REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

IN THE JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 275 OF 2014

IN THE MATTER OF AN APPLICATION BY AIRWAYS HOLDINGS LIMITED FOR LEAVE FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE ACT, CAP. 21 OF THE LAWS OF KENYA, THE ENVIRONMENT AND LAND COURT ACT, NO. 19 OF 2011, THE LAND REGISTRATION ACT, NO. 3 OF 2012, THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012 AND THE LAND ACT, NO. 6 OF 2012

AND

IN THE MATTER OF AIRWAYS HOLDINGS LIMITED

BETWEEN

REPUBLIC………………………….……………….……………..APPLICANT

-VERSUS-

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

THE REGISTRAR OF TITLES,

LAND TITLES REGISTRY-NAIROBI…….........………..2ND RESPONDENT

NAIROBI COUNTY……………….………..…………………3RD RESPONDENT

***EX-PARTE*: AIRWAYS HOLDINGS LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th July, 2014, the *ex parte* applicant herein, **Airways Holdings Limited**, seeks the following orders:

1. An Order of *certiorari* be and is hereby issued to remove into the High Court and quash the entire decision of the 1st Respondent made on the 1st day of July, 2014, determining Title Number I.R. 71291/1 for property Land Reference Number 209/13300 registered in the name of the Ex- parte Applicant as unlawful and directing its revocation.

2. An Order of *prohibition* be and is hereby issued to remove into the High Court to prohibit the 2nd Respondent, its servants, agents or in any manner whatsoever from revoking Title Number I.R. 71291/1 for property Land Reference Number 209/13300 registered in the name of the Ex-parte Applicant in reliance upon the decision of the 1st Respondent made on the 1st day of July, 2014.

3. An Order of *prohibition* be and is hereby issued prohibiting the 1st, 2nd and 3rd Respondents, their servants, agents or in any manner whatsoever from interfering with the Ex-parte Applicant's title, possession and use of the land comprised in Title Number I.R. 71291/1 for property Land Reference Number 209/13300 registered in the name of the Ex-parte Applicant in reliance upon the decision of the 1st Respondent made on the 1st day of July, 2014.

4. The costs of this application be paid by the Respondents.

***Ex Parte* Applicant's Case**

2. The application was supported by a verifying affidavit sworn on 15th July, 2014 by **Jacob Juma**, a director of the applicant.

3. According to the deponent, the aapplicant is the registered owner of Title Number I.R. 71291/1 for property Land Reference Number 209/13300 and occupier of the said property (hereinafter referred to as "the suit property") which was allotted as a remainder of property Land Reference Number 209/6559 I.R. No. 21112. Prior to the allotment, a part development plan for the property had been approved by the City Council of Nairobi on the 7th day of May, 1996 changing the land use of the property from its original use to the use for which the property was allotted, being commercial, residential and health centre purposes.

4. It was deposed that the City Council of Nairobi issued a lease for the property in the name of the Applicant, which lease was registered on the 14th day of November, 1996 and on the 5th day of November, 2011, the 3rd Respondent's predecessor, the City Council of Nairobi confirmed the validity of the lease.

5. On the 26th day of April, 2012, the Ministry of Lands published a notice in the Daily Nation intimating that it intended to zone the area comprising the property and gazette the same as a protected national heritage and invited representations on the intention.

6. The deponent averred that he went to the Lands Office and inspected the proposed part development plan number PDP No. 42/29/2012/1 referred to in the notice when he leant that the same purported to include the Applicant's property notwithstanding the fact that a part development plan for the same had already been prepared and approved on the 7th day of May, 1996 before the allotment of the property and issuance of a lease for the same to the Applicant. On the 27th day of April, 2012, the Applicant wrote to the Ministry of Lands, objecting to the intention to deprive it of the property through the unlawful proposed part development but there was no response or reaction to the Applicant's objection aforesaid.

7. According to the deponent, there has been no complaint whatsoever, since the registration of the lease in favour of the Applicant in 1996 that the same is illegal for any reasons whatsoever.

8. However, on the 7th day of July, 2014, the 1st Respondent published a notice in the Daily Nation,

notifying that it had, in its decision made on the 1st day of July, 2014, determined Title Number I.R. 71291/1 for property Land Reference Number 209/13300 registered in the name of the Applicant as unlawful and directed its revocation. As at the time of the making of the decision by the 1st Respondent, it was deposed, the Applicant had commenced steps towards the construction of a multibillion shopping complex with offices, hospital wing, parking and hotel, restaurants and cafes and stands to lose irreparably, if the project is stalled or defeated as a result of the decision.

9. The applicant's case was that it was not notified of any complaint on any alleged illegality of Title Number I.R. 71291/1 for property Land Reference Number 209/13300, required to respond to any such complaint nor was it heard on any such proceedings that preceded the making of the decision by the 1st Respondent. To the applicant, the 1st Respondent's decision was made without or in excess of jurisdiction for the reason that the power to determine the legality of title to land is vested in the Environment and Land Court under Article 162 (2) (b) of The Constitution of Kenya, 2010 and Section 13 of the ***Environment and Land Court Act***, No. 19 of 2011.

10. The applicant therefore contended that the 1st Respondent's decision is procedurally unfair, unlawful and unconstitutional in so far as it was made without affording the Applicant a hearing as required by the rules of natural justice, The Constitution of Kenya, 2010 and Section 14 of the ***National Land Commission Act***, No. 5 of 2012 (hereinafter referred to as "the Act"). Further, the 1st Respondent's decision is contra and *ultra vires* statute in so far as the same was made without adherence to the requirements for a hearing set out under Section 14 of the Act.

11. It was the applicant's case that the 1st Respondent's decision was arrived at and made in contravention of the Applicant's legitimate expectation that it will not be deprived of its property without adherence to the due process of the law and the 1st Respondent's action and decision was arbitrary as there are no reasons or grounds at all to warrant the taking of the decision.

12.The applicant asserted that the High Court has supervisory jurisdiction over the 1st, 2nd and 3rd Respondents and power to make any such orders or give any directions appropriate to ensure the fair administration of justice. It was its apprehension that the 1st, 2nd and 3rd Respondents, their servants, agents may interfere with the Applicant's title, possession and use of the land comprised in Title Number I.R. 71291/1 for property Land Reference Number 209/13300.

13.It was submitted on behalf of the applicant that though under section 14(1) of the Act the 1st Respondent Commission (hereinafter referred to as "the Commission") has the power to review grants and dispositions of public land to establish their propriety or legality, subsections (3) and (4) thereof oblige the Commission to notify persons with interest in the property in question of the intention to do so and afford them an opportunity to appear and inspect the relevant documents and only make a determination after hearing the said parties. In this case, as this was not done, the Commission contravened the said basic procedural requirement. Further it was submitted that the Commission contravened Articles 40 and 50 of the Constitution. In support of the submissions the applicant relied on ***Halsbury's Laws of England***, 4th Ed. 2001 Reissue; **Republic vs. Principal Registrar of Government & Another [2014]e KLR, R vs. Chief Magistrate's Court & 2Others exp Violet Ndanu Mutinda & Others [2014] eKLR** and **Ezekiel Misango Mutisya vs. National Land Commission & 6 Others [2014] KLR**.

14.It was submitted that pursuant to Article 50(1) of the Constitution, the primary forum for dispute resolution is before a Court of law while the secondary forum is an independent and impartial tribunal or body hence the secondary for a for dispute resolution cannot take away the power of the Court. Since there is a Court mandated to determine disputes relating inter alia to title to land, being the Environmental and Land Court (hereinafter referred to as "the ELC"), the power to determine the validity of title to land is donated to that Court by the Constitution and no such powers can be lawfully exercised by the Commission. To that extent, it was submitted that section 14(1) and (5) of the Act, are inconsistent with Articles 159 and 162 of the Constitution in so far as they give the Commission dispute resolution powers

and functions over the determination of title to land hence the Commission acted without jurisdiction. In support of this submission the applicant relied on **Hassan Ali Joho & Another vs. Suleiman Said Shahbal 7 2 Others [2014] eKLR**.

15. Since Article 40 of the Constitution guarantees the protection of the right to property, it was submitted that the ex parte applicant could not be deprived of its property without the due process of the law which the applicant legitimately expected. In support of this submission the applicant relied on ***Halsbury Laws of England*** (supra), **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] eKLR** and **Republic vs. County Government of Mombasa exp Outdoor Advertising Association of Kenya [2014] eKLR**.

16.It was submitted that other than the notice published in the Daily Nation of 7th July, 2014, there is no evidence of what the determination of illegality on the ex parte applicant's title is, how, it was arrived at and reasons and considerations that underlie it hence the decision was arbitrary and unreasonable as a public body is duty bound to indicate what considerations it took into account and justify its decision with reasons.

17. Based on **Livingston Kunini Ntutu vs. Minister for Land and Others Misc. Civil Appl. No. 169 of 2010**, it was submitted that the orders sought herein are merited.

1st and 2nd Respondents' Case

18.In opposition to the application, the 1st and 2nd respondents filed the following grounds of opposition:

> **1. That the Notice of motion application has no merit and is based on a misconception of the law, vexatious and an abuse of the court process.**
>
> **2. That the respondents acted within the premises and confines of The national Land Commission Act.**
>
> **3. That Investigations by the Commission indicate that LR.No.209/6559 was allocated to Municipal Council of Nairobi in 1942 and the same is now what is popularly referred to as City Park.**
>
> **4. That According to Nairobi Sheet No.15 LR.No.209/13300 was unlawfully excised from City Park and the same still lies within City Park.**
>
> **5. That the Commission is not aware of any change of user over the greater City Park Land and in any event there are due processes and procedures to be followed if land has to change user. The Ex-parte Applicant has failed to pursue or demonstrate compliance with the same.**
>
> **6. That LR.No.209/6559 has not been adjudicated or demarcated and its user The Nairobi County Government has denied through the sworn statement of Isaac Njuguna Nyoike ever issuing any letters of allotment to the *Ex parte* Applicant and the same have no known origin.**
>
> **7. That the suit land is purportedly committed to File.No.31910 and 2202 Vol II but efforts to trace the said files have been futile.**
>
> **8. That The National Land Commission in compliance with the provisions of section 14(3) of the National Land Commission Act invited all interested Parties through the print media on 10th July 2013 to appear before the Commission for purposes of the Review under challenge and the *Ex parte* Applicant despite knowledge of the same failed to appear before the Commission.**

9. That section 14 allows the Commission to proceed with review of grants and dispositions on its own volition which effectively negates the requirement for a written complaint.

10. That presently the *Ex parte* Applicant is not in occupation of the said land as the same remains part of City Park under public use.

11. That Public Interest and the doctrine of public trust Militates against the granting of the orders sought.

12. That the grant of orders of PROHIBITION would under ordinary circumstances lead to curtailing of statutory powers of the respondents in accordance with the law.

13. That the matter before court would under ordinary circumstances require extensive analysis of evidence for a proper and just determination which is not within the purview of a judicial review court.

14. That the court lacks jurisdiction to preside over this matter for the reason that The Environment and Land Court has been established under Article 162(2b) (3) of the constitution of Kenya and Act No 19 of 2011 (The Environment & Land Court Act) to deal with land matters and by dint of the provisions of Article 165(5) has specifically limited the jurisdiction of the High court to this extent.

15. That the application is thus bad in law, not merited and should be dismissed with costs.

3rd Respondent's Case

19.In response to the application, the 3rd Respondent filed a replying affidavit sworn by **Isaac Njuguna Nyoike**, the 3rd Respondent's Chief Valuer on 21st July, 2015.

20. According to the deponent, he was unaware of any resolution by the defunct City Council of Nairobi or that of its successor the 3rd Respondent to allot the whole or any portion of all the suit property. In his view, that the purported allotment letter dated 9th May, 1996 and payment of Kshs 757,000 for stand premium and annual rent purportedly made 6th August, 1996 in respect of the suit property are untenable. To him whereas the *ex parte* Applicant's claim is over the suit property, the same which is popularly referred to as City Park has hitherto not been adjudicated and or demarcated. He further averred that the Ex parte Applicant is not in possession and or occupation of the said property as alleged or at all as the said property is in the Possession of the 3rd Respondents, Nairobi City County.

21.The deponent disclosed that there are no minutes within the 3rd Respondents showing that the application by the *ex parte* Applicant for change of user was ever received, considered and or approved and the 3rd Respondent is a stranger to the purported part Development plan referred to in the *ex parte* Applicant's verifying affidavit.

22. It was reiterated by the deponent that from the records of the 3rd Respondent, there is no Resolution made by the 3rd Respondent and or its predecessor to issue any lease over the suit property or part thereof and the purported lease registered on 14th November, 1996 is untenable. According to him, the lease over the Title Number I.R 21112 of I.R to the extent that it relates to all that public land popularly known as City Park is untenable.

23. The deponent deposed that the 3rd Respondent's letter dated 15th September, 2011 Ref Val. 1009/SG/1/92/ROA/1GM alluded to at paragraph 8 of the verifying affidavit was confined to the term of lease over the suit property being L.R. No. 209/6559, I.R No. 21112/1 and was not intended for any other

purpose let alone ownership of any subleases thereof.

24. It was averred, based on legal counsel, that Article 67 of the Constitution and Sections 5 and 6 of the Act confers power upon the 1st and 2nd Respondents to carry out the steps they carried out hence availing the *ex parte* Applicant an opportunity to also exercise its right to make its representation as it indeed did hence the decision made and action taken by the 1st Respondent is lawful and in the public interest.

25. It was denied that the *ex parte* applicant has sought or obtained approvals to carry out such constructions as required under the ***Physical Planning Act*** and ***NEMA Act*** and that the pictorial artists impressions exhibit annexed to the Ex parte Applicant's verifying affidavit are not approved architect's drawings and have in any event not yet been submitted to the 3rd Respondent for approval as required by law.

26. To the 3rd respondent, the acts complained of are not acts of the 3rd Respondent and there is no action by the 3rd Respondent that is sought to be quashed or prohibited hence this application as between the Applicant and the 3rd Respondent be dismissed with costs.

27. The same contention was made in the 3rd respondent's submissions.

Determination

28. Having considered the foregoing it is clear that the factual basis of the ex parte applicant's case is not challenged in light of the fact that the 1st and 2nd Respondents have opted not to controvert the same by way of affidavit evidence yet the allegations are directed at them.

29. Judicial review proceedings, it was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

> **"…is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

30. Accordingly, the Court in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

31.Accordingly, this Court will only concern itself with the process followed by the Commission in arriving at the impugned decision and therefore will not dwell on whether the documents held by the applicant are genuine or otherwise. That is an issue which can only be resolved in a merit hearing before the ELC. Similarly this Court cannot, based solely on the affidavit evidence, make a decision as to whether the applicant is in possession of the suit premises or the status of the same in light of conflicting averments by the parties herein. In this case the issue of occupation is not clear-cut. To the contrary it is seriously disputed. Hence that being a crucial factor, it can only be resolved in a full-fledged hearing where parties would be afforded an opportunity of being heard in which their evidence would be tested by

cross examination.

32. Section 24 of the ***Land Registration Act*** provides as follows:

> ***Subject to this Act—***
>
> ***(a)the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***
>
> ***(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.***

33. Under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The crucial words in Article 40(6) are "***found to have been unlawfully acquired"***. Therefore there must be a finding that the property in question was unlawfully acquired.

34. The power of review of titles is conferred by section 14 of the ***National Land Commission Act*** Cap 5D of the Laws of Kenya which provides:

> ***(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).***

35. It is implicit from the foregoing that the rules of natural justice apply when the 1st Respondent

in exercising its powers under section 14 of the ***National Land Commission Act***, pursuant to which it purported to have been acting when it made the impugned decision. The Applicant however contends, which contention is not denied that the rules of natural justice were never adhered to.

36. Article 40(3) of the Constitution provides:

> ***The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***
>
> ***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***
>
> ***(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***
>
> ***(i) requires prompt payment in full, of just compensation to the person; and***
>
> ***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

37. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which 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.***

38.From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution.

