affidavit and the exhibits annexed thereto.

32. I have also considered the applicant's counsel's written submissions which were fully adopted during the oral hearing as arguments in support of the notice of motion.

33. I have given equal consideration to the Constitutional, statutory and case law cited in support of the Judicial Review proceedings.

34. In my humble view, the issues for determination fall in the following categories.

1) Whether the respondent National Land Commission had the jurisdiction to review title to land which is private land.

2) Whether the 1st respondent National Land Commission acted within the law and Constitutional confines when it reviewed and revoked the subject titles.

3) Whether the Judicial Review orders sought are available to the exparte applicant.

4) *What orders should this court make.*

5) *Who should bear costs of these Judicial Review proceedings?*

35. Shall essentially determine these issues together. On the first issue, the commencement point is that the National Land Commission is an independent constitutional commission established under Article 67 of the Constitution.

36. The same Article sets out the functions of the National Land Commission, among other functions vested in the Commission by the National Land Commission Act, the Land Act, the Land Registration Act, the Environment and Land Court Act, among other pieces of legislation as stipulated and envisaged under Article 67(3) of the Constitution.

37. The key function that is material to these proceedings is the function stipulated in Article 68 (b) (v) of the Constitution which relates to the review of all grants or disposition of public land to establish their propriety or legality. That same function is to be found in Section 14 of the National Land Commission Act.

38. According to the *exparte* applicant, the National Land Commission exceeded its jurisdiction when it purported to review title to private property which is owned by him.

39. It was alleged by the *exparte* applicant that the property subject of these Judicial Review proceedings and whose titles were reviewed and revoked by the respondent National Land Commission are private property.

40. Nonetheless, it is not disputed that the head lease is owned by the Government of Kenya and the titles which are leaseholds have a specific terms of 99 years after which the Government has the reversionary interest and right.

41. That being the case, although the property is private land, the fact that it is leasehold means that at one time it was public land and therefore what the National Land Commission would be doing in reviewing the titles or dispositions in those parcels of land, is to investigate, on its own motion or following a third party's complaint, whether the process of acquiring that private land which was formerly public land was regular, legal and or without any fraud or misrepresentation.

42. In other words, in order for the National Land Commission to execute its statutory and constitutional mandate, it must review the process by which the public land was granted to private persons. If that were not the case, then the principles and purposes of the Constitution would be defeated since in Kenya, one has to appreciate the history of the land question which is hinged on the private individuals who were loyalists to the establishment of the day were, over a period of time heavily rewarded with allocation of public land including land occupied by the police stations, schools and even Government institutions and not even the judiciary land was spared in that its buildings were grabbed by private individuals and entities.

43. It is for that reason that I find, without hesitation, that the framers of the Constitution found it necessary to provide for review of titles of public land with a *Read in* establishing that it would defeat logic if the Commission was to review public land owned by public institutions.

44. In my humble view, the National Land Commission has jurisdiction to review title to land which though private, but is leasehold land where the head lessor (grantor) is the Government, in order to establish whether the process of acquisition of that title to that particular land as is in this case, was legal or regular.

45. However, still on the question of jurisdiction of the National Land Commission to review title to land, and proceeding to revoke the said title(s), the question is whether the National Land Commission after reviewing the titles or dispositions in land has the jurisdiction to revoke the said titles.

46. A reading of Articles 67,68 of the Constitution and Section 14 of the National Land Commission Act does not establish any power bestowed upon the National Land Commission to revoke titles to land.

47. Section 14(8) of the National Land Commission Act Cap 5D of Laws of Kenya provides, under the heading 14: *Review of grants and dispositions*.

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

2)

3) In 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 note 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.

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).

48. From the above clear provisions of the law, it is trite that whereas Section 14(1) of the National Land Commission vests the Commission with the statutory mandate to review grants of dispositions of public land to establish their propriety or legality, ***nonetheless, the power to revoke title to land does not vest in the Commission.*** Under Section 14 (5), it is clear that *where the commission finds that the title was acquired in an unlawful manner, the commission shall direct the Registrar to revoke the title.*

49. The power to revoke titles is vested by statute the Registrar and not in the Commission and therefore where the Commission purports to revoke any title whether that title was acquired illegally or irregularly, that act of revocation is illegal and ultra vires the statute and it would be amenable to Judicial Review by way of an order of certiorari.

50. In the instant case, it is not in dispute that the subject titles are registered in the names of the exparte applicant and whether or not they were acquired regularly or illegally is not for this court to determine.

51. What this court is concerned about ***is whether the*** National Land Commission's decision to revoke the said titles as per the Gazette Notices vide the Kenya Gazette Notice No. 6 VOL CXVIII

dated 22nd January 2016, Gazette Notice No. 307 of the same dated titled “ **Determination for Review of Grants and dispositions of Public Land**” at page 120 items No. 80,81 and 82 regarding Nairobi/Block 82/8866, Nairobi /Block 82/8867 and Nairobi/Block 82/8868 both of Nairobi Embakasi, without naming any interested party, but under the column for “**Determination and vesting**” it is indicated “ **title revoked /title to be regularized,**” was made with jurisdiction.

52. This court would have excused the National Land Commission if the National Land Commission had after determining the legality or otherwise of the suit titles, among others, it instructed the Registrar to revoke the title.

53. However, at page 118 and page 120 of the Kenya Gazette Notice, it is crystal clear that the Commission had made a determination in respect of the named subject grants and had revoked the grants (titles) to the subject lands. What appears to be pending is “ **title to be regularized**” which speaks to the future, **unlike “title revoked”** which speaks to what had already taken place.

54. With such a clear decision as to what had happened to the exparte applicant’s grants to the suit properties, this court need not look for any super decision to anchor its finding that National Land Commission in revoking the exparte applicant’s grants to the suit properties acted illegally and ultra vires.

55. Section 14(5) of the National Land Commission Act which mandates the National Land Commission, after finding that the title to the land was acquired in an unlawful manner, the Commissions shall direct the Registrar to revoke the title was not followed. The National Land Commission in revoking the subject titles usurped the power vested in the Chief Land Registrar.

56. The said respondent National Land Commission was served with the pleadings in this case to appear in court and explain circumstances that may have informed it to revoke the title to the subject parcels but the Commission never seized that opportunity.

57. Accordingly, on that ground of want of jurisdiction to revoke title to land or grant, this court would not hesitate to hold and I hereby hold that the respondent the National Land Commission acted outside its jurisdiction or statutory mandate when it revoked the grant to the exparte applicant’s leasehold properties, and that it acted in excess of its jurisdiction.

58. A decision that is ultra vires calls for being called into this court for purposes of being quashed by a Judicial Review order of Certiorari, which I hereby invoke and call into this court for purposes of quashing and I hereby quash that decision of the National Land Commission communicated vide Gazette Notice No. 307 of 22nd January 2016 to the public to revoke the title/grants to properties No, Block 82/8866; Block 82/8867 and Block 82/8868 all of Embakasi Nairobi.

59. However, I must also establish whether the respondent National Land Commission in making such a drastic decision, acted in accordance with the Constitutional and statutory mandate as espoused in Articles 47(2) 50(1) of the Constitution and Section 14(8) of the National Land Commission Act and Section 4 of the Fair Administrative Action Act No. 4 of 2015 which latter Act came into force on 17th June 2015, before the impugned acts of the Respondent /National Land Commission herein and which latter Act is therefore applicable in these proceedings.

60. In other words, was the exparte applicant afforded any hearing, let alone a fair hearing, prior to such determination or decision to revoke his titles to land.

61. Section 14(8) of the National Land Commission Act mandates the respondent when exercising its powers to review grants or dispositions in land concerned, to be guided by the principles set out under Article 47 of the Constitution.

62. Article 47 of the Constitution guarantees every person a right to fair administrative action. Under Section 14(3) of the National Land Commission Act, the Commission is mandated to give notice to

every person who appears to the respondent, to have an interest in the grant or disposition to be reviewed and such person is entitled to appear before the Commission and inspect any relevant documents. Further, Section 14 (4) is clear that a determination should only be made after the hearing the parties.

63. According to the exparte applicant, he was never given any notice to appear before the Commission or to make representation or to inspect any relevant documents before the drastic revocation of his titles was made which action or inaction he claims violates his constitutional and statutory rights to be accorded a fair hearing before being condemned.

64. I have examined Gazette notice No. 307 of 22nd January 2016 which is the official notification by the Commission of the determination for review of grants and disposition of public land. The said notice says in its introductory paragraphs:

“ In exercise of the powers conferred by Article 68 (c) (v) of the Constitution of Kenya and Section 14(4),(5) (6) (7) and (8) of the National Land Commission Act , 2012, the Chairman of the National Land Commission informs the general public that the National Land Commission upon receipt of complaints from the National Government, County Governments and members of the public undertook review of grants and dispositions (titles) of public land to establish their legality or otherwise. The commission via a public notice in the national dailies invited all interested parties to appear before it, inspect documents and make written representations and submission. Consequently, the commission has made determination in respect of the following grants s and orders s as follows:.....”

65. The above notice does not specify at page 120 who the complainant or interested party(s) in respect of titles Block 82/8866; 82/8867 and 82/8868 was (were). It does not state what the complaint was all about or what it related to; the notice does not even mention the date on which the notice was placed in the dailies inviting all the interested or affected parties to appear before it to inspect documents and make written representation and submissions; neither does the notice mention in which specific national dailies the notice was published inviting all affected parties to appear before it.

66. If all the procedure laid down under Section 14 of the National Land Commission Act was followed, then this court wonders why the respondent Commission could not make an appearance before this court to defend its actions.

67. Article 47 of the Constitution of Kenya which is echoed in Section 14 of the National Land Commission Act on the right to fair administrative action and as implemented by the Fair Administrative Action Act No. 4 of 2015 is clear that ***(1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

68. From the above constitutional provisions as espoused in the Bill of Rights, is it clear that the right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair has been elevated to a constitutional right and not just a rule of practice under common law. That being the case, the respondent and any other tribunal, body person or authority exercising judicial or quasi judicial jurisdiction like the National Land Commission must exercise that power or jurisdiction in conformity with the Rules of Natural Justice, as espoused in Article 47(1) of the Constitution, Section 14,(3) (4) and (8) of the National Land Commission Act, 2012 and Sections 3 and 4 of the Fair Administrative Action Act No. 4 of 2015.

69. There are a plethora of decisions on this issue of the right to fair administrative action, both old and new, just to cite but a few.

70. In **De Souza V Tanga Town Council [1961] EA 377**, the Court of Appeal for Eastern Africa held:

“The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi judicial capacity are well known. The authorities are reviewed in the recent case of University of Ceylon V Fernando (4), [1960]1 ALL E.R 631. I think that the principles, so far as they affect the present case, may be summarized as under:

1) If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed.

2) If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue.

3) In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: It need not examine witnesses; and it can obtain information in any way it thinks best.....A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendants..

4) The person accused must know the nature of the accusation made...

5) A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view; and to make any relevant statement they may desire to bring forward.

6) The tribunal should see the matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party, it should give the other party an opportunity of commenting on it.....”

71. What the above decision is speaking to any quasi judicial body exercising administrative powers is that the person who is likely to be affected by a decision must be given the allegations, the evidence in support thereof and an opportunity to rebut those allegations before a decision is made against that person.

72. In the instant case, the exparte applicant complains that he was never given notice of the intended review of his titles and or any evidence in support of the review. Neither was he given reasons for the intended review. The notice of determination of the review of the said titles vide Gazette Notice No. 307/22/1/2016 which I have reproduced in this judgment in part does not even reflect the reasons for the revocation of the subject titles. There is no allegation or conclusion reached that the said titles were acquired fraudulently or through misrepresentation or through illegal or irregular means.

73. The respondent National Land Commission has not controverted the serious assertions and depositions by the exparte applicant that he was never given an opportunity to be heard before the titles in issue were revoked unilaterally, which in essence is a violation of the applicant’s right to fair administrative action as enshrined in Article 47(1) of the Constitution and as stipulated in Section 4 of the Fair Administrative Action Act No. 4 of 2015 which provide:

1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair;

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action.

b) An opportunity to be heard and to make representations in that regard;

c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;

d) A statement of reasons pursuant to section 6;

e) Notice of the right to cross examine or where applicable;

f) Notice of the right to cross examine or where applicable or

g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

a) Attend proceedings, in person or in the company of an expert of his choice;

b) Be heard;

c) Cross examine persons who give adverse evidence against him; and

d) Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5) Nothing in this Section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.”

74. The procedure for considering review of grants or dispositions in land is clearly set out in Section 14 of the National Land Commission Act and in the event any deficiency in that procedure, the Fair Administrative Action Act is at hand to fill in that gap if any, since the impugned decision was made after the said Act came into force. That being the case, this court does not find any reason why the respondent National Land Commission could not follow those procedures to accord the ex parte applicant an opportunity to be heard, and to give him reasons why, after reviewing his titles, the Commission found it necessary to have the same revoked, and in any event, by the Registrar and not by the Commission.

75. Consequently, this court finds that the applicant's right to fair administrative action as stipulated in Article 47(1) of the Constitution and Section 4 of the Fair Administrative Action Act No. 4 of 2015 was violated.

76. Even assuming that the purported notices notifying the public and or interested parties of the intention to review the stated titles were placed in the unnamed national dailies, as was observed by honourable Korir J in **Republic vs National Land Commission & Tropical Treasure Limited Ex parte Kystalline Salt Limited [2015] e KLR at page 14 of 17** of the judgment:

“ 67. In summary, an accused person is entitled to know the allegations, the evidence in support of the allegations and ought to be given an opportunity to rebut the allegations before an impartial tribunal. I have already reproduced a paragraph of the affidavit in support of the applicant’s case in Judicial Review No. 309 of 2014 in which Mr Patel admits that he saw the notice in the newspapers inviting the applicant for a review of its titles. Was that sufficient compliance with the Rules of natural justice by the respondent? I will have to examine the evidence in this case in order to arrive at a decision.

77. As earlier stated, the notice in the unnamed daily newspapers did not have the name (s) of the complainant and neither did it disclose the complaint against the applicant’s titles.

78. In my humble view, in order for the applicant to prepare its defence, it ought to have been served with the particulars of the allegations by the interested party(s) and informed of the manner that the applicant allegedly obtained grants to public land in an illegal or improper manner.

79. In a matter that eventually led to the revocation of the applicant’s titles, a notice in the newspapers without any useful information was not sufficient.

80. Infact the standard service is provided for in another land statute which is part VIII of the Land Act which deals with compulsory acquisition of interests in land at Section 131 as follows:

“131(1) A notice which may be given under this Part. Service of notices may be served on a person-

a) By delivering it to the person personally;

b) By sending it by registered post to the person’s last known address;

c) If the whereabouts of the person or the address cannot, after reasonable inquiry, be ascertained, by leaving it with the occupier of the land concerned or, if there is no occupier, by affixing it upon some prominent part of the land;

d) If the person is a body corporate, society or other association of persons, by serving it personally on a secretary, director or other officer thereof or on a person concerned or acting in the management thereof or by leaving it or sending it by registered post addressed to the body corporate, society or if there is no registered office, at any place where it carries on business, or, if there is none, by leaving it with the occupier, by affixing it upon some prominent part of the land; or

e) The commission may in addition to serving notice by paragraph (c) and (d), place an advertisement in two newspapers with a national circulation.”

81. In addition, the same Land Act provides at section 151 of the Miscellaneous Provisions in Part XI for substituted service as follows:

“ 151. If the commission is satisfied that a notice effected and cannot be served personally or by post, either because the person to be served is evading service or for some other reason the commission may order service to be effected by-

a) Affixing a copy of the notice in a conspicuous place;

i. On or as near as may be to the land where possible; and

iii. f the land is community land, at the offices of the community land committee or other public place within the village or

iii. If the land is public land, at the offices of the County Government having jurisdiction in the area where the land is located or other public place in the area where the land is located; and

b) Publishing a copy in the gazette and if it thinks fit, one or more newspapers circulating in Kenya.”

82. As was observed by the Honourable Korir J, personal service of notice of intention to review grants of disposition in land is very important and as stipulated in Section 131 of the Land Act, service through advertisement in two newspapers with a national circulation is only in addition to serving notice where the person's whereabouts or address cannot, after reasonable inquiry be ascertained. In such latter case, the notice can be left at the last known place or with occupier of land or at some prominent part of the land and in the case of a corporate entity or a society or association, personal service upon a Secretary, director or other person acting in the management.

83. Thus, alternative means of service of notice can only be resorted to where personal service or service by registered post to the person's last known address had failed.

84. Further, advertisement in the newspapers is only meant to inform the public on the intended service and not considered as service.

85. As earlier stated, there is no evidence that the *exparte* applicant herein was ever served with notice to review the grants to his 3 parcels of land and neither was he served with specific allegations that would necessitate review of the said grants. Further, even after the said grants were unilaterally reviewed, the notice of 22nd January 2016 vide Gazette Notice No. 307 of 22nd January 2016 does not disclose the reasons for revocation of the titles to the said three parcels of land.

86. Under such circumstances, this court has no alternative but to find that the entire process employed by the National Land Commission in reviewing the *exparte* applicant's grants and dispositions in the three titles Block 82/8866, 82/8867 and 82/8868 was improper and unlawful.

87. Non-compliance with the Rules of natural justice as coded in the provisions of Article 47(1) of the Constitution and Section 4 of the Fair Administrative Action Act No. 4 of 2015 and Section 14 of the National Land Commission Act is a fertile ground for granting Judicial Review orders.

88. In the instant case, the applicant has also lamented that revocation of his titles without any justifiable or reasonable cause is in violation of Article 40 of the Constitution which guarantees every person the right to own property of any description in any part of the country, and the right to be protected from arbitrary deprivation of the said property other than through the known constitutional means.

89. This court does appreciate that the rights to own property and to be protected from arbitrary deprivation thereof under Article 40 of the Constitution is not absolute in that under Article 40 (b) of the Constitution, that right does not extend to any property that is found to have been unlawfully acquired.

90. It therefore follows that indeed, the Commission has a statutory mandate to initiate proceedings in court for the determination on the unlawfulness of the acquisition. (see **Chemei Investments Limited Vs Attorney General & Others Petition No. 94/2005** cited with approval in **Isaac Gathungu Wanjohi & Another vs Attorney General & 6 Others** (supra).

91. Thus, the procedure of determining the unlawfulness or irregularity in the acquisition of the titles must follow due process. In **Kuria Greens Ltd V Registrar of Titles & Another[2011] e KLR**, the court was faced with the situation where the petitioner's titles were revoked through the Kenya Gazette Notice. Honourable Musinga J (as he then was) held that the nullification of the petitioner's titles was unconstitutional null and void. The court further stated and I concur;

“ Assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the proprietor was not party to such fraud or misrepresentation. The petitioner lawfully purchased the suit land....

Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the state through unlawful decisions taken by public officers.”

92. In the end, and based on all the above analyses, I find that the respondent’s decision to nullify the applicant’s titles was made without jurisdiction, unlawfully, unprocedural and violated the constitutional and statutory enactments and therefore such a decision cannot be allowed to stand (see also the decision by said J Chitembwe J in **Republic Vs Land Registrar Kakamega District & Another exparte Kito Pharmaceutical Ltd & 2 Others** (supra).

93. In the end, I find that the exparte applicant’s notice of motion seeking for Judicial Review order of certiorari as prayed in the notice of motion dated 22nd February 2016 is merited.

94. Accordingly, an order of certiorari is hereby issued to remove into this court for the purpose of quashing and I hereby quash the decision of the 1st respondent the National Land Commission as published in the Gazette Notice No. 307 of 22nd January, 2016 revoking titles over Nairobi/Block 82/8866; Nairobi/Block 82/8867 and Nairobi /Block 82/8868.

95. On the prayer for prohibition, this court having quashed the decision to revoke the subject titles, there is nothing left to be prohibited. In addition, this court would not prohibit a lawful exercise of constitutional or statutory mandate of the National Land Commission. The process of reviewing titles if procedurally and lawfully done is in accordance with the established legal regime, to determine how the applicant acquired the said titles from the Government and therefore the court must not prohibit that process.

96. Accordingly, I decline to grant the order of prohibition sought in the notice of motion dated 22nd February 2016.

97. I order that the exparte applicant bears his own costs of these Judicial Review proceedings in view of the fact that there are thousands of similar claims sought against the 1st respondent the National Land Commission which is a public body and which is likely to be grounded if costs were ordered against it in each of those pending decisions.

98. Nonetheless, this court can only hope that the National Land Commission takes a cue from the past decisions, this one included, and reorganizes itself on how to discharge its constitutional and statutory mandate and to ensure that it exercises its mandate in accordance with the dictates of the Constitution and the law to avoid burdening the public tax payer and the court with unnecessary litigation and costs.

99. In that regard, I direct that upon delivery and signing of this judgment, the Deputy Registrar of this court shall effect service of a copy thereof upon the Chairman Prof. Muhammad A. Swazuri and Chief Executive Officer of the National Land Commission Mr Tom Aziz Chavangi, personally for their perusal and necessary future action.

Dated, signed and delivered in open court at Nairobi this 5th day of December, 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Waithaka h/b for Miss Kimasia for the exparte applicant

N/A for the Respondent

CA: Lorna