



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KARANJA, OKWENGU & SICHALE, J.J.A.)

CIVIL APPEAL NO. 56 OF 2018

BETWEEN

BENSON WEKESA MILIMO.....APPELLANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE BOARD OF MANAGEMENT SITATUNGA SECONDARY SCHOOL....2ND RESPONDENT

CHRISTOPHER KHAMWANA.....3RD RESPONDENT

(Being an appeal against the Judgment and order of the Environment and Land Court

(Mwangi Njoroge, J) delivered on the 20th March, 2018).

in

E.L.C. (JR) N0.1 of 2017

JUDGMENT OF THE COURT

1. This appeal arises from the decision of the Environment and Land Court (ELC) (Mwangi Njoroge, J), delivered on 20th March 2018 in which the learned Judge dismissed a judicial review application brought by **Benson Wekesa Milimo (Benson)** for orders of certiorari and prohibition against the National Land Commission (the Commission), the Board of Management Sitatunga Secondary School (the school), and Christopher Khamwana (Christopher).

2. Benson who is the registered proprietor of a parcel of land known as LR No. Trans-Nzoia/Sinyerere/66 (Sinyerere/66) was served with a notice of eviction dated 27th July 2017 by the Commission. Benson filed a Notice of Motion dated 31st October 2017, seeking orders of: certiorari to remove into the court and quash the notice of eviction issued to him by the Commission in respect of “the whole or part of all that parcel of land known as LR No. Trans-Nzoia/Sinyerere/66” and as wholly or partly referred to in the said notice of eviction as plot No. 354, Sinyerere Settlement Scheme (plot 354 Sinyerere); certiorari to remove into this court and quash any and or all publication(s), proceeding(s) and or decision(s) of the Commission, its agents, employees and or any other person(s) whatsoever or howsoever acting on, with and or under its instructions processing and or culmination of which is the notice of eviction issued by the Commission; and prohibition forbidding the Commission by itself, its agents, employees and or any other person(s) whomsoever and howsoever acting on, with and or under its instructions from conducting and hearing, review or action in respect of the whole or part of all that parcel of land known as LR. Reference No. Trans-Nzoia/Sinyerere/66 and as wholly or partly referred to as plot 354, Sinyerere Settlement Scheme.

3. In the notice, the Commission gave Benson 90 days to vacate plot No. 354 Sinyerere, (which it claimed belonged to the school), and threatened to forcefully evict Benson should he fail to vacate. Benson contended that he was not in possession or occupation of plot No. 354 Sinyerere, and understood the notice to refer to part of or the whole of his property, that is, Sinyerere/66 of which he is in possession and occupation as the absolute proprietor; that the Commission issued the eviction notice without making any inquiries regarding the land, or giving him a hearing and his attempts to get any explanation from the Commission was unsuccessful; and that neither the rules of natural justice nor due procedure was followed. For these reasons, Benson sought the orders of certiorari and prohibition against the Commission’s decision.

4. The Commission opposed Benson's application through a replying affidavit sworn by **Zachary Ndege (Ndege)**, a Principal Land Officer working with the Commission. Ndege deposed *inter alia*, that the Commission is charged with the responsibilities of monitoring and exercising oversight over land use planning throughout the country; that under Article 62(2) of the Constitution, the County Government is mandated to hold public land in trust for the people resident in the county, but the Commission has the mandate of managing and administering such land; and that plot No. 354 Sinyerere comprising 1.4 Ha, is registered under the Settlement Fund Trustee since 1985, and is deemed to be public land as it is reserved as a permanent improvement within the Sinyerere Settlement Scheme. Ndege stated that the Commission received a complaint from the school, conducted its investigations and confirmed that Benson had encroached on plot No. 354 Sinyerere, and consequently issued the eviction notice under section 152C of the Land Laws Amendment Act, which Act does not impose any obligation upon the Commission to hear any party before issuing the notice.

5. The school and Christopher who were joined in the suit as interested parties, relied on a replying affidavit sworn by Christopher who is secretary to the school. In the affidavit, Christopher deposed that plot No. 354 Sinyerere measuring 1.4 Ha is a parcel of land whose register was opened on 3rd October, 1985 in the name of the Settlement Fund Trustees (SFT) and reserved for public purpose; that plot No. 354 was allocated to the school by the District Development Committee in 2008; that Benson's property, Sinyerere/66 shared a common boundary with plot No 354 Sinyerere; that in 2015 Benson started interfering with the boundary and the school complained to the County Land Registrar amongst others; that the County Land Registrar issued a notice for a boundary dispute determination; that the County Land Registrar and the County Surveyor confirmed that Benson had encroached on plot No. 354 Sinyerere; and that the eviction notice was issued in the spirit of protecting a public utility property, which was lawfully allocated to the school.

6. Upon hearing the parties, the learned Judge dismissed the motion holding *inter alia*, that the applicant's case was fatally defective.

7. In his memorandum of appeal, Benson faulted the decision of the learned Judge on grounds *inter alia*: that the learned Judge erred in addressing the status of the disputed property rather than the status and or illegality of the impugned notice that was issued by the Commission; in failing to understand Benson's claim which was that the purported plot No. 354 Sinyerere, has never existed on the ground and that the impugned notice referred to part or the whole of Sinyerere/66 possessed and occupied by Benson; that the learned Judge relied on the findings of the County Land Registrar and the County Land Surveyor that were made after the eviction notice was issued; and that the issue of the boundary dispute arose after the impugned notice was issued.

8. Benson was represented by Mr. Ombati of Kepha Ombati & Co. Advocates, who duly filed written submissions which he highlighted at the hearing of the appeal. The Commission did not file any submissions. The school and Christopher were represented by Mr. Denis Wabwire, a State Counsel from the Attorney General's Chambers. During the hearing of the appeal, Mr. Wabwire informed the Court that he was holding brief for the Commission. Mr. Wabwire relied on the written submissions that had been filed on behalf of the school and Christopher, which he also highlighted.

9. In his written submissions, Benson argued that the learned Judge misled himself on the nature of the proceedings before him and committed a fundamental error in addressing his mind to the status of the land, and the respective competing land ownership claims; that in so doing, the Judge converted Benson's judicial review application to a merit based land ownership claim; and that the Judge failed to appreciate that the judicial review proceedings were about the procedural propriety of the impugned notice issued by the Commission. Relying on **Francis Karioko Muruatetu vs Republic & 5 Others [2016] eKLR**, Benson submitted that the joining of the school and Christopher as interested parties in the suit could not change the nature of the case before the court, as the issues remained as presented by the principal parties in their pleadings.

10. Benson argued that since he was in possession and occupation of what the Commission considered to be plot No. 354 Sinyerere, and had established a permanent residence on the property, he had a right which could only be determined in a lawful due process, but neither the Commission nor the school engaged in a lawful process. He faulted the learned Judge for addressing the issue of ownership, which was not a matter before it.

11. In addition, Benson posited that the Commission in presiding over any dispute over land, exercises quasi-judicial powers where fair hearing principle must apply. This included the issuance of the impugned notice which in Benson's view was a decision of the Commission and an administrative action issued in purported exercise of statutory powers, subject to the Fair Administrative Action Act. He urged that the learned Judge could not rely on the boundary proceedings, as those proceedings took place in October 2017, while the notice was issued on 27th July, 2017. Moreover, what required examination in the judicial review proceedings was the procedural process regarding the impugned notice, including the events prior to the issuance of the impugned notice. Citing **David Oloo Onyango, vs Attorney General [1987] eKLR**, it was submitted that in judicial review proceedings the merit of the impugned decision is of no consequences, if it is found that the impugned decision was made in breach of fair procedural rules.

12. In highlighting the submissions, learned counsel Mr. Ombati asserted that contrary to section 5 of the National Land Commission Act, that requires the Commission to make inquiries, the decision to evict Benson was made without any reference to Benson, and that neither the rules of natural justice nor the Fair Administrative Actions Act were complied with by the Commission, and these issues were not addressed by the learned Judge.

13. In the written submissions of the school and Christopher, four broad issues were identified for determination. These were: whether the eviction notice dated 27th July 2017 was issued in respect to a portion of Benson's land, Sinyerere/66; whether the eviction notice dated 27th July 2017 infringed and/or violated Benson's right; whether the learned Judge erred in addressing himself on the issue of the status of the land vis-à-vis the legality of the notice in view of the materials placed before him; and whether the superior court could grant the order sought by Benson.

14. In regard to whether the notice issued was in respect to Benson's land Sinyerere/66, it was submitted that contrary to the assertions by Benson that plot No. 354 Sinyerere does not exist, and that Benson did not encroach onto that plot, evidence presented to the court confirmed that plot No. 354 Sinyerere exists both on the map and on the ground, and that Benson had encroached onto it. It was argued that Sinyerere/66 and plot No. 354 Sinyerere, were two separate land parcels; that the County Surveyor's report confirmed that Benson encroached on plot No. 354 Sinyerere; that the notice was directed against the encroachment of plot No. 354 Sinyerere; that Benson had no

legitimate or registrable interest on plot No. 354 Sinyerere; that plot No. 354 Sinyerere is public land; and that the impugned notice was communication of the intention of the Commission to reconstitute the land back to the school in accordance with the Land Law (Amendment Act 2016).

15. In addition, it was submitted that the notice was not the final act or decision of the Commission as Benson was at liberty to contest the notice with the Commission, and Benson did so through a letter dated 1st September 2017, which led to the boundary dispute being determined. Further, the Commission is mandated under section 98 of the Land Law (Amendment) Act 2016 as read with section 152 of the Land Act, to issue eviction notices, and there is no requirement that a party must be heard before such notice is issued.

16. Further, that Benson moved the court by presenting inaccurate information regarding the eviction notice relating to Sinyerere/66, and also alleging that plot No. 354 Sinyerere was non-existent. This placed a duty on the court to scrutinize and analyse that information before making an informed decision, as the decision whether or not to grant judicial review orders is an exercise of judicial discretion depending on the circumstances of each case. The learned Judge had therefore to weigh Benson's apprehension against the wider public interest, as well as balance and weigh the remedy sought, in order to determine whether judicial review was the most efficacious. Having found that the dispute before the court was a boundary dispute which was resolved by the relevant statutory body, the court was right in finding that the judicial review remedy was not appropriate. Finally, it was pointed out that the notice dated 27th July 2017 which was in regard to plot No. 354 Sinyerere, did not therefore violate Benson's rights as he categorically denied any encroachment on plot No. 354 Sinyerere, and maintained that he was not laying any claim on that parcel.

17. In highlighting the submissions of the school and Christopher, learned counsel Mr. Wabwire added that the genesis of the dispute was not the notice served on Benson, but the complaints lodged by the school. As a result of investigations carried out by the Commission, the encroachment was confirmed and the Commission issued the notice. He reiterated that the notice was not issued with regard to private land, but that it was issued in regard to plot No. 354 Sinyerere, which was public land. The Court was therefore urged to dismiss the appeal.

18. In dismissing Benson's application for judicial review, the learned Judge not only found the application to be fatally defective but also found that there was lack of candor on the part of Benson, and that Benson did not establish that he had any rights that could be affected by the actions of the Commission, as the dispute was merely a boundary dispute which was resolved by the County Land Registrar.

19. We have carefully considered this appeal, the submissions made by the respective parties and the authorities cited. It is evident that the application before the trial judge was one for judicial review orders, in regard to a decision through a notice of eviction that is alleged to have been served on Benson by the Commission. The Commission has not denied issuing the impugned notice, but contends that it acted within its powers and that Benson not having any interest in plot No. 354 Sinyerere, his rights were not violated.

20. The issues that arise in this appeal are: whether the impugned notice was a decision made by the Commission as a quasi-judicial body, such as could be subject of judicial review, and if so, whether the Commission acted within its jurisdiction in making the decision. Secondly, whether the learned Judge considered the process leading to the impugned notice. Thirdly, whether the learned Judge properly exercised his discretion in refusing to grant the orders of judicial review, and finally, whether Benson's right to fair administrative action under Article 47 of the Constitution was violated.

21. It is common ground that the Commission issued the impugned notice. The notice which was signed by the Chairman of the Commission stated as follows:

"NOTICE OF EVICTION FROM UNLAWFUL TRESPASSING ON/OCCUPATION OF THE PUBLIC PLOT 354 AT SINYERERE SETTLEMENT SCHEME TRANS NZOIA EAST TRANS NZOIA COUNTY

Please refer to the above subject matter.

In accordance with Article 67 of the Constitution of Kenya and Section 98 of the Land Laws (Amendment Act 2016) the National Land Commission hereby issue you a ninety (90) day eviction notice from 27th July 2017.

You are notified to peacefully vacate the school's land (Sitatunga Secondary School) by removing your structures and domestic animals during the 90 days period.

Note: Any other properties including trees, shall remain assets of the school.

Upon expiry of the 90 days' notice period, if you will not have moved out, you shall be forcefully evicted in accordance with the law.

Signed"

22. The question is whether the Commission is a quasi-judicial body whose decision could be subjected to judicial review, and whether the impugned notice constituted a decision. The Commission is a constitutional commission created by Article 67 of the Constitution 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.

23. From the impugned notice, the Commission was acting in exercise of its mandate under Article 67 of the Constitution. The National Land Commission Act enacted under Article 67(3) of the Constitution has reiterated the functions and powers of the Commission as provided in the Constitution. Under Section 14 of the National Land Commission Act, the Commission has powers to review grants or dispositions relating to public land, in order to establish their propriety or legality. We do not find it necessary to reproduce the section herein, except to observe that the procedure provided therein includes all interested parties being given notice of such review and opportunity to appear before the Commission, and the Commission being guided by the principles of Fair Administrative Action under Article 47 of the Constitution. Of note is that in issuing the impugned notice, the Commission was not dealing with review of a grant or disposition of public land, but was dealing with “eviction” from what in the Commission’s view, was public land.

24. The Commission’s power regarding eviction from public land is stated under section 152 of the Land Act as amended by section 98 of the Land Laws (Amendment) Act 2016, and Section 155 of the Land Act. The amendment introduced by section 98 of the Land Laws (Amendment) Act, 2016 are as follows:

“152A. A person shall not unlawfully occupy private, community or public land.

152B. An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

152C. The National Land Commission shall cause a decision relating to an eviction, from public land to be notified to all affected persons in writing by notice in the gazette and in one newspaper with nationwide circulation and by radio announcement in a local language where appropriate at least 3 months before the eviction.

152D....

152F. (1) Any person or persons served with a notice in terms of section 152C, 152D and 152E may apply to court for relief against the notice.

(2) The court after considering the matter set out in section 152C, 152D and 152E may -

- (a) confirm the notice and order the person to vacate**
- (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just.**
- (c) suspend the operations of the notice for any period which the court shall determine or**
- (d) order for compensation.” (emphasis added)**

25. We note that the Land Laws (Amendment) Act, 2016 came into effect on 21st September 2016. As the notice issued to Benson was dated 27th July 2017, it was issued after those provisions came into effect, and the Commission was therefore bound to follow the procedure provided therein regarding eviction of a person occupying private, community or public land. The procedure provided includes the National Land Commission causing a decision relating to an eviction from public land to be notified to all affected persons. In addition, the Commission is obliged to exercise its powers in regard to evictions from public land in accordance with the provisions of the Land Act. Section 155 of the Land Act provides specific guidelines regarding evictions from land unlawfully occupied, including public land. It states as follows:

155. (1) Any person who, without, express or implied, lawful authority or without any right or license, under customary or statutory land law so to do—

(a) occupies, or erects any building on any public land;

(b) clears, digs, ploughs, cultivates, or grazes animals over, any public land or part of it; or

(c) cuts or removes any timber or other produce on or from any public land or part of it, shall be taken to be in unlawful occupation of that land.

(2) If, with respect to public land the Commission is of the opinion that a person is in unlawful occupation of public land, the Commission may serve on that person a notice in the prescribed form or give to that person an oral communication, in a language calculated to be understood by that person requiring that person to show cause as to why the person should not be required to vacate that land within any time and subject to any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters which the justice of the case may require, which may be specified in the notice or oral communication.

(3) Any notice referred to in subsection (2) shall inform the person to whom it is addressed that the person has a right to be heard in connection with showing cause as to why the person should not vacate the land to which the notice relates.

(4) In determining whether to serve a notice or oral communication and the period of time to be specified in the notice by the end of which the person is required to vacate the land, the Commission shall take account of—

(a) whether the person has reasonable belief that the person is in lawful occupation of land;

(b) the use which the person is making of the land, including any crops being grown by that person and when they may reasonably be expected to be ready to be harvested;

(c) the length of time that person has been on that land and the person's age and general circumstances;

(d) whether that person is living with any dependants;

(e) whether that person or any dependants of that person are in employment near to that land;

(f) whether the occupation of the land took place peaceably or by force and whether the occupation is, as a consequence, depriving and (*sic*) person of the lawful occupation and use of that land which that person could take up immediately the land was vacated;

(g) whether the occupation of the land is preventing some necessary or desirable development or public works)
(h) the nature and environment of the land and where the land is land reserved for the primary use of wildlife, whether the occupation of the land is hindering or preventing the use of the land by wildlife or is in practice in harmony with that use;

(h) the nature and environment of the land and where the land is land reserved for the primary use of wildlife, whether the occupation of the land is hindering or preventing the use of the land by wildlife or is in practice in harmony with that use;

(i) whether in all the circumstance, it would be reasonable to pay any sum of money to the person on account of being required to vacate the land;

(j) any other factors, which seem relevant include any matters that the person occupying the land brings to the attention of the Commission.

(5) A person served with a notice or oral communication under this section shall, within not more than sixty days, show cause to the commission as to why the person should not vacate the land to which the notice relates.

(6) If a person does not show cause within sixty days as to why the land should not be vacated, and has no reasonable excuse for not so complying, the person shall be deemed to have accepted the notice and shall be under duty to comply with that notice.

(7) Where after considering any representations made by the person attempting to show cause the Commission determines that the person has failed to show cause, the Commission shall inform that person by notice or oral communication to vacate the land within the time specified in the notice served under subsection (2).

(8) A person who responded to the notice to show cause but who failed so to do in terms of subsection (5) may apply to the court for relief against the operation of that notice or oral communication, within thirty days of being notified of the failure has failed to show cause.

(9) An application for relief is not to be taken as an admission by the person applying for relief: provided that—

(a) the person is in unlawful occupation of the land;

(b) by reason of that unlawful occupation, the Commission has the right to require the person to vacate the land in respect of which the application for relief has been made;

(c) all notices and oral communications which were required to be served by the Commission were properly served;
or

(d) the period by which the land must be vacated specified in the notice or oral communication was reasonable or had expired. (emphasis added)

26. It is clear that before the Commission can serve a notice on any person to vacate public land, the Commission must first serve a notice on that person to show cause as to why he should not be ordered to vacate the land. Of importance is that the notice to show cause must inform the person of his right to be heard. Secondly, it is only after the person has had the opportunity to show cause that the Commission can issue a second notice to the person, and this second notice is the one to vacate.

In his judgment, the learned Judge identified the pivotal fact on which his decision was to rest as the status of the suit land. He then framed the issue before him as follows:

(i) does the notice of motion reveal violation of the applicant's rights by the respondent as claimed to warrant the orders of judicial review sought?

(ii) what orders should issue?

28. In his analysis, the learned Judge laid emphasis on the existence and ownership of plot No. 354 Sinyerere which he found to be public land. In this regard, the learned Judge rendered himself as follows:

25. The applicant's greatest stumbling block in this case is that he failed to establish any legal claim to plot number 354. The applicant's own evidence is that the eviction notice did not indicate that he should vacate parcel number 66 but parcel number 354 and that in his view the notice was directed at his occupation of parcel number 66.

26. In view of the revelation of the existence of the boundary dispute, it would be normal for the applicant to deem the eviction notice as directed at his occupation of parcel no 66 for the reason that, at least according to the evidence on the record, he has merged both parcels and illegally occupied the 1.4 acres comprising of Plot No. 354.

27. Can the respondent be deemed to be the person before whom the applicant's case was dealt" Did the respondent sit in a quasi-judicial capacity over the applicant's issue" The answer, in my view, is an emphatic "no".

28. The proceedings that the applicant should be complaining about were not before the respondent but before the County Land Registrar and the County Land Surveyor. They are the ones who invited the parties and gave a verdict as to the status of the land and established the true position of the boundaries between the plaintiff's plot and parcel number 354." (emphasis added)

29. With due respect, the learned Judge in our view misdirected himself. Benson was not asserting any claim to plot No. 354 Sinyerere. His complaint was the notice of eviction served on him on 27th July, 2017. Benson was challenging two things relating to that notice. First, the procedural aspect concerning the manner in which the notice was issued, and secondly, the fact that the notice, though talking of plot No. 354 Sinyerere, was actually directed at Sinyerere/66, of which he was in possession and occupation and which was private land and not public land.

30. As we have endeavoured to show above, the law provides a clear process for the Commission to follow in issuing an eviction notice. In order to review the procedural propriety of the notice, the learned Judge needed to address the requirements of section 155 of the Land Act. The learned Judge did not at all address these provisions or the procedural aspect concerning the notice. His conclusion that the Commission did not deal with Benson's case or sit in a quasi-judicial capacity is strange, considering that the Commission issued a notice whose effect was to determine Benson's occupation and possession of the disputed land, and this was long before the boundary proceedings were undertaken.

31. In addition, although in his report the County Land Surveyor found that plot No. 354 Sinyerere had been encroached on, rendering it part of Sinyerere/66, the proceedings of the County Land Registrar which were annexed to Benson's affidavit show that the County Land Registrar who had the mandate to resolve the issue of the boundary dispute, concluded that there was no boundary or physical feature demarcating plot No. 354 Sinyerere and Sinyerere/66, and that the matter involved a land claim which ought to be dispensed with first, before the issue of the common boundary could be resolved. It is not therefore correct, as found by the learned Judge, that the County Land Registrar and the County Land Surveyor resolved the boundary dispute and established the true position of the boundaries between Benson's land and plot No. 354 Sinyerere.

32. Moreover, the finding of the County Land Registrar and County Land Surveyor confirms Benson's concern that although the notice was in regard to plot No. 354 Sinyerere, it was affecting Sinyerere/66, the boundary between the two plots not being clear, and the Surveyor being of the view that Sinyerere/66 had encroached on plot No. 354 Sinyerere. The learned Judge was not in a position to resolve the issue of encroachment as he attempted to do. In effect the learned Judge was engaging in a merit review of the notice by attempting to demonstrate that the notice of eviction was justified.

33. The notice served on Benson was clear that he was being evicted from unlawful occupation of a public land. Even assuming for the sake of argument that Benson was in unlawful occupation of public land, it was mandatory for the Commission to comply with section 155 of the Land Act, by first serving Benson with a notice to show cause as to why he should not be required to vacate that land, and secondly, informing Benson in that notice, of his right to be heard. It is only after failing to show cause as to why the land should not be vacated, that an eviction notice could issue. The Commission failed to demonstrate that it complied with these statutory provisions, and therefore, due process was not followed in issuing the impugned notice.

34. In addition, Article 47 of the Constitution provides a right to fair administrative action. This right includes, amongst others, the right to administrative action that is lawful, reasonable and procedurally fair, and the right to have prior adequate notice of the nature and reason for the proposed administrative action, and an opportunity to be heard - (section 4 of Fair Administrative Actions Act).

35. The Commission did not give Benson any reasons for its proposed administrative action of evicting him from the land, nor did it give him any opportunity to be heard. Instead, an attempt was made to justify the notice by using subsequent boundary dispute proceedings. Needless to state that the subsequent boundary dispute could not cleanse the defective procedure that had been employed by the Commission in issuing the eviction notice. We find that the Commission in issuing the impugned notice did not comply with the required procedure, and also violated Benson's right to fair administrative action. These were sufficient reasons for the court to grant the judicial review orders that were sought by Benson. The learned Judge failed to properly exercise his discretion as he misdirected himself by failing to address the applicable law relating to the Commission's power to evict a person from public land, and addressed the merit rather than the procedural propriety of the impugned notice.

36. We believe we have said enough to show that this appeal is for allowing. Accordingly, we allow the appeal, set aside the judgment of the learned Judge and substitute thereto orders allowing Benson's notice of motion dated 31st October 2017, and issuing orders of certiorari and prohibition against the Commission's decision as sought in the motion. We award costs of the suit in the High Court and this appeal to Benson as against the respondents jointly.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR