IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 46 OF 2012

BETWEEN

SUCHAN INVESTMENT LIMITED ……..……..……..…..… APPELLANT

AND

THE MINISTRY OF NATIONAL

HERITAGE & CULTURE..... 1st RESPONDENT

SANDEEP DESAI ……...……..…… 2nd RESPONDENT

DIPA PULLING……...……...…….. 3rd RESPONDENT

KEVIT DESAI & NIRANJAN DESAI…….....…….……. 4th RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Musinga, J.) delivered on 21st July 2011

in

Judicial Review Misc. Civil Case No. 129 of 2009

****

JUDGMENT OF THE COURT

1. The suit property in this appeal is **Nairobi L.R. No. 209/1916/6** measuring 1.7 acres situated at Parklands in Nairobi within the City of Nairobi and otherwise known as ***Desai House***. By **Legal Notice No. 128** dated 17th September 2008, the 1st respondent, the ***Minister for National Heritage & Culture***, declared the property a National Monument. The appellant, by an amended Notice of Motion dated 8th February 2011, filed a judicial review application at the High Court seeking an order of *certiorari* to remove into court and quash the decision of the Minister declaring the suit property a National Monument.

2. The appellant has proprietary interest in the suit property derived as follows: By a Will dated 16th July 1991, ***Mr. Jashbai Motibhai Desai*** (deceased) vested the suit property upon ***Niranjan***

Jashbai Desai, ***Dipa Pulling***, ***Kevit Shubash Desai*** and ***Sandeep Rajni Desai*** as beneficiaries. The property consists of an outhouse servant quarters and main house which served as residential house of the deceased. The main house is presently occupied by the 2nd respondent.

3. The appellant bought two undivided shares in the property from ***Niranjan Jashbai Desai*** and ***Kevit Shubash Desai***. Subsequent to the purchase of the undivided shares, the appellant company was registered as proprietor of the undivided shares. Todate, the appellant company is the registered proprietor of two undivided shares in the suit property.

4. By Gazette Notice **No. 3204** dated 25th April 2008, the 1st respondent in exercise of powers conferred by ***Section 25 (1) (b)*** and ***(c)*** **of the National Museums & Heritage Act** issued a notice to declare the suit property a National Monument on the ground that the Minister considered the property to be of historical interest. The Minister invited objections to be lodged within two months. Upon sighting the Gazette Notice, the appellant lodged an objection through the firm of AGN Kamau Advocates. Despite reminder, no response to and or determination of the objection was forthcoming from the Minister until 16th July 2008 when one ***Dr. Jacob Ole Miaron***, the Permanent Secretary in the Ministry of State for National Heritage and Culture responded *inter alia* that "We shall not confirm the said notice to pave way for further consultations with the relevant parties for an amicable solution". It is the appellant's contention that this letter was a confirmation that the suit property would not be declared a monument.

5. On 11th August 2008, the appellant's counsel received a letter from the Minister's Office calling for and convening a meeting at the National Museums of Kenya to be held on 12th August 2008 as a follow up to the letter dated 16th July 2008. The meeting scheduled for 12th August 2008 did not take place and was rescheduled to 21st August 2008. On the said 21st August 2008, the appellant attended the meeting at the National Museums and the following transpired as per evidence adduced before the trial court:

> ***"It was quite clear that the National Museum staff who had not convened the meeting had no idea why the meeting had been called. AGN Kamau and Virginia Shaw clearly stated that the statute had no provision for an amicable solution to be worked out and the Minister must either confirm the objection or withdraw the Gazettement. It was resolved that the Museum staff passes the message to the Minister and thereafter reverts. The meeting ended at 4.15pm."***

6. Despite there having been no meaningful deliberation or resolution at the meeting held on 21st August 2008, the appellant received no further communication from the Minister and was surprised to see and to read **Legal Notice No. 128** dated 17th September 2008 declaring the suit property a National Monument. Upon citing the foretasted Legal Notice No. 128, the appellant filed a judicial review application under ***Order 53, rule 1 (2) of the Civil Procedure Act and Rules*** seeking an order of Certiorari to move into court and quash the decision of the Minister in **Legal Notice No. 128** dated 17th September 2018 declaring the suit property a National Monument. The grounds in support of the application as contained in the Statement are:

> *"(a) The Minister had no power to make the aforesaid order in terms of the provisions of the National Museums and Heritage Act (No. 6 of 2006) and the suit property is not a monument within the meaning of Section 2 (A) of the Act; that the legal pre-requisites to the exercise of any powers under Section 25 (3) of the Act was not followed and the order so made was null and void;*

b. *The Minister's Order was made in excess of jurisdiction and without due process;*

c. *The Order breaches the Constitution of Kenya as it purports to compulsorily acquire the suit property without due, prompt and fair compensation;*

d. *The Order is in breach of the rules of natural justice in that the appellant was not given an opportunity to be heard or make any representation;*

e. *The Minister took into account matters which he ought not to have taken into account; that the Minister's Order was capricious as the suit property had no historical, cultural, scientific, technological or human interest;*

f. *That the suit property is not situate within a protected area as defined in Section 34 and 35 of the National Museums and Heritage Act and the said Order was made without due regard to the provisions of Section 35 (i) of the Act which protects private property from falling within the ambit of Section 25 (3) of the Act and that the said Order was made without due regard to the provisions of law which the Minister purported to invoke."*

7. Before the trial court, the 2nd respondent filed a replying affidavit deposing that she owned one quarter undivided share in the property; that the appellant's Motion for judicial review was incurably defective because upon the gazettement of **Legal Notice No. 128 of 2008**, the appellant invoked the provisions of ***Section 25 (3)*** **of the National Museum and Heritage Act** and appealed against the Minister's Order; that the institution of the judicial review application was an afterthought as the appellant company had availed itself an alternative remedy and could not invoke the trial court's jurisdiction for prerogative orders. The 2nd respondent also contended that constitutionality and merits of the Minister's decision could not be questioned and determined in judicial review proceedings.

8. The 3rd respondent, ***Dipa Pulling***, stated that if the appellant was dissatisfied with the fact that the Minister did not consider its objection, the available remedy was an order for mandamus to compel the Minister to consider the objection; that the appellant's judicial review application was fatally defective for relying upon a ground that invited the determination of the constitutionality of the provisions of the **National Museum and Heritage Act** in an application for prerogative orders; that constitutionality of any legislation cannot be challenged in judicial review proceedings; that such a challenge can only be done by way of a constitutional petition.

9. The Attorney General, for the 1st respondent, filed grounds of opposition stating that the application was bad in law, an abuse of court process and incurably defective.

10. Upon hearing the parties, the learned judge dismissed the judicial review application and declined to grant the order of *certiorari*. In dismissing the application, the trial judge expressed himself as follows:

> ***"It is evident that the Minister exercised statutory discretion donated to him by the said Act. It was not demonstrated that there was any abuse of such discretion for example, that he acted in bad faith. It is a cardinal principle of administration that discretion must be exercised reasonably and in good faith, that is, for legitimate reasons. I am satisfied that the Minister acted within his power and his decision was not ultra vires. The applicant cannot argue that the Minister did not consider its objection. A consultative meeting was held and inspite of the objections raised by the applicant, the Minister was unmoved.***
>
> ***The merits of the Minister's decision cannot be challenged in judicial review proceedings. It is trite law that in judicial review proceedings, the court is concerned not with the merits of a decision but with the decision making process itself….To the extent that the applicant is questioning the constitutionality of the Minister's decision and not the process through which the decision was made, I agree with the respondent and the interested parties that the applicant can only do so by way of a constitutional petition and not judicial review proceedings. The issue as to whether the Minister ought to have invoked the provisions of Article 40 (3) of the Constitution regarding compulsory acquisition of the suit property and payment of full and prompt compensation cannot be***

addressed in these proceedings. …In view of the foregoing, there is no basis for granting an order of certiorari sought by the applicant."

11. Aggrieved by the High Court ruling, the appellant lodged the present appeal citing *inter alia* the following grounds:

"(i) The learned judge erred in law and fact in concluding that the Minister acted within his powers and holding that the Minister was justified in declaring the residential suit property to be a National Monument;

ii. *The judge erred in depriving the appellant its purchased title and interest in the suit property and such deprivation was carried out without regard to due process and prompt and fair compensation;*

iii. *That there was no warrant or right in the Minister to declare the property a National Monument when it was not such a property and when it was an ordinary residence of the late Mr. J.M. Desai (not the Desai of Desai Memorial Library fame);*

iv. *The judge erred in concluding that constitutionality of the Minister's decision cannot be questioned in a judicial review proceedings;*

v. *The judge failed to appreciate (from what was before him) that the Minister exercised his discretion wrongly and without due regard to the appellant's right;*

vi. *The Minister's decision making process was not based on any historical interest."*

12. At the hearing of this appeal, learned counsel Mr. A.B. Shah teaming up with Mr. A.G.N. Kamau advocate appeared for the appellant. Learned Counsel Ms Jan Mohammed appeared for the 2nd respondent while learned counsel Mr. W. K. Muthee holding brief for Ms Shaw appeared for the 3rd respondent. State Counsel Mr. K. Onyiso appeared for the 1st respondent. There was no appearance by the 4th and 5th respondent. All parties, including the 4th and 5th respondents, filed written submissions in the matter.

13. In its submissions, the appellant emphasized that the Minister erred in declaring the suit property a National Monument because he failed to give reasons for such declaration; that the Minister did not hear the objection that had been lodged by the appellant; that the substance of the objection was that the suit property was neither of any historical interest nor within a protected area as defined in ***Sections 34*** and ***35*** **of the National Museums & Heritage Act**; that it cannot be said that the Minister was justified in declaring the suit property a National Monument when no reasons were given for such a declaration; that ***Section 25 (1) (c)*** of the **National Museums & Heritage Act** casts a duty upon the Minister to consult all affected parties which duty the Minister utterly failed to discharge; that ***Section 25 (3) of the Act*** contains procedural steps that mandates the Minister to consider the objections and this procedural step was not followed by the Minister; that ***Section 34 of the Act*** subjects a National Monument to numerous controls which restrict use, access and development of the monument and consequently, the Minister's declaration of the suit property as a monument is a restriction of use, access and development of the suit property and this is a deprivation of the appellant private property rights without due process and effective compensation contrary to the Constitution. The appellant contended that the Minister did not consider the hardship that the declaration of the suit property as a monument will cause the appellant; in this context, the proportionality of the Minister's declaration vis-a-vis the appellant's proprietary interests or rights in the property was not considered. Counsel submitted that before the Minister could declare the suit property a monument, he was and is required by law to consider: (a) the objections raised (b) reasons why a building is not worthy or is worthy of being a National Monument and (c) whether it is proportional or of greater benefit to declare a building a National Monument. It was submitted that it is not for the Minister to merely receive objections and then secretly decide the way forward as he did in this case; that the Minister's conduct in not

considering the appellant's objection was a violation of the rule of law and principle of accountability in public office; that in the instant case, from the Minister's conduct in not responding to the appellant's objection and other correspondences to his office, no one would know if he applied the law or acted through mere fiat.

14. The appellant cited the Uganda persuasive case of **Pastoli -v- Kabale District Council & Others (2008) 2 EA 300** where it was held that an applicant in judicial review proceedings must show that the "decision or act complained of is tainted with illegality, irrationality and procedural impropriety." The appellant submitted that in the present case, the Minister proceeded and acted *suo moto* without giving the appellant any audience and or without assigning any reason for declaring the suit property a monument. In the appellant's view, the action by the Minister violated the rules of natural justice on the right to be heard, was unreasonable and full of procedural impropriety. The appellant relied on the case of **R -v- Revenue Commission ex parte Preston (1985) 1 AC 835** where Lord Templeman clarified that judicial review is available where a decision making authority exceeds its powers, commits an error of law, breach of natural justice or reaches a decision which no reasonable tribunal could have reached or it simply abused its power.

15. Counsel for the appellant submitted that the Minister was in breach of the rules of natural justice when he failed to consider the appellant's objections and there was nothing monumental about a residential property on 2nd Parklands Avenue; that the Minister did not consider relevant historical facts and erred in confusing the residential suit property of the deceased ***Mr. Desai*** as the property of ***Mr. Desai*** of the ***Desai Memorial Library*** fame who died at Bukoba in Tanzania; that the Minister did not accord the appellant a hearing wherein it would have been clarified that the suit property was not the residential property of Mr. Desai of Tanzania. It was submitted that the appellant was not given a chance to argue its objections and its proprietary right in the suit property was taken away and rendered nugatory; that there was no procedural fairness and rationality in depriving the appellant the suit property when the said property had no historical significance.

16. The appellant further submitted and urged that the trial judge erred in holding that constitutional issues cannot be raised in judicial review proceedings. Counsel cited the dicta in **Rashid Odhiambo Allogoh & 245 others & Haco Industries Ltd. (Civil Appeal No. 110 of 2001**) where it was stated:

> **"So there it is, in the plainest possible language; the availability of other lawful causes of action is no bar to a party who alleges a contravention of his rights under the Constitution."**

17. The 1st respondent in opposing the appeal submitted that ruling by the trial judge was sound in law because ***Section 25 (3)*** **of the National Museum & Heritage Act** clothed the Minister with the requisite authority to make the decision; that the Minister's decision was in strict compliance with statutory procedural dictates and rules of natural justice; that the appellant had failed to exhaust an appropriate alternative legal remedy to pursue its rights; that ***Section 25 (1)*** as read with ***sub-section (3)*** of the Act grants the Minister the authority to declare a building a monument and the trial judge was correct in finding that the Minister acted pursuant to the donated statutory powers; that ***Section 23 (1)*** as read with ***25 (3)*** grants the Minister the authority to declare the suit property a monument.

18. The 1st respondent submitted that the suit property was of historical significance in that it belonged to Mr. Desai who was a prominent figure who even served within the LEGCO; that determination of the character and ownership of the suit property are factual matters going into the merits of the case which according to judicial review principles, the learned judge was correct in not delving into the merits of the Ministerial decision. It was submitted that under ***Section 25*** of the Act, the Minister is enjoined to consult the National Museums and this was done as stated in **Gazette Notice No. 3204** of 25th April 2008. It was submitted that the appellant's objection was

considered as evidenced by the letter from the Permanent Secretary and the meeting held on 21st August 2008 between all the concerned parties. It was submitted that the appellant had an alternative remedy to pursue compensation under the **Land Acquisition Act**, **Cap 295** (now repealed); that the mandatory requirement to follow and use alternative statutory procedures and remedies was upheld by this Court in **Narok County Council -v- Trans Mara County Council & Another (Civil Appeal No. 25 of 2000)** wherein it was stated that where the law provides for the procedure to be followed, the parties are bound to follow that procedure as provided by law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute.

(See also **Speaker of National Assembly -v- Karume, Civil Application No. NAI 92 of 1992).**

19. The 2nd respondent in opposing the appeal submitted that the decision of the learned judge was proper; that the Minister considered the appellant's objection and went out of his way to hold consultations with the appellant; that the appellant was given adequate audience more than what is provided by statute; that all procedural requirements were followed by the Minister. Counsel submitted that if the declaration of the suit property as a monument affected the appellant's property rights, the correct procedure available to the appellant is to invoke ***Section 35 (1)*** **of the National Museum & Heritage Act** and demand compensation from the government. Counsel submitted that the appellant had not been deprived of its title and interest in the suit property for reason that the appellant had not raised any demand for compensation. The 2nd respondent adopted the 1st respondent's submissions that judicial review proceedings cannot be used to question the merits and constitutionality of the Minister's decision; that the appellant's core complaint should have been raised and canvassed in a constitutional application and not by way of judicial review. Counsel concluded that the appellant company had no reason to complain as it was involved in the process that culminated in the decision of the Minister in consultation with the National Museum to declare the suit property a National Monument.

20. Counsel for the 3rd respondent associated himself with submissions by the 1st and 2nd respondents and urged that the appeal be dismissed. Counsel reiterated that ***Section 25 (1)*** **of the Act** empowered the Minister to declare the suit property a monument; that due process of consulting the National Museum was followed; that the Minister upon receiving the appellant's objection was unmoved; that the appellant company cannot claim it was not given audience as it was involved in the process that culminated in the decision by the Minister. Counsel submitted that the appellant's application before the trial court was hinged on ***Sections 8*** and ***9*** **of the Law Reform Act, Cap 26 and Order 53 of the Civil Procedure Act and Rules;** that under these provisions, an applicant for judicial review cannot claim any remedy apart from *certiorari*, *mandamus* or *prohibition*; that the appellant cannot raise a constitutional claim in a judicial review application. Counsel cited the case of **Municipal Council of Mombasa -v- Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001** where it was held that judicial review is concerned with the decision making process and not with the merits of the case. The case of **Peninah Nandako Kiliswa -v- IEBC & 2 Others (2014) eKLR** was cited to support the principle that judicial review is only available where a tribunal acts upon a wrong principle or omits to do or considers a matter which it should have done or where there is a violation of any principle of natural justice. Counsel concluded that the appellant was not entitled to an order of *certiorari* because ***Section 35 (1)*** **of the Act** provided an alternative remedy for compensation which the appellant should pursue.

21. The 4th and 5th respondents filed written submissions in support of the appeal. They submitted that it is shuddering to wake up one morning and find that your private property had been declared a National Monument without being heard and with no reasons given; that a declaration of a National Monument converts private property into a public property where access to all and sundry is granted by law and restrictions are imposed on the property rights of the registered owner. It was submitted that the appellant had legitimate expectation that the Minister would consider its objections and render a decision on those objections; that there is no evidence that the Minister considered the objection and there is no decision on the objections. The 4th and 5th

respondents cited ***Articles 47 (1)*** and ***(2)*** of the ***Constitution*** wherein it is stated that 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. It was submitted that the Minister did not give written reasons for his decision and thus violated ***Article 47 (2)*** of the Constitution. The 4th and 5th respondents submitted that ***Article 159 (2) (d)*** of the ***Constitution*** enjoins this Court to consider substantive rather than technical procedural justice; that there is no legal justification for the decision by the trial judge that the appellant could not pursue constitutional issues in a judicial review application. The respondents cited the Oxygen principles in ***Section 1 A (1)*** of the **Civil Procedure Act** and urged that the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of disputes; that the learned judge erred and failed to consider the proportionate and affordable resolution of the present dispute. The respondents submitted that the suit property was now worth Ksh. 680 million and pursuing compensation for the same would be a wanton waste of tax payer's money in purchasing an imaginary monument. The 4th and 5th respondents urged us to allow the appeal.

22. We have considered the record of appeal, the oral and written submissions by counsel and the judicial decisions cited. We have also considered the ruling by the trial judge. This is a first appeal and we are obliged to re-evaluate the evidence on record and arrive at our own conclusions. (See **Selle -vs-Associated Motor Boat Co. [1968] EA 123)**; see also ***(*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**.

23. We must at the outset point out that the provisions of ***Article 47*** of the ***Constitution*** and the **Fair Administrative Action Act of 2015** are relevant and applicable to this appeal. The provisions of the **Fair Administrative Action Act** are retroactive and apply to all proceedings pending in court. ***Section 14 (1)*** of the Act provides:

> **"14. (1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done."**

24. Pursuant to ***Section 12*** of the **Fair Administrative Action Act**, the general principles of common law and rules of natural justice continue to apply in review of administrative actions. The Section provides that the Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice. This means that the common law principles on judicial review of administrative action under the heads of illegality, irrationality, procedural impropriety and proportionality are relevant and applicable in Kenya. (See the common law principles as expounded by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374).** See also the principle of reasonableness as stated in the case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223.)**

25. In determining this appeal, various issues are pertinent: first, whether the trial judge erred in law and fact in finding that there was no procedural irregularity in the process through which the Minister arrived at the decision to declare the suit property a National Monument; second, whether the Minister was under a legal obligation to give reasons for his decision in declaring the suit property a National Monument; third, whether the trial court erred in law and fact in finding that the rules of natural justice were not violated and that the appellant had been given a hearing; fourth whether the trial judge erred in holding that merits of an administrative decision and constitutional issues cannot be raised in judicial review proceedings and finally whether the appellant company was and is obliged in law to pursue the alternative remedy of compensation under ***Section 35*** of the **National Museum & Heritage Act**.

26. In considering whether the Minister violated any procedural requirements, we must identify the statutory procedures that had to be followed by the Minister before declaring the suit property a monument.

27. ***Section 25*** of the **National Museums & Heritage Act of 2006** provides that:

"After consultation with the National Museums the Minister may by Notice in the Gazette declare:

a. **….**

b. **a specified place or immovable structure which the Minister considers to be of historical interest and a specified area of land under or adjoining it which is in the Minister's opinion required for maintenance thereof, to be a monument within the meaning of the Act.**

c. **a specified site on which a buried monument or object of archeological or paleontological interest exist or is believed to exist and a specified area of land adjoining it which is in the Minister's opinion required for maintenance thereof, to be a protected area within the meaning of the Act.**

d. **……..**

e. **a building and a specified area of land adjoining it which in the Minister's opinion is required for the maintenance thereof to be a protected building with the meaning of the Act**

f. **……..**

AND the notice shall state that objections to a declaration made under this Section shall be lodged with the Minister within two months from the date of publication of the Notice."

Section 25 (3) provides that:

"On expiration of the period of two months, the Minster, after considering the objections, if any, shall confirm or withdraw the notice."

28. In the **Gazette Notice No. 3204** dated 25th April 2008, the Minister stated he was exercising powers conferred by ***Section 25 (1) (b)*** and ***(c)*** of the **National Museums & Heritage Act**. ***Section 25 (1) (b) and (c)*** of the Act has four conditions that must be fulfilled prior to the Minister making a declaration that a building is to become a National Monument.

29. The first condition relates to the purpose of declaration as a monument. While under ***Section 25 (1) (b)*** it must be established that the immovable property is of historical interest, in ***Section 25 (1) (c)*** the site to be protected as a monument must have a buried monument or object of archaeological or paleontological interest. The second condition is the requirement that there must be consultation with the National Museum and the third requirement is consideration of any objections raised. The fourth condition is in ***Section 25***

3. where the Minister must invite and consider objections.

30. The Minister having declared that he was exercising powers under ***Section 25***

1. ***(b)*** and ***(c)*** of the Act, a pertinent issue for our determination is whether the Minister considered the suit property to be of historical interest and or having a monument buried therein or if the suit property was an object of archaeological or paleontological interest. Other pertinent issues are whether there is evidence on record showing that the Minister consulted with the National Museums and whether he considered the objections raised by the appellant.

31. On record, there are two items of evidence that point towards consultation with the National Museums. The first is the contents of **Gazette Notice No. 3204** which states that the Minister had

consulted the National Museum and that he considered the suit property to be of historical interest. The second item is the letter dated 16th July 2008 from the Ministry of State for National Heritage & Culture stating that the declaration of the suit property as a "cultural heritage" was undertaken after comprehensive feasibility studies undertaken by the National Museum. Based on these two items of evidence, we are satisfied that there was consultation between the Minister and the National Museums of Kenya.

32. It is not in dispute that the appellant lodged written objection to the Minister by letters dated 25th April 2008 and 9th May2008. By letter dated 19th August 2008, the Minister's response to the appellant's objection was to convene and call for a meeting to be held on 21st August 2008 in the Office of Director, Sites and Monuments at the National Museums of Kenya. A very brief meeting was held as the officers of National Museum who were present indicated that they had no knowledge as to why the meeting was convened.

33. It is the 1st, 2nd and 3rd respondents case that the meeting held on 21st August 2008 was the meeting at which the appellant was given an opportunity to be heard and the rules of natural justice were followed. It is the respondents contention that during the meeting held on 21st August 2008, the appellant gave an ultimatum to the Minister to either withdraw the Gazette Notice or further action shall be taken; that in view of the ultimatum, there was no need for the Minister to engage with the appellant and all that was required was for the Minister to consider the objection and confirm the declaration of the suit property as a National Monument. It is the respondents' submission that the Minister did consider the appellant's objection and issued **Legal Notice No. 128** declaring the suit property a National Monument.

34. The appellant contends that the meeting of 21st August 2008 was not a meeting at which the Minister considered its objection. We agree with the appellant for the following reasons. First, neither the Minister nor his representative attended the meeting; second, the officers from National Museums who were present did not know why the meeting was convened; third, the grounds for objection as raised by the appellant were never discussed and fourth, National Museum and or its officers are not the competent organ to receive and consider any objections under ***Section 25 (1)*** **of the Act**.

35. The trial judge in appraising the meeting held on 21st August 2008 concluded that the appellant cannot argue that the Minister did not consider its objection.

The learned judge came to a finding that a consultative meeting was held and inspite of the objections raised by the appellant, the Minister was unmoved. With respect, the learned judge erred and we do not agree with his finding. In our considered view, whatever transpired at the meeting held on 21st August 2008 was *ultra vires*, null and void because such a meeting or procedure is not provided for in law. The empowering provisions in ***Section 25 of*** the **National Museums & Heritage Act** does not provide for a procedure for a meeting with the National Museum of Kenya for purposes of considering objections. Objections under the Act are directed to the Minister pursuant to ***Section 25 (3)*** of the Act and it is the Minister to consider the objections. We do note that in ***Section 25 (5),*** it is provided that no declaration made and gazetted by the Minister may be revoked without the consent of the National Museums. The consent of the National Museum under ***Section 25 (5)*** does not envisage a meeting with an objector.

36. The critical issue in this appeal is whether the Minister did in fact consider the objection lodged by the appellant? Was the appellant given an opportunity to be heard in relation to its objection? Was the appellant entitled to be heard? Is the Minister obliged to give reasons for his decision declaring the suit property a National Monument?

37. A right to be heard is a fundamental right and as this Court stated in the case of **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others**, **Nyeri C.A. No. 18 of 2013:**

"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law".

38. The existence of a right to be heard is uncontroversial where the interest that gives rise to the right is a legal right or interest. For instance, if a decision-maker proposes to compulsorily acquire a house to which someone holds the legal title; in the absence of a statutory intention to the contrary there is no difficulty in implying a common law duty for the decision-maker to consult with the legal owner before a final decision is made to compulsorily acquire the property.

39. In the instant case, the appellant has a proprietary interest in the suit property. There is no evidence on record to show that the appellant was heard or given an opportunity to be heard in relation to its objections. The Ministry's letter dated 16th July 2008 indicates that there was a comprehensive feasibility study conducted by the National Museums. From this letter, it is apparent that the Minister gave a hearing to one party and did not hear the proprietor of the suit property.

40. The trial judge erred when he failed to appreciate that the appellant was not given an opportunity to be heard and the principle of *audi alterem partem* was not observed. Under common law the Minister is required to have accorded the appellant an opportunity to be heard in relation to the objection that had been lodged. We note that under ***Section 64*** of the **National Museums & Heritage Act**, the burden to prove that the suit property is not of historical interest is on the appellant. How could the appellant company have discharged this burden when it had not been given an opportunity to be heard? In our view, failure to accord the appellant the opportunity to be heard denied the appellant company the opportunity to exercise its right under ***Section 64*** of the Act.

41. The appellant contends that its constitutional right to protection of private property was violated when the suit property was declared a National Monument. The evidence on record shows that the appellant was never given the comprehensive feasibility study conducted by the National Museum in relation to the suit property. The Constitution of Kenya in particular ***Article 47*** makes provision for fair administrative action. ***Section 4 (3) (b)*** of the **Fair Administrative Act** stipulates that 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 an opportunity to be heard and to make representations in that regard. These provisions are given effect by the **Fair Administration Act**. ***Section 4 (3) (g)*** of the Act requires the person affected to be given information, materials and evidence relied upon in making the decision or taking the administrative action.

42. In Gazette Notice **No. 3204** of 25th April 2008, the Minister stated that the suit property was of historical interest. It is the appellant's contention that the suit property has no historical interest; that there is confusion of historical facts as to who is the actual "Desai" whose residence the Minister claims to have historical interest. Counsel for the 1st respondent submitted that Mr. Desai was a prominent person who was even member of the **LEGCO**. There is no evidence on record to support this submission and in our view this is a statement from the bar with no evidential value.

43. As to whether the Minister considered the objections raised, ***Section 25 (3)*** of the **National Museums & Heritage Act** imposes a duty on the Minister to consider the objections received. Our re-evaluation of the evidence on record has failed to reveal any written note, memorandum or letter by the Minister showing that he considered the appellant's objection and or made any decision relating to the objections. The 1st, 2nd and 3rd respondents contend that **Legal Notice No. 128** is proof that the appellant's objection was considered by the Minister. The trial judge held that the Minister was unmoved by the objection. In the absence of any written note, letter or document from the Minister, can a conclusive inference be drawn that the Minister did in fact consider the appellant's objection and he was unmoved?

44. Related to the above question is whether the Minister was under duty to give reasons for his

decision to declare the suit property a National Monument. At common law, there is no duty to give reasons. This was stated in ***Regina –v-***

Secretary of State for the Home Department Exparte Doody (1994) 1 AC 531 where Lord Mustill at 564 para. E-F expressed himself as follows:

> **"I accept without hesitation – that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied."**

45. Under ***Article 47 (2) of the Constitution*** as read with the provisions of the ***Fair Administrative Actions Act of 2015***, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions. ***(See also Section 45 (2) (a) and (b) of the Employment Act No. 11 of 2007).*** In ***Judicial Service Commission -v- Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014,*** Githinji JA in considering the duty to give reasons for administrative action in light of ***Article 47 (2) of the Constitution*** expressed that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause.

46. ***Article 47 (2)*** of the ***Constitution*** as read with ***Sections 4 (3) (d)*** and ***5 (d) (i)*** and ***6 (2) (a)*** and ***6 (4)*** of the **Fair Administrative Action Act** require written reasons for administrative decision. ***Section 6 (1)*** as read with ***Section 6 (2)***

(a) of the Act stipulates that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary and such information shall include reasons for which the action was taken and any relevant documents relating to the matter. ***Sections 3(d)***, ***5 (d) (i)*** and ***6 (2) (a)*** and ***6 (4)*** of the **Fair *Administrative Act*** encompass a statutory obligation upon decision-makers to give written reasons for their decisions. This contrasts with common law that had stopped short of requiring reasons for all administrative decisions.

47. In the instant case, in the absence of any written reasons explaining the Minister's decision that the suit property is of historical interest and in the absence of a written determination of the objection raised, we come to a finding that there is no proof that the Minister did in fact consider the appellant's objections that had been lodged on 9th May 2008. Our decision is fortified by the provisions of **Section 6 (4*)*** of the **Fair Administrative Action Act** which stipulate that if reasons for decision are not given, a presumption arises that the decision was taken without good reason. We accordingly find that **Legal Notice No. 128** dated 17th September 2008 is null and void as having been issued when the Minister had not considered the objection that had been lodged by the appellant.

48. A further ground of appeal urged by the appellant is that trial court erred in holding that constitutionality of the Minister's decision cannot be questioned in judicial review proceedings. In support of this submission, the appellant cited the decision of this Court in **Rashid Odhiambo Allogoh & 245 others & Haco Industries Ltd. (Civil Appeal No. 110 of 2001**) where it was stated that the availability of other lawful causes of action is no bar to a party who alleges a contravention of his rights under the Constitution.

49. The respondents submitted that judicial review proceedings cannot be used to raise constitutional issues; that the proper way to raise a constitutional issue is by way of a constitutional petition and not judicial review. It was further submitted that if the appellant's constitutional right to protection of private property was violated, the appellant had an alternative remedy under ***Section 35 (1)*** of the **National Museums & Heritage Act** and it should pursue the remedy in ***Section 35 (1)*** of the

Act. In support, the respondents cited the decisions in **Narok County Council -v- Trans Mara County Council & Another (Civil Appeal No. 25 of 2000);** and **Speaker of National Assembly -v- Karume, Civil Application No. NAI 92 of 1992.**

50. ***Section 35 (1)*** of the **National Museum & Heritage Act**, provides as follows:

> **"Where private land is included in a protected area, and the development or other use of that land by the owner or occupier thereof is prohibited or restricted by the Minister or by reason of any steps taken by the Minister or by the Board with the authority of the Minister, on or in relation to the private land, the rights of the owner or occupier are disturbed in any way, or damage to the land or to crops, trees, buildings, stock or works therein or thereon is caused, the Government shall on demand pay to the owner or occupier such compensation as is fair and reasonable having regard to the extent of the prohibition, restriction, disturbance or damage and to the interest of the owner or occupier of the land."**

51. We have considered the rival submissions on the issue of an alternative remedy. The respondents' submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the **2010 Constitution**. The law has now changed and the provisions of ***Article 22 (3)*** and ***22 (4)*** of the ***Constitution*** as read with ***Article 47*** of the ***Constitution*** and ***Sections 5 (2) (b)*** and ***(c)*** and ***Section 7 (1) (a)*** and ***(2)*** of the **Fair Administrative Action Act** suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by Petition under the Rules made pursuant to ***Article 22 (3)*** of the ***Constitution***. (See ***Legal Notice No. 117/2103 Protection of Rights and Fundamental Freedoms - Practice and Procedure Rules, 2013).***

52. Of significance is ***Section 5 (2)*** of the **Fair Administrative Action Act** which stipulates that:

> ***"(2) Nothing in this section shall limit the power of any person to –***
>
> ***(a)…..***
>
> b. ***apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or***
>
> c. ***institute such legal proceedings for such remedies as may be available under any written law."***

53. ***Article 47*** of the Constitution as read with the provisions of ***Section 5 (2)*** of the **Fair Administrative Action Act** establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to ***Section 9 (2),***

3. and ***(4)*** of the **Fair Administrative Action Act**, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of ***Article 47*** of the ***Constitution*** and

Section 12 of the **Fair Administrative Action Act**. The common law principles of administrative review have now been subsumed under ***Article 47*** Constitution and ***Section 7*** of the **Fair Administrative Action Act**. In this regard, there are no two systems of law regulating administrative action - the common law and the Constitution - but only one system grounded in the Constitution. The courts' power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated **Fair Administrative Action Act** and ***Article 47*** of the Constitution.

54. The law on judicial review of administrative action is now to be found not exclusively in common

law but in the principles of ***Article 47*** of ***Constitution*** as read with the **Fair Administrative Action Act of 2015**. The Act establishes statutory judicial review with jurisdictional error in ***Section 2 (a)*** as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in ***Articles 47*** and ***10 (2) (c)*** of the ***Constitution***. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the **Fair Administrative Action Act** and the Constitution. As correctly stated by the High Court in **Martin Nyaga Wambora v Speaker of the Senate [2014]e KLR** it is clear that they -***Articles 47*** and ***50(1)***- have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, ***Section 7 (2) (l)*** of the **Fair Administrative Action Act** provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in **R v Home Secretary; Ex parte Daly [2001] 2 AC 532**. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in ***Article 24 (1) (b)*** and ***(e)*** of the ***Constitution*** *to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of ***Article 47*** of the Constitution as read with the **Fair Administrative Action Act** reveals the implicit shift of judicial review to include aspects of merit review of administrative action**.** ***Section 7 (2) (f)*** of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; ***Section 7 (2) (j)*** identifies abuse of discretion as a ground for review while ***Section 7 (2) (k)*** stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. ***Section 7 (2) (k)*** subsumes the dicta and principles in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223** on reasonableness as a ground for judicial review. ***Section 7 (2) (i) (i)*** and ***(iv)*** deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in ***Section 7 (2) (i)*** that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in ***Section 7 (2)*** of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In **Mbogo & another -v- Shah (1968) EA 93 at 96,** this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a

manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in **Mbogo -v- Shah *(supra)*** and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the ***Fair Administrative Actions Act***, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. ***Section 11 (1) (e)*** and ***(h)*** of the **Fair Administrative Action Act** permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

59. In the instant case, the 1st, 2nd and 3rd respondents submitted that the Minister had statutory power under ***Section 25 (1) (b) and (c) of the National Museum & Heritage Act*** to declare the suit property a National Monument. The learned judge made the same conclusion stating that the Minister acted within his power and his decision was not *ultra vires*. This conclusion by the learned judge was a misapprehension of the issue before the court. The issue was not whether or not the Minister had statutory power to declare the suit property a National Monument; it was not disputed that the Minister had such powers under ***Section 25 (1) (b) and (c***) of the ***National Museum & Heritage Act*** . The legal issue was whether the suit property had any historical, cultural, archaeological or paleontological interest that could lead the Minister to invoke his powers under ***Section 25 (1) (b) and (c) of the Act.***

60. The 1st, 2nd and 3rd respondents were not able to show to our satisfaction any evidence on record that justified the Minister to invoke his statutory powers under the Section 25 (1) (b) and (c) of the Act. There is no evidence on record revealing why the Minister was of the view that the suit property was of historical interest; there is no evidence that any monument had been buried in the suit property. Failure to disclose the evidence in support of the purpose stated in ***Section 25 (1) (b)*** or ***(c)*** vitiates the Minister's decision and this is an unreasonable exercise of statutory power, abuse of discretion and irrationality in decision making.

61. In totality, our re-evaluation of the evidence on record and applicable law leads us to come to the conclusion and make a finding that this appeal has merit and is hereby allowed. We set aside the ruling of the High Court dated 21st July 2011 and all consequential orders. We hereby issue an order of certiorari as prayed for in the appellant's Amended Notice of Motion dated 8th February 2011. For avoidance of doubt, **Legal Notice No. 128** dated 17th September 2008 declaring the suit property as a National Monument be and is hereby quashed. The 1st, 2nd and 3rd respondents shall bear the appellant's costs in this appeal and at the High Court. No order as to costs against the 4th and 5th respondents.

Dated and delivered at Nairobi this 4th day of March, 2016

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

……...……

JUDGE OF APPEAL

J. OTIENO-ODEK

……...…….…..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR