IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO P., MAKHANDIA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 17 OF 2017

BETWEEN

TOM DOLA...1ST APPELLANT

SAMUEL DOLA..2ND APPELLANT

PAULINE DOLA...3RD APPELLANT

AND

CHAIRMAN, NATIONAL LAND COMMISSION.................1ST RESPONDENT

NATIONAL LAND COMMISSION..2ND RESPONDENT

CHIEF LAND REGISTRAR..3RD RESPONDENT

COUNTY LAND REGISTRAR (KISUMU)............................4TH RESPONDENT

ATTORNEY GENERAL..5TH RESPONDENT

LAKE BASIN DEVELOPMENT AUTHORITY.....................6TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Kisumu

(Kibunja, J.) dated 24th October 2019

in

ELC MISC. APP. No. 39 of 2019 (JR))

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JUDGMENT OF THE COURT

The lament of this Court in ***Chemey Investments Limited v. Attorney General & 2 Others [2018] eKLR*** is a fitting preface to the dispute in this appeal. In the opening part of that judgment, the Court reflected as follows:

> "*There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodians.*"

The respondents in this appeal maintain that the ***1st appellant, Tom Dola (Mr. Dola),*** at the material time a public officer in the employment of the ***6th respondent, the Lake Basin Development Authority (LBDA)***, irregularly and illegally caused the property known as ***Kisumu/Municipality/Block/x1/210 (the suit property)*** which was registered in the name of LBDA and which he occupied by virtue of his employment, to be transferred and registered jointly in his name and that of his wife ***Pauline Dola (Mrs Dola)*** and his son, ***Samuel Dola (Samuel).***

They further contend that the ***Environment and Land Court*** at ***Kisumu (Kibunja, J.)*** did not err in upholding the decision of the ***2nd Respondent, the National Land Commission (the Commission)*** to recommend cancellation of the appellants' title to the suit property, the same having been illegally acquired.

On their part the appellants claim that the suit property is private property, registered in their names, protected by the Constitution and therefore beyond the reach of the Commission. They also complain that the Commission denied them the right to fair administrative action and natural justice before recommending revocation or cancellation of their title to the suit property and that the Commission was obliged to hear each one of them before recommending revocation of the title. In their view, it was not enough to hear Mr Dola only.

The evidence on record shows that the Government of the Republic of Kenya initially allotted the suit property on 17th October 1983 to the ***National Cereals & Produce Board (the Board)***, a public parastatal established under the ***National Cereals & Produce Board Act, Cap 338 Laws of Kenya.*** Subsequently, on 1st May 1986, in consideration of a sum of ***Kshs 70,000***, the Board transferred the suit property to LBDA, another public parastatal established under the ***Lake Basin Development Authority Act, Cap 442 Laws of Kenya***.

On the suit property stood a house in which LBDA housed its officers. Mr. Dola occupied the house as his official residence from 1993 by virtue of his employment as a fisheries officer. On 10th January 1996, Mrs Dola applied to the ***Commissioner of Lands*** to be allotted the suit property and by a reply dated 22nd March 1996, the Commissioner advised her that the suit property was owned by the Board and that she should therefore first seeks the Board's clearance. Of course that was misleading because the Board had already transferred the suit property to LBDA. Be that as it may be, by a letter dated 4th February 1998 addressed to the Commissioner of Lands and copied to Mrs Dola, the Board advised that it no longer had any use for the suit property and that the Commissioner was at liberty to re-allocate it. Subsequently the suit property was allotted to Mrs Dola, ***Esther Chebet (Chebet)*** and ***Saina Christopher Kipkoech (Kipkoech)*** and ultimately registered in their names as tenants in common in equal shares on 12th February 2002.

Even before the registration of the suit property in their names, on 20th August 2001, Mrs Dola, Chebet and Kipkoech entered into an agreement under which Mrs Dola was allocated the portion of the suit property on which stood the residential house while the other two agreed to take the undeveloped part of the suit property. Shortly thereafter, Chebet and Kipkoech appear to have relinquished their interest in the suit property and on 23rd April 2002, it was registered in the joint names of Mr Dola, Mrs Dola and Samuel, then a minor. Mr Dola states that with his wife and son, they bought out the interests of Chebet and Kipkoech.

On 27th February 2002, about two weeks after registration of the suit property in the names of Mrs Dola, Chebet and Kipkoech, Mr Dola wrote to his employer, LBDA, and informed it that its house, which he was occupying, had been acquired by "some Kalenjins" and that in the circumstances he had been forced to make private arrangements with the new owners. The evidence on record is of course completely at variance with what Mr. Dola was telling LBDA. It was Mrs Dola, his wife, who applied in her own name for allotment of the suit property to herself and most likely merely brought in Chebet and Kipkoech for political connection and correctness.

Upon learning of these developments, LBDA directed Mr Dola not to enter into any dealings involving the suit property. However after learning of the registration of the suit property in the name of Mr Dola and members of his family, on 14th May 2002 LBDA issued him with a notice to show cause why disciplinary action should not be taken against him for misconduct, for fraudulently transferring LBDA's property to himself. In the meantime LDBA suspended Mr Dola from employment and ultimately dismissed him from its employment on 24th November 2002 for misconduct and breach of trust arising from the transfer of the suit property to his family.

Matters appear to have taken a lull, with Mr Dola and his family comfortable in the belief that they had acquired, under the old Constitution and the then exiting land laws, indefeasible title to the suit property. However, on 28th August 2010, the people of Kenya promulgated and bequeathed to themselves the Constitution of Kenya 2010. Among the radical changes that the Constitution introduced, necessitated by numerous cases of open fraud and irregular allocation of public land to private and politically connected individuals, touched on land and the environment. Thus for example, while still guaranteeing the right to property in ***Article 40*** of the Constitution, ***Article 40(6)*** expressly provided that the right to property did not extend to any property that was found to have been unlawfully acquired.

Article 67 of the Constitution established the National Land Commission with among other functions, the duty to *"initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress."* ***Article 68 (c) (v)*** directed Parliament to enact legislation that would among other things *"enable review of all grants or dispositions of public land to establish their propriety or legality"*.

Subsequently, Parliament enacted the ***National Land Commission Act, No. 5 of 2012***, to give effect to the Constitution and to operationalise the Commission. ***Section 14 (1)*** of the Act required the Commission, within five years of the commencement of the Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, to review all grants and dispositions of public land to establish their propriety or legality. For that purpose the Commission was empowered to hold inquiries and to gather by such means as it considered appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ,and to compel the production of such information where it considered it necessary.

Determined to reclaim the suit property from Mr. Dola, LBDA seized the opportunity offered by the new constitutional and legal framework and lodged a complaint with the Commission, contending that the registration of the suit property in the name of Mr Dola and members of his family was unlawful and illegal. On 24th March 2016 the Commission notified Mr Dola of LBDA's complaint and requested him to avail, by 13th April 2016, all the necessary documents pertaining to his acquisition of the suit property to enable it resolve the matter. On 3rd June 2016, the Commission sent another notice to Mr Dola and invited him to appear in its offices on 14th June 2016 for hearing of the dispute over his acquisition of the suit property. The record shows that Mr Dola appeared before the Commission as scheduled. He was requested to present some specified documents which he did not do, compelling the Commission, on 5th August 2016, to send him a reminder and an invitation to a further hearing on 23rd August 2016. On the same date, 5th August 2016, the Commission invited LBDA to appear before it on 30th August 2016 with its own documents for further hearing. On 16th September 2016 the Commission published a notice in the *Daily Nation Newspape*r requesting affected or interested parties, among them Mr. Dola, to submit written memoranda and documents and to appear on 5th October 2016 for hearing. Mr. Dola claims that he was not aware of the notice and that the same was

brought to his attention by a friend on the morning of the hearing and that he hurriedly appeared before the Commission without proper preparation and was attacked by members of the Commission instead of being afforded a hearing.

After investigating the matter, the Commission determined that the registration of the suit property in the names of Mr Dola, his wife and son was illegal. By a letter dated 20th February 2017, the Commission advised the ***Chief Land Registrar*** of its findings and recommended revocation of the Dola's title and registration of the suit property in the name of LBDA. The same letter, which was copied to Mrs Dola, give her a 3 months notice to vacate the suit property, by 31st May 2017.

