



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 29 OF 2018

ACCRA TRADE CENTRE LIMITED.....APPLICANT

=VERSUS=

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2 ND RESPONDENT

GULED HOUSING COMPANY LIMITED.....INTERESTED PARTY

JUDGMENT

1. On 22/5/2018, the ex parte applicant, Accra Trade Centre Limited (**the applicant**) initiated judicial review proceedings pursuant to which, on 19/6/2018, it was granted leave to bring a substantive motion to ventilate its grievances relating to a decision by the National Land Commission (**the 1st respondent**) made on 8/3/2018 and conveyed to the applicant through a letter dated 11/4/2018. The applicant subsequently brought a substantive notice of motion dated 13/7/2018 seeking the following orders:

(i) An order of certiorari to remove into this honourable court for purposes of quashing the decision of the 1st respondent made during its review committee meeting on the 8th March 2018 vide minute 1/5/3/2018-iv reversing its earlier determination of review of grants and disposition of public land, Land Reference Number 209/6497 and Land Reference Number 209/13769/1 contained in a letter dated 11th April 2018.

(ii) An order of probation directed against the 2nd respondent prohibiting them from acting on the decision by the 1st respondent contained in a letter dated 11th April 2018 with regard to the determination of review of grants and disposition of public land, Land Reference Number 209/6497 and Land Reference Number 209/13769/1

(iii) An order of mandamus directed against the 2nd respondent compelling them to comply with the initial determination on the review of grants and dispositions of LR 209/6497 and 209/1369/1 dated 20th December, 2016. To wit, it was ordered that property LR No 209/6497 is, and has always been a public utility, planned and alienated as a public access road. Any allocation of the same is thus a nullity to the extent that it is illegal ab initio. Any title will be revoked to effect this determination.

(iv) Costs of and incidental to the application be provided for.

(v) Such further and other reliefs that the honourable court may deem just and expedient to grant.

2. The motion was supported by the applicant's statutory statement dated 21/5/2018 and a verifying affidavit sworn by **James Njuguna Ngururi** on 13/7/2018. That application is the subject of this Judgment.

Applicant's Case

3. The case of the applicant was that it was the registered proprietor of Land Reference Number 209/4349 measuring about ½ of an acre and situated along Ronald Ngala Street within the Central Business District of the Nairobi City County. The public road serving its property was illegally hived off and allocated to the two interested parties herein, Guled Housing Company Limited and Social Services League, respectively, through two separate grants. Aggrieved by the allocations, it made a complaint to the National Land Commission (**the 1st respondent**) and sought a review of the two grants under Article 67(2)(e) of the Constitution and Section 14 of the National Land Commission Act. All the parties interested in the matter were invited and heard by the 1st respondent. On 20/12/2016, the 1st respondent rendered a decision to all the parties, in which it found that Land Reference Number 209/6497 held by Guled Housing Company Limited (**the 1st interested party**) was a public road which was not available for allocation. The 1st respondent consequently recommended that Land Reference Number 209/6497 held by the 1st interested party was a public utility, planned and alienated as a public access road and the allocation of the same was a nullity *ab initio*. It further recommended revocation of the said title by the Chief Land Registrar (**2nd respondent**).

4. The applicant further contended that after sixteen (16) months, through a letter dated 11/4/2015, the 1st respondent, without conducting any hearing or inviting the applicant to any hearing, wrote a letter purporting that the 1st respondent had on 8/3/2018 reversed its earlier finding and had now found that Land Reference Number 209/6497 had never been a public road. The applicant contended that the decision contained in the letter dated 11/4/2018 was reached arbitrarily to the exclusion of the applicant because the applicant was neither made aware nor invited to submit during the meeting at which it was made. The case of the applicant was that the decision violated the rules of natural justice as set out under Articles 47 and 50 of the Constitution, Section 4 of the Fair Administrative Action Act and Section 14 of the National Land Commission Act.

1st Respondent's Case

5. The 1st respondent responded to the motion through a replying affidavit sworn on 20/5/2019 by Brian Ikol. He deposed that the determination by the 1st respondent dated 20/12/2016 was made after the 1st respondent concluded a hearing guided by the principles laid out under Articles 47 and 50 of the Constitution and after the 1st respondent had accorded all parties a fair chance to be heard and to put forth their respective cases. He added that subsequent to the making of the determination dated 20/12/2016, the 1st respondent "got hold of further information" indicating that the public road which was the subject of the complaint had been officially closed and allocated to the two interested parties herein. The portion allocated to the 1st Interested Party had been surveyed and registered as Land Reference Number 209/6497 while the portion allocated to the 2nd Interested Party was yet to be registered. In light of the above information, the 1st respondent held a meeting on 8/3/2018 and changed its earlier finding to the effect that the "grants" were acquired in an unlawful manner. It consequently upheld the legality of Land Reference Number 209/6497 and its decision was communicated to the parties vide a letter dated 11/4/2018.

