



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

JUDICIAL REVIEW No. 6 OF 2019

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSIONRESPONDENT

AND

THE FAMILIES/CLANS OF KIPBOSON ARAP SELUMBU AND

KIPKILACH ARAP LEITICH.....INTERESTED PARTY

ERASTUS GITHUKU NJUGUNA, PETER KARIUKI WAWERU,

HEZIRONI NDIRANGU GITHIOMI, CHALSEG NJOROGE MUNDERU,

JULIUS MWANGI MUNDERU, JOHN NGETHE MUNDIA,

MILIKA WOKI, PHILISILA WANJIKU KUNGU,

PETER MACHARIA MAKUMI, NGURE MAKUMI (Suing on their own

behalf and on behalf of all land owners of LR No.

Mau Narok/Siapei Block 1 Meta) EX PARTE APPLICANTS

JUDGMENT

1. The ex parte applicants were granted leave on 17th April 2019 to commence these proceedings. The court also allowed them to prosecute the matter as a representative suit in respect of all land owners of parcels forming part of Mau Narok/Siapei Block 1 Meta. About two weeks later, they filed Notice of Motion dated 2nd May 2019. The following orders are sought in the application:

1. THAT this Honourable court be pleased to grant an order of certiorari to call for and quash the decision of the respondent herein vide the Kenya Gazette Notice No. 1995 of 1st March, 2019 page 876 in respect of allocating L.R No. 8653 IR 13230 to Kipkilach Arap Leitich and Kipboson Arap Selembu families/clans for settlement and directing the Ministry of Lands and Physical Planning (Department of Land Adjudication and Settlement) to facilitate the said settlement.

2. THAT this Honourable court be pleased to grant an order of prohibition prohibiting the respondent from dealing in any manner whatsoever, investigating and reviewing the title of the property known as Mau Narok/Siapei Block 1 Meta formerly known as LR No. 8653 IR 13230

3. THAT costs of this application be provided for.

2. The Notice of Motion is supported by statement of facts dated 17th April 2019 and verifying affidavit sworn by Erastus Githuku. He deposed that the ex parte applicants are the registered proprietors of various parcels of land within Mau Narok/Siapei Block 1 Meta formerly known as LR No. 8653 IR 13230. That the applicants were all members and shareholders of Metta Estate Limited, a land buying company. That the company acquired L.R No. 8653 IR 13230 in the year 1968 from the then owner Marshal Cox and surrendered the mother title in order to facilitate its subdivision among its members. He annexed a copy of an extract of the title. The company then used the

property to secure a loan from the Agricultural Finance Corporation. Upon discharge on 12th September 1983, the company embarked on the process of subdividing the land in order to settle its members. He annexed a copy of a charge and discharge. That the ex parte applicants and other members of the company obtained titles, settled in their respective plots and have lived thereon uninterrupted.

3. Mr a Githuku added that L.R No. 8653 IR 13230 was converted from Registration of Title Act (RTA) (repealed) registration system to Registered Land Act (RLA) (repealed) registration system and given title numbers Mau Narok/Siapei Block 1 (Meta) with respective plot numbers assigned to each member. He annexed copies of some of the titles. He further deposed that the ex parte applicants started receiving reports to the effect that their titles had been revoked by the respondent and their land had been allocated to other persons. They later went to the respondent's offices where they learnt that the respondent had through Gazette Notice No. 1995 published in the Kenya Gazette of 1st March 2019 made a determination with a recommendation that L.R No. 8653 IR 13230 be allocated to the interested party for settlement. He annexed copies of the gazette notice and the determination made in Historical Land Injustice Reference Number NLC/HLI/522/2018 between the Families/Clans of Kipboson Arap Selembu and Kipkilach Arap Leitich -vs- the Estate of Morrison Waweru Njenga, Njenga Mathu (Waweru Farm) and the Attorney General. He stated that the respondent's decision was neither right nor fair since the ex parte applicants who are registered owners of various parcels of land within Mau Narok/Siapei Block 1 (Meta) formerly known as L.R No. 8653 IR 13230 were not privy to the proceedings leading to the decision and never received any complaint from the respondent.

4. The deponent further stated that the respondent conducted its proceedings against the Estate of Morrison Waweru Njenga, Njenga Mathu and George Mathu (Waweru Farm) and the Attorney General instead of the ex parte applicants who are the registered owners of subdivisions arising from L.R No. 8653 IR 13230. That L.R No. 8653 IR 13230 is not known as Waweru Farm as alluded to by the respondent in the decision and that Waweru Farm is LR No. 8655 IR 14005 which neighbours L.R No. 8653 IR 13230. That the respondent did not conduct thorough investigations so as to ascertain the proper owners of L.R No. 8653 IR 13230 so as to carry out its proceedings in a fair manner and did not give them any notice to attend the proceedings. As such, the ex parte applicants and other 50,000 families were condemned unheard.

5. The respondent opposed the application through a replying affidavit sworn by Okenyi Samuel Odari its Deputy Director, Adjudication and member of its secretariat on Historical Land Injustices. He deposed that the respondent received and admitted a complaint from the families/clans of Kipkilach Arap Leitich and Kipboson Arap Selembu (the interested party) being Historical Land Injustice Ref No. NLC/HLI/522/2018 regarding the suit land. That it was alleged in the complaint that the parcels of land known as LR No. 8653, LR No. 8654, LR No. 8655, LR No. 8660 and LR No. 8652 were the interested party's ancestral land since time immemorial until sometime in the year 1954 when the colonial government forcefully alienated and granted it to one Cecil Marshal Cox. That upon alienation of the land, the interested party's families were forcefully evicted and forced to live in abject poverty in various parts of the region and that when Kenya attained independence in 1963, the families regrouped with a view to reoccupying the land but they did not succeed owing to vested interests and lack of political goodwill. That the respondent invited the parties to hearings which were to be held on 11th October 2019 at Kericho Teachers Training College, a ground visit on 18th November 2018 and a meeting of all the parties on 21st November 2018 at the respondent's County Coordinator's office. That the ground visit was done in the presence of all the parties, parties participated in the proceedings and made submissions.

6. Mr Odari further deposed that the respondent additionally conducted its own investigations which entailed ground visits and official searches at the land registry. That after those investigations and upon considering the parties submissions and documents, the respondent made a determination dated 7th February 2019 which it published through gazette notice Vol CXXI No. 27 of 1st March 2019. He added that the respondent complied with the law and that if the ex parte applicants have any titles in respect of the suit land then such titles are invalid as due process of conversion of public land to private ownership was not undertaken. That in making its decision, the respondent only determined the issue of indigenous people's claim to the suit land. He also deposed at length on matters of law. Such matters have their proper place in submissions.

7. In response and in opposition to the application, the interested party filed a replying affidavit sworn by Jackson Sigei. He reiterated the respondent's assertions as to the fact that the interested party filed a complaint, the nature as well as merits of the complaint and that the respondent gave the parties including the ex parte applicants a hearing before making its determination. He added that the ex parte applicants have not demonstrated any nexus between their properties and L.R No. 8653 IR 13230. He termed the respondent's determination a rightful conclusion and urged the court to uphold the respondent's constitutional and statutory mandate. The interested party also filed a supplementary affidavit sworn by Jackson Sigei to which he annexed copies of title documents and searches.

8. For good measure, the ex parte applicants reacted by also filing a supplementary affidavit sworn by Erastus Githuku. He deposed that Metta Estate Limited purchased LR No. 8653 IR 13230 and subdivided it into various parcels. He annexed a copy of a transfer dated 28th December 1968 from Cecil Marshall Cox to the company and 6th edition of RIM for Mau Narok/Siapei Block 1 Meta. He added that owners of various parcels in Mau Narok/Siapei Block 1 Meta formerly known as LR No. 8653 IR 13230 were not aware that a complaint had been made in relation to the suit lands, were not involved in the ground visits and that they only came to know when the gazette notice was published.

9. The Notice of Motion was canvassed through written submissions. It was argued on behalf of the ex parte applicants while relying on the provisions of **Article 47** of the **Constitution** and **Section 4 (3) and (4)** of the **Fair Administrative Action Act** that the respondent's impugned decision was tainted with unfairness, irrationality, procedural impropriety and was contrary to the rules of natural justice. The following extract from Halsbury's Laws of England, 5th Edn. Vol. 61 page 539 at para 639 was relied on:

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.

10. It was further argued that the ex parte applicants who are owners of various parcels in Mau Narok/Siapei Block 1 Meta formerly known as LR No. 8653 IR 13230 were condemned unheard by the respondent. To demonstrate the connection between LR No. 8653 IR 13230 and the ex parte applicants' plots, it was argued that the ex parte applicants' annexures EG 1, EG 2 and EG 3 show that LR No. 8653 IR 13230 was transferred to Metta Estate Limited, was charged by the company, discharged and ultimately surrendered to the government in consideration of a subdivision scheme. The respondent was faulted for failing to carry out proper investigations after receiving the complaint from the interested parties and that it ended up conducting its proceedings against the Estate of Morison Waweru Njenga, Njenga Mathu and George Mathu (Waweru Farm) and not the ex parte applicants. Reliance was placed inter alia on the cases of **Barasa W. Wabomba & another v Omunyin Kituyi & 2 others [2016] eKLR**, **Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 others (Interested parties) [2019] eKLR** and **Evans Thiga Gaturu & another v Naiposha Company Ltd & 13 others [2017] eKLR** to buttress the argument that failure to accord registered proprietors a hearing was a breach of principles of natural justice and that the determination cannot therefore stand. Accordingly, the ex parte applicants urged the court to grant the orders sought.

11. In response, it was argued on behalf of the respondent that it acted fairly, judiciously and with due regard to the applicable law and that the allegations of ultra vires and irrationality are unfounded and should fail. That the ex parte applicants have not demonstrated any omission which would suggest any irrationality and illegality in the process undertaken by the respondent. It was further argued that the respondent as an independent commission is mandated under **Article 67(1) (e)** of the **Constitution** to initiate investigations, on its own initiative or on a complaint on historical land injustices and to recommend appropriate redress. That the interested party's complaint warranted the respondent to invoke its jurisdiction in line with **Section 15** of the **National Land Commission Act** and it therefore admitted and processed the complaint as a historical land injustice claim. It was further argued that despite inviting all identified parties to public hearings and ground visit, the ex parte applicants squandered their opportunity to be heard by failing to file any documentation or to attend. Citing the case of **Republic v National Irrigation Board & 4 others ex-parte Josphat Kariuki Mutuanjara** [2016] eKLR, it was argued that the ex parte applicants were afforded a reasonable opportunity to be heard.

12. It was also argued for the respondent that its investigations and records at the Ministry of Lands and Physical Planning indicated that LR No. 8653 I.R. 13230 was surrendered to the Government of Kenya in consideration of a sub-division scheme and that in view of those records, the parties to the claim were the Families/Clans of Kipboson Arap Selembu and Kipkilach Arap Leitich vs The Estate of Morrison Waweru Njenga, Njenga Mathu, George Mathu and the Attorney General. That the ex-parte applicants were represented in the investigations by the Attorney General, the investigations were conducted with due diligence and that the respondent did not breach the ex parte applicants' rights under **Article 47** of the **Constitution**. Reliance was placed on the cases of **Kenya Revenue Authority v Menginya Salim Murgani** [2010] eKLR and **Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others** [2013] eKLR to support those arguments. It was further argued that the ex parte applicants have not exhausted all internal mechanisms for review of the matter as required by **Section 9(2)** of the **Fair Administrative Action Act**. Citing **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others** [1997] eKLR and the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others** [2008] 2 EA 300, it was argued that the ex parte applicants have not met the test for granting the orders sought. Consequently, the respondent urged the court to dismiss the application.

13. Finally, it was argued on behalf of the interested party that their complaint lay squarely within the respondent's jurisdiction since it appertained to historical land injustice. Regarding the issue of right to a fair hearing, it was argued that the ex parte applicants were given an opportunity to be heard through the meetings held on 18th November 2018 and 21st November 2018. Accordingly, the interested party viewed the respondent's determination as a lawful decision of a constitutional commission and urged the court not to replace it with its own decision. It was further argued that the ex parte applicants have failed to discharge the burden of proof cast upon them by **Sections 107 and 109** of the **Evidence Act**. The interested party relied inter alia on the cases of **Republic v Chief Magistrate Milimani Commercial Court & 2 others Ex-Parte Violet Ndanu Mutinda & 5 others** [2014] eKLR, **Republic v National Land Commission & another Ex Parte Muktar Saman Olow** [2015] eKLR, **Stephen Nendela v County Assembly of Bungoma & 4 others** [2014] eKLR and **Joseph Mbalu Mutava v Attorney General & another** [2014] eKLR and urged the court to dismiss the application with costs.

14. I have considered the application, the statement of facts, the affidavits filed by parties and the submissions. From the onset, it must be restated that this court, exercising its judicial review jurisdiction, is concerned purely with the decision making process and not the merits of the respondent's decision. That caveat is necessary in view of the fact that parties on both sides of the case have to some extent addressed the merits of the respondent's decision herein. The mandate of a judicial review court was reiterated by the Court of Appeal in **Municipal Council of Mombasa v Republic & another** [2002] eKLR as follows:

... judicial review is concerned with the decision -making process, not with the merits of the decision itself. ... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.

15. Guided by the foregoing, I have distilled the issues for determination herein as firstly whether the ex parte applicants were entitled to a hearing by the respondent, if so whether they were accorded a fair hearing and lastly whether the reliefs sought should issue.

16. The respondent is a constitutional commission established under **Article 67** of the **Constitution** which also defines its functions as follows:

67. National Land Commission

(1) There is established the National Land Commission.

(2) The functions of the National Land Commission are –

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation. [Emphasis supplied]

17. Additional provisions defining the respondent's functions are legislated at **Section 5** of the **National Land Commission Act**. With specific regard to historical land injustices **Section 15 (2)** of the **National Land Commission Act** defines such a claim as follows:

For the purposes of this section, a historical land injustice means a grievance which—

(a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;

(b) resulted in displacement from their habitual place of residence;

(c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated;

(d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and (e) meets the criteria set out under subsection 3 of this section.

18. It is not in dispute that the respondent received a complaint from the families/clans of Kipkilach Arap Leitch and Kipboson Arap Selemu (the interested party) in which it was alleged that the parcels of land known as LR No. 8653, LR No. 8654, LR No. 8655, LR No. 8660 and LR No. 8652 were the interested party's ancestral land until sometime in the year 1954 when the colonial government forcefully alienated it and forcefully evicted the interested party's families therefrom. It was alleged in the complaint that when Kenya attained independence in 1963, the interested party tried to reoccupy the land without success owing to vested interests and lack of political goodwill. The respondent deemed the complaint admissible under **Section 15 (3)** and **(4)** of the **National Land Commission Act** and accordingly admitted it as Historical Land Injustice Ref No. NLC/HLI/522/2018.

19. It is important to remember that the respondent's mandate when handling a historical land injustice claim includes not only the power to recommend appropriate redress but also the power to conduct investigations prior to making its determination. In that regard, **Section 15 (5)** and **(6)** of the **National Land Commission Act** provide:

(5) When conducting investigations under subsection (1) into historical land injustices the Commission may—

(a) request from any person including any government department such particulars, documents and information regarding any investigation, as may be necessary; or

(b) by notice in writing, addressed and delivered by a staff of the Commission to any person, direct such person, in relation to any investigation, to appear before the Commission at such time and place as may be specified in the notice, and to produce such documents or objects in the possession, custody or under the control of such person and which are relevant to that investigation.

(6) Where a complainant is unable to provide all the information necessary for the adequate submission or investigation of a complaint, the Commission shall take reasonable steps to have this information made available.

20. The respondent heard the complaint and made a determination dated 7th February 2019 which it published through gazette notice Vol

CXXI No. 27 of 1st March 2019. It recommended that LR. No. 8652 I.R. 14002 and LR. No. 8653 I.R. 13230 be allocated to the interested party for settlement and that the Ministry of Lands and Physical Planning to facilitate their settlement.

21. Were the ex parte applicants entitled to a hearing by the respondent? To answer that question, it is crucial to revisit the applicable law and the ex parte applicants' stake in the properties in contention.

22. **Article 50 (1)** of the **Constitution** provides for the right to a fair hearing in the following terms:

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.

23. In the particular context of administrative actions, **Article 47 (1)** and **(2)** of the **Constitution** provide:

(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.

24. Further provisions to secure fair administrative actions are provided for in the **Fair Administrative Action Act, 2015, Section 2** of which defines "administrative action" as including the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The section further defines "administrator" as meaning a person who takes an administrative action or who makes an administrative decision. **Section 4 (3)** and **(4)** of the Act provide:

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

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

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

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

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

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

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

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

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

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

25. The foregoing provisions of **Articles 47** and **50** of the **Constitution** and those of **Section 4 (3)** and **(4)** of the **Fair Administrative Action Act, 2015** sum up what is commonly referred to as natural justice. An entity such as the respondent is required to accord all persons who are likely to be adversely affected by its decision a hearing before making its decision. The Court of Appeal summarized the rule as follows in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR**:

... The landmark decision of the House of Lords in Ridge v. Baldwin [1964] AC 40 clarified the law, that the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

1. the right to be heard by an unbiased tribunal.

2. the right to have notice of charges of misconduct

3. the right to be heard in answer to those charges.

On his part, Lord Reid when dealing with class of cases of dismissal from office “where there must be something against a man to warrant his dismissal” said at page 66:

“There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”

[20] The right to fair hearing as a rule of natural justice, a part of the common

law, has in modern times been variously described as “fair play in action”, justice of the common law”; “common fairness” “fairness of procedure” or simply as “duty to act fairly.”

As an example, in Wiseman v Borneman [1969] 3 All ER 275 in determining, inter alia, the question whether the principles of natural justice (right to fair hearing) had been followed Lord Morris of Borth-y-Gest denominated the issue as to one of whether the tribunal had “acted unfairly”.

So did Lord Denning MR in Selvarajan v Race Relations Board [1976] 1 All ER 12 when dealing with the procedure of bodies required to make investigation where he said at page 19:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it.”

26. The ex parte applicants maintain that they are owners of various parcels in Mau Narok/Siapei Block 1 Meta which they claim was previously LR No. 8653 IR 13230. They have exhibited copies of title deeds in respect of properties located within the registration section known as Mau Narok/Siapei Block 1 (Meta). A perusal of the respondent’s annexure NLC-5 which is a copy of the title in respect of LR No. 8653 IR 13230 shows at entry number 11 thereof that the property was transferred to Metta Estate Limited on 30th December 1968 for a consideration of KShs 320,000. Simultaneously, a charge in favour of Agricultural Finance Corporation to secure a loan of KShs 160,000 was registered under entry number 12 followed with a discharge on 12th September 1989, under entry number 13. Finally, entry number 14 shows that the grant was surrendered to the Government of Kenya on 7th November 1991 in consideration of a subdivision scheme. All those transactions echo the ex parte applicants’ allegations and match the transactions on the interested party’s copy of the title. It is apparent therefore that the ex parte applicants’ claim that their titles trace back to LR No. 8653 IR 13230 is a significant issue with a possible bearing on the right to property. It was worthy of audience before the respondent pursuant to **Section 4 (3) and (4) of the Fair Administrative Action Act, 2015** as an entity determining proprietary rights over land that was comprised in the said grant. Whether such an audience or hearing would have resulted in a different outcome is really of no significance in so far as these judicial review proceedings are concerned. The first issue for determination is therefore answered in the affirmative: the ex parte applicants were entitled to a hearing by the respondent.

27. The second issue for determination is whether the ex parte applicants were accorded a fair hearing. As stated by the Court of Appeal in Evans Thiga Gaturu & another v Naiposha Company Ltd & 13 others (supra):

... It cannot be overemphasized that Article 50 of the Constitution guarantees every party to a dispute that can be resolved by the application of law a fair and public hearing by a court or other independent and impartial tribunal or body. Implicit in the fair hearing guaranteed by the Constitution is the right of a party to know in advance the allegations against him and a reasonable opportunity for rebuttal.

28. The respondent has contended that in spite of it identifying and inviting all concerned parties to public hearings and ground visit, the ex parte applicants squandered their opportunity to be heard by failing to file any documentation or to attend. A reading of paragraphs 1 and 2 of the respondent’s determination shows that it identified parties to the claim as the interested party and “the families of the late Morrison Waweru Njenga, Njenga Mathu and George Mathu Families (Waweru family)”. Further, it is indicated at paragraph 24 thereof that a ground visit was conducted on 18th November 2018 in the presence of the respondent’s County Coordinator, Assistant County Commissioner Mau Narok, Waweru family representative and Kipkilach family representative. Neither the ex parte applicants nor the properties located within the registration section known as Mau Narok/Siapei Block 1 (Meta) are mentioned anywhere in the determination. It has not been suggested by the respondent that the ex parte applicants, the Waweru family and George Mathu family are one and the same entity. I do not think they are. There is no evidence that the ex parte applicants were notified of the claim and the ensuing proceedings pursuant to **Section 4 (3) and (4) of the Fair Administrative Action Act, 2015**. The respondent’s contention that they were represented by the Attorney General, apart from not being supported by any record of any participation by the Attorney General in the proceedings before the respondent, cannot be an acceptable answer to the ex parte applicants’ insistence on their right to a fair hearing. To the extent that the ex parte applicants were not notified of the interested party’s claim or given an opportunity to be heard in response thereto, they were not accorded a fair hearing. The second issue for determination is also answered in the affirmative.

29. Failure to ensure a fair hearing renders any resultant decision a nullity. As stated in Evans Thiga Gaturu & another v Naiposha Company Ltd & 13 others (supra):

A decision arrived at without affording a party a fair opportunity to be heard cannot be allowed to stand and it matters not that the court or tribunal would have come to the same conclusion had it afforded the party a fair hearing. In General Medical Council v. Spackman [1943] 2 All E.R. 337 the position was articulated thus:

“If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”

30. It follows therefore that the ex parte applicants are entitled to an order of certiorari to quash the respondent's impugned decision.

31. The ex parte applicants have also sought an order of prohibition to stop the respondent from dealing in any manner whatsoever, investigating and reviewing the titles of the properties known as Mau Narok/Siapei Block 1 Meta formerly known as LR No. 8653 IR 13230. The scope of such an order was summarized as follows in **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others** (supra):

... What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

32. The respondent's determination having been made, an order of prohibition is powerless against it. At the same time, there is no basis upon which to stop the respondent from discharging its constitutional and statutory mandate in regard to the properties known as LR No. 8653 IR 13230 or Mau Narok/Siapei Block 1 Meta, provided that it does so strictly within the confines of the law. I will therefore not grant prohibition.

33. Before concluding, I emphasize that this court makes no determination on the validity or otherwise of the ex parte applicants' title to the properties known as Mau Narok/Siapei Block 1 Meta since that is not an issue before the court. This being a judicial review matter, the focus is purely on the decision making process leading to the subject determination.

34. In view of the foregoing discourse, I make the following orders:

i) An order of certiorari is hereby issued, bringing into this court and quashing the decision of the respondent published vide Kenya Gazette Notice No. 1995 of 1st March, 2019 page 876 allocating LR No. 8653 IR 13230 to Kipkilach Arap Leitich and Kipboson Arap Selembu families/clans for settlement and directing the Ministry of Lands and Physical Planning (Department of Land Adjudication and Settlement) to facilitate the said settlement.

ii) Costs are awarded to the ex parte applicants and shall be borne by the respondent.

35. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 17th day of September 2020.

D. O. OHUNGO

JUDGE