39. It is therefore clear that under both the Constitutional and the relevant statutory provisions a registered proprietor’s title to land cannot be revoked without the proprietor being afforded an opportunity of being heard.

40. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

> **“Judicial review has I think developed to a stage today when...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...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...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 ....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.”**

41.In the recent case of **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR**, **Majanja J.** on a matter similar to the current one expressed himself thus:

"……first, the Registrar of Titles has no authority under the *Registration of Titles Act* to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation."

42. I find no reason for diverging from the learned judge's finding.

43. In my view the decision of the 1st Respondent was clearly tainted with illegality and procedural impropriety.

44. The applicant however contends that section 14 of the Act is inconsistent with Articles 159 and 162 of the Constitution. Article 67(2) of the Constitution provides for the functions of the Commission. However clause (3) of the same Article provides that the Commission may perform any other functions prescribed by national legislation. The relevant national legislation in question is the ***National Land Commission Act*** and it is not denied that it empowers the Commission to review all grants or dispositions of public land to establish their propriety or legality. Therefore the powers given to the Commission under section 14 of the Act are powers which the Commission exercises pursuant to an Act of Parliament enacted pursuant to the Constitution. As readily admitted by the applicant under Article 50(1) of the Constitution:

> ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

45. It is not contended that the Commission is not a body contemplated under Article 50(1) of the Constitution. Apart from that Article 159(1) of the Constitution provides:

> ***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.***

46. The applicant however contends that the Commission being a secondary forum, the appropriate tribunal to determine the validity of title to land is the Court. With due respect I do not subscribe to this position. I associate myself with the position adopted by the Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

47. It is therefore my view that Constitutional Commissions and bodies ought to be given space to carry out their constitutional and statutory mandate and the Court ought only to step in to ensure that their mandate is carried out in accordance with the law and that the due process is followed in the process.

48. I wish to reiterate that this decision is not meant to sanitise the title to the suit property. It is only meant to bring back on track the process of determining the issue and leave to the authorities concerned the decision on what step to take thereafter. However, the Court cannot sit back and watch as the due process if thrown out of the window and sacrificed at the altar of expediency. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572,** the Court of Appeal expressed itself as follows:

“The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court’s consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law…..Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari*, prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable.”

49. Therefore, once the impugned decision is quashed the next course of action is left to the authority concerned which course is of course expected to be lawful.

50. Having considered the issues raised herein, the inescapable conclusion I come to is that the due process was not followed. There is no evidence that the rules of natural justice were complied with in the process as required under the Constitution and the relevant statutory provisions. In other words the Commission’s decision was tainted with procedural impropriety hence a candidate for quashing by an order of certiorari. Fundamental rights and freedom which are expressly laid out in our constitution such as the right to a hearing must never be given casual observance or breached with impunity by the Government or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010**:

“The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers.”

51. The learned Judge was of the view, which view I share that some members of the executive arm of this country have not tried to understand and appreciate the provision of the new Bill of Rights and the yester years impunity are still thriving in that arm of the government.

Order

52. Consequently, I find the Notice of Motion dated 16th July, 2014 merited and grant the following orders:

1. **An Order of *certiorari* removing into this Court for the purposes of being quashed the entire decision of the 1st Respondent made on the 1st day of July, 2014, determining Title Number I.R. 71291/1 for property Land Reference Number 209/13300 registered in the name of the Ex- parte Applicant as unlawful and directing its revocation which decision is hereby quashed.**

2. **As the decision in question has been quashed it is nolonger necessary to prohibit its implementation as there is nolonger any such decision to be implemented.**

3. **The costs of this application are awarded to the applicant to be borne by the 1st and 2nd Respondents while the costs of the 3rd respondent shall be borne by the applicant since there is no reason why the 3rd respondent was joined to these proceedings.**

Dated at Nairobi this 19th October, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Shitubi for Mr Havi for the Applicant

Mr Odhiambo for the 2nd and 3rd Respondent

Miss Mwae for 3rd Respondent

Cc Patricia