REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 28 OF 2017

ADAN DADA ROBA (Administrator of the Estate of

DADACHA ROBA TULUS.....APPLICANT

VERSUS

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

THE REGISTRAR OF TITLES, NAIROBI.....2ND RESPONDENT

MARSABIT PASTORS FELLOWSHIP

(Through their registered officials).....3RD RESPONDENT

JUDGMENT

1. The Ex-Parte applicant's Motion dated **6th September, 2017** seeks the following principal orders:

> **(a) An order of certiorari to remove into this honourable court to quash the recommendation/decision/order of the 1st respondent gazetted in the Kenya Gazette dated 17th July, 2017 recommending and/or ordering for revocation of the applicant's title to land LR No. 11969/215.**
>
> **(b) An order of prohibition to prohibit the 2nd respondent, its agents, employees, servants, county officers or whosoever from enforcing the decision/or of the 1st respondent in too and in particular the revoking the title to land LR No. 11969/215.**

2. The motion is premised on the grounds contained in the statement filed on **16th August 2017** and is supported by the verifying affidavit of the ex-parte applicant sworn on the **15th August 2017.**

3. In the statement of facts the grounds on which the application is brought are as follows:

> **(a) That the 1st respondent's decision contained in the Kenya Gazette dated 17/7/2017 was arrived at in breach of the principles of natural justice for failure to hear the parties or to facilitate their inspection of all the relevant documents;**
>
> **(b) That the 1st respondent's decision violated the provisions of Section 14(4) of the National Land Commission Act and Article 47 of the Constitution of Kenya 2010;**
>
> **(c) That the 1st respondent's decision is unreasonable;**
>
> **(d) That the decision was tainted with bias;**
>
> **(e) That the proceedings leading up to the decision were conducted in defiance of an existing court order.**

4. The 1st respondent filed grounds of opposition dated **20/3/2018** on **21/3/2018** and a replying affidavit dated **24/10/2018** on **26/10/2018.**

Determination

5. The issues that arise in this matter are as follows:

(a) Did the 1st respondent make a decision?

(b) If so, was the 1st respondent's decision arrived at in breach of the principles of natural justice for failure to hear the parties or to facilitate their inspection of all the relevant documents?

(c) Was the 1st respondent's decision in violation of the provisions of Section 14(4) of the National Land Commission Act and Article 47 of the Constitution of Kenya 2010 or illegal for arising from the conduct of proceedings that took place in defiance of an existing court order?

(d) Was the 1st respondent's decision unreasonable and tainted with bias?

(e) Did the 1st respondent make a decision capable of being quashed?

6. The 1st respondent avers in the grounds of opposition that there is no determination of the 1st respondent capable of being quashed. The argument advanced by the 1st respondent is that a gazette notice communicates a decision and does not constitute a decision by itself. However the following grounds of opposition filed by the 1st respondent betray that there was a decision made. It appears that without that gazettement the decision may not be rendered effective. The gazettement is therefore the embodiment of the decision of the 1st respondent. On other occasions the decision of the Registrar of Titles cancelling certain titles which was communicated by gazette notices has come under challenge and been nullified by the court on various grounds. In my view this ground has no merit. There was a decision made by the 1st respondent and if the grounds for quashing of that decision are established, the same is liable to certiorari.

7. As to whether the decision arrived at in breach of the principles of natural justice for failure to hear the parties or to facilitate their inspection of all the relevant documents the submission of the applicant is that it appeared to him that the 1st respondent had predetermined outcome in the dispute before hearing the parties.

8. Is this supported by the verifying affidavit?

9. Before examining whether affidavit evidence adduced by the applicant supports this ground, it is good to examine to provisions of **Section 14(4)** of the **National Land Commission Act** and **Article 47** of the **Constitution of Kenya** upon which the claim of violation of the rules of natural justice in this motion are premised.

