



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 376 OF 2014

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSIONRESPONDENT

PIUS NGUGI.....INTERESTED PARTY

Ex Parte

MUKTAR SAMAN OLOW

JUDGEMENT

1. The matter before this Court concerns Land Reference No.1870/240/1 located in Westlands, Nairobi. The parcel of land will hereinafter be simply referred to as the suit property. The Applicant, Muktar Saman Olow, contends that he is the *bona fide* registered owner of the land. The Respondent on the other hand is the National Land Commission, a body created by Article 67 of the Constitution and bestowed with the mandate of overseeing land matters in the country. The Interested Party, Pius Mbugua Ngugi, also lays claim to the suit property and asserts that he is in possession of it.
2. On 18th August, 2014 the Respondent issued a notice through the Standard newspaper seeking to review grants and dispositions of public land identified therein. Among the identified parcels of land was the suit property. The Applicant was aggrieved by the issuance of the notice and immediately moved this Court and obtained leave to commence these proceedings. The Court directed that the leave would operate as stay of further proceedings by the Respondent.
3. The Applicant subsequently filed the notice of motion dated 21st October, 2014 seeking to prohibit the Respondent from continuing with the review of the grant to the suit property.
4. In brief, the Applicant's case is that he became the registered owner of the suit property with effect from 1st June, 2003. In the year 2005 the Interested Party who was a tenant to the previous registered owner, Helen Fear, filed a suit by way of Originating Summons being H.C.C.C. No. 1321 of 2005 (O.S.) seeking a declaration that he is the proprietor of the land in question by virtue of adverse possession. A default judgement was entered in favour of the Interested Party on 16th July 2009. The Applicant later filed an application seeking to be substituted as the defendant and also asking that the judgement be set aside.
5. The Applicant avers that on the 22nd August, 2011 he filed Nairobi ELC Civil Case No. 424 of

- 2011 in which he sued the Interested Party for trespassing on the suit property and that matter is yet to be determined.
6. The Applicant reveals that the Interested Party and one Angeline Ngugi on 23rd August, 2011 filed Nairobi ELC case No. 437 of 2011 against him and an auctioneer alleging that they had unlawfully exercised distress for rent over the suit land.
 7. All the suits touching on the suit property were by a Court order issued 31st October, 2011 consolidated to be heard together by the Environment and Land Court. On 23rd August, 2014, the Court hearing the case dismissed the Interested Party's application to enjoin the Respondent herein as one of the defendants in that matter.
 8. Further, that the Interested Party had through the said application sought orders to compel the Respondent to produce the correspondence and deed files for the suit property but the Court declined to issue an order holding that the same should have been made before the matter was fixed for hearing and the application was only meant to delay the trial process.
 9. It is the Applicant's case that if the review of the grant is allowed to take place, the Respondent would be making a fundamental error of fact in deciding that the land in dispute is public land contrary to the established fact that the same is private land. The Applicant further contends that the Respondent has no jurisdiction to review private land.
 10. The Applicant states that he is apprehensive that the Respondent might be acting at the behest of the Interested Party who is a party to the consolidated suits and reiterates that the Respondent is aware of the consolidated suits relating to the ownership of the suit property.
 11. The Applicant asserts that the Respondent should not be allowed to proceed with the review of the grant in question as it lacks power and authority to do so. Further, that the Environment and Land Court which is the body with jurisdiction to determine the issue is seized with three different disputes relating to the same land. Additionally, the Applicant asserts that there may be miscarriage of justice if the matter is allowed to proceed before the Respondent whereas the Court is already seized of the matter.
 12. The Respondent opposed the application. The Respondent asserts that it is mandated by Section 14 of the National Land Commission Act, 2012 to review grants or dispositions of public land with a view to establishing the legality or propriety of the same.
 13. The Respondent's case is that it received a letter from the firm of Mbugua Atudo and Macharia Advocates complaining that the Applicant had fraudulently acquired title documents to the suit property and seeking its intervention to redress the illegality. Upon receipt of the complaint the Respondent conducted its own preliminary investigation to ascertain the veracity of the allegation and noted several anomalies concerning the title.
 14. The Respondent discovered that the correspondence file and deed file in respect of the suit property were missing from the records. However, the Respondent managed to retrieve a copy of the grant which had been scanned into the Saperion Document Management System on 31st October, 2007 by the Ministry of Lands, Housing and Urban Development and discovered that there were only two entries in the register, the last being made on 26th January, 1977. This last entry showed that ownership of the property had been conferred to one Helen Fear.
 15. According to the Respondent, the grant in possession of the Applicant had four entries in the register. The last entry in the register purportedly transferred ownership of the property to the Applicant on 19th July, 2000. The investigation further revealed that Helen Fear passed away on 11th December, 1988 and could therefore not have transferred the property to the Applicant on 19th July, 2000.
 16. The Respondent also discovered that the Applicant had on 18th August, 2011 obtained an extension of the lease for a period of fifty years which lease had expired sometime in 2003.
 17. The Respondent asserts that the outcome of the preliminary investigation of the complaint met the threshold warranting a review of the legality of the Applicant's title to the suit property.
 18. The Respondent contends that the grants or dispositions of public land it is mandated and empowered to review include any conveyance, agreement for sale, lease or license made by and on behalf of the Government and includes a certificate of title issued by the Land Registration Court and a certificate of lease issued pursuant to the provisions of any Act of Parliament over any public land.
 19. It is further the Respondent's case that any lease or certificate of lease where the Government

- remains the head lessor and determines the conditions under which the said land is to be held and utilised and which upon expiry of the lease reverts to the Government, falls under its review jurisdiction.
20. The Respondent asserts that the issue of the legality of the Applicant's title to the suit property is not and neither has it been the subject of any determination of any court or tribunal and neither is it aware if the same is the subject of determination in the consolidated suits before the Court. It is the Respondent's case that the issues pending determination in Court are different from those pending before it and therefore not subject to the *sub judice* rule.
 21. It is the Respondent's view that the only way the proposed review of the Applicant's title to the suit property can affect the proceedings pending before Court is if the outcome of the review was adopted by the Court by way of evidence.
 22. The Respondent contends that the process of review of grants or dispositions of public land has to be concluded within five years from the time of the commencement of the National Land Commission Act, 2012 and two years have since lapsed and therefore if an order of prohibition is granted the same would in effect stop it from effectively executing its mandate.
 23. The Respondent concludes by asserting that the Applicant has not precisely pointed out any procedural unfairness, irregularity, illegality, or abuse of power to warrant issuance of judicial review orders.
 24. The Interested Party opposed the application through his affidavit sworn on the 15th December, 2014. His case is that he has been in continuous uninterrupted possession of the disputed property since 1974. In 2005, he commenced a suit for adverse possession in the High Court and a decree was subsequently issued on the 16th July, 2009. When he presented the decree to the Land Registrar on the 2nd December, 2009 the same was rejected on the basis that it had not been signed by the Deputy Registrar of the High Court. He later obtained a transfer duly executed by himself and the Deputy Registrar of the High Court in place of the registered owner Helen Fear but the transfer could not be completed as the file could not be traced at the Lands Office.
 25. The Interested Party avers that on 18th August, 2011 a large group of violent people accompanied by policemen forced their way into the two houses erected on the property. They destroyed property and took away household goods on the pretext that they were levying distress for rent. He was shocked by the turn of events because neither himself nor his daughter had been served with any Court order or any proclamation notice.
 26. He contacted his advocates who discovered that an application for distress for rent had been made by Pyramid Auctioneers on the ground that the Applicant herein had allegedly entered into a lease agreement with his daughter on 20th June, 2010 for a period of two years and that his daughter owed the Applicant a sum of 495,000/=. It is the Interested Party's case that the application for distress for rent was based on falsehoods and forgeries.
 27. According to the Interested Party, the Applicant followed the invasion of the suit property by filing ELC Civil Suit No. 424 of 2011 in which he (the Applicant) alleged that he purchased the disputed property from Ms Helen Fear in 2000. The Interested Party asserts that Ms Helen Fear passed away in England on 11th December, 1988 and there is no way she could have transferred the property to the Applicant in 2000. He deposes that he has since reported the matter to the police for criminal investigation.
 28. The Interested Party points out alleged anomalies as to how the Applicant acquired the title to the parcel of land in question. He claims that the Applicant is unable to produce a copy of the sale agreement that Ms Helen Fear allegedly executed in 2000 and neither can he produce the transfer document executed by the deceased. The Interested Party asserts that the copy of the title for the property produced by the Applicant indicates that the property was transferred to him on the 19th June, 2000 and that the registration was done by a Ms Mule but Ms Mule had denied effecting the transfer to the Applicant. Further, that the last two entries in the title document produced by the Applicant do not appear in the scanned records in the Ministry of Lands.
 29. The Interested Party states that the Registrar of Titles, one Mr Lubulellah, who allegedly issued the certified copy of the title produced by the Applicant had denied that the signature appearing on the said certified copy of title was his.
 30. It is the Interested Party's case that a Mr Moses Otieno Kola a registered and practising physical planner who the Applicant allegedly retained for purposes of extending the lease for the property

- had denied signing the report used to extend the lease.
31. The Applicant deposes that he had written numerous letters to the Ministry of Lands seeking information on the status of the records regarding the property but had not received any response but it was only after he wrote to the Respondent that the matter was attended to.
32. The Interested Party contends that these proceedings are an attempt to conceal the truth by the Applicant. It is the Interested party's case that the Applicant had also written to the Respondent asking it to investigate the title in question.
33. From the pleadings and submissions filed in Court, I find that the issues for the determination of the Court are whether the Respondent had jurisdiction to investigate the matter and if so, whether it ought to have taken over the matter in light of the existence of a Court case relating to the property in dispute.
34. There was an argument by the Respondent and Interested Party that it is the Applicant who invited the Respondent into the dispute and it cannot now be heard to say that the Respondent has no jurisdiction in the matter. Their argument is premised on the letter dated 20th November, 2013 addressed to the Respondent by the Applicant's counsel. The letter states:

“RE: L.R.NO.1870/1/240 (I.R.NO.129305)-MUKTAR SAMOW OLOW

The above matter refers.

On the peremptory instructions of our client the registered proprietor of all that piece of land known as L.R. Number 1870/1/240-Mr.Muktar Samow Olow we have peremptory instructions to write you as hereunder:-

- 1. Two known hustlers/wheeler dealers by the names Mr. Rashid Adan Hussein and Mohamed Jimale approached our client on 19th November 2013 and informed him that they had stolen the files relating to our client's title from the Land Registry in Nairobi. They showed our client photographs from the mobile phones of various documents in the file to proof that they are indeed in possession of the file.**
- 2. They demanded that unless our client paid them Kshs. 10 Million they will sell and hand over the entire file to one Mr.Pius Ngugi whom our client is litigating against in a number of suits including HCCC Number 424 of 2011, HCCC Number 1321 of 2005, HCCC number 437 of 2011. Alternatively, Mr Jimale had threatened to destroy the same out of spite.**
- 3. You will appreciate both the danger and gravity of the matter at hand and our client's concern and genuine fears.**
- 4. That Mr. Rashid Adan Hussein and Mohamed Jimale can claim they hold in their hands the file and blackmail our client over the same is the most alarming matter. It challenges in most direct and fundamental manner the sanctity and integrity of the Land Registry and may compromise such vital national office and documents.**

In light of the above, we petition your good office and the Commission to undertake an in depth investigation of our client's complaint and reach the very bottom of this grave matter.

Our client is ready to assist and co-operate with your officers in the investigation.”

35. The Applicant does not state anywhere in that letter that the parcel of land is public land. The Applicant is only inviting the Respondent to enquire into allegations that some people are alleging to be in possession of documents that are ordinarily meant to be in the custody of the Respondent. Jurisdiction cannot be bestowed by such an invitation.
36. The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** stated that jurisdiction can only be granted by:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a

Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

37. The letter could not have therefore conferred jurisdiction upon the Respondent where it had none.
38. The next question therefore is whether the Respondent had jurisdiction to review the grant in question. The Applicant’s case is that the Respondent had no jurisdiction over the suit land as the same is private property. The Respondent and the Interested Party thinks otherwise.
39. There is no dispute that the Respondent is a constitutional commission established under Article 67(1) of the Constitution. Under Article 67 (2) it is given functions as follows:

“(2) The functions of the National Land Commission are—

- (a) to manage public land on behalf of the national and county governments;**
- (b) to recommend a national land policy to the national government;**
- (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**
- (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**
- (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**
- (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**
- (g) to assess tax on land and premiums on immovable property in any area designated by law; and**
- (h) to monitor and have oversight responsibilities over land use planning throughout the country.”**

40. Article 67(3) of the Constitution provides that the Respondent may perform any other functions prescribed by national legislation.

41. Under Article 68(c)(v) Parliament is authorized to enact legislation **“to enable the review of all grants or dispositions of public land to establish their propriety or legality.”** Acting on this mandate, Parliament enacted the National Land Commission Act, 2012 and at Section 14 provided the procedure for the review of grants or dispositions of public land in order to establish their propriety or legality.

42. Article 62 of the Constitution defines public land as:

“(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

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

(i) in force at the effective date; or

(ii) enacted after the effective date.”

43. On the other hand private land is defined by Article 64 of the Constitution as:

“(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.”

44. Under Section 5(1) of the National Land Commission Act, 2012 the functions of the Respondent as set out in the Constitution are reiterated. Under Sub-section (2) additional functions are given to the Respondent as hereunder:

“(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—

(a) on behalf of, and with the consent of the national and county governments, alienate public land;

(b) monitor the registration of all rights and interests in land;

- (c) ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;**
- (d) develop and maintain an effective land information management system at national and county levels;**
- (e) manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and**
- (f) develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.”**

45. Section 14 of the same Act provides for review of grants or dispositions of public land as per Article 68(c)(v) of the Constitution. The Section states:

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

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

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

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

46. Article 67(2)(e) of the Constitution empowers the Respondent to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress. From the pleadings it is clear that this is not the mandate the Respondent was exercising in this matter.

47. Under Section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once

registered as private property is no longer within the reach of the Respondent.

48. Article 40 of the Constitution and Section 26 of the Land Registration Act, 2012 only protects lawfully acquired property. Any title acquired illegally, unprocedurally or through a corrupt scheme is not protected and so is property acquired fraudulently or through misrepresentation. The Respondent is allowed by the law to enquire into unlawfully acquired public land and direct the revocation of the title or regularise the disposition if the land was irregularly acquired.

49. I am persuaded by the submission by the Applicant that the Respondent has no business wading into disputes over private land. However, the Respondent gave two reasons for holding that the suit property is public land. The first argument by the Respondent is that it has jurisdiction over leasehold property because the Government remains the head lessor of such property throughout the lease period. Secondly, the Respondent contends that the suit property had converted to public land as the lease expired in 2003.

50. The Respondent's argument that where the Government remains the head lessor the suit land remains public land throughout the leasehold period has no legal backing. Article 64(b) of the Constitution classifies land held under leasehold tenure as private property.

51. On the Respondent's second argument, I find that there is evidence before this Court showing that the lease for the suit property expired in 2003 and its renewal and the circumstances surrounding the renewal are questionable.

52. It is not disputed that private land can be converted to public land by (i) compulsory acquisition; (ii) reversion of leasehold interest to Government after the expiry of the lease; (iii) transfer; or (iv) surrender-see Section 9(c) of the Land Act, 2012. In this case, it appears that the leasehold interest may have reverted to the Government upon the expiry of the lease in 2003. The Respondent has jurisdiction to enquire into the circumstances under which the suit property which became public land in 2003 was converted to private property. In the circumstances of this case it cannot be said that the Respondent lacked jurisdiction. The Applicant's contention that the Applicant did not have jurisdiction over the suit property therefore fails.

53. Another argument advanced by the Applicant to propel his submission that the Respondent lacked jurisdiction is that the Environment and Land Court is the only organ with constitutional and statutory power to handle the dispute herein. Among the cases cited in support of this proposition is my decision in **Republic v Registrar of Titles-Nairobi Registry and others [2012] eKLR (JR Case ELC 19 OF 2011)** in which the following passage appears:

“It is clear that none of the above cited provisions of the Constitution clearly provides who should make a finding as to whether a given parcel of land was unlawfully acquired. The Constitution has however established one arbiter of disputes in this country. In Article 159(1) of the Constitution it is provided that:-

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

Under Article 159 the people of Kenya have therefore placed the making of any finding in justiciable matters on courts and tribunals. Whether public land was irregularly acquired by an individual is a justiciable matter and the only institutions that can determine if indeed it was unlawfully acquired are the courts and tribunals. At the moment therefore, for a property to fall outside the protection of Article 40 of the Constitution a court or tribunal must have made a finding that the property was illegally or improperly acquired. The respondents' contention that the Applicant's parcel of land does not fall under the protection of Article 40 of the Constitution therefore fails.”

54. In citing that passage from my judgement, the Applicant has failed to disclose that prior to that

statement I had stated that:

“A clear provision on how illegally acquired land will be dealt with in the new dispensation is found in Article 68 which provides that Parliament shall enact legislation on land. Under Article 68 (c) (v) one of the legislations to be enacted will “enable the review of all grants or dispositions of public land to establish their propriety or legality.””

55. The above statement clearly demonstrates that the judgement was written before the Respondent came into existence. The legal architecture that informed my decision has changed and Section 14 of the National Land Commission Act, 2012 is now clear that the organ mandated to review grants or dispositions of public land with a view to establishing their legality and propriety is the Respondent. However, as will be shortly demonstrated the Environment and Land Court has its special jurisdiction.

56. The remaining question is whether the Respondent had jurisdiction to handle the dispute considering that the matter was already before the Court. The Applicant postulates that the Respondent exceeded its jurisdiction and usurped the role of the Environment and Land Court. On its part the Respondent submits that the issues before the Court are different from the issues it intends to review.

57. The jurisdiction of the Environment and Land Court as provided by Section 13 of the Environment and Land Court Act, 2011 is as follows:

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land. (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5)....”

58. The Respondent and the Interested Party hold the view that the Respondent’s mandate is not in conflict with that of the Environment and Land Court. They urge this Court to follow the decision of Waithaka, J in **Elizabeth Nditi Njoroge v The National Land Commission [2013] eKLR**. In

that case the learned Judge found that there was no friction between the jurisdiction of the Environment and Land Court and that of the Respondent. I agree that is a valid statement.

59. However, I do not envisage a situation where both the Respondent and the Environment and Land Court can entertain parallel proceedings between the same parties litigating over the same issues concerning the same parcel of land. Ideally, where the Respondent has jurisdiction, it ought to be given an opportunity to deal with the dispute. That does not mean that the Environment and Land Court cannot deal with a dispute in which the Respondent has jurisdiction.

60. In the case before me, the parties had already submitted themselves to the jurisdiction of the Court which has the mandate to deal with the matter. The Respondent had no business commencing parallel proceedings over the same parcel of land. The Environment and Land Court is in a position to determine the rival interests of the Applicant and the Interested Party as well as the legality of the grant.

61. In the case of **Civil Service Union v Minister for Civil Service [1985] A.C. 374 at 401D**, Lord Diplock explained the purpose of judicial review as follows:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.”.....

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

62. The attempt by the Respondent to review the grant in question while there are court cases geared towards addressing that issue is clearly an abuse of power bordering on contempt of court. In my view the information that the Respondent gathered during its investigations will help the Court in arriving at a just decision.

63. The answer to the application is that the same is allowed. The Respondent is prohibited from reviewing the grant or disposition to the suit property. This does not, however, bar the Respondent from conducting investigations into the suit property with a view to clearly establishing the full facts surrounding the ownership of the property in order to assist the court, if called upon, in arriving at a just decision.

64. From the pleadings and submissions, it is clear that all the parties were only interested in unearthing the truth as to how the parcel of land moved from the hands of Ms Helen Fear to either the Applicant or the Interested Party and they felt that the Respondent could have been of assistance. For that reason I decline to award costs to any of the parties but instead order each party to meet own costs of these proceedings.

Dated, signed and delivered in Nairobi this 9th day of June, 2015

W. KORIR,

JUDGE OF THE HIGH COURT