On 16th March 2017, Mr Dola, his wife and son took out judicial review proceedings in the Environment & Land Court, Kisumu for an order of *certiorari* to quash the decision of the Commission that recommended revocation of their title to the suit property and their vacation of the same, and an order of *prohibition* to stop implementation of the decision of the Commission. The application, supported by an affidavit sworn by Mr Dola was based on the grounds that his family had lawfully and regularly acquired the suit property; that Mrs Dola and Samuel, co-owners of the suit property with Mr Dola were denied an opportunity to be heard before the Commission took the impugned decision; that Mr. Dola came to learn of the Commission's proceedings only on 5th October 2016 from a friend who had seen his name in the newspaper notice; that he rushed to the hearing and the Commission requested him to produce documents which he could not because of the short notice; that in the circumstances he was denied a fair opportunity to be heard and to present his defence as required by the National Land Commission Act; that the Commission acted *ultra vires* its constitutional mandate of managing and reviewing dispositions of public land as opposed to private land; and that its decision was therefore illegal, irrational, null and void.

The Commission and its chairperson opposed the application vide a replying affidavit sworn by its deputy director, legal affairs and enforcement, ***Mr. Brian Ikol*** on 9th April 2018 whilst LBDA opposed the same through an affidavit sworn by its legal officer, ***Mr. Clifford Obiero,*** on 21st June 2017. The position of those respondents was that the Commission had jurisdiction to inquire into the acquisition of the suit property by the Dolas; that their acquisition of the suit property was fraudulent, illegal, null and void; that the Dolas had been afforded a fair hearing; and that in the circumstances, the revocation of their title to the suit property was merited and within the law.

Kibunja J. agreed with the respondent and found no merit in the application. He accordingly dismissed the same, precipitating this appeal, in which the appellant's impugns the learned judge's judgment on three main grounds, namely that he erred by failing to hold that ***section 14*** of the National Land Commission Act requires each and every holder of an interest in land to be heard before cancellation of their title; by holding that the appellants' right to fair hearing and fair administrative action were not violated; and by failing to hold that the mandate of the Commission is limited to review of grants and dispositions to public land, in which category the suit property, being private land, did not fall.

On the first and second grounds of appeal which are closely related, the appellants, represented by ***Messrs. O. M. Otieno & Company Advocates*** submitted that ***section 14(3)*** of the National Land Commission Act requires the Commission, in mandatory terms, to give every person with an interest in a grant or disposition, notice of review and an opportunity to appear and inspect relevant documents. As regards Mr Dola, it was contended that he was not afforded a fair hearing, having learnt of the review only from the newspaper notice on the morning of the hearing. He was forced to appear before the Commission unprepared and the Commission, in violation of his rights under Articles 47 and 50 of the Constitution, did not hear him before reaching its decision.

Secondly, it was contended that Mrs Dola and Samuel, who were joint owners of the suit property with Mr Dola were not afforded an opportunity to be heard contrary to the requirements of the Act. It was argued that even if Mr Dola was heard, which the appellant's denied, that did not amount to hearing Mrs Dola and Samuel. It was also contended that the learned judge erred by relying on Mr Dola's disciplinary proceedings to conclude that he was aware of LBDA's complaint. For the violation of the mandatory provisions of the Act regarding hearing, the appellants submitted, the decision of the Commission to revoke their title was null and void. They relied on the judgments in ***Republic v. National Transport & Safety Authority & 10 Others ex parte James Maina Mugo [2015] eKLR*** and ***Republic v. County Government of Nairobi ex parte Spa Ltd*** & ***Another [2017] eKLR*** in support of the submission.

On the third ground of appeal, the appellants submitted that under ***Article 68 (c) (v)*** of the Constitution, the mandate of the Commission to review grants or dispositions is limited to public land only and to the extent that the suit property was private land, the Commission did not have any jurisdiction over it. It was also the appellants' contention that the Commission's decision had the effect of nullifying their title to the suit property, whereas under the Act the power of the Commission is limited to making recommendations only. In support of that proposition they relied on the judgment in ***Mwangi Stephen Muriithi v. National Land Commission & 3 Others [2018] eKLR***. For the foregoing reasons the appellants urged us to allow the appeal with costs.

The Commission and its chairperson opposed the appeal, contending that there were no grounds upon which the judgement of the trial court could be impeached. On whether the Commission acted *ultra vires* its mandate, they submitted that ***Articles 67*** and ***68 (c) (v)*** of the Constitution and ***section 14*** of the National Land Commission Act empowered the Commission to review ***all*** grants and dispositions of public land to confirm their propriety and legality. They added, on the authority of the decisions of the High Court in ***Joseph Mungai & Another v. Mathaara Mwangi & Others [2017] eKLR*** and ***Republic v. National Land Commission & Another ex parte Muktar Saman Olow [2015] eKLR***, that where land which was previously public is registered as private land, the Commission is entitled to investigate the process by which the land was converted to private land. In this appeal, they contended, it was common ground that the suit property belonged to LDBA before it was transferred to the appellants and therefore was within the jurisdiction of the Commission. These respondents also relied on the judgment in ***Isaac Gathungo Wanjohi & Another v. Attorney General & 6 Others [2012] eKLR*** and submitted that the protection of the right to property in ***Article 40*** of the Constitution did not extend to illegally acquired property.

On whether the appellants' right to natural justice and fair hearing were violated, it was submitted that the appellants were heard as required by ***section 14*** of the National Land Commission Act. The two respondents contended that the Commission published a notice in the Daily Nation newspapers specifying the properties whose titles were under review, the owners thereof and the place where the hearing would take place on 5th October 2016, which the appellants had not disputed. The notice, they added, invited representations from all persons who had any interest in the concerned properties and pursuant to the notice Mr Dola appeared. They relied on the decision in ***Republic v. National Police Service Commission ex parte Daniel Chacha [2016] eKLR*** on the attributes of a fair hearing which they contended were satisfied in

this case.

Lastly the Commission and its chairperson submitted that an innocent purchaser for value cannot obtain a good title where the title is void *ab initio*, having been obtained in violation of the law. They cited the judgment in ***Kenya Anti-Corruption Commission v. Ahmed Karama Said & 2 Others [2011] eKLR*** in support of the submission.

The appeal was also opposed by LBDA. It submitted that the appellants were notified, through the letters dated 24th March 2016, 3rd June 2016 and 5th August 2016, as well as the newspaper notice, of the review hearings and therefore cannot be heard to say that their right to natural justice or fair administrative action was violated.

LBDA further submitted that the suit property was public land and that Mr Dola was in occupation thereof as its employee and that his registration as the owner of public land was fraudulent and illegal. In the circumstances, it was contended that the Commission had the mandate to inquire into how the Dolas converted the suit property from public to private and that the constitutional protection of the right to property did not extend to illegally acquired property.

The other respondents neither filed written submissions nor appeared at the virtual hearing of the appeal.

We have carefully considered the record of appeal, the impugned judgment, the grounds of appeal, the submissions by the parties, the authorities they have cited, as well as the law. In our estimation, all the grounds of appeal boil down to two issues, namely, whether the mandate of the Commission extended to reviewing the appellants' title, which they claim is private land, and whether the Commission afforded the appellants a fair hearing before recommending revocation of their title to the suit property. The last issue encompasses the question whether the decision of the Commission is null and void for failure to hear Mrs Dola and Samuel, as co-owners of the suit property with Mr Dola.

Earlier in this judgment we adverted to some of the changes that the Constitution of Kenya, 2010 introduced to property law in Kenya. Under the former Constitution and land laws, registration of a person as owner of property largely conferred on them absolute and indefeasible title that could not be impeached, save in very few and restricted situations. Those who were registered as owners of land in first registration were completely immunised from scrutiny, even if they had acquired their titles through fraud or express violation of the law. After close to 50 years of application of that law, it became plainly obvious that the land law as it existed had metamorphosed into a sort of *Frankenstein* monster for fraud and large scale theft of public land, to the detriment of the majority of the people of this Country. The full extent of abuses, irregularities and other horrors perpetrated on public land were laid bare in the ***Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, June 2004***, popularly known a the ***Ndungu Report***. It is apposite to quote from the introduction to that report:

> "*At the time of the Commission's appointment, the country was already experiencing a major crisis in its public land tenure. Land meant for public purposes had over the years been wantonly and illegally allocated to private individuals and corporations in total disregard of public interest. The privatization of public land in this manner is commonly referred to as "land grabbing". So pervasive was this practice that by the turn of the Century, there was real danger that Kenya could be without a public land tenure system. There is no legal or political system in the world which condone the extinction of its public land tenure. A country's physical development planning depends on the manner in which it balances private and public land rights. Kenya has two options of recreating its public land tenure system. Either, the system can be recreated through massive and large scale compulsory acquisition of private lands by the Government (this would have to be undertaken at considerable costs to an already burdened and impoverished taxpayer), or, the Government can embark on the process of tracing illegally allocated public land with a view to repossessing and restoring the same to the public for its original purpose."*

In its advisory opinion in *In the Matter of the National Land Commission [2015] eKLR,* Supreme Court adverted to those abuses and the various other initiatives and investigations, such as the ***Report of the Judicial Commission of Inquiry into Tribal Clashes (Akiwumi Report)*** and the ***Report of the Presidential Commission of Inquiry into the Land Law System of Kenya (the Njonjo Commission)***, that were appointed to try and address, among others, the theft of public land.

To address the problem, the Constitution of Kenya, 2010, while continuing to protect the right to lawfully acquired property, expressly provided in ***Article 40(6)*** that the constitutional protection of the right to property did not extend to protection of illegally acquired property. To protect public land, the Constitution created the National Land Commission which would henceforth be responsible for safeguarding such land. It is important to bear in mind this history background because, as the the Supreme Court affirmed in ***The Matter of the Interim Electoral Commission [2011] eKLR,*** the values and principles articulated in the preamble, in Article 10, in Chapter 6 and in various other provisions of the Constitution, address critical historical, economic, social and cultural realities in Kenya.

It may be queried whether the Constitution of Kenya 2010 and the National Land Commission Act, 2012, which came into force long after the Dolas were registered as owners of the suit property, can apply retrospectively to them. In ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others [2012] eKLR***, the Supreme Court considered at length the question of retroactive application of the Constitution and statutes and isolated the following principles, which must guide us on this issue. As regards retroactive application of criminal statutes, the practice is prohibited as is made clear in ***Article 50 (2)*** of the Constitution. As for civil matters, as a general rule all statutes other than those which are merely declaratory or are on matters of procedure or evidence, are *prima face* prospective and only retrospective where it is expressly so stated or where by necessary implication retroactive application appears to have been the intention of the legislature.

As regards retrospective application of the Constitution, the Supreme Court stated:

> "*At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. <u>A Constitution looks</u> <u>forward and backward, vertically and horizontally, as it seeks to re-engineer the social</u>*

order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution." (Emphasis added).

As we have already stated, the mischief that the Constitution wished to address when it expressly provided in ***Article 40(6)*** that the right to property does not extend to property that is unlawfully acquired, was the widespread abuse of the existing land laws and the rampant theft of public land christened *"land-grabbing"*. We have no doubt in our minds that as regards review of dispositions and grants of public land that were illegally or irregularly acquired, the Constitution is not merely prospective. This is made crystal clear by ***Article 67 (e)*** which empowers the Commission to initiate investigations, on its own initiative or upon a complaint, into ***present or historical*** land injustices and to recommend appropriate redress.Further support for this view is found in ***Article 68 (v)*** of the Constitution which obliged Parliament to enact legislation to, among other things, enable the review of all grants or dispositions of public land to establish their propriety or legality. The legislation contemplated by ***Article 68 (v)*** is the National Land Commission Act, which in ***section 14*** establishes mechanisms for review of grants and dispositions already made out of public land.

Because of what we have stated above, we are therefore satisfied that the Commission has jurisdiction, granted expressly by the Constitution and the National Land Commission Act, to review grants and dispositions of public land to establish their propriety or legality. That jurisdiction is specific to the Commission and cannot be usurped by any other institution or agency and if we may add, cannot be ousted on the bare argument that land which was previously public land, has since become private land. The appellants have relied upon, among others, the judgments of the High Court in ***Republic v. National Land Commission & Another ex parte Salim Gulamhussein Gilani [2016] eKLR*** and ***Republic v. National Land Commission & 4 Others ex parte Fulson Co Ltd & Another [2015] eKLR*** which hold that once public land has been transformed into private land by whatever form, it is beyond the reach of the Commission. With respect, we do not share that view, which does not consider the express provisions of the Constitution as well as the rationale and historical context of the establishment of the National Land Commission and the powers vested in it. As the Supreme Court underlined in its advisory opinion in ***In the Matter of the National Land Commission (supra),*** it is always important to bear in mind the historical and cultural perspective when interpreting the Constitution because its provisions did not evolve in a vacuum nor are they mere abstractions or aberrations.

To our minds, transformation into and registration of public land as private land following irregular or illegal grants and dispositions cannot defeat the clear constitutional intent manifest in ***Articles 67*** and ***68***. We believe it was precisely the questionable grants or dispositions that transformed public land into private land that the Constitution intended to be investigated to establish their propriety. To interpret the Constitution and the National Land Commission Act in the manner suggested by the Dolas would defeat a major plank of the Constitution and shield illegally acquired land from the reach of the Commission on the ground that what was unquestionably public land, is now private land. We cannot countenance such an interpretation which completely defeats a major constitutional function of the Commission. In addition, such interpretation cannot be said to promote the purpose, values and principles of the Constitution as demanded by ***Article 259*** of the Constitution. We are therefore in agreement with the reasoning of the High Court in ***Joseph Mungai & Another v. Mathaara Mwangi & Others [2017] eKLR***, which upholds the constitutional mandate of the Commission as regards review of grants and dispositions of public land.

In ***Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR***, this Court emphasised, and we reiterate, that where the Constitution has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted *ultra vires* or in breach of the Constitution or the law. The Court expressed itself thus:

> ***"Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have."***

(See also *T**he Speaker of the Senate & Another v. Attorney General & 4 Others [2013] eKLR).***

It is our conclusion therefore that on the issue of jurisdiction, the Commission has jurisdiction, vested in it by the Constitution and the National Land Act, to inquire into the process and legality of how public land ended up registered as private land, as was the case with the suit property.

This leads us to the question whether the Commission afforded the Dolas a fair hearing before it recommended revocation of their title to the suit property. It cannot be gainsaid that it is an entrenched principle of our law that no person should be condemned or suffer loss of goods or liberty without an opportunity to be heard. ***Article 50*** of the Constitution guarantees every party to a dispute a fair hearing. In criminal cases ***Article 50 (1)*** guarantees an accused person the right to a fair and public hearing by a court or independent and impartial tribunal or body. It further guarantees an accused person the right to know the charge he has to meet, the right to adequate time and facilities to prepare for his defence, and the right to adduce and challenge evidence, among several other rights.

Article 47 of the Constitution further guarantees every persons the right to administrative action that is procedurally fair whilst the ***Fair Administrative Action Act, 2015*** provides, among others, that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, that person is entitled to prior and adequate notice of the nature and reasons for the administrative action, an opportunity to be heard and to make representation and reasons for the decision.

The National Land Commission Act has ample provisions that safeguard the right to a fair hearing before it can recommend revocation or cancelation of title. ***Section 14 (3)*** require that in reviewing grants and dispositions, the Commission must give every person who appears to

it 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. ***Section 14(8)*** further demands that in exercising its powers of review of grants and dispositions, the Commission shall be guided by the principles of fair administrative action set out in ***Article 47*** of the Constitution, which include the right to know the case one has to meet, an opportunity to confront one's accuser, an opportunity to be heard and the right to receive the reasons for a decision.

But as this Court stated in ***Judicial Service Commission v. Mbalu Mutava & Another [2015] eKLR***, whether a person has been afforded a fair hearing or the right to natural justice, depends on the circumstances of each case. In this appeal Mr Dola contends that other than the fact that his wife and son were never heard by the Commission, he learnt of the Commission's proceedings on the morning of the hearing on 5th October 2016 when a friend drew his attention to the newspaper notice. Accordingly he rushed to the hearing and did not have adequate time to prepare to be heard and to present documents in support of his case.

The evidence on record however shows otherwise. On 24th March 2016 the Commission wrote to Mr Dola and informed him about the dispute over the suit property and requested him to avail any relevant documents in his possession by 13th April 2016. On 3rd June 2016 the Commission sent Mr Dola another notice inviting him for a hearing on 14th June 2016. The documents produced by the respondents advert to Mr Dola's appearance before the Commission on 14th June 2016 when he was requested to provide specific documents touching on the suit property. On 5th August 2016, the Commission sent him yet another reminder about the documents and invited him to a further hearing on 23rd August 2016. Thus, from the record, before 5th October 2016 when Mr Dola claims to have belatedly learnt of the hearing before the Commission, there is consistent evidence that the Commission was in touch with him and that he had appeared before it at least once when he was requested to produce documents pertaining to the suit property.

We agree with the learned judge that taking into account all the circumstances of this appeal, Mr Dola cannot seriously claim not to have known of the review hearing or what it was all about. The notices from the Commission were clear that the hearing was about the circumstances under which the suit property came to be registered in the names of Mr Dola and members of his family. More importantly he was aware even from his disciplinary proceedings and dismissal from employment that the registration of himself, his wife and his son as the owners of the suit property was a contentious issue with LBDA. The trial judge cannot therefore be faulted for taking that into account in determining whether in the circumstances of this appeal, Mr Dola was aware of the review hearing, of the issues at stake and whether ultimately he was afforded an opportunity to be heard.

As to the complaint that the Commission violated the appellants' right to natural justice and fair administrative action by failing to hear Mrs Dola and Samuel, we think this is a mere red herring. Samuel knew nothing about how the suit property came to be registered in his name together with those of his father and mother. The evidence, including the certificate of lease, shows that at the time of registration, Samuel was just a minor. As for Mrs Dola, it is obvious from the evidence on record that she was a mere cog in the wheel, with Mr Dola as the prime mover of the events that culminated in the registration of the suit property in their name and that of their son. Mrs Dola occupied the suit property as her husband's official residence, courtesy of his employment with LBDA. It is plainly clear that she applied for allocation of the suit property well aware that it belonged to LBDA. She applied for allocation in her own name to spare her husband the blushes, but ultimately the suit property ended up registered in the name of Mr Dola and his family. It was Mr Dola who informed LBDA of the change of ownership of the suit property, but untruthfully claimed that it was acquired by "some Kalenjins", rather than by his wife. From all the evidence, it was Mr Dola who was behind the registration and transfer of the suit property jointly in his name and those of his wife and son, and in the circumstance of this appeal, we cannot fault the trial court for concluding that the three registered owners were heard when the prime mover, Mr Dola was heard.

Lastly, from the evidence we have set out above, it cannot fall from the mouth of Mr Dola to claim that he was a *bona fide purchaser* of the suit property, for value and without notice. The ***Black's Law Dictionary*, 8th Edition** defines a *bona fide* purchaser as:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."*** (See also ***Athi Highway Developers Ltd v. West End Butchery Ltd & 6 Others [2015] eKLR).***

For starters, Mr Dola had express notice and knowledge that the suit property belonged to LBDA and that he occupied it as his official residence due to his employment. Before him the house had been occupied by other LBDA employees, namely ***Dr Ogembo*** from 1981 to 1984 and ***Mr. K'oniala*** from 1984 to 1993, when LBDA gave Mr. Dola the house. It was expected that when Mr Dola's employment came to an end, the house would be available for other LBDA employees. Mr Dola cannot therefore claim to be an innocent purchaser when it was his own wife who applied to be allotted his employer's house. In common sense, he cannot be an innocent purchaser, having misled LBDA that the suit property was acquired by "some Kalenjins" when he knew that it was his wife who had applied for its allotment. He cannot be an innocent purchaser when he agreed to transfer and register his employer's property in his name and that of his wife and son. And lastly he cannot be an innocent purchaser because LBDA expressly instructed him not to get into any dealings or arrangements regarding the suit property, but nevertheless he went ahead to do exactly that. For all intents and purposes, Mr Dola was not an innocent purchaser of the suit property for value and without notice, but an active participant in the illegal and irregular transfer of the suit property from public land, belonging to LBDA, to private land belonging to him, his wife and son.

For all the foregoing reasons, we have come to the conclusion that this appeal is totally bereft of merit. The same is dismissed in its entirety with costs to the Commission, its chairman, and LBDA. It is so ordered.

Dated and delivered at Nairobi this 7th day of August, 2020

W. OUKO, P

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JUDGE OF APPEAL

M. ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR