



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 429 OF 2014

**IN THE MATTER OF APPLICATION BY PROF. SAMSON KEGENGO ONGERI ORDERS OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF ARTICLE 22, 47, 59 & 75 (3) OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF SECTIONS 36, 37 & 39 OF THE COMMISSION ON ADMINISTRATIVE
JUSTICE ACT 2011**

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26

BETWEEN

REPUBLIC

VERSUS

COMMISSION ON

ADMINISTRATIVE JUSTICE1ST RESPONDENT

NATIONAL LAND COMMISSION..... 2ND RESPONDENT

EX PARTE

PROF. SAMSON KEGENGO ONGERI.....APPLICANT

JUDGEMENT

1. By a Notice of Motion filed 24th November, 2014, the *ex parte* applicant herein, **Prof. Samson Kegenjo Ongeri**, seeks the following orders:

1. **An order of certiorari do issue to bring into the High Court and to quash the Report of the 1st Respondent (the Commission of Administrative Justice) released in October 2014 entitled “A MARKET UNDER SIEGE: AN INVESTIGATIONS REPORT BY THE OMBUDSMAN-KENYA ON ALLEGED IRREGULAR AND ILLEGAL ACQUISITION OF KISII MUNICIPAL MARKET LAND BY PRIVATE DEVELOPERS”.**
2. **An order of Prohibition do issue to the 1st Respondent and 2nd Respondent from illegally dealing in any manner whatsoever or taking any unfair administrative action in regard to plot number Kisii Municipal/Block 111/258.**
3. **The costs of this application and of the entire suit be awarded to the *Ex parte* Applicant.**

Ex Parte Applicant’s Case

2. The application was supported by a supporting affidavit sworn on 24th November, 2014 by the Applicant.

3. According to the applicant, 1st Respondent herein (the Commission on Administrative Justice also known as Ombudsman) released in October 2014 a report entitled “A MARKET UNDER SIEGE: AN INVESTIGATIONS REPORT BY THE OMBUDSMAN-KENYA ON ALLEGED IRREGULAR AND ILLEGAL ACQUISITION OF KISII MUNICIPAL MARKET LAND BY PRIVATE DEVELOPERS” which report the applicant was illegal since it was published in defiance of the rule in *res sub judice* since the contents thereof form the subject matter of Kisii H.C.C.C. No. 133 of 2010. It was averred that the said report was accompanied by a press statement that was gravely misleading as regards the case in Kisii HCCC No. 133 of 2010 since the same came up for ruling sometimes last year on 7th November, 2013 contrary to the assertions in the reckless press statement that the case was due for mention on 13th March, 2008.

4. It was the applicant’s view that the orders of prohibition against the Respondents were therefore necessary since there was a real likelihood that they will in future take extra judicial actions especially as relates to the repossession of Land Reference No. Kisii/Municipality/Block III/258 unless this honourable court injuncts them.

5. According to the applicant, he was never afforded an opportunity to be heard by the Commission on Administrative Justice before publishing the report contrary to the procedural safeguards in Sections 36, 37 and 39 of the ***Commission on Administrative Justice Act, 2011*** (hereinafter referred to as “the Act”) and Article 47 of the Constitution. It was further contended that the applicant neither given any written reasons for the administrative action of publishing the adverse report nor indeed was he served with the report itself before and after publication as required under Article 47(2) of the Constitution of Kenya 2010. He only got wind of the report through the media.

6. According to the applicant, on the 23rd October, 2014, he instructed his advocates to write a letter to the Ombudsman demanding an explanation for the aforementioned unprocedural failures but never received a reply or explanation from the Ombudsman. To the applicant was yet another unfair administrative action by the 1st Respondent even after all the unfairness in their report and the unprocedural process leading to its publication.

7. He therefore deposed that his appointment on 15th August, 2014 as Ambassador of Kenya to United Nations Settlements Programme (U.N-HABITAT) stood to be challenged in court or otherwise jeopardized by the adverse contents in the aforementioned report which was compiled and published unlawfully and without due process of law. Moreover, the adverse findings on his alleged abuse of office captured in the ombudsman Report aforementioned were likely to impair his legitimate expectations of any future appointment(s) to public office bestowed upon him due to the provisions of Article 75(3) of the Constitution of Kenya unless the report is quashed by an order of the High Court.

8. According to the applicant, the recommendation of the 1st Respondent’s report to the 2nd Respondent to investigate and repossess Land Reference No. Kisii Municipal/Block 111/258 while the same is the

subject of court proceedings in Kisii H.C. No. 133 of 2010 which is yet to be determined, was a threatened invasion of his rights to access to justice and equal protection before the law. He lamented that as a matter of fact, the executive branch had previously given extra-judicial orders and taken unfair administrative action against him in relation to the land known as Kisii Municipal/Block 111/258 by revoking his title and registration when the same issue is still pending in court in Kisii High Court Case No. 133 of 21.

9. The applicant was therefore equally apprehensive that the 2nd Respondent might in similar vein as the 1st Respondent and the Kisii Land Registrar take unfair administrative action against him and his proprietary interests due to their obvious lack of adherence to the rule in *res sub judice*.

10. He reiterated that in all circumstances of the case, his rights to fair administrative action and access to justice had been infringed, were still being infringed and were likely to continue being infringed unless the court granted him the orders sought. Besides the infringement of his right to fair administrative action in the facts of this case, the applicant asserted that his own reputation as a person and a public figure had suffered greatly and continued to suffer due to the accusations of abuse of office that he was not given a chance to rebut.

11. It was submitted on behalf of the applicant that the investigations and the report related to a matter that was before the Court of law hence the same was illegal as it was based on *sub judice* issues and as such prohibited by section 30(c) of the Act.

12. It was submitted that the applicant was never afforded an opportunity of being heard before the report was published; that the entire process constituted an unfair administrative action; that the conclusions in the said report that the applicant abused power were unreasonable as the applicant was in the government in 1982 when the report was bought in 1982; and that the applicant's legitimate expectations under the Constitution to appointment in public service are threatened by the contents of the report. A perusal of the plaint in Kisii HCCC No. 133 of 2010, it was submitted, clearly shows that the matters in issue in the said suit and in the report the subject of these proceedings were similar, hence the application of *sub judice* rule. Accordingly, the Court was urged to quash the whole report and not just limit the relief to the applicant since it is trite law that an administrative action done in abuse of power is not severable in cases of quashing the said action. In support of this submission, the applicant relied on **R vs. City Council of Nairobi exp Callfast Services Limited & 32 Others Misc. Appl. No. 276 of 2010** and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] KLR 240**.

13. According to the applicant it did not matter whether or not the Respondent had notice of the pendency of the said civil proceedings. It was however submitted that the Respondent visited the Kisii High Court and ought to have discovered the existence of the said suit. Apart from that the Respondent, from the supporting affidavit was clearly aware of the existence of the said suit.

14. It was submitted that even if section 31 of the Act relied upon by the Respondent was to be construed as bestowing unlimited power on the Respondent, the Court will still have power to issue judicial review orders to stop abuse of power.

15. It was submitted that the principle of a fair hearing is embodied in the Act itself in section 36 to the effect that a person against whom an adverse finding or recommendation is made is required to be given an opportunity of making representations thereon before the Commission includes the finding in its report. Similarly section 39 of the Act enjoins the Respondent to afford a person whose reputation is likely to be prejudiced by an inquiry an opportunity to give evidence and it was submitted that the applicant fell in that category of persons.

16. On the issue of service by postage, it was submitted that based on section 112 of the ***Evidence Act***, the burden was on the Respondent to prove that such service was effected and that the applicant proved that the address to which the letter was addressed belonged to the University of Nairobi where he was a don decades before. Even if service on the applicant was in the Respondent's opinion satisfactory, it was submitted that the fact that the other three letters were returned and yet the Respondent still proceeded to

publish the report was an indication of the height of abuse of power and hence an indication of a political vendetta coming at a time when the applicant was being vetted for the position of an Ambassador to UN HABITAT.

17. Section 43 of the Act as read with Article 47(2) of the Constitution, it was submitted enjoined the Respondent to serve the Respondent's report on the applicant. The Applicant however came to know of the report through the media.

18. According to the applicant every citizen has a legitimate expectation to offer himself for consideration in the service of his country. However as a result of the impugned report the applicant's appointment to the said UN HABITAT is in danger of being vacated for breach of the integrity clauses in the Constitution pursuant to Article 75(3) of the Constitution.

19. On the allegation by the Respondent that the report was a mere recommendation, it was submitted that a reading of section 42 of the Act reveals that the recommendations of the Respondent are worth their weight in gold since the same are capable of being implemented by the National Assembly. It was submitted that where a Commission arrives at a recommendation after an inquiry has been made in which the recommendation is final in nature that would amount to a determination for the purposes of judicial review and support for this submission was sought in **Republic vs. Attorney General ex parte Biwott [2002] 1 KLR 668** and **Republic vs. Judicial Commission of Inquiry into Goldenberg Affair, ex parte George Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**. In this case it was submitted that the Respondent has finally determined the culpability of the applicant and sees no cause for further investigations or court determinations.

20. According to the applicant with the passing of the current Constitution the issue of justiciability no longer arises and the Court was based on **Republic vs. Attorney General & 2 Others ex parte Shem Odongo Ochuodho Misc. Appl. 416 of 2005** urged to seek to protect the right to fair administrative action and reputation of the applicant.

Respondent's Case

21. In response to the application, the Respondent filed a replying affidavit sworn by **Dr. Otiende Amollo**, the Chairperson of the Commission on Administrative Justice, also known as the "Office of the Ombudsman" the 1st Respondent herein (also referred to as "the Commission").

22. According to the deponent, the 1st Respondent is a Constitutional Commission established pursuant to the restructuring of the Kenya National Human Rights and Equality Commission to create the Respondent pursuant to Article 59(4) of the Constitution of Kenya and Part II of the Act.

23. It was deposed that pursuant to Article 59(5) of the Constitution as read together with section 4 of the Act, the 1st Respondent has the status and powers of a Commission within the meaning of Chapter 15 of the Constitution of Kenya. The deponent deposed that the 1st Respondent has been given a wide mandate under Article 59(2)(h) - (k) and Articles 249 and 252 of the Constitution as read with sections 8, 26, 27, 28 and 29 of the Act, including the mandate to, amongst other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct and further to deal with maladministration through conciliation, mediation and negotiation where appropriate. In the conduct of its functions, Article 252 of the Constitution and Sections 8, 26, 27, 28 and 29 of the Act grants the 1st Respondent the powers to conduct investigations on its own initiative or on a complaint made by a member of the public, to issue summons as it deems necessary for the fulfillment of its mandate and require that statements be given under oath, to adjudicate on matters relating to administrative justice, obtain any information it considers relevant from any person or Governmental authorities including requisition of reports, records and documents and to compel the production of such information, to interview any persons, and to recommend compensation or other appropriate remedies against persons or bodies to which the Act applies.

24. It was disclosed that pursuant to Article 252(2) of the Constitution, a complaint to the 1st Respondent may be made by any person entitled to institute court proceedings under Article 22(1) and (2) of the Constitution and under Section 31 of the Act, the 1st Respondent may investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question. After undertaking its investigations, the 1st Respondent is required under Section 42 of the Act to prepare a report to the state organ, public office or organization to which the investigation relates, and the report shall include the findings of the investigation, action the 1st Respondent considers to be taken, reasons whereof and recommendations the Respondent deems appropriate.

25. It was further disclosed that the 1st Respondent may upon an inquiry into a complaint, undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of the Act and that further Article 59(2)(j) of the Constitution and Section 8(g) of the Act empower the 1st Respondent to report on complaints investigated under paragraph (h) and (i) and take remedial action.

26. According to the deponent, the 1st Respondent received complaints from members of the public while on a county visit to Kisii County that Kisii Municipal Market Land was irregularly acquired by private individuals. Pursuant thereto and in exercise of the investigative powers of the 1st Respondent as set out above under Articles 59 and 252(1)(a) of the Constitution and Sections 8, 26, 27, 28 and 29 of the Act, the 1st Respondent decided to undertake investigations into the subject complaints whose summary were the alleged maladministration through irregular allotment of Kisii Municipal Market Land to private individuals and alleged abuse of power by public officers. It was disclosed that as detailed in the 1st Respondent's Report titled "A Market Under Siege, An Investigations Report by the Ombudsman-Kenya on Alleged Irregular and Illegal Acquisition of Kisii Municipal Market Land by Private Developers, October 2014", the 1st Respondent's investigative process entailed the following:-

- i. That in consonance with the provisions of Section 37 of the Act, the 1st Respondent first notified the Governor, Kisii County, vide a letter Ref: CAJ/IE/6/21 Vol. 1 dated 14th February 2014 of its decision to undertake investigations regarding alleged irregular allotment of Kisii Municipal market land to private individuals.
- ii. The 1st Respondent thereafter visited various offices for investigations including the Kisii County Governor's Office, the Land Executive Office, Land Registry, County Surveyor's Office, Town Engineer's Office, Town Administrator's Office, Physical Planning Office and the Kisii High Court.
- iii. The 1st Respondent interviewed the Deputy Governor, Kisii County, Kisii County Executive Officer for Lands, the Land Registrar, the County Surveyor, Kisii Town Administrator, The County Planning Officer, The Kisii Municipal Surveyor and members of the Public.
- iv. The 1st Respondent recovered various documents in respect of matters in issue including documents relating to Plot Number Kisii Mun/Block III/258, Kisii Mun/Block III/259, Kisii Mun/Block III/260, Kisii Mun/Block III/418, Kisii Mun/Block III/334, Kisii Mun/Block III/261.
- v. The 1st Respondent further recorded statements by County Planning Officer, Statement by **Benjamin Onkoba, Jared Osano Atancha, Robert Ombasa, Steven Rioba Kambaga and Tom Nyagami Gai.**

27. It was deposed that the 1st Respondent thereafter analyzed all the statements/information and documentation retrieved during the investigations and came up with, *inter alia*, the following conclusions:-

- i. Copies of Approved Plan Number N/37/71/1 of 1971 showed that there is land that had been reserved for Kisii Municipal Market.
- ii. The subject piece of land set aside for Kisii Municipal Market was subdivided into eight plots and according to the Register Index Map for Kisii Municipality, the Kisii Municipal Market occupies one of the plots while the other seven plots were acquired by named individuals including the ex-parte Applicant herein who it was found acquired Plot Number Kisii Mun/Block III/258.
- iii. Official searches as well as the Register Index Map confirm that the seven plots inclusive of Plot Number Kisii Mun/Block III/258 acquired by the ex-parte Applicant were hived from the Kisii Municipal Market Land
- iv. Documents availed confirmed that the land in question is public land set aside for the Kisii Municipal Market and that it was irregular for the subject land to have been acquired by private individuals.

28. Based on the above conclusions, it was averred, the 1st Respondent came up with, *inter alia*, the following preliminary recommendations as guided by relevant legislative framework on public land including Article 61(1)(2), 62(1)(d), 62(2)(a)(b) and the Fourth Schedule (Article 185(2), 186(1) and 187(2) of the Constitution; Sections 8(a)(b) and 12((2)(f) of the Land Act No. 6 of 2012; Sections 5(1)(a) (c)(e)(h), 5(2)(b)(c)(d)(e), 6(1)(2)(a)-(c), 6(3)(a) of the **National Land Commission Act**, 2012; Sections 5(1)(2)(c) of the **County Governments Act** No. 17 of 2012 and Sections 16(1), 21(2) of the **Physical Planning Act** Revised Edition 2012:-

- i. That the National Land Commission should investigate the illegal acquisition of the seven plots of land with a view to repossessing the same
- ii. The County Government of Kisii should survey and register the market land as per the Approved Master Plan of 1971.
- iii. The County Government of Kisii should ensure that public land within the County is surveyed and registered with the Ministry of Lands, Housing and Urban Development
- iv. Similarly, other County Governments should survey and register all the public land within their jurisdictions with the Ministry of Lands, Housing and Urban Development and acquire Title Documents
- v. The Principal Secretary Lands, Housing and Urban Development should seek to establish those public officers who facilitated the illegal acquisition of the seven plots and take appropriate punitive action as provided for by law
- vi. That the named individuals including the ex-parte Applicant herein should willingly and unconditionally surrender the irregularly acquired plots.

29. The deponent added that after making the above conclusions and recommendations and bearing in mind that the same adversely mentioned various individuals including the *ex-parte* Applicant herein, the 1st Respondent, in consonance with the provisions of Section 36 and 39(1)(b) of the Act, notified all the named individuals (the *ex-parte* Applicant inclusive) of the adverse findings and recommendations and called on them to make presentations thereon before compiling and publishing the Report. With respect to the *ex parte* applicant, he was notified and called to comment and make presentations thereon vide its letter dated 4th September 2014 sent to the ex-parte Applicant by registered mail on 5th September 2014. In sending the notice, the 1st Respondent used the *ex-parte* Applicant's postal address obtained from the Kisii Lands Registry in respect of Kisii Mun/Block III/258 which had been allocated to the ex-parte Applicant. However, unlike in the case of some individuals whose letters were unclaimed and thereby Returned to Sender (RTS) by Postal Corporation of Kenya as evidenced by copies of such notification by Postal Corporation of Kenya, the *ex-parte* Applicant claimed his letter dated 4th September 2014 and the same was not returned. The deponent therefore believed that the ex-parte Applicant received the notice through the letter of 4th September 2014 but chose not to give any presentations in respect of the subject parcel.

30. He averred that upon conclusion of its investigations and in the absence of the *ex-parte* Applicant's response after the lapse of over one month from the date of calling upon the *ex-parte* Applicant to respond, the 1st Respondent proceeded and compiled the Report subject of the instant judicial review

proceedings in October 2014. However, in his view, the said report is not justiciable because whereas it contains Recommendations impacting on the rights of the ex-parte Applicant, the same are not Decisions and the Report is therefore not amenable to judicial review.

31. The deponent further deposed that:

- i. The subject of the 1st Respondent's investigations herein was not Kisii HCCC No. 133 of 2010 but the alleged maladministration by various public officers in the irregular and illegal alienation of public land reserved for the Kisii Municipal Market and that in those circumstances, it would be inevitable for the investigations to uncover the beneficiaries of such illegal allocation.
- ii. The Report did not in any way prejudge the merits of the pending suit against the ex-parte Applicant. It is upon the ex-parte Applicant to progress the pending suit expeditiously in whatever manner he deems appropriate.
- iii. The documentation exhibited by the ex-parte Applicant reveal that his title over the suit property was revoked vide The Kenya Gazette Notice Vol. CXII-No. 124 dated 26th November 2010.
- iv. With respect to the alleged apprehension by the ex-parte Applicant, there is no evidence that the 2nd Respondent has started acting on the 1st Respondent's recommendations without giving the ex-parte Applicant an opportunity of being heard and bearing in mind that this is a judicial review application, the Honorable Court ought not to issue orders at large.
- v. The powers of the 1st Respondent under Section 31 of the Act are not limited by any other provisions of law.

32. It was further averred that:

- i. The *ex-parte* Applicant was given an opportunity to be heard vide the letter dated 4th September 2014 but he declined to embrace the opportunity.
- ii. In the letter under reference, the Findings and Recommendations were detailed to the *ex-parte* Applicant who was thereby called upon to respond to the subject Findings and Recommendations in vain.
- iii. It is therefore not true that the 1st Respondent failed to comply with the provisions of sections 36 and 39(1)(b) of the Act as alleged.
- iv. Article 47(2) of the Constitution was adhered to by the 1st Respondent to the extent that as soon as the 1st Respondent realized in its conclusions and recommendations (prior to compiling and publishing the Report) that the ex-parte Applicant had been adversely mentioned, a notification calling upon the *ex-parte* Applicant to respond thereto was sent to the *ex-parte* Applicant.

33. It was submitted that the Court ought to determine whether the doctrine of sub judice can be invoked in the investigative proceedings conducted by the 1st Respondent. It was submitted based on **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993** cited in **Republic vs. National Environment Tribunal ex parte Orbit Chemicals Industries Limited & Another** that whilst undertaking investigations the 1st Respondent did not constitute itself as a Court of law or judicial tribunal as the investigations by the 1st Respondent were neither a court process nor a suit. It was further submitted that neither the parties in the two matters were the same nor were the issues similar. It was therefore contended that *sub judice* was inapplicable.

34. It was submitted that consequent upon the investigations carried out by the Respondent, save for the sole remedial action taken against the beneficiaries of the plots calling upon them to surrender the plots, the rest of the recommendations required various public officers/offices to undertake specified their mandates with a view to providing remedial action to the public.

35. It was submitted that prior to uncovering the beneficiaries of the allocations, the 1st Respondent would not have known of the *ex parte* applicant's interest in the allocations and the existence of the court cases hence the allegations of breach of section 30(c) does not arise. It was submitted that the said section is merely a procedural provision which bar the 1st Respondent from proceeding with a matter pending

before a Court but does not bar administrative investigation. In this case the report did not prejudice the merits of the suit pending in Court.

36. According to the 1st Respondent, having sent to the applicant a letter by way of certificate of posting to the applicant's last known address calling for the applicant's representations and having not received any such representations, the 1st Respondent complied with sections 36 and 39(1)(b) of the Act as well as Article 47(2). In support of its submissions the 1st Respondent relied on **Republic vs. Advocates Complaints Commission & Another [2013] KLR.**

37. With respect to Article 47(2) of the Constitution it was submitted that section 43 of the Act only requires that the complainant be informed of the result of the investigation and that the applicant in this case was not the complainant.

38. Since the recommendations were not final in nature and have not been acted upon by the 2nd Respondent, it was submitted that the applicant's legitimate expectations had not been violated.

39. The orders being sought being discretionary, it was submitted that in the circumstances of this case, they ought not to be granted.

Determination

40. I have considered the application, the affidavits in support of and in opposition to the application the submissions as well as the authorities relied upon and this is the view I form of the matter.

41. *Halsbury's Laws of England*, 5th Edn. Vol. 61 page 539 at para 639 states:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge.”

42. In this case, it was contended that the impugned findings being recommendations rather than a decision, they cannot be the subject of judicial review remedy of certiorari. It is therefore important to determine the nature of the said findings and whether the same can be subjected to an order of certiorari.

43. The general position on this matter is stated in *Halsbury's Laws of England* (supra) as follows:

“The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded.”

44. This position found favour in our local jurisprudence in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** in which the Court stated:

“The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations

and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application.”

45. However, in **Re Pergamon Press Ltd [1971] Ch. 388**, the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

“It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay’s submission. 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. They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind.” [Emphasis mine].

46. *Halsbury’s Laws of England* (supra) puts it thus:

“However, the nature of the inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice.”

47. It is therefore clear that the need to act fairly depends on the nature of the report and the recommendations to be made. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. Where the report and recommendations may have far reaching implications such as the ruining of careers and reputation as well as being the basis of judicial proceedings, the authority concerned has a duty to act fairly. It is for this reason that I believe the provisions of sections 36 and 39 of the Act are relevant. The two provisions provide:

36. The Commission shall give any person, State organ, public office or organisation against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the findings in its report.

39(1) Subject to subsection (2), if at any stage of an inquiry, the Commission-

- a. *considers it necessary to inquire into the conduct of any person; or*
- b. *is of the opinion that the reputation of any person is likely to be prejudice by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.*

48. Therefore even without the benefit of case law, the Act itself imports the elements of a hearing before the Commission's findings are included in the report. On this issue *Halsbury's Laws of England*, (supra) states:

“Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded.”

49. In this case the Commission recommended that the National Land Commission does investigate the illegal acquisition of the seven plots of land with a view to repossessing them. The consequences of the failure to act by a body to whom the Commission has directed its recommendations are specified in section 42(4) of the Act as follows:

3. *If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.*

50. Therefore as opposed to a situation where a body is merely tasked with investigations and preparation of a report and what follows thereafter is solely left to the institutions to which a report is made, the Commission's duty does not end at the point where the report is made. The Commission has the mandate to follow up and see that its recommendations are implemented. In my view the Commission's recommendations are the kind of recommendations which were contemplated in **Re Pergamon Press Ltd** (supra). I therefore find that the Commission was under a duty to act fairly and before condemning the ex parte applicant or criticising him, had to afford the applicant a fair opportunity for correcting or contradicting what was said against him.

51. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. It was accordingly held by **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that:

“Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

52. In **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57** the Court of Appeal expressed itself as follows:

“The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.”

See Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.

53. That the law must of necessity, adapt itself to the changing social conditions and not lay still was similarly appreciated in Kimani vs. Attorney General [1969] EA 29.

54. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

55. The Respondents have sought to avoid this Constitutional provision by contending that under section 43 of the Act it is only the complainant who is required to be informed of the result of the investigation and that the applicant in this case was not the complainant. If that interpretation was to be adopted it would mean that section 43 of the Act limits the rights granted to a person adversely affected by an administrative action under Article 47. For that position to be valid, the legislation purporting to limit the right must conform to Article 24(2) of the Constitution which provides that a provision in the legislation limiting a right or fundamental freedom-

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

56. Pursuant to Article 24(3) of the Constitution it is the obligation of the State or a person seeking to justify a particular limitation to demonstrate to the court, tribunal or other authority that the requirements of the foregoing Article have been satisfied.

57. In this case I do not find that section 43 of the Act limits the rights in Article 47 of the Constitution. It follows that the Commission was under the constitutional obligation to ensure that its decision met the requirement of fairness. In R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G, Lord Mustill held:

“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.”

58. Similarly, in Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E it was held that the commissioners;

“...must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely.”

59. The 1st Respondent has excused its action by contending that prior to uncovering the beneficiaries of the allocations, the 1st Respondent would not have known of the *ex parte* applicant's interest in the allocations and the existence of the court cases. It is however my view that as soon as the 1st Respondent came to realise that arising from its investigations there were persons whose interests were likely to be affected by its decision, it ought to have afforded them an opportunity of being heard before releasing the report. Even assuming that by the time of releasing the report, it was not aware that the report adversely affected the interests of any person, it had an obligation to furnish its decision and reasons therefor to any person affected thereby in order to afford the person an opportunity of correcting the impression created in the report and if necessary modify the same.

60. In this case however, the 1st Respondent has contended that by its letter dated 4th September, 2014, it afforded the applicant an opportunity of being heard which the applicant did not utilise. It is true that where a person is offered an opportunity of being heard and fails to utilise the same he cannot be heard to complain that he was never heard. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:**

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

61. However in this case, in the same letter the 1st Respondent indicated that one of its findings arising from the investigations was that the applicant “irregularly acquired plot number Kisii Municipality/Block III/258”. The 1st Respondent then outlined its recommendations including investigations of the said action. The applicant was then given a notice purportedly under section 36 of the Act to comment on what the 1st Respondent termed “adverse findings”. It is patently clear that though the 1st Respondent purported to act pursuant to section 36 of the Act, nothing could be far from the truth. As indicated above, section 36 is clear that the notice thereunder must be given before the Commission includes the findings in its report. From the contents of the letter it is clear that by the time the 1st Respondent wrote the letter it had to all intents and purposes not only made findings but even arrived at its recommendations. In my view a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, *Halsbury's Laws of England*, 5th Edn. Vol. 61 page 545 at para 640 states:

“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing...The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the

deficiency in the notice did not cause him any substantial prejudice...Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.”

62. It is therefore clear that even if it is true that the *ex parte* applicant was duly notified of the findings by the 1st Respondent such notification was unprocedural and did not lend itself to a fair hearing.

63. The applicant however contended that he never received the notification. He said that the address to which the letter was purportedly dispatched belonged to the University where he used to work but had since left. He in fact adduced evidence to support that fact. That the applicant is a public figure is not in doubt. The Act is however silent on the mode of service or notification. Section 3(5) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

Where any written law authorizes or requires a document to be served by post, whether the expression “serve” or “give” or “send” or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

64. It is clear that the foregoing section deals with situations where the law authorizes or requires a document to be served by post. It is my view that personal service remains the best mode of service and unless it is shown that such service was not possible or for some reason not convenient, where the action intended to be taken has the potential of giving rise to abridgement of a persons’ rights, public bodies ought to endeavour to personally serve notices where the law requires that notification be given. In this case, I am unable to see why it was so difficult to effect personal service on the applicant. Having found that the purported notification was unprocedural nothing however turns on this issue.

65. It was further contended by the applicant that since there were pending proceedings before a Court of law in respect of the same matter, the 1st Respondent was barred from conducting investigations in respect of the same issues. Section 30(c) of the Act bars the Commission from investigating a matter pending before any Court or judicial tribunal. The 1st respondent has attempted to argue that the said provision does not bar investigation but only bars the taking of an action. In my view that position is incorrect. What that provisions bars in express terms is investigation. It has further been contended that since the 1st Respondent was unaware of the existing court proceedings, section 30(c) is inapplicable. With due respect the 1st Respondent is attempting to read into legislation what does not exist. The general rule is that a statute should not, in absence of express provision, be construed so that it deprives people of their accrued rights. See **Panafrica Builders and Contractors Limited vs. Singh [1984] KLR 121; Zainal Bin Hashim vs. Malaysia Government [1980] 2 WLR 136, 140; Craies on Statute Law, 7th Edn. [1971] 389.**

66. It must always be remembered that one of the canons of statutory construction is that words of a statute should never, in interpretation be added to or subtracted from without almost a necessity and that it is the duty of the court to construe a statute according to the ordinary meaning of the words used. See **Purshottam N Kotak vs. A Ali Abdullah [1957] EA 321.**

67. I therefore do not see the reason why the word “investigate” used in section 30 of the Act ought to be substituted with the word “act”. The 1st Respondent is barred from investigating matters pending in Court knowledge or otherwise of such proceedings immaterial. Want of jurisdiction, it has been held may arise under two or more circumstances. **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** expressed himself on this issue as hereunder:

“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or

things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction.”

68. Similarly, in Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics.

69. Therefore even if the Commission had powers to investigate the nature of the complaints in issue but the Legislation under which it operates restricts its powers as was the case, in the instant case, the Commission would not have jurisdiction to embark on the said voyage unless the statutory bottlenecks had been removed or settled. A tribunal which has no jurisdiction to entertain a matter, it has been held, cannot purport to accord the respondent a fair hearing.

70. The 1st Respondent has however attempted to distinguish the matters it was investigating from the matters which were the subject of the said proceedings. In E & L Case No. 133 of 2010 it is clear that what was being sought was a declaration that the applicant’s title was null and void and for cancellation of his registration as the proprietor thereof. The basis for seeking the said order was that the land was part of the land reserved for a municipal market within Kisii Town and that the same was fraudulently leased. In its report, the 1st Respondent found that the applicant acquired the same plot despite the fact that it was part of the land set aside for the Kisii Municipal Market. It was held in Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR that:

“It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleading in both cases.”

71. Having looked at the pleadings in the ELC and the subject matter which the 1st Respondent set out to investigate or which it did actually investigate and made findings on, I have no doubt that the subject matter was the same and the issues were also the same. It is not in doubt that the applicant was a party to those same proceedings. In my view the reason for barring the 1st Respondent from investigating matters which are the subject of Court proceedings is to avoid possibility of the 1st Respondent’s findings running contrary to court decisions. I am therefore satisfied that the 1st Respondent ought not to have investigated the matter the subject of these proceedings. If it did unknowingly as it alleges, that does not render its findings valid.

72. It was contended that the applicant’s legitimate expectation of an appointment to public service was threatened by the 1st Respondent’s action. In De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6th Edn. Sweet & Maxwell page 609 it is stated that:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

73. However it was held in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] that:

“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”

See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].**

74. In this case I am not satisfied that the applicant has proved that he had a legitimate expectation that he would be appointed to serve as he has alleged. Whereas he may have had legitimate expectation that his appointment in the ambassadorial position would not be withdrawn, his expectation cannot be transferred to the 1st Respondent as the 1st Respondent was not the appointing authority. In my view there cannot be a general or amorphous legitimate expectation in the manner asserted by the *ex parte* applicant.

75. It was submitted based on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) that once this Court finds that the process was unprocedural the entire report of the 1st Respondent ought to be quashed. In my view, and it has been stated before, judicial review proceedings are special proceedings and whereas the Court may quash a report or decision, the order ought not to be crafted in such a manner that even those who have not contested the decision would be entitled to benefit otherwise that would defeat the limitation provided under the *Law Reform Act* as read with Order 53 of the *Civil Procedure Rules*. I therefore associate myself with the decision in **Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69** that a party cannot expect to reap any benefit from court proceedings to which he is not a party. In any event based on the material before me I am unable to find that the circumstances of the persons who were subject of the impugned report were similar to that of the *ex parte* applicant. In arriving at this finding I am reinforced by the holding 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** a decision made by bench presided by Nyamu, J (as he then was) who also made the decision in *Keroche Case*. In the *Goldenberg Case* the Court expressed itself as follows:

“Like so much straw into a burning fire let this order of certiorari consume all offending references. Like fire which converts, everything to itself let this order of certiorari remove and convert the dark spots. Like guided missiles hit only the target, let this order have the same effect by hitting only the targeted paragraphs which are in relation to the applicant only. In the result, we forthwith order the removal into this Court of the Goldenberg report and immediately quash the following paragraphs to the extent that they refer adversely to the applicant only.”

76. In the result I find that the manner in which the proceedings leading to the findings in the impugned report was conducted was tainted with procedural impropriety. I further find that the decision of the 1st Respondent was similarly tainted with illegality as the 1st Respondent was barred by the legal instrument from which it derived its authority to make the questioned decision from acting in the manner it did.

Order

77. In the result, I hereby grant an order of certiorari bringing into this Court for the purposes of being quashed the Report of the 1st Respondent (the Commission of Administrative Justice) released in October 2014 entitled ***“A Market Under Siege: An Investigations Report By The Ombudsman-Kenya On Alleged Irregular And Illegal Acquisition Of Kisii Municipal Market Land By Private Developers”*** and the same is quashed to the extent that it makes adverse findings against the *ex parte* applicant herein.

78. In the circumstances I do not find it necessary to grant the order of prohibition as sought in the Motion since the quashing of the report necessarily implies that the same can no longer be implemented.

79. I award the costs of this application to the Applicant to be borne by the 1st Respondent.

80. It is so ordered.

Dated at Nairobi this 20th July, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kalii for the Applicant

Mr Wachira for Miss Nungo for the 1st Interested Party

Cc Muruiki