



Republic v National Land Commission; Ruto & 2 others (Interested Parties); County Government of Bomet (Exparte Applicant) (Judicial Review Application 1 of 2019) [2024] KEELC 4348 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4348 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

JUDICIAL REVIEW APPLICATION 1 OF 2019

MC OUNDO, J

MAY 30, 2024

(FORMELY NAROK JUDICIAL REVIEW APPLICATION NO. 1 OF 2019)

IN THE MATTER OF THE LAW REFORM ACT

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

IN THE MATTER OF NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

IN THE MATTER OF ARTICLE 67 AND 47 OF THE CONSTITUTION 2010

IN THE MATTER OF NATIONAL LAND COMMISSION (HISTORICAL LAND INJUSTICES) RULES 2016

IN THE MATTER OF HISTORICAL LAND INJUSTICES REFERENCE NO.

NLC/HLI/159/2017

IN THE MATTER OF A DETERMINATION BY THE RESPONDENT DATED

7TH FEBRUARY, 2019

IN THE MATTER OF KENYA GAZETTE VOL CXXI NO. 27 OF 1ST

MARCH, 2019

BETWEEN

REPUBLIC OF KENYA APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

EMILY TORGOTTI RUTO INTERESTED PARTY

ISAAC KIPKEMOI MUTAI INTERESTED PARTY



ANTHONY KIPNGENO BETT INTERESTED PARTY

AND

COUNTY GOVERNMENT OF BOMET EXPARTE APPLICANT

JUDGMENT

1. Pursuant to Leave of Court dated 24th July, 2019, the Ex parte Applicant filed a Notice of Motion Application dated 9th August, 2019 brought pursuant to the provisions of section 80 of the law Reform Act, section 7(1) and(2), 8, 9, 10, 11 of Fair Administrative Action Act, Order 53 Rule 1(2) and 1(4) of the Civil Procedure Rules, Article 165 (6), 47, 50 (1) of the Constitution, section 3A of the Civil Procedure Act and all enabling provisions of the law seeking the following orders:
 - i. That the Honourable Court be pleased to issue an order of certiorari to remove into Environment and Land Court and quash the Respondents' determination against the Applicant in Historical Land Injustice Reference No. NLC/HLI/159/2017 made on 7th February, 2019.
 - ii. That the Honourable Court be pleased to issue an Order of Certiorari to remove into the Environment and Land Court and quash the Respondent's determination in Historical Land Injustice Reference No. NLC/HLI/159/2017 as published in the Kenya Gazette Notice No. 1995 of 1st March, 2019.
 - iii. That the Honourable Court be pleased to issue an order of Prohibition, prohibiting the Respondents from implementing and enforcing the determination of the Respondent made on 7th February, 2019 in Historical Land Injustice Reference No. NLC/HLI/159/2017 and published in the Kenya Gazette Notice No. 1995 of 1st March, 2019.
 - iv. That the Honourable Court be pleased to grant the costs of the motion to the Ex-parte Applicant,
2. The said application was based on the grounds in the Statutory Statement dated 9th August, 2019 and amended on 21st November, 2020 but filed on 13th January, 2023 together with the Verifying Affidavit dated 9th August, 2019 sworn by Oscar Sang, the Applicant's County Attorney.
3. The gist of the application was that the Respondent had on 7th February, 2019 decided on a matter arising from a historical land injustice complaint in a claim by the interested parties in Historical Land Injustice Reference No. NLC/HLI/159/2017 to the effect that the Claimants claim had been granted and that the County Government do ensure allocation and registration of 3.2 hectares and 2.02 hectares to Tapnyobi Kiruch Targotit and Cecilia Chelangat Keiyo respectively. Further, that the County Government needed to compensate the claimants on the remaining acreage, that is, 4.78 hectares at the current market rate. That the said determination had subsequently been published in the Kenya Gazette Notice No. 1995 on 1st March, 2019.
4. That the Respondent's determination of 7th February, 2019 was irregular, illegal, un-procedural hence null and void ab initio. Further, that the said determination had been erroneous both in fact and law and ultra vires the powers conferred to the Respondent by law hence it was tantamount to abuse of power. That the Respondent's determination had also been made in bad faith, was irrational, biased against the Applicant, unreasonable, oppressive and against the Applicant's legitimate expectation.



5. That the Applicant had not been granted a proper hearing before the aforementioned Respondent's determination thus the same had been contrary to the Applicant's right to fair administrative action as provided for under the provisions of Article 47 of *the Constitution* and Section 4 of the Fair Administrative Actions Act No. 4 of 2015. That the Respondent had in the said determination made a final decision which was beyond the mandate, scope and limits of Article 67(2)(e) of *the Constitution* which only mandated the Respondent to investigate and make recommendations but not make a final determination. The Applicant placed reliance in the decided case of Sceneries Limited v National Land Commission [2017] eKLR.
6. The Applicant thus sought redress in respect of the Respondent's determination for the reasons that;
 - i. The Respondent's proceedings and determination were a nullity as the regulations governing their proceedings were ultra vires the provisions of the *National Land Commission Act* and Article 67 (2)(c) of *the Constitution* of Kenya.
 - ii. The liabilities of the defunct government did not vest in the county governments but rather in the National Government.
 - iii. The decision by the Respondent was in direct contravention of Article 47 and 50(1) of *the Constitution* 2010, and Section 4(1) of the Fair Administrative Action in respect of the requirement of a fair hearing as the Applicant was enjoined to Historical Land Injustice Reference No. NLC/HLI/159/2017 very late in the proceedings.
 - iv. The Commission acted arbitrarily and/or discriminatively in issuing a decision that would affect the interest of the Applicants and the people of Bomet County.
 - v. The decision of the Respondent was irrational and unreasonable as all liabilities of the defunct governments were transferred to the National Government on the onset of the county governments as provided for under the *Transition to Devolved Government Act*. Thus, it was only the National Government that could offer compensation in the present case.
 - vi. The determination of the Respondent was unreasonable, irrational and against the Applicant's legitimate expectations thus impeding the Applicant's constitutional mandate.
7. The Applicant's position was that the Respondent's determination would gravely prejudice and expose it as it had a constitutional mandate to protect the property of its people which it held in for them in trust and hence should the Respondent's determination be implemented, the people stood to suffer huge financial loss.
8. That if at all any historical injustice was visited upon the Interested Parties, the same was not through acts and/or omissions of the Ex Parte Applicant but by third parties in that vide letter dated 21st September, 2017 by the 1st Interested Party addressed to the Respondent, the 1st Interested Party's grievances seem to have arisen in the year 1992 where her land had been appropriated by the Ministry of Agriculture. That by a letter dated 18th November, 1999, the Commissioner of Lands, whose functions were taken over by the Respondents, had allocated the land, which was known as Farmers Training Centre, to the Permanent Secretary, Ministry of Agriculture hence the Respondent had acted as a judge in its own cause.
9. That further, by a letter dated 6th July, 2009 and extracts of the minutes of meeting of the District Development Committee, the District Agricultural Officer Bomet had agreed that each squatter living on the Farmers Training Centre be allocated one-acre parcel of land. That a letter dated 17th April, 2002 from the Director of Surveys and addressed to the District Surveyor, Bomet, had referred to a letter



- dated 18th March, 2002 from Bomet District Agricultural and Livestock Extension Officer which had requested authority for the District Surveyor to undertake the survey of their land.
10. In its Verifying Affidavit, Oscar Sang, the Applicant's County Attorney deponed that he had represented the Applicant before the Respondent and had prepared and filed submissions in opposition to the Interested Parties' claim. That the hearing had been conducted on 11th October, 2018 (Kericho County), 5th April, 2018 (Nairobi County) and 27th September, 2018 (Narok County), however, the Applicant had been introduced into the proceedings at the conclusion hence it did not have ample time to introduce vital documents. That instead of the Respondent investigating the matter, it had conducted adjudication with final and conclusive findings contrary to Article 67 (2) (c) of *the Constitution*.
 11. That a search showed that the interested parties were still the registered owners of 1.3055 hectares hence it was irrational to order for compensation for a portion without ordering for severance. Further, that it had been the Central Government that had issued a letter of allotment to the Ministry of Agriculture hence the Ex parte applicant could not be ordered to compensate the Interested Parties for an injustice meted on the Interested Parties by the Central Government through the Ministry of Agriculture.
 12. That vide a letter dated 6th July, 2009, the District Commissioner Bomet had written to the District Physical Planning Officer Bomet, to the effect that each Interested Party be allocated 3 acres of land. That as a follow up to the aforesaid letter, the District Development Committee had met on 8th July, 2009 and thereafter, on 1st December, 2009, the Town Planning, Works and Markets Committee of the defunct Municipal Council of Bomet had held a meeting where the recommendations of the District Development Committee had been approved.
 13. That subsequently, vide a letter dated 2nd February, 2010, the Town Clerk of the defunct Municipal Council of Bomet had written to the District Physical Planner Bomet to the effect that the formal allocation of the 3 acres of land to each interested party be carried out. That by a letter dated 28th May, 2010, the interested parties had lamented to the Physical Planner of their inability to erect permanent structure on the parcel of land or use the land as collateral without ownership documents.
 14. The Interested Parties died in the cause of the proceedings wherein they had been substituted by their respective Legal Representatives.
 15. In response and in opposition to the Ex Parte Applicant's application, the Respondent vide its Replying Affidavit dated 23rd October, 2019 sworn by Edmond Gichuru, the Respondent's Deputy Director, Legal Affairs and Enforcement deponed that the Respondent was an independent Commission established under Article 67 (1) of *the Constitution* and was operationalized by the *National Land Commission Act* No. 5 of 2012, and had its fundamental functions as the management of public land on behalf of the National and County Government. That further, it is also mandated under Article 67 (1) (e) of *the Constitution* to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. That in the exercise of the said mandate, the Respondent operated a quasi-judicial body within the full meaning of Article 169 (1) of *the Constitution* and the procedure for carrying out the same as outlined under Section 15 of the *National Land Commission Act*.
 16. That the investigation into historical land injustice entailed investigating into land related injustices which had taken many forms such as illegal takeover of individual and community land by public and private institutions; illegal hiving of public land and trust lands; preferring members of a specific ethnic group to benefit from settlement schemes, at the expense of others who were more deserving;



- forceful eviction; and land grabbing by government officials and thereafter making its finding and recommending appropriate redress.
17. That as per the findings of the Truth, Justice and Reconciliation Commission (TJRC) in their report, the land injustices had started during the colonization of the Coast by the Arabs and thereafter by the British and that all post-independence government regimes had failed to honestly and adequately address the said injustices which had caused individuals and communities to turn to violent. That the Respondent had been identified in the implementation matrix of the TJRC Report as a focal player in initiating investigations, on its own initiative or on a complaint, into present or historical land injustice, and recommend appropriate redress as further directed under Article 67 (e) of *the Constitution*. That the Respondent's constitutional mandate with regard to historical injustice was two-pronged that is initiate investigations on its own initiative or on a complaint, into present and historical land injustices and recommending appropriate redress.
 18. He placed reliance on the provisions of Section 15 (2) of the *National Land Commission Act* on the meaning of a historical land grievance and Section 15 (3) to the effect that such historical land claim may only be registered and processed by the Respondent and that the act complained of had resulted in displacement of the claimant or other forms of historical land injustice had been verifiable. That pursuant to the said constitutional mandate, the Respondent had received complaints from members of the public of various present or historical land injustices alleged to have been occasioned upon them as prescribed by law. That once a complaint had been determined to warrant a claim of historical land injustice occasioned, the Respondent would circulate a notice of intended investigation notifying all interested parties the dates and venue of the scheduled hearings, as well as the period within which the interested parties were required to submit their documents.
 19. That after the expiry of the notice, the hearings commenced at the scheduled date and venue prescribed wherein all the interested parties were first established after which parties were directed to disclose and exchange all documents.
 20. That in the instance case, the Respondent had been informed through a complaint by the 1st and 2nd Interested Parties herein and that the content of the said complaint had warranted the Respondent to invoke its jurisdiction in line with section 15 (1) of the *National Land Commission Act* whereby it had admitted the complaint for historical land injustice and assigned it claim number NLC/HLI/159/2017. That the Ex parte Applicant and the Interested Parties herein had duly been invited for hearings vide notices from the Respondent, which hearings had been held on 24th September, 2018, 11th October, 2018 and 2nd November, 2018. That at all times during the said hearings, the Ex Parte Applicant and the Interested Parties had been duly represented by their Advocates Mr. Oscar Sang (Country Attorney of the Ex-parte Applicant) and Mr. Kipngetich Geoffrey (for the Interested Parties) persons who had made submissions on their behalf.
 21. That the Applicant had submitted to the jurisdiction of the Historical Land Injustice Committee of the Respondent and did not at any one time raise an objection to the proceedings before the said commission. That the Respondent through its secretariat the Historical Land Injustice Committee had further conducted its own independent investigation which had entailed conducting a ground visit among other things with a view of establishing whether an injustice had been occasioned upon the Interested Parties by the Ex-parte Applicant as provided for under Section 15 of the *National Land Commission Act* as had been amended by Section 38 of the Land Law Amendment Act.
 22. That after extensive investigations, consideration of the 1st Interested Party's submissions and a scrutiny of documents, the Respondent had produced a well-informed determination whose decision was subsequently gazetted vide a Gazette Notice dated 1st March, 2019. That from the foregoing, it was



- clear that the Respondent had complied with both the provisions of Article 50 of the Constitution, the Fair Administrative Action Act and Section 15 of the National Land Commission Act as had been amended by Section 38 of the Land Laws Amendment Act.
23. He deponed that the right to protection of property conferred under Article 40(1) of the Constitution was not an absolute right in itself as the said protection did not extend to property that was found to have been unlawfully acquired. That under the current regime, only the Respondent had the jurisdiction to investigate all historical land injustices complaints and recommend appropriate redress hence the Respondent's actions in exercising its constitutional mandate could not be said to be in breach of the Ex-parte Applicant's right under Article 40 of the Constitution.
 24. That the Ex-parte Applicant was being dishonest, uncandid and untruthful by demeaning the latitude of the Respondent. That it had been well envisioned under the Constitution and the National Land Commission Act that the Respondent was solely required to admit and investigate all historical land injustice complaints and recommend appropriate redress. That the assertions cast by the Applicant were baseless, frivolous and geared towards unnecessarily annoying the Respondent without any cause and greatly delaying, if not defeating the Interested Parties herein from deservedly enjoying the fruits of a well conducted investigation.
 25. In response to the Ex-parte Applicant's allegation that the proceedings before the Respondent were a nullity as the governing regulations were ultra vires, the Respondent reiterated the contents of its Replying Affidavit and added that it was clearly contemplated under the provisions of Article 67 (2) (e), that the Respondent had an exclusive mandate to initiate investigations, on complaint, into present or historical land injustices, and recommend appropriate redress.
 26. With regards to the Ex-parte Applicant's allegations that the defunct Government fell under the National Government, the Respondent deponed that in its investigation into the historical injustices that had been alleged by the Interested Parties, it had confirmed that the land in dispute was in regard to occupation of Bomet Farmers Training Centre which was among the several Institutions devolved to the Ex-parte Applicant as per Schedule 4 of the Constitution hence the said allegations were unfounded and should fail.
 27. That the allegations stated in the Ex-Parte Applicant's Verifying Affidavit had been geared to disillusion the court from objectively interrogating whether the Ex-parte Applicant had duly been accorded a fair hearing by the Respondent, as that formed one of the essential dictates of Judicial Review. That it was evident that the Applicant was merely forum shopping for audience to hear their submissions having not made the same before the Respondent. This was thus an outright abuse of the court process.
 28. That the Ex-Parte Applicant had properly been served with the summons/notices to attend and had been accorded a fair hearing in the proceedings before the Respondent. That the Ex-parte Applicant's motion had not been supported by any fact or evidence that would support the prayers sought and further that no plausible grounds had been established to set aside a lawful and regular determination that had been arrived at by the Respondent.
 29. He thus urged the Court to dismiss the Ex-parte Applicant's Application with costs to the Respondents.
 30. The 1st and 2nd Interested Party's position in response to and in opposition to the Ex-parte Applicant's Application was that they had been claiming ancestral interest of about 50 acres comprised in property that had been alienated by the Ex-parte Applicant and its predecessor, the County Government of Bomet vide PDP No. BMT/336/97/10 part of which was now comprised properties



known as L.R No. Bomet Municipality/294 and L.R No. Bomet Municipality/295 (ancestral lands) which land they had been in occupation since the year 1920.

31. That in the year 2016, the Ex-parte Applicant had lodged a complaint with the Director of Public Prosecution who had referred them to the Commission of Administration of Justice (the office of the Ombudsman) who had in turn advised it to seek recourse from the National Land Commission, the Respondent herein. That subsequently, on 21st September, 2017, they had written to the Respondent seeking recourse whereupon their complaint had been noted as Historical Land Injustice Claim No. NLC/HLI/159/2017.
32. That the 4th Respondent then commenced investigations into their complaint and subsequently invited her mother, the 1st and 2nd Respondents for hearings which had been conducted on 24th September, 2018, 11th October, 2018 and 2nd November, 2018 at Narok, Kericho and Nairobi respectively. That on 10th October, 2018, the Respondent's agents had visited their ancestral land and noted their grievances especially the one relating to the trees that had been cut down by the 1st Respondent, the location of their family's burial site wherein they had presented their finding to the Respondent's Commissioners on 11th October, 2018 and 2nd November, 2018. That the 1st Respondent had also made representations on the said dates, in support of their position.
33. That on 2nd February, 2019, the Respondent had decided in their favour having among other things found that they were victims of historical land injustice that had been occasioned by the Respondent. That to remedy the injustice that had been visited upon them, the Respondent had recommended that the ex-parte Applicant herein, should allocate and ensure registration of 3.2 and 2.02 hectares of land to them respectively. That further, the Respondent had recommended that the ex-parte Applicant compensate them on the remaining acreage, being 4.78 hectares at the current market rate.
34. That the ex-parte Applicant's contention that the Respondent's determination dated 7th February, 2019 had been irregular, unreasonable, made in bad faith and ultra vires as the Respondent had purported to make a final decision as opposed to investigating and making recommendations was a misapprehension of the Respondent's findings in the said determination since the Respondent had only made a finding on whether they had been victims of a historical land injustice and had proceeded to recommend redress, in line with its statutory and constitutional mandate.
35. That whereas the ex-parte Applicant had contended that it had been denied fair administrative action guaranteed under Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*, it had been duly represented by Counsel during the proceedings and had been afforded time to procure documents in support of its position which documents were however never submitted and instead its Counsel had proceeded to file submissions on its behalf for consideration by the Respondent. Further, that the ex-parte Applicant had not exhibited the documents claimed to have been locked out of the proceedings in the instant Application. The court was urged to dismiss the Application with costs as it was frivolous, vexatious and devoid of merits. That the ex-parte Applicant was using the present application as a delaying tactic to deny them the fruit of the sound determination by the Respondent.
36. In a rejoinder, the ex-parte Applicant filed two Supplementary Affidavits both dated 1st February, 2020 and sworn by Oscar Sang, its Attorney deponed that the Respondent had not attached the alleged notices for the hearings which were to be held on 24th September, 2018, 11th October, 2018 and 2nd November, 2018 to ascertain the adequacy of the said notices for attendance. That it was also evident from the proceedings of 11th October, 2018 and 2nd November, 2018 that had been attached to the Respondent's Replying Affidavit as annexure "E9-1 (a) (b)" that he had sought for more time to furnish the Respondent with proper documents, which time he had not been granted. That further,



- the Respondent had not attached the proceedings of 24th September, 2018 in which the ex-parte Applicant's counsel had been absent.
37. That whilst it had submitted to the Respondent's jurisdiction, it did not acquiesce and/or consent to illegalities, irregularities and nullities therein and that the Respondent had not been the right forum to address such fatalities. That whereas the Respondent had alleged that it had conducted an independent investigation through its secretariat by ground visits, it had not stated when and how the ground visits were conducted or the outcome of the same.
38. He deponed that by making its determination dated 7th February, 2019 and allowing the claim according to Gazette Notice No. 1995 of 1st March, 2019, the Respondent had acted outside the scope and mandate conferred to it by Article 67 (2) of *the Constitution* which mandate was limited to investigative powers as opposed to judicial and/or quasi-judicial powers. That had framers of the law intended to vest upon the Respondent judicial or quasi-judicial powers, they would have provided for an appellate mechanism for aggrieved parties. That the Respondent's determination had been final hence tainted with illegality.
39. That the 1st Interested Party's land having been appropriated at the instance of the Ministry of Agriculture, it had been unfair, irrational and unreasonable for the Respondent to Order the ex-parte Applicant to compensate them. That according to the provisions of Section 15 (2) (c) of the *National Land Commission Act* No. 5 of 2012, the period within which the historical land injustice must have arisen was between 15th June 1895 and 27th August, 2010 during which period the ex-parte Applicant had not come into being having come into existence and/or being pursuant to Article 6(1) and the First Schedule to *the Constitution*. That it had not existed prior to 27th August, 2010 hence if at all any historical injustice (s) had been visited upon the Interested Parties, then had been by the third parties.
40. The application was canvassed by way of written submissions wherein only the Ex-parte Applicant and the interested parties filed their respective submissions as summarized herein under: -

Ex-parte Applicant Submissions.

41. The ex-parte Applicant vide its written submissions dated 14th December, 2023 first summarized the factual background of the matter before hinging its reliance on the Provisions of Articles 67 (2) (e) of *the Constitution* and the decided case in Sceneries Limited v National Land Commission [2017] eKLR which spoke on the roles of the Respondent, the provisions of Section 15 of the *National Land Commission Act* No. 15 of 2012 on the nature and scope of historical injustices, the provisions of Article 47 of *the Constitution* and Section 7(2) of the *Fair Administrative Action Act* as well as the circumstances under which the court may review administrative actions or decisions. Reliance was also placed on the decisions in the case of Leina Konchellah & Others v Chief Justice & President of the Supreme Court of Kenya & Others, High Court of Kenya at Nairobi Petition No. E 291 of 2020 and Republic v Public Procurement Administrative; Galana Oil Kenya Limited & 2 others [2023] KEHC 483 (KLR).
42. On the Respondent's decision of 7th February, 2019 being erroneous, irregular, illegal, ultra vires and un-procedural, the Applicant maintained that the Respondent had conducted hearings that were akin to judicial proceedings contrary to the provisions of Article 67 (2) (e) of *the Constitution* and Section 5 (1) (e) of the *National Land Commission Act* which confers upon it the investigative powers and not the judicial powers thus exceeding its powers.
43. The ex-parte Applicant further submitted that the Respondent's determination had been irrational, unreasonable and bad in faith, and adverse to it since it required it to allocate and register 5.22 hectares of land to the interested parties and to compensate them for the remainder of 4.78 acres at the current



market rate despite neither it nor its predecessor having allotted the subject property. That conversely, it was the Respondent's predecessor, the Commissioner of Lands, who had allotted the subject property to the Permanent Secretary, Ministry of Agriculture vide a letter of allotment dated 18th November, 1999.

44. It reiterated the contents of its Statement of Facts and Verifying Affidavit with regards to the letters dated 17th April, 2002 by the Directors of Survey to survey the subject land, minutes that had been signed by the District Commissioner Bomet for approval of squatters to be settled on the subject land and a letter dated 21st September 2017 indicating that the interested parties' grievances had been against the Ministry of Agriculture.
45. That subsequently, it had been irrational, unreasonable and in bad faith to require the ex-parte Applicant to allocate land to the interested parties and compensate them yet it was the Ministry of Agriculture that had been the allottee of the subject property. It maintained that the allotment of the subject property had been done by the Respondent's predecessor, the Commissioner of Lands.
46. On the issue on fair hearing and biasness, the Applicant submitted that it had prepared and filed submissions in opposition to the interested parties' claim. That whereas the hearings had been conducted on 11th October, 2018, 5th April, 2018 and 27th September, 2018, it had been introduced into the proceedings almost at its tail and therefore had neither been given ample time to introduce vital documents nor a fair hearing and fair opportunity, the Respondent's decision ought to be quashed.
47. That since it had been established that it had been the Respondent's predecessor, the Commissioner of Lands who had allotted the subject property, there was a likelihood of biasness on the part of the Respondent who ought not to have been a judge in its own cause.
48. The ex-parte Applicant thus urged the court to grant the prayers sought in its Notice of Motion Application dated 9th August, 2019.

Interested Parties' Submissions

49. The Interested Parties summarized the factual background of the matter in details before framing their issues for determination as follows: -
 - i. Whether the Respondent's proceedings and determination are ultra vires the provisions of the [National Land Commission Act](#) and Article 67 (2) (e) of [the Constitution](#) of Kenya
 - ii. Whether the Ex-parte Applicant was accorded a fair hearing.
 - iii. Whether the Respondent's decision is laden with irrationality.
 - iv. Whether the Ex-parte Applicant is entitled to the reliefs sought.
50. On the first issue for determination, the interested parties placed reliance on the provisions of Article 67 (2)(e) of [the Constitution](#), Section 15 of the [National Land Commission Act](#) on the Respondent's mandate to submit that after their complaint to the Respondent had been noted as Historical Land Injustice Claim No. NLC/HLI/159/2017, the Respondent had commenced investigations into their complaint wherein it had found that they were victims of historical land injustice. That, the Respondent had then recommended redress which was in line with its statutory and constitutional mandate. They placed reliance in the decided case in Republic v National Land Commission & Another Ex parte Farmers Choice Limited [2020] eKLR. That the ex-parte Applicant's interpretation of the Respondent's cause of action was therefore a blatant misapprehension of the Commission's findings.



51. On the second issue for determination as to whether the Ex-parte Applicant had been accorded a fair hearing, they submitted that the Ex parte Applicant's allegations that it was not granted the benefit of a proper hearing before the Respondent's determination was unfounded and should fail. That a perusal of the Respondent's Hansards pertaining the hearings of the complaint NLC/HLI/159/2017 dated 11th October, 2018 and 2nd November, 2018 indicated that the Ex parte Applicant had duly been represented by their counsel, Mr. Oscar Sang, who had in fact asked for and was afforded time to procure documents in support of its position. The documents were however never submitted wherein instead, the said Counsel had proceeded to file submissions for consideration by the Respondent.
52. As to whether the Respondent's decision was laden with irrationality, the interested parties submitted in the negative to the effect that the rights and responsibilities of the defunct County Municipal Council had been duly vested in the County Government being their successor in title. Reliance was placed in the decided case in *J.A.S Kumunda & Another v The Cleark Municipal Council of Kisii & 6 others* where the court had affirmed that County Governments were likely to pay for the liabilities of the defunct local authorities and were their successor within their jurisdiction. Further reliance was placed on the decision in the case of *(Interim) County Secretary, County Government of Kakamega v Republic Ex Parte Ali Adam & Another [2017] eKLR* where the Court of Appeal had concluded that the legal rights and liabilities of the defunct Local Authorities were to accrue in favour of and be sustained against their successors which in the instant case, the respective County Governments and not the National Government.
53. That the ex-parte Applicant had not disputed its interest/stake in the subject property in the proceedings before the National Land Commission but had indicated that the interested parties had been compensated by being allotted 3 acres each, that 6 acres had been hived off for the purposes of settling the two families and therefore they could not now attempt to avoid liability by approbating and reprobating on its stake and/or interest over the subject property.
54. In conclusion the interested parties' submission was that the Ex parte Applicant had not met the threshold to be granted judicial review orders of Certiorari and Prohibition and therefore its application ought to be dismissed with costs.

Determination

55. I have considered the ex-parte Applicant's application dated the 9th August, 2019 seeking an order of certiorari to quash the Respondent's determination in Historical Land Injustice Reference No. NLC/HLI/159/2017 as published in the Kenya Gazette Notice No. 1995 of 1st March, 2019 and thereafter issue an order of Prohibition, prohibiting the Respondents from implementing and enforcing the said determination. I have also considered the affidavits filed, the submissions for and against the said application, the law as well as the authorities herein cited.
56. The issue that emerges for determination is whether the ex-parte Applicant is entitled to the remedies sought.
57. The purpose of Judicial Review as set out in the case of *Municipal Council of Mombasa vs. Republic, Umoja Consultant Ltd, (2002) eKLR* as follows;

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a Court hearing



a matter by way of Judicial Review is concerned with and such Court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal Court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

58. In the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

59. The ex parte Applicant’s complaint in the matter before me is that vide the Respondent’s determination of 7th February, 2019 in the Historical Land Injustice Reference No. NLC/HLI/159/2017 which finding arose from a historical land injustice complaint by the interested parties, the Respondent had consented to their claim whereby the County Government had been directed to ensure allocation and registration of 3.2 hectares and 2.02 hectares to Tapnyobi Kiruch Targotit and Cecilia Chelangat Keiyo (the original interested parties herein) respectively. Further, the County Government had also been directed to compensate the claimants on the remaining acreage, what was 4.78 hectares at the current market rate. The said determination had subsequently been published in the Kenya Gazette Notice No. 1995 on 1st March, 2019.
60. The Applicant’s issue was that the Respondent’s determination of 7th February, 2019 was irregular, illegal, un-procedural hence null and void ab initio. Further, that the said determination had been erroneous both in fact and law and ultra vires the powers conferred to the Respondent by law hence it had been made in bad faith, was irrational, biased against the Applicant, unreasonable, oppressive and against the Applicant’s legitimate expectation. That the Applicant had not been granted a proper hearing before the said determination which was thus contrary to its right to fair administrative action as provided for under the provisions of Article 47, 50(1) of *the Constitution* and Section 4 of the Fair Administrative Actions Act No. 4 of 2015. That the Respondent’s determination was a final decision which was beyond its mandate, scope and limits of Article 67(2)(e) of *the Constitution* which only mandated it to investigate and make recommendations.



61. That the Respondent's decision was irrational and unreasonable because as all liabilities of the defunct governments had been transferred to the National Government on the onset of the county governments as provided for under the [Transition to Devolved Government Act](#). Thus, it was only the National Government that could offer compensation in that case.
62. The Applicant's position was that the Respondent's determination would gravely prejudice and expose its (Applicant's) people who stood to suffer huge financial loss thereby going against the Applicant's Constitutional mandate to protect the property it held in trust for its people.
63. The Respondents and the interested parties' argument on the other hand had been that the Interested Parties were claiming ancestral interest of about 50 acres comprised in property that had been alienated by the Ex-parte Applicant and its predecessor, the County Government of Bomet vide PDP No. BMT/336/97/10 part of which was now comprised properties known as L.R No. Bomet Municipality/294 and L.R No. Bomet Municipality/295 (ancestral lands) which land they had been in occupation since the year 1920.
64. That upon lodging their complaint, both the Ex-parte Applicant and the Interested Parties herein had duly been invited for hearings vide notices from the Respondent, which hearings had been held on 24th September, 2018, 11th October, 2018 and 2nd November, 2018 at Narok, Kericho and Nairobi respectively. That at all times during the said hearings, they had been duly represented by their respective Advocates who had thereafter made their respective submissions on their behalf.
65. That the Respondent through its secretariat the Historical Land Injustice Committee had further conducted its own independent investigation which had entailed conducting a ground visit among other things with a view of establishing whether an injustice had been occasioned upon the Interested Parties by the Ex-parte Applicant. There had followed consideration of the 1st Interested Party's submissions and a scrutiny of documents availed wherein after, the Respondent had produced a well-informed determination whose decision was subsequently gazetted vide a Gazette Notice dated 1st March, 2019. That the Respondent had only made a finding on whether the interested parties had been victims of a historical land injustice wherein it had proceeded to recommend redress, in line with its statutory and constitutional mandate.
66. The Respondent had thus complied with the provisions of both Article 50 of [the Constitution](#), the [Fair Administrative Action Act](#) and Section 15 of the [National Land Commission Act](#) as had been amended by Section 38 of the Land Laws Amendment Act in as far as its constitutional mandate to investigate all historical land injustices complaints and recommend appropriate redress was concerned and therefore it could not be said to be in breach of the Ex-parte Applicant's right under Article 40 of [the Constitution](#).
67. That the investigations into the historical injustices that had been alleged by the Interested Parties was in regard to occupation of Bomet Farmers Training Centre which was among the several Institutions devolved to the Ex-parte Applicant as per Schedule 4 of [the Constitution](#) hence liabilities of the defunct Governments had not been transferred to the National Government.
68. Article 67(2)(e) of [the Constitution](#) provides as follows:
 - “..... The functions of the National Land Commission are—
 - (2)to initiate investigations, on its own initiative or on a complaint,
 - (e) into present or historical land injustices, and recommend appropriate redress;.....”



69. The provisions of Section 15 (1) of the National Land Commission also provide as follows:
- “Pursuant to Article 67(3) of *the Constitution*, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.”
70. After noting that the interested parties’ complaint was in the nature of a historical land injustice wherein the Respondent had noted the same as Historical Land Injustice Claim No. NLC/HLI/159/2017, I find that the Respondent had acted well within its constitutional mandated as provided for under Article 67(2)(e) of *the Constitution* as well as under Section 15 (1) of the National Land Commission to commence investigations into their complaint and to recommend appropriate redress and therefore the Respondent did not act ultra vires or in excess of its jurisdiction.
71. Article 47 of *the Constitution* provides as follows;
- (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.
72. Section 4 of the Fair Administrative Actions Act provides as follows
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.



4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
 5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
 6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of *the Constitution*, the administrator may act in accordance with that different
73. It is clear that part of the Respondent’s process of investigation included circulation of a notice of the intended investigation notifying all interested parties the dates and venue of the scheduled hearings, which hearings had been held on 24th September, 2018, 11th October, 2018 and 2nd November, 2018 at Narok, Kericho and Nairobi respectively. That at all times during the said hearings, the ex-parte Applicant had been duly represented by their respective Advocate Mr. Oscar Sang (the Country Attorney) who even made his submissions. I thus find that the ex-parte Applicant had not been denied fair administrative action guaranteed under Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*. That it had been duly represented by Counsel during the proceedings and also been afforded time to procure documents in support of its position which documents were however not submitted because its Counsel had instead decided to file submissions on its behalf for consideration by the Respondent.
74. As to whether the Respondent had in the said determination made a final decision which was beyond its mandate, it is clear that vide the impugned determination of 7th February, 2019 in Historical Land Injustice Reference No. NLC/HLI/159/2017 which was published in the Kenya Gazette Notice No. 1995 of 1st March, 2019 the Respondent had recommended as follows:
- “The claim is allowed
- The county government should ensure allocation and registration to Tapnyobi Kiruch Targotit and Cecilia Chelangat Keiyo of the 3.2 hectares and 2.02 hectares respectively. The County Government of Bomet need to compensate the claimants on the remaining acreage, (4.78 ha) at the current market rate.”
75. In *SGS Kenya Limited v Energy Regulatory Commission & 2 others* SC Petition No 2 of 2019 [2020] eKLR, the Supreme Court at paragraph 40 observed as follows:
- “The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question.....”



76. I find that the Respondent had only made a finding on whether the interested parties had been victims of a historical land injustice wherein it had proceeded to recommend redress, in line with its statutory and constitutional mandate.
77. In the end, I find that the ex-parte Applicant's application dated the 9th August, 2019 seeking an order of certiorari to quash the Respondent's determination in Historical Land Injustice Reference No. NLC/HLI/159/2017 as published in the Kenya Gazette Notice No. 1995 of 1st March, 2019, herein lacks merit and the same is dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 30TH DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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