6. Mr Ikol further deposed that the proceedings of the 1st respondent were inquisitorial in nature and therefore the rules of adversarial proceedings did not apply. He urged the court to dismiss the application.

2nd Respondents' Case

7. The 2nd respondent opposed the motion through grounds of opposition dated 24/4/2019. The case of the 2nd respondent was that the application did not disclose any cause of action against the 2nd respondent as no wrong doing was attributed to the 2nd respondent. The 2nd respondent added that the applicant had failed to adhere to the mandatory requirements of Section 13A of the Government Proceedings Act in that it had failed to serve a statutory notice.

1st Interested Party's Case

8. The 1st interested party opposed the application through a replying affidavit sworn on 18/2/2018 by Mohamed Hasan Maalim. The deponent set out the registration history of Land Reference Number 209/6497, indicating that the land was a product of a resurvey contained in Grant Number 86112 which was registered on 22/5/2001 in the name of Nararashi Wholesalers (Kenya) who on the same day transferred the title to Castle Brewing Kenya Limited. The resurvey incorporated the contested public road. The title was subsequently transferred to Karume Investments Limited for Kshs 200,000,000 on 201/12/2005. On 14/12/2007, it was transferred to the 1st interested party at a consideration of US Dollars 5,178,000.

9. Mr Maalim further deposed that the 1st respondent's decision of 20/12/2016 had failed to take into account various material facts, including: (i) closure of the 30 feet lane between Land Reference Number 209/798 and 209/4349, and the Gazette Notice relating to the closure; (ii) the approval of the closure by the Director of Surveys; and (iii) the amalgamation of Land Reference Number 209/3538 with the suit property.

10. The deponent added that under Section 6 of the National Land Commission Act, the 1st respondent had jurisdiction to review its decisions upon discovery of new evidence. He urged the court to dismiss the application.

2nd Interested Party's Case

11. The 2nd Interested Party opposed the application through a replying affidavit sworn on 15/7/2019 by A G Chandrasekaran. He deposed that the 2nd Interested Party was initially the lawful proprietor of Land Reference Number 209/3538 which was served by a 30 feet lane separating their said parcel and Land Reference Number 209/4349. The 2nd interested party applied to the Commissioner of Lands and was allocated half of the said 30 feet lane. The remaining half of the lane was offered to Kenya Shell Limited who were the proprietors of Land Reference Number 209/4349 but they rejected the offer. Consequently, the 2nd interested party surrendered the title relating to Land Reference Number 209/3538 and caused the land to be resurveyed to incorporate the closed lane. The new parcel was assigned Land Reference Number 209/6498. The other half of the 30 feet Lane was surveyed as Land Reference Number 209/6497.

12. The deponent further deposed that in 2015, the applicant made a complaint to the 1st respondent, alleging illegal conversion of the public lane into private properties. The 1st interested party considered the complaint and rendered a determination dated 20/12/2016 holding that the part of Laxim Lane which had been surveyed as Land Reference Number 209/6497 was a public road and was not available for allocation to the 1st Interested Party. By a subsequent letter dated 11/4/2018, the 1st respondent communicated to the parties that following emergence of new evidence, it held a review meeting on 8/3/2018 and reviewed its decision of 20/12/2016. The deponent added that there was no legal duty on the 1st respondent to hear the *ex parte* applicant again upon emergence of the new information. It was the 2nd interested party's position that the 1st respondent had the jurisdiction and power to review its decision of 20/12/2016, hence the decision contained in the letter dated 11/4/2018 was proper and valid. The 2nd interested party urged the court to dismiss the application.

Submissions by the Applicant

13. The applicant filed written submissions dated 16/6/2018 and made brief oral highlights at the plenary on 3/12/2019 through its counsel,

Mr Muchemi. Counsel submitted that the sole issue for determination in the application was whether the decision communicated by the 1st respondent in its letter dated 11/4/2018 was reached with due regard to fair hearing for all parties involved. Counsel argued that the centrality of a fair hearing is manifested in its codification under Article 50 of the Constitution. He added that the right to a fair hearing is at the heart of every judicial determination and is a cardinal rule premised on the principle of natural justice. Reliance was placed on the decision in **Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another [2019] eKLR**.

14. Counsel added that, in exercise of its powers, the 1st respondent was mandated to give every person who appeared before it with an interest in any grant or disposition a notice of the review and an opportunity to appear before it and to inspect any relevant documents. He argued that the requirements of Article 50 were not met and the decision contained in the letter dated 11/4/2018 was reached arbitrarily to the exclusion of the applicant.

15. Counsel for the applicant added that under Article 47 of the Constitution, the applicant was entitled to an administrative action that was fair and reasonable. He argued that the decision contained in the letter dated 11/4/2018 was arrived at in breach of the requirements of Article 47 of the Constitution. Reliance was placed on the decision in **Tarak Khawaja & 5 others v Registrar of Societies & 9 Others [2017] eKLR** and **Mbaki & Others v Macharia & Another [2005] 2 EA 206**. Counsel urged the court to allow the application.

Submissions by the 1st Respondent

16. The 1st respondent filed written submissions dated 22/8/2019 and made oral highlights at the plenary through its counsel, Mr Wahome. Counsel submitted that two issues fell for determination in the application: (i) Whether the 1st respondent's decision as contained in the Letter dated 11/4/2018 was reached with due regard to fair hearing for all parties; and (ii) Whether the orders sought should issue.

17. Mr Wahome argued that the focus of judicial review is the decision-making process and not the merits of the decision. Reliance was placed on, among others; (i) **Peninah Madako Kilishawa v Independent Electoral Boundaries Commission (IEBC) and 2 others (2015) eKLR** and **Municipal Council of Mombasa v Republic & Umoja Consultants Limited; Civil Appeal No 185 of 2001**.

18. Counsel argued that the applicant having fully participated in the proceedings which led to the first determination, the 1st respondent was not under any obligation to give the applicant a further right of hearing. He added that the proceedings before the 1st respondent were conducted under Section 14 of the National Land Commission Act; were inquisitorial in nature; and were meant for the sole determination of whether public land was acquired in an unlawful manner or not. Counsel urged the court not to interpret the right to fair administrative action, and by extension, the right to fair hearing, to mean a full adversarial hearing. Relying on the decision in **Joseph Mbalu Mutava v Attorney General & Another [2014] eKLR**, counsel submitted that what constitutes procedural fairness in any hearing depends on the circumstances of each particular case, the nature of the inquiry, and the rules under which the tribunal is acting. Counsel added that the 1st respondent fully complied with the requirements of Section 6(2) of the Fair Administrative Action Act because it gave written reasons for its decision to review its earlier determination.

19. On whether the orders sought should be granted, counsel submitted that the impugned decision was made following discovery of new evidence which made the 1st respondent's earlier decision untenable as it amounted to an infringement on the rights of the 1st and 2nd interested parties to own property under Article 40 of the Constitution. He urged the court not to grant the judicial review orders sought.

20. The 2nd respondent neither filed written submissions nor made oral submissions at the plenary.

Submissions by the 1st Interested Party

21. The 1st interested party itemized the following as the four issues falling for determination in the application: (i) What is the constitutional and statutory mandate of the 1st respondent? (ii) What is the nature of proceedings by the 1st respondent? (iii) Whether the 1st respondent can correct and/or review its determination; and (iv) Is the applicant entitled to the prayers sought?

22. Ms Lipwop, counsel for the 1st interested party submitted that the mandate of the 1st respondent was set out in Article 67 of the Constitution and Section 5 of the National Land Commission Act. She added that the 1st Interested party duly published a public notice on the review of the interested parties' titles; invited the applicant to appear before it; heard all the parties as provided under Section 14(3) of the National Land Commission Act; rendered a determination dated 20/12/2016; and finally rendered a review of the said determination.

23. Counsel further submitted that under Section 6(2) of the National Land Commission Act, proceedings before the 1st respondent were inquisitorial and not adversarial in nature. On whether or not the 1st respondent had jurisdiction to review its decision dated 20/12/2016, counsel submitted that Section 6(4) gave the 1st respondent jurisdiction to make consequential orders and the power to make consequential orders included jurisdiction to review its determination to correct the record. Counsel urged the court to consider that there was an error (being the omission of the fact that there was an actual gazette notice number 2182 confirming closure of the public road) on the record which required to be rectified and failure to rectify the error would have violated the purpose of the 1st respondent's statutory powers under Section 3 of the National Land Commission Act and the framework in Articles 40 and 60 of the Constitution.

24. On whether the order of *certiorari* should be granted, counsel for the 1st interested party submitted that the contention that the decision conveyed in the letter dated 11/4/2018 was rendered contrary to Article 47 of the Constitution and in breach of the applicant's right to fair hearing was without any merit, misleading, and founded on a mis-appreciation of the law and evidence on record. Counsel added that the applicant was duly invited through an invitation dated 18/11/2015. It was argued that the 1st respondent had substantially complied with the requirements of Article 47 of the Constitution. Relying on **Russel v Duke of Norfolk [1949] 1 ALL ER**, counsel for the 1st interested party submitted that the requirements of natural justice vary depending on the circumstances of each case, the nature of inquiry, the rules under which the tribunal is acting, and the subject matter that is being dealt with. Counsel invited the court to be guided by the decision in **Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison (2007) (EA 354** and decline to grant the order of *certiorari*.

25. Ms Lipwop added that all parties affected by the review proceedings were substantially heard and the two determinations made by the 1st respondent were within the scope of that review. She further submitted that all the affected parties were given reasons for the review of the earlier determination by the 1st respondent. Further reliance was placed on the decision in **Karaini Investments Limited v National Land Commission [2018]eKLR** in urging the court not to grant the order of *certiorari*.

26. On the plea for an order of prohibition, Ms Lipwop argued that an order of prohibition would issue only if the applicant established that the impugned decision was illegal, irrational and or improper procedurally, a burden which the applicant had failed to discharge.

27. On the applicant's plea for an order of mandamus, the 1st interested party argued that there was no evidence that the 2nd respondent had failed to perform a statutory duty, hence there was no basis for the plea for an order of mandamus. The 1st interested party urged the court to dismiss the application.

Submissions by the 2nd Interested Party

28. The 2nd interested party filed written submissions dated 18/10/2019 and made oral highlights at the plenary through Ms Ogula. She identified the following as the three key issues falling for determination in the application: (i) Whether the 1st respondent violated the provisions Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act as read together with Section 14(3) of the National Land Commission Act; (ii) Whether the *ex parte* applicant's right to natural justice was violated; and (iii) What are the appropriate orders in the matter?

29. Ms Ogula submitted that Section 4(6) of the National Land Commission Act exempted the 1st respondent from the provisions of Section 4(3) of the Fair Administrative Action Act, hence, to the extent that the present application was based on the provisions of Section 4(3) of the Fair Administrative Action Act, the same was misconceived and without merit.

30. Counsel added that the procedure provided for review of grants and dispositions was not an adversarial process but an inquisitorial one, where, besides hearing the parties affected, the 1st respondent was empowered to gather information under Section 6 of the National Land Commission Act. It was further submitted that the National Land Commission Act did not place a duty on the 1st respondent to recall all interested parties every time new evidence came up. Counsel contended that the new evidence which necessitated the second determination was to be considered as part of the complaint alongside all the other pieces of evidence which informed the 1st decision.

31. Relying on the Supreme Court of Rhode Island case of **In re-Raymond Denisewich No. 94-49-Appeal, 634 A . 2d1194 (1994)**, counsel for the 2nd interested party submitted that the 1st respondent had inherent powers to reconsider its own decision as a necessary consequence in the exercise of its statutory mandate. Counsel argued that denying the 1st respondent the right to correct its errors and injustice would run counter to the public interest.

32. On whether the applicant's right to natural justice was violated, the 2nd respondent relied on the decision in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** and submitted that the requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, and the subject matter of the inquiry. It was argued that to the extent that the applicant was heard by the 1st respondent and there was no legal requirement that all parties be invited every time fresh evidence was obtained, there was no basis for the allegation that the rules of natural justice were violated.

33. Counsel further submitted that the orders of *certiorari*, prohibition and mandamus which the applicant sought should not be granted. She argued that an order of prohibition restrains abuse or excess of jurisdiction and neither had been demonstrated against the 2nd respondent. Reliance was placed on the decision in **Kenya National Examination Council v Republic *ex parte* Geoffrey Gathenji Njoroge & 9 Others [1997]eKLR**.

34. On the plea for an order of mandamus, counsel submitted that the order issues to compel a party who has refused to perform a legal duty to the detriment of a party who expected the legal duty to be performed. Relying on the High Court decision in **Republic v National Employment Authority & 3 Others *ex parte* Middle East Consultancy Services Limited [2018] eKLR**, counsel for the 2nd interested party argued that the applicant had not established that the 2nd respondent was under a legal duty to comply with the decision of the 1st respondent dated 20/12/2016 nor that it received a demand to do so, had reasonable time to comply, and either expressly or impliedly refused to comply, and that there were no other remedies available to the applicant to enforce compliance. The 2nd interested party urged the court to dismiss the application.

Analysis & Determination

35. I have considered the motion together with the statement of facts, the verifying affidavit, and all the responses thereto. I have also considered the parties' respective submissions, the relevant constitutional and legal frameworks, and the jurisprudence relevant to the key questions in the motion. Parties did not file a common statement of issues. However, having considered the parties' pleadings and submissions, the following are the three key issues falling for determination in this motion: (i) Whether the decision of the National Land Commission conveyed in the Letter dated 11/4/2018, reviewing and rescinding its earlier decision dated 20/12/2016, violated the applicant's right to fair administrative action and the right to fair hearing; (ii) If the answer to the above question is in the affirmative, is the applicant entitled to any of the prayers sought in the motion; and (iii) what order should be made in relation to costs of this suit? I will make brief analysis and pronouncements on the three issues sequentially in the above order.

36. The first issue is whether the decision of the National Land Commission (hereinafter referred to as **the NLC**) conveyed in the letter dated 11/4/2018, reviewing and rescinding its earlier determination dated 20/12/2016, violated the applicant's right to fair administrative action and the right to fair hearing. The right to fair administrative action is secured under Article 47 of the Constitution which 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.*

37. Subsequent to the promulgation of the Constitution of Kenya 2010, Parliament enacted the Fair Administrative Action Act to operationalize the constitutional framework on fair administrative action. Section 4 of the Fair Administrative Action Act contains the following framework on key substantive and procedural ingredients of fair administrative action:

- (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 of 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-*
 - i. *Attend person or in the company of an expert of his choice;*
 - ii. *be heard;*
 - iii. *cross-examine person who give adverse evidence against him; and*
 - iv. *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 47 of the Constitution, the administrator may act in accordance with that different procedure*

38. The right to fair hearing in a dispute either of a Civil or Criminal nature is contained in Article 50 (1) of the Constitution which provides as follows :

50. (1) *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

39. The National Land Commission is a commission established under Article 67 of the Constitution which sets out the following as its constitutional functions:

67. (2) *The functions of the National Land Commission are—*
 - a) *to manage public land on behalf of the national and county governments;*

- b) to recommend a national land policy to the national government;*
- c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;*
- d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;*
- e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;*
- f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;*
- g) to assess tax on land and premiums on immovable property in any area designated by law; and*
- h) to monitor and have oversight responsibilities over land use planning throughout the country*

40. The National Land Commission was operationalized through the enactment of the National Land Commission Act (“the NLC Act”). Among the legal frameworks in the Act is Section 14 which contains the procedural framework on how the National Land Commission was to carry out its mandate under Article 67(2) (e) of the Constitution. Section 14 of the National Land Commission Act provides as follows:

14. (1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear

before it and to inspect any relevant documents.

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

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

41. It is apparent from the foregoing constitutional and statutory frameworks that the National Land Commission was commanded by the Constitution to be guided by the constitutional principles on fair administrative action under Article 47. It is also clear from the wording of Section 14 of the National Land Act that the Legislature intended that the National Land Commission would adhere to the principle of fair hearing as set out under Article 50(1) of the Constitution.

42. The gist of the applicant’s complaint is that it made a complaint to the National Land Commission under Article 67(2) (e) of the Constitution, challenging the validity of Grant Number 86112 in which Land Reference Number 209/6497 was comprised. The said land was a public road known as Laxmi Lane before part of it was allocated to the 1st interested party. The applicant contended that it owned an adjacent property, Land Reference Number 209/4349, which was hitherto served by the alienated public road. He sought a finding and recommendation to the effect that Land Reference Number 209/6497 was a public road.

43. Further the case of the applicant is that, the National Land Commission published a notice and conducted a public hearing within the frameworks of the Constitution and the relevant statutes. This included taking of evidence. It thereafter rendered its findings and recommendation to the effect that the suit property was a public road. It recommended revocation of the 1st interested party’s Grant. Its decision was dated 20/12/2016 and was communicated to all the parties. About sixteen months later, the Vice Chairperson of the National Land Commission wrote to the parties a letter dated 11/4/2018 stating that the National Land Commission had on 8/3/2018 reviewed its earlier decision and had now made a finding to the effect that the suit property was not a public road.

44. It is not in dispute that the applicant was not invited to the hearing which culminated in the 2nd decision by the Commission, the decision which is now impugned. There is no evidence of any public notice issued in relation to the hearing which culminated in the impugned decision. There are no minutes of the proceedings or meeting in which the impugned decision was made. There is no evidence of

any fresh public hearing leading to the impugned decision.

45. The centrality of the right to fair administrative action under Article 47(1) of the Constitution was echoed by Githinji JA in **Judicial Service Commission v Mbalu Mutava & Another [2015]eKLR** in the following words:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance and accountability.

46. The applicant was the complainant in the grants review exercise which culminated in the decision of 20/12/2016. Articles 47 and 50 of the Constitution, Section 4 of the Fair Administrative Action Act and Section 14 of the National Commission Act required the National Land Commission to give the applicant notice and a chance to be heard if the process of changing its first decision was to be undertaken. The first decision was both a constitutional and a statutory exercise governed by clear constitutional and statutory legal frameworks. The National Land Commission blatantly disregarded the dictates of the Constitution and the relevant statutes in its process of arriving at the impugned decision. It is therefore my finding that the National Land Commission (1st respondent) violated the applicant’s right to fair administrative action and the right to fair hearing. The consequence is that the National Land Commission’s decision contained in the Letter dated 11/4/2018 purporting to review its earlier decision dated 20/12/2016 is illegal, null and void.

47. I now turn to the question as to whether the applicant is entitled to any of the prayers sought in the motion. The first prayer is a plea for an order of certiorari quashing the impugned decision. Having found that the National Land Commission blatantly violated the requirements of Articles 47 and 50 of the Constitution, Section 4 of the Fair Administrative Action Act, and Section 14 of the National Land Commission Act, I would grant the order of *certiorari* in terms of prayer 1 of the notice of motion dated 13/7/2018.

48. Prayer 2 relates to an order of prohibition restraining the 2nd respondent against acting on the quashed decision. Looking at the way the prayer was framed, it is clear that this is a consequential relief necessary for avoidance of confusion and/or disorder. It would succeed or be disallowed depending on whether prayer 1 is granted. Having granted prayer 1, I will similarly grant prayer 2 which is a consequential relief.

49. Prayer 3 seeks an order of mandamus directed at and compelling the 2nd respondent to comply with the National Land Commission’s decision dated 20/12/2016. An order of mandamus issues to compel a party who has refused to perform a public legal duty to undertake the legal duty. There is no evidence that the applicant demanded performance of a specific duty by the 2nd respondent and the 2nd respondent declined. The evidence before court is that the National Land Commission made findings and recommendations. There is no evidence to suggest that the applicant asked the 2nd respondent to perform a specific legal duty in relation to the findings and recommendation and the 2nd respondent failed to act. The court has not been told if the 2nd respondent was served with the findings and recommendations. It is also not clear in this motion if the recommendations of the National Land Commission were binding on the 2nd respondent and created a legal duty on his part. The court was not addressed on that issue. I will therefore not grant the plea for an order of mandamus in the circumstances.

50. Lastly, the motion has largely succeeded. The respondents and the interested parties opposed the motion. The interested parties sided with the National Land Commission. The dispute in this motion was solely authored by the National Land Commission. In the circumstances, I will award the applicant costs of this suit to be borne by the 1st respondent. The other parties will bear their respective costs of the suit.

Disposal Orders

51. In light of the above findings, the Notice of Motion dated 13/7/2018 is disposed in the following terms :

a) An order of certiorari is hereby issued quashing the decision of the 1st respondent made during its review committee meeting on the 8th March 2018 vide minute 1/5/3/2018-iv reversing its earlier determination of review of grants and disposition of public land, Land Reference Number 209/6497 and Land Reference Number 209/13769/1 contained in a letter dated 11th April 2018.

b) An order of prohibition is hereby issued and directed against the 2nd respondent prohibiting them from acting on the decision by the 1st respondent contained in a letter dated 11th April 2018 with regard to the determination of review of grants and disposition of public land, Reference Number 209/6497 and Land Reference Number 209/13769/1

c) The applicant is awarded costs of this suit, to be borne by the 1st respondent

d) The other parties to this suit shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Obura for the Applicant

Ms Sharon Lipwop for the 1st Interested Party

Court Clerk - June Nafula