10. Article 47 of the **Constitution of Kenya 2010** provides as follows:

"47. Fair administrative action

(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

11. It is clear that any administrative action that a citizen is subjected to must be expeditious, efficient, lawful, reasonable and procedurally fair.

12. Fairness goes to the heart of the concept of natural justice. The cardinal principle of natural justice is that no one shall be condemned unheard. In the case of **Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR** the court, citing a plethora of decisions, delivered itself as follows

"69. The Supreme Court of Uganda in The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010, which was followed with approval by Justice Lenaola in Mandeep Chauhan v Kenyatta National Hospital & 2 others [2013] eKLR to the effect that:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.""

13. Has natural justice principles been built into the legislation governing the mandate of the 1st respondent and were they observed?

14. Section 14(1) of the **National Land Commission Act** provides as follows:

> **"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."**

15. Section 14(3) of the **National Land Commission Act** provides as follows:

"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."

16. Section 14(4) of the **National Land Commission Act** provides as follows:

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

17. It is clear that **Section 14(4)** of the Act expects the 1st respondent to act fairly in exercising their mandate by according the applicant a hearing. Natural justice is therefore covered.

18. Back to the evidence in the verifying affidavit. The applicant states in that affidavit that he was invited for a hearing scheduled for **9/3/2017.** Exhibit **"ADR 4"** in his affidavit is the invitation letter from the 1st respondent's vice chairperson.

19. It states that the 1st respondent has commenced investigations into a complaint regarding the suit land and the applicant is invited to make representations as to how he acquired the said property; he is also advised of his right to legal representation. Documentary evidence from the applicant was also invited.

20. However, the applicant's apprehension of a predetermination of the case is premised on a letter dated **14/1/2016** written by the County Executive Committee Member for Energy; Lands and Urban Development and addressed to the Deputy Governor Marsabit. It attaches a copy of a document entitled *"LAND DISPUTE OVER GRAVEYARD BETWEEN MARSABIT PASTOR'S FELLOWSHIP AND FOUR PERSONS OF PARCELS LR NOS 11969 /211 213-215."* The document is not dated. It purports to recommend inter alia the revocation of the ratification process the cadastral surveys and the cadastral surveys approved in **1993** used to initiate the surveys and all the title deeds. Paragraph 6 of the applicant's verifying affidavit identifies this document, rightly or wrongly, as *"…a recommendation that has already been made by the Commission."*

21. Evidence that the annexture to the letter dated **14/1/2016** emanated from the 1st respondent could have established that the 1st respondent had made the recommendations. However the 1st respondent invited the applicant for a hearing even while seized of the Board's recommendations. Can this court accept evidence of only such an annexture as proof of predetermination while it had not been linked to the 1st respondent? In my view, it cannot. It is up to the applicant to establish that the annexture emanated from the Commission in order to establish predetermination of the dispute.

22. However, one of the notable recommendations that makes it clear that the document is not from the 1st respondent is the 3rd recommendation which states as follows:

> ***"3. The Commission to undertake an independent review of grant and dispositions on the disputed graveyard."***

23. The replying affidavit of the 1st respondent also makes it clear that the dispute had previously been addressed by the Marsabit County Land Management Board which, Board prepared the offending document. The actions of the county land management board are not in issue in these proceedings. However, is the recommendation of the Marsabit County Land Management Board necessarily the recommendation of the Commission?

24. In my view, the contents of the third recommendation in the County Land Management Board's determination, if it may be referred to as such, shows that the Board never intended the Commission to take up and adopt its recommendations wholesale without hearing the parties at all. The applicant has not demonstrated that the 1st respondent was bound by the recommendation of the Board.

25. There is apparently affixed thereto a receipt stamp of the National Land Commission with the date **9/3/2017** imprinted on both the letter dated **14/1/2016** and the attachment. The 1st respondent on the other hand upon receiving that recommendation never adopted it, but called upon the applicant for a hearing to resolve the matter. That cannot be considered to be the conduct of a body determined to adopt the Board's recommendations by hook or by crook, without granting the applicant an opportunity to be heard.

26. In the case of **Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR (Miscellaneous Civil Application 266 of 2017,) Odunga J** stated as follows:

"In Selvarajan vs. Race Relations Board [1976] 1 All ER 12 at page 19 of the judgement Lord Denning MR observed that:

"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 investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."

27. The applicant alleges in his verifying affidavit that he demanded to be furnished with the recommendations attached to the said letter vide a letter written by his advocate on **7/4/2017** but to date no positive response has ever been received from the 1st respondent. However I am persuaded that the 1st respondent did not need to reveal its sources of information and its reliance on the information provided by the Marsabit County Land Management Board to arrive at a decision cannot be faulted.

28. It would also appear from the dicta cited above that though the 1st respondent called the applicant and others for a hearing, a formal hearing was not a must. In this court's view, what matters is that the applicant acknowledges that he was called upon to answer the complaint lodged by the Marsabit Pastors Fellowship and he did not take that opportunity.

29. When a sufficient opportunity to defend himself is provided and an applicant fails to take it up for inexplicable reasons, the rules of natural justice cannot be said to have been violated in regard to his case. All this court needs do is examine if that opportunity afforded the applicant was sufficient, for indeed fairness in natural justice entails sufficiency of the opportunity to defend oneself.

30. The applicant admits that he and others were called upon by the 1st respondent's letter dated 6th February 2017 to respond to the Marsabit Pastor's Fellowship Complaint dated 15th March 2015. This was not the first time the matter had come to the notice of the applicant, for the Marsabit County Land Management Board record shows that the applicant appeared before the Board over the same issue before and his only hindrance at the Board's sitting was lack of letters of administration. He therefore knew that a complaint existed. This court is persuaded that the applicant knew of the said report and possibly had it even before he demanded a copy from the 1st respondent. His only complaint was that he was not heard before the Board. I have stated before that the focus of these proceedings is not on the Board's actions but on the 1st respondent's.

31. Back to the 1st respondent's letter dated 6/2/2017, the 1st respondent summoned inter alia, the applicant to attend the public hearing scheduled for *"Thursday 9th March 2017 at ACK Garden Annex Building 7th Floor, 1st Avenue Ngong Road next to Ardhi House at 10:00 am"* to *"make representation*" on how he acquired the suit property. The said letter also informed him of his right to legal representation and his right to submit to the 1st respondent any document or written representation intended to be relied on at the hearing before the hearing.

32. I have already observed as above that though a hearing was scheduled, the conduct of a formal hearing was not a must, and it appears that the 1st respondent's the request for, among others, a written representation from the applicant, was borne out of this recognition.

33. In summary, the applicant hired the services of an advocate who appeared on the appointed date of hearing and applied to be served with copies of the complaint and other documents by the complainant which he admits were supplied on 23rd March 2017. Thereafter the applicant applied on two occasions through his advocate to be provided with a copy of the Board's recommendation which he states he has never received to date. However as I have stated before it was incumbent upon the applicant to respond to the complaint and the demand for a copy of a recommendation had no relevance to the hearing that he faced. In my view had the applicant not engaged in sideshows the period between the service of the letter dated **6/2/2017** and **21/4/2017** the latter being the date that the hearing took place, was sufficient to enable him mount his defence which he failed to do. I find that there is no sufficient evidence of breach of the rules of natural justice with regard to sufficiency of opportunity offered to the applicant to defend the allocation of the suit land.

34. As to the allegation regarding alleged admissions regarding predetermination, there is no evidence annexed to the verifying affidavit to show that the 1st respondent admitted to the applicant to having made the recommendations complained of before hearing the applicant.

35. Since the Board's recommendation was already before the 1st respondent, a cursory examination of this situation may lead one to easily agree with the applicant. However, caution demands note of the fact that only the bare statements of the applicant, implicating the 1st respondent's legal counsel and the vice chairman of having admitted that a predetermination of the matter had been made and only ratification of that determination remained, exist.

36. There is no other independent evidence of such an admission by the two officials of the 1st respondent.

37. The applicant has attached a copy of a notice of preliminary objection dated **19/4/2017**, said to have been raised before the 1st respondent on this very issue and which is said to have been dismissed on **20/4/2017** by the 1st respondent. This is not the *"other independent"* evidence that this court would be looking out for.

38. As I have stated before, no other evidence of the alleged predetermination has been submitted to this court by the applicant. In my view the analysis of the evidence set out above does not prove that there was a predetermination of the dispute before the applicant was heard by

the 1st respondent.

39. While still addressing the ground of violation of the rules of natural justice, this court has to examine whether the 1st respondent failed to hear the parties or to facilitate their inspection of all the relevant documents.

40. The 1st respondent invited the applicant to a hearing and in my view that is a pointer to the fact that the 1st respondent desired that the dispute be determined on its merits and the only evidence I find and it is at **paragraph 8** of the verifying affidavit is that the applicant was not furnished with the copy of the recommendations attached to the letter dated **14/1/2016**.

41. This court would have expected the applicant to lay out a list of the documents that he applied for from the 1st respondent and show that by the time of the hearing of the dispute before the respondent such request for documents had not been honoured by the respondent.

42. From the record before me the only document that appears to be a source of the applicant's complaint of "failure to be furnished with documents" is the recommendation of the Marsabit County Land Management Board. I have indicated before that since the focus of the hearing was on the complaint by the Marsabit Pastor's Fellowship, the supply of the recommendation was not relevant to the proceedings before the 1st respondent who by conduct evinced a desire to arrive at an independent finding after the hearing.

43. Next is the issue as to whether the 1st respondent's proceedings and decision were undertaken in defiance of an existing court order so as to render them illegal.

44. I have already addressed this issue albeit peripherally while dealing with the issue of natural justice as above. I have stated that there was no proof of service of the order before the proceedings that took place on **21/4/2017.**

45. The copy of the letter dated **24/4/2017** betrays the fact that instead of service of an order upon the 1st respondent the applicant's counsel *orally* informed "*the Commission*" on the **20th April 2017** that the High Court had issued a stay of the Commission's proceedings in the dispute in **NBI JR NO 188 of 2017**. This is not sufficient service upon the 1st respondent of an order of the court made in its absence at the leave stage of a judicial review proceeding.

46. The letter purports to attach a copy of the order. However in the bundle filed by the applicant there is no copy of the order said to have accompanied the letter.

47. The letter is also said to have been served - going by the receipt stamp - on the 1st respondent on **25/4/2017**. It is interesting that the applicant concedes at **paragraph 18** of his verifying affidavit that he had not been made a party in those judicial review proceedings by the time the High Court ordered the file closed on **29/5/2017** for failure to file the substantive notice of motion within the requisite time.

48. If the applicant did not serve the 1st respondent with a copy of the order staying the proceedings in respect of the title, how would the 1st respondent be expected to unilaterally stop the proceedings?

49. It appears that neither the applicant nor his advocate attended the hearing on the **21/4/2017** and the hearing was concluded in his absence. The applicant in his affidavit states that he only learnt from a friend that the 1st respondent had made a decision to revoke the title subject matter herein and that the decision was advertised vide the Kenya Gazette Notice dated **17/7/2017**.

50. It was the duty of the applicant to avail himself or his representative or both of them at the hearing held on the **21/4/2017** which he never did hence leading to an ex parte hearing. Such can not be called a denial of the right to be heard.

51. On the basis of the above evidence can the 1st respondent be said to have denied the applicant a hearing? In my view it did not. The applicant had notice of the case he was to meet but he busied himself with other affairs that snatched from his hands the golden opportunity to defend himself placed on a platter into his hands.

52. Upon an analysis of the evidence before the court on all the three alleged limbs, there is therefore no basis for holding that the applicant's rights to natural justice were violated, or that **Section 14(4)** of the **National Land Commission Act** and **Article 47** of the Constitution of Kenya were violated.

53. The case of **Republic Vs National Land Commission & Another Ex Parte Hellen Kemunto Obaga [2018] eKLR** can be distinguished. In that case the High Court had already made a final determination upholding the contention by the registered owner that he had regularly and procedurally acquired the suit land. Nothing of the sort is said about **NBI JR 188 of 2017.**

54. However even if the interim order made in **NBI JR 188 of 2017** can be deemed to have been eventually served with the latter dated **24/5/2017**, it was too late as evidence on record shows that proceedings had already been concluded on **21/4/2017**. The applicant further conceded that the judicial review proceedings in **NBI JR 188 of 2017** were brought to an end on **25th May 2017.** By that time he had not been enjoined in those proceedings. In any event the mode of termination was by way of the file being closed in that no substantive motion was filed within the relevant period to enable the court consider it.

55. This court would not be mistaken to consider that that finale to the judicial review proceedings in **NBI JR 188 of 2017** could not allow the order of stay to survive and that it was automatically vacated once the court ordered that the file be closed.

56. The effect is that without any other orders of stay being served upon the 1st respondent, it was entitled to resume the process from where it had stopped upon the service of the order - if service was effected - to conclusion which is the delivery of the recommendations that were contained in the gazette notice now impugned. In my view there was no wrongdoing on the part of the 1st respondent under this ground as alleged.

57. The last issue in the instant motion is whether the 1st respondent's decision is unreasonable and tainted with bias?

58. First it must be noted that judicial review proceedings are principally concerned with the procedure employed in arriving at a decision. Unreasonableness and bias go into the merits of the decision. Nevertheless they have been successfully relied on over many years as grounds for certiorari in judicial review.

59. ***"Wednesbury unreasonableness"*** is the benchmark against which the applicant's claim of irrationality must be held to determine whether it has merit. Absurdity is another term to refer to such unreasonableness. In considering this ground, an examination is made to establish if the decision is so unreasonable, or so absurd that reasonable authority could have envisaged the making of such a decision.

60. In the celebrated case of **Associated Provincial Picture Houses, Ltd. -vs- Wednesbury Corporation [1947] 2 All E.R 680** the principle laid down is that a court will consider the merits of a decision only where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; it is *'so unreasonable that no reasonable authority could ever come to it.'*

61. Can the decision of the 1st respondent be said to be so unreasonable that no reasonable authority could ever come to it?

62. Mandate is granted to the 1st respondent under **Section 14** of the **National Land Commission Act** to review grants and dispositions. It had jurisdiction to consider the complaint against the applicant, hear the applicant and issue a determination thereof. The determination was in consonance with its findings.

63. A little factual background will enable a deeper understanding of whether there was any irrationality in the decision that the 1st respondent made so as to render it subject to certiorari on that ground.

64. The complaint against the allocation of the suit land was lodged by the Marsabit Pastors Fellowship. The end result was that the land was found to have been reserved and planned for a Christian cemetery and was not available for allocation to a private developer.

65. The report by the County Land Management Board shows that its findings were that the land was a cemetery, that it had already been surveyed but a second survey had overlapped on the cemetery land and that the second survey was conducted at the behest of the applicant.

66. All through the proceedings it is not in doubt that the suit land was carved out of cemetery land. In my view there is no unreasonableness in the revocation of the titles and their reversion to the County Government of Marsabit for use as a cemetery. This ground must fail.

67. On the issue of bias, it also depends on the evidence availed by an applicant. I have scoured through the verifying affidavit for evidence on bias in vain. The applicant's submissions also failed to address this issue and I find that it has not been proved.

68. For the reasons stated hereinabove I find that the applicant's judicial review motion dated **6/9/2017** has no merits and the same is hereby dismissed with costs.

Dated signed and delivered at Meru this 1st day of March, 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE