



Republic v Director of Surveys & 2 others; Sadhani Limited & another (Interested Parties); Sayani Investments Limited (Exparte) (Environment and Land Case Judicial Review Application 77 of 2018) [2023] KEELC 16838 (KLR) (18 April 2023) (Judgment)

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**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 77 OF 2018
SO OKONG'O, J
APRIL 18, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF SURVEYS 1ST RESPONDENT

CHIEF REGISTRAR OF TITLES 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

AND

SADHANI LIMITED INTERESTED PARTY

KEIBUKWO INVESTMENT LIMITED INTERESTED PARTY

AND

SAYANI INVESTMENTS LIMITED EXPARTE

JUDGMENT

1 The full facts of the dispute between the parties herein are set out in detail in the judgment delivered by this court on 4th February 2021 in Nairobi ELC J.R No. 72 of 2018, R. v. National Land Commission & 2 others (Respondents), Sadhani Limited & another (Interested Parties) and Exparte Sayani Investments Limited (hereinafter referred to as “the previous suit”). In summary, the ex-parte applicant, Sayani Investments Limited (hereinafter referred to only as “the applicant”) was at all material times registered as the proprietor of all those parcels of land known as L.R No. 209/923, L.R No. 209/924 and L.R No. 209/925 (hereinafter referred to together as “the suit properties”). The applicant acquired L.R No. 209/923, L. R No. 209/924 and L.R No. 209/925 on 9th April 1965, 1st



April 1968 and 31st July 1957 respectively. The suit properties were leaseholds from the Government of Kenya for a term of 99 years with effect from 1st January 1911. The leases for the suit properties were to expire on 1st January 2010.

- 2 Before the expiry of the terms of the said leases, the applicant applied to the Commissioner of Lands for the extension of the same. The applicant's application for extension of the leases for the suit properties was approved by the Director of Physical Planning through a letter dated 13th August 2007. By separate letters dated 4th December 2007, the Commissioner of Lands informed the applicant that its application for extension of leases in respect of L.R No. 209/923 and L.R No. 209/925 had been approved and that it had been granted a lease extension of 50 years with effect from 1st December 2007. In the said letter, the Commissioner of Lands asked the applicant to furnish his office with a new deed plan for the proposed extension of the leases for the suit properties. Through letters dated 14th January 2008, the Commissioner of Lands informed the applicant that following the approval of its application for extension of the leases for the suit properties, new ground rents had been assessed for the suit properties with effect from 1st December 2007 and it was called upon to make payment of the revised rents. The applicant has averred that it complied with the conditions for the renewal of the said leases and submitted the requisite documents to the Commissioner of Lands for the issuance of the new grants.
- 3 The process of extending the leases for the suit properties stalled thereafter. The applicant's director who had initiated the process died on 12th March 2010. The applicant was unable to establish why there was a delay in the issuance of new grants for the extended leases. The land registry files for the suit properties in which the applications for extension of the said leases were being processed disappeared and could not be traced. On 31st March 2014, the applicant was informed by the Director of Surveys that it could not be issued with deed plans for the suit properties because the suit properties had been amalgamated into L.R No. 209/20737 (hereinafter referred to as "amalgamated parcel") under deed plan No. 356256 (hereinafter referred to as "disputed deed plan"). The applicant had not instructed any surveyor to amalgamate the suit properties and to produce the disputed deed plan. The applicant learnt that the said deed plan was issued to a stranger. While the matter was pending investigation, the applicant learnt that the 2nd and 3rd respondents were planning to issue to unknown persons a title over the suit properties on the strength of the disputed deed plan.
- 4 To forestall the foregoing plan by the 2nd and 3rd respondents, the applicant brought this judicial review application seeking among others; an order of Certiorari to remove to this court for the purposes of being quashed the disputed deed plan, an order of mandamus to compel the 1st and 2nd respondents to issue grants to the applicant in respect of the suit properties for a term of 99 years and an order of prohibition to stop the 2nd and 3rd respondents from issuing grants in respect of the suit properties or L.R No. 209/20737 (amalgamated parcel) to any other person or persons other than the applicant.
- 5 While granting leave to the applicant in the present application to apply for the said orders of judicial review on 13th August 2014, the court ordered that:

“.....the order granting leave do operate as stay of issuance of Grants in respect of L.R No. 209/923, 209/924 and 209/925 the suit properties or a Grant in respect of L.R Number 209/20737 to any other person or persons other than the ex-parte applicant or dealing with the suit properties in any manner that will deprive the ex parte applicant proprietary rights and interest in the suit properties until the hearing and determination of the substantive application.”
- 6 The said order was served upon the 2nd and 3rd respondents herein on 14th August 2014 and 15th August 2014 respectively. This judicial review application was heard and a judgment delivered on



21st September 2016 by Aburili J. In the judgment, the court quashed the disputed deed plan and prohibited the 2nd and 3rd respondents herein from issuing grants in respect of L.R No. 209/20737 (amalgamated parcel) to any other person or persons other than the applicant. The court also issued an order of mandamus compelling the 2nd and 3rd respondents herein to consider issuing grants to the applicant in respect of the suit properties for a term of 50 years with effect from 1st December 2007 as per the approval for renewal granted in 2007.

- 7 On 5th October 2016 after the judgment of the court made herein on 21st September 2016 aforesaid, the 2nd respondent herein issued to the interested parties jointly a certificate of title (hereinafter referred to as “amalgamated title”) in respect of L.R No. 209/20737 (amalgamated parcel) on the basis of the disputed deed plan that had been quashed by the court and contrary to the order of the court prohibiting the respondents herein from issuing a grant in respect to the amalgamated parcel to any other person apart from the applicant. The applicant which was not aware of this development continued to pursue the issuance of grants in its favour for the extended leases pursuant to the said judgment that was made of 21st September 2016. It was until the interested parties demanded the payment of rent from the tenants on the suit properties that the applicant learnt of the existence of the interested parties and their interest in the suit properties.
- 8 Due to this new development, the applicant brought Nairobi ELC J.R No. 72 of 2018, R. v. National Land Commission & 2 others (Respondents), Sadhani Limited & another (Interested Parties) and Ex-parte Sayani Investments Limited (the previous suit) by way of Notice of Motion dated 19th September 2017 seeking the following reliefs;
1. An order of certiorari to remove into the High Court for purposes of being quashed and quashing Certificate of Title No I.R 180647 (amalgamated title) being a consolidation/ amalgamation of all the properties known L.R Nos. 209/923, 209/924 and 209/925 (the suit properties) into L.R No. 209/20737(amalgamated parcel) issued by the National Land Commission and the Land Registrar to Sadhani Limited and Keibukwo Investments Limited on 5th October 2016.
 2. An order of mandamus to compel the National Land Commission and the Land Registrar to rectify the land register by cancelling, expunging and removing from the land register any entry or registration of the Certificate of Title No I.R 180647(amalgamated title) in respect of L.R No. 209/20737(Original Number 209/923-925) (amalgamated parcel) issued to Sadhani Limited and Keibukwo Investment Limited on 5th October 2016.
 3. A conservatory order restraining Sadhani Limited and Keibukwo Investment Limited whether by themselves, their employees, servants, agents and/or assigns or any other person whatsoever acting on their behalf and/or under their mandate and/or instructions from demanding rents from the applicant’s tenants, alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever, whether claiming under the Certificate of Title No. I.R 180647(amalgamated title) in respect of L.R No 209/20737 (amalgamated parcel) or otherwise, interfering with the properties known as L.R No 209/923, 209/924 and 209/925(the suit properties) and the premises or building erected thereon commonly known as Caxton House or the occupants, tenants and or licensees thereof.
- 9 The previous suit was initially filed in the High Court. The same was transferred to this court in 2018 and given its current case number. In a judgment that was delivered by this court in the previous suit on 4th February 2021, the court made the following orders;



1. An order of certiorari removing into this court and quashing Certificate of Title No. I.R 180647 in respect of L.R No. 209/20737(original number 209/923-925) that came about following the consolidation/amalgamation of all those parcels of land known L.R Nos. 209/923, 209/924 and 209/925 issued by the 1st and 2nd respondents to the interested parties on 5th October 2016.
2. An order of mandamus compelling the 1st and 2nd respondents to rectify the land register relating to Title No. I.R 180647 in respect of L.R No. 209/20737(Original Number 209/923-925) issued to the interested parties on 5th October, 2016 by cancelling, expunging and removing from the register all entries or registration entered therein as relates to the interested parties' ownership of L.R No. 209/20737(Original Number 209/923-925).
3. The applicant to have the costs of the suit to be paid by the interested parties.

In the said judgment, the court stated as follows in part:

“It is apparent on the face of that letter that it was addressed to the applicant and not the interested parties which means that it was the applicant who was called upon to provide the Commissioner of Lands with a deed plan for the purposes of amalgamation of the suit properties. The letter was written on 12th September, 2008. As at that time, the interested parties were not in the picture as they had not applied to be allocated the suit properties. In fact, the leases for the suit properties had not expired and as such they could not have applied for the said properties to be allocated to them. The circumstances under which Catherine Maranga who appears to have been acting as an agent of the interested parties got or obtained the said letter and used the same to survey the suit properties and amalgamate the same into L.R No. 20737 under Deed Plan No. 356256 is a mystery. Apart from this letter dated 12th September, 2008 that was addressed to the applicant, there is no other letter by the Commissioner of Lands authorising the survey and amalgamation of the suit properties. It is apparent from the foregoing that the disputed Deed Plan No. 356256 was produced on the strength of a letter addressed to the applicant but without the applicant's authority since the applicant did not instruct Patrick Opiyo to survey any of the suit properties or to amalgamate the same. There is no doubt that the process that had been initiated by the applicant for the renewal of its leases in respect of the suit properties was high jacked midstream...

- 10 It is also my finding that in issuing the said certificate of title, the 2nd respondent violated the applicant's legitimate expectation and also acted irrationally. It is not disputed that as at the time when the 2nd respondent issued the interested parties with the impugned certificate of title, the applicant was in possession of the suit properties and had received a confirmation that its leases in respect of the suit properties would be renewed. Neither the 1st nor the 2nd respondent had revoked the approvals for the renewal of the applicant's leases over the suit properties as at the time the 2nd respondent purported to offer the suit properties to the interested parties. In the circumstances, the applicant which was in possession of the suit properties on the basis of the said approval had legitimate expectation that its leases would be renewed. The 2nd respondent was under an obligation to fulfil that expectation. I have also noted from the material on record that the 2nd respondent had been informed as early as 26th August, 2014 by the Director of Surveys that there were irregularities in the manner in which the survey that produced the disputed deed plan No. 356256 was carried out. In the replying affidavit sworn by Charles Kipkurui Ngetich in response to the present application, he stated that the 2nd respondent also



carried out investigations that revealed that the interested parties acquired the amalgamated parcel and title irregularly by false pretences. I am of the view that with the information that was in the possession of the 2nd respondent as at 5th October, 2016 as concerns the irregularities surrounding the preparation of the disputed deed plan and allocation of the amalgamated parcel to the interested parties some of which I have highlighted earlier, the 2nd respondent acted irrationally in issuing the interested parties with the impugned certificate of title.

- 11 There is no dispute that an illegal, null and void decision is amenable to judicial review. The same applies to decisions made irrationally and in breach of legitimate expectation. See the decisions in *Republic v Kenya Revenue Authority, Ex-parte Yaya Towers Limited* [2008] eKLR and *Karume Investments Limited v Kenya Shell Limited & The Commissioner of Lands*(supra) that were cited by the applicant in its submissions. An illegal decision cannot be said to be rational or procedurally fair. A public body or a person in public office does not have jurisdiction to make illegal decisions. From the evidence on record, the applicant had brought to the attention of the 1st and 2nd respondents prior to the filing of the present application the fact that the impugned certificate of title was issued illegally in violation of a court order and that the deed plan on the basis of which it was issued was prepared irregularly. The 2nd respondent has contended that it had already cancelled the said certificate of title in favour of the interested parties. I have noted that despite this claim by the 2nd respondent, the interested parties have placed before the court what they claim to be an official search issued by the 2nd respondent on 13th June, 2019 showing that they are still registered as the proprietors of the amalgamated parcel, L.R No. 209/20737. This court has jurisdiction under section 80 of the *Land Act*, 2012 to compel the 2nd respondent to rectify a land register. The court also has power under section 13(7)(b) of the *Environment and Land Court Act*, 2011 to issue an order of mandamus compelling the 1st and 2nd respondents to cancel all the records relating L.R No. 209/20737 from the register.
- 12 Due to the foregoing, I am satisfied that the applicant has made out a case for grant of the orders of certiorari and mandamus sought in the application dated 19th September, 2017.”
- 13 I thought that the said judgment in the previous suit had laid the dispute between the parties to rest save for any appeal that the parties may have wished to lodge in the Court of Appeal. In view of the findings and orders made in the said judgment, I did not expect the applicant to pursue this suit.
- 14 The applicant amended its Notice of Motion application herein dated 22nd August 2014 on 7th October 2021 and added the interested parties as parties to the application. This followed the setting aside of the judgment that had been delivered herein by Aburili J. on 21st September 2016 aforesaid. In the amended application, the applicant abandoned two prayers it had sought in the original application. In the amended Notice of Motion dated 7th October 2021, the applicant sought only one principal relief namely; an order of Certiorari to remove to this court for the purposes of being quashed Deed Plan No. 356256(the disputed deed plan) issued by the Director of Surveys for the consolidation/amalgamation of all the properties known as L.R No. 209/923, L.R No. 209/924 and L.R No. 209/925(the suit properties) into L.R No. 209/20737(the amalgamated parcel).
- 15 This means that the Applicant is now challenging only the propriety of the decision by the 1st respondent to issue the disputed deed plan. In this court’s judgment in the previous suit, the court had made a finding that there were irregularities in the issuance of the said deed plan. I am of the view that having cancelled the Certificate of Title No. I.R 180647 in respect of L.R No. 209/20737(original number 209/923-925), that cancellation applied with equal force to the disputed deed plan on the strength of which the title was issued since the deed plan was part and parcel of the said certificate of title. I do not think that it is necessary for the court to make a determination once again on the legality or otherwise of the said deed plan. Since the court is neither sitting on an appeal against its decision



in the previous suit nor on a review of the said decision, the court will not be able to reach a different outcome on the issue.

- 16 However, since the matter is before this court for a judgment, in the absence of an order by the court made on a formal application brought for that purpose or from the appellate court staying the delivery of the judgment, this court has no jurisdiction to defer the delivery of the judgment or to decline to deliver the same.

The application before the court:

- 17 As mentioned earlier, what is before the court is the amended Notice of Motion dated 7th October 2021 in which the applicant has sought an order of Certiorari to remove to this court for the purposes of being quashed Deed Plan No. 356256 (the disputed deed plan) issued by the Director of Surveys for the consolidation/amalgamation of all the properties known as L.R No. 209/923, L.R No. 209/924 and L.R No. 209/925 (the suit properties) into L.R No. 209/20737(the amalgamated parcel).
- 18 The application was supported by a verifying affidavit sworn by Nazlin Jetha on 7th August 2014, a statutory statement dated 12th August 2014 and a further affidavit of Karim Jetha sworn on 7th October 2021. Save for minor variations, the present application was brought on the same grounds as the previous suit. I have set out earlier in this judgment the grounds upon which the previous suit was brought. In its statutory statement filed herein, the applicant averred that the acts and omissions of the 1st, 2nd and 3rd respondents complained of amounted to an abuse of their statutory powers and duties. The applicant averred further that the it had a constitutional right and legitimate expectation that it would continue enjoying its proprietary rights and interests in the suit properties. The applicant averred that its said rights and interests would be jeopardized if the orders sought in the application were not granted.
- 19 In its further verifying affidavit, the applicant averred that after thorough investigations by the Land Administration Committee of the 3rd respondent, the 3rd respondent confirmed on 18th January 2016 that it had upheld the renewal of the leases in respect of the suit properties in favour of the applicant that was done on 4th December 2007.The applicant averred that following that confirmation, the 3rd respondent issued it with letters of allotment to facilitate the issuance of new grants with respect to the suit properties.
- 20 The applicant averred that it had since been issued with the Certificates of Titles for the suit properties. The applicant averred that the certificate of title that was issued to the interested properties in respect of the suit properties was cancelled by the 2nd respondent after investigations that revealed that the same was obtained fraudulently. The applicant averred that the 1st respondent by a letter dated 26th August 2014 informed the applicant through its advocates on record that its investigations had revealed that the disputed deed plan was procured through utterance of face documents and that it had been cancelled. The applicant averred that the 1st respondent instructed 2nd respondent to ensure that the impugned deed plan was not entered into the land register.
- 21 The applicant averred that the use of the Deed Plan No. 356256(the disputed deed plan) which had been cancelled by the 1st respondent on the ground that it was obtained fraudulently to generate the Certificate of Title No. 180467 in respect of L.R No. 209/20737 in favour of the interested parties was a clear demonstration that unless the said deed plan was quashed by an order of the court, the same will be used to process other fraudulent Certificates of Title to the detriment of the applicant and the general public. The applicant averred that its constitutional right to benefit from its investment in the suit properties would continue to be threatened and jeopardized unless the court intervened by issuing



an order of certiorari to quash the disputed deed plan. The applicant averred that the court had power to grant the order sought.

The response by the 1st and 2nd respondents:

22 The 2nd respondent filed a replying affidavit sworn by the Deputy Chief Land Registrar, Charles Kipkurui Ngetich on 22nd June 2022 in response to the applicant's amended Notice of Motion dated 7th October 2021 although the affidavit talks of an amended Notice of Motion application dated 19th September 2017. In the affidavit, the 2nd respondent averred that it received a complaint from the applicant regarding a lease dated 5th October 2016 and a Certificate of Title registered as I.R 180647 in respect of L.R No. 209/20737 (the amalgamated parcel). The 2nd respondent averred that it investigated the complaint and established that the said Certificate of Title was irregularly issued in that the interested parties had manipulated the 2nd respondent's correspondence file and caused themselves to be registered as the proprietors of the amalgamated parcel through false pretences. The 2nd respondent averred that it wrote to the interested parties on 21st November 2017 to surrender the said Certificate of Title. The 2nd respondent averred that it was served with a court order dated 21st September 2016 from the High Court issued in Nairobi JR Misc. Application No. 313 of 2014 cancelling the Deed Plan No. 356256 (the disputed deed plan) on the basis of which the Certificate of Title registered as I.R 180647 in respect of the amalgamated parcel was processed. The 2nd respondent averred that the said court order was registered against the Certificate of Title No. I.R 180647 on 15th November 2017. The 2nd respondent averred that it wrote to the advocates on record for the applicant on 14th November 2017 informing them that it had cancelled the said Certificate of Title registered as I.R 180647 in respect of the amalgamated parcel. The 2nd respondent averred that from its investigations, it found that the documents that were presented to it by the interested parties for registration were misleading since the applicant had never surrendered its title nor had it applied for a new title in the names of the interested parties. The 2nd respondent averred further that the letter of allotment purportedly issued to the interested parties on 4th October 2013 was a forgery. The 2nd respondent averred that the acquisition of the suit properties by the interested parties was fraudulent since the interested parties had applied to be allocated three (3) separate plots and yet they were purportedly issued with a letter of allotment for an amalgamated single plot. The 2nd respondents averred that there was no authority to amalgamate the suit properties. The 2nd respondent averred that the procedure that was in place was that the interested parties would have been issued with a letter of allotment for each of the three plots and after acceptance of the allotment, amalgamation survey would have been carried out. The 2nd respondent averred that according to the records at the office of the Senior Plans Records, the suit properties were not available for allocation as the same were committed under file No. 2339-2341. The 2nd respondent averred that the suit properties had a 3 storey building on them and that the same were only available for allocation to the person or entity which had developed the same unless the developer indicated in writing that it was not interested in the renewal of the leases. The 2nd respondent averred that the disputed deed plan was issued on 23rd August 2013 while the letter of allotment to the interested parties was issued on 4th October 2013. The 2nd respondent averred that this was highly irregular as the letter of allotment is supposed to be used as the authority to carry out survey for the purposes of producing a deed plan. The 2nd respondent averred that the deed plan could not precede the letter of allotment. The 2nd respondent averred that according to its records, the Certificate of Title registered as No. I.R. 180647 in respect of the amalgamated parcel had already been cancelled and the interested parties notified of the same.

The response by the interested parties:



- 23 The interested parties opposed the application through a Notice of Preliminary Objection dated 18th March 2021 and a replying affidavit sworn by David Some Barno on 24th June 2022. The interested parties contended that under Article 162 (2)(b) of *the Constitution* of Kenya, the jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land is conferred on the Environment and Land Court. The interested parties urged the court to strike out the suit herein for the following reasons;
- i. This suit that was filed in the High Court as Misc. Civil Application No. 313 of 2014) was filed in a court without jurisdiction and as such could not be legally transferred to this court as was purportedly done. The interested parties cited the cases of Onward Cargo System Company Limited v. Eveready East Africa Limited [2015] e KLR, Cany Investments Limited v. County Government of Kiambu & Another [2015]eKLR and Kagenyi v. Musiramo &Another [1968] 1 EA 43 in support of their submission on the issue.
 - ii. This court had no jurisdiction to receive High Court Misc. Civil Application No. 313 of 204 from the High Court, to continue to hear it and or to render itself on the matter.
 - iii. The proper course was for the applicant to withdraw High Court Misc. Civil Application No. 313 of 2014 and make a fresh application for leave to commence judicial review before this court which was never done.
 - iv. For this court to proceed with the suit as it is would make nonsense of the law and shall embarrass the administration of justice.
 - v. There having been no valid suit before he High Court to warrant a transfer and or a valid receipt of the same by this court, there is no valid suit before this court to warrant any further consideration for reasons that there was no valid suit for determination before the High Court.
 - vi. This court has no jurisdiction to hear and determine the suit as presently filed as it originated from a court which had no jurisdiction.
 - vii. This court at present has no jurisdiction to entertain these proceedings.
- 24 In their replying affidavit, the interested parties reiterated the contents of their Notice of Preliminary Objection dated 18th March 2021 and the replying affidavits of David Some Barno and Peter Gathii Reuben both sworn on 26th November 2019 and filed in the previous suit. The interested parties averred that as at August 2012 when the interested parties applied for allotment of the suit properties, the leases previously issued to the applicant had expired in 2010 and had not been extended. The interested parties averred that the suit properties had reverted back to the Government and were available for alienation.
- 25 The interested parties averred that in December 2007, the Government had approved an extension of the leases over the suit properties in favour of the applicant subject to clear mandatory conditions to be fulfilled before the extension of the leases could be effected. The interested parties referred the court to the letters dated 4th December 2007 and 14th January 2008 addressed to the applicant by the Commissioner of Lands and averred that the applicant neglected and or failed to fulfil the conditions for extension of the leases contained in the said letters before expiry of the leases on 1st January 2010. The interested parties averred that the leases for the suit properties expired without extension on 1st January 2010 and the suit property reverted to the Government and became available for alienation. The interested parties averred that by the time the applicant filed the present application in August 2014 and thereafter applied for reissue of letters of allotment in 2015 and 2016, the suit properties had already been alienated to the interested parties.



- 26 The interested parties averred that upon approval by the Director of Survey of the amalgamation survey work that was carried out by a licensed Surveyor, Patrick Adero Opiyo and Deed Plan No. 356256 (disputed deed plan), the suit properties ceased to exist and that no lease extension or letter of allotment could legally be issued for the same since it was only L.R No. 209/20737(the amalgamated parcel) that existed. The interested parties averred that once the letter of allotment dated 4th October 2013 was issued to the interested parties in respect of the amalgamated parcel, neither the suit properties nor the amalgamated parcel was thereafter available for alienation to the applicant. The interested parties averred that there was nothing left to alienate to the applicant. The interested parties averred that on 18th January 2016 when the 3rd respondent decided to extend the leases over the suit properties in favour of the applicant and on 16th August 2016 when it issued letters of allotment in favour of the applicant, the suit properties had already been certified on 12th September 2012 for allocation to the Interested Parties. The interested parties averred that the attempted conferment of interest over the suit properties upon the applicant by the 3rd respondent was null and void. The interested parties averred that by the time the 3rd respondent sat to hear the application by the applicant on 18th November 2015 and 20th January 2016, the interested parties were already holders of legal interest in the suit properties and had the right under Article 47(1) of *the Constitution* and the provisions of section 4 of the Fair Administrative Actions Act, 2015 to be heard on the matter before the 3rd respondent could make a decision to allocate the suit properties to the applicant.
- 27 The interested parties averred that in any event, the decision by the 3rd respondent contained in the minutes of 18th November 2015 and 20th January 2016 and communicated in a letter dated 25th January 2016 upheld the approval for extension of leases that was granted to the applicant on 4th December 2007. The interested parties averred that the approval for extension of leases granted on 4th December 2007 was for fifty (50) years while the letters of allotment issued to the applicant by the 3rd respondent in respect of the suit properties purported to grant to the applicant extension of leases for ninety-nine (99) years. The interested parties averred that the said letters of allotment were nullities for being ultra vires the fifty (50) years lease extension approval that was granted by the 3rd respondent.
- 28 The interested parties averred that the judgement of this court made on 4th February 2021 in the previous suit was the subject of an Appeal before the Court of Appeal at Nairobi and that the Court of Appeal had by a ruling delivered on 1st April 2022 on an application by the interested parties in Court of Appeal Civil Application No. E078 of 2021, Keibukwo Investments Limited & Another v. Sayani Investments Limited & 3 Others stayed execution of the said judgement and decree of this court. The interested parties averred further that the issue of the cancellation of the interested parties' title and lease over the amalgamated parcel by 2nd respondent and issuance of titles over the suit properties to the applicant were issues that were substantively before this court in Constitutional Petition No. 29 of 2018, Keibukwo Investment Limited & Ano v. Chief Land Registrar and 2 Others and as such the applicant was estopped from relying on the said actions of the 2nd respondent as conclusive facts that this court ought to be guided with in arriving at a determination in the present dispute.
- 29 The interested parties averred that it was clear beyond any peradventure that the process of issuance of a title over the suit properties to the interested parties was above board, legal and at all times in full compliance with laws and practice attendant to the process. The interested parties averred that there was no fraud at all and or connivance between the interested parties and any employees of the respondents herein in the processing and issuance of the title and neither was there any illegality and or fraud that the interested parties were aware of and or participated in the issuance of the said title.
- 30 The interested parties averred that upon issuance of the title in respect of the amalgamated parcel to the interested parties, the interested parties became seized of indefeasible rights over the property to



the maximum extent provided for under sections 24 and 25 of the [Land Registration Act](#), 2012 and consequently holders of a right to property and interest over land guaranteed and protected by [the Constitution](#) under Article 40 as read with Article 260 of [the Constitution](#). The interested parties averred that the quashing of the Deed Plan No. 356256 (disputed deed plan) issued to the interested parties would threaten the constitutional and proprietary rights and interest of the interested parties and not the non-existent and illegal rights and interests claimed by the applicant.

The submissions by the parties:

- 31 On 28th June 2022, the court ordered that the applicant's application and the interested parties' preliminary objection be heard by way of written submissions and gave timelines within which the parties were to file their submissions. Only the applicant filed submissions. The respondents and the interested parties did not file submissions even after time was extended for them to do so. In its submissions the applicant framed the following issues for determination;
 - a. Whether this court has jurisdiction to hear and determine the application.
 - b. Whether the orders sought by the applicant should be granted.
 - c. Who should pay costs of these proceedings?
- 32 On the issue of the court's jurisdiction to hear and determine this application, the applicant submitted that the interested parties' preliminary objection lacked merit. The applicant submitted that this court has the same status as the High Court. The applicant submitted that the authorities cited by the interested parties were not applicable to the case at hand in that they dealt with the transfer of suits from the magistrate's court to the High Court for want of pecuniary jurisdiction which was not the case here where the suit was transferred from the High Court to a court of equal status with the High Court.
- 33 On the issue of whether the applicant was entitled to the orders sought in the application, the applicant submitted that it had demonstrated illegality, irrationality and procedural impropriety in the issuance of the disputed deed plan to the interested parties. In support of this submission, the applicant relied on *Republic v. National Land Commission & Another Ex parte: Farmers Choice Limited* [2020] eKLR. The applicant submitted that the suit properties were not available for alienation to the interested parties. The applicant submitted that the terms of the leases for the suit properties were extended by the Government of Kenya in writing in favour of the applicant in 2007. The applicant averred that following that extension, the suit properties were not available for alienation to the interested parties. In support of this submission, the applicant relied on the cases of *Kenya Industrial Estates Limited v. Anne Chepsisor & 5 Others* [2015] eKLR and *Republic v. National Land Commission & 5 Others ;C.E.C Land Housing and Physical Planning Uasin Gishu County & 2 Others (Interested Party)* (2022) KEELC 3 (KLR).
- 34 The applicant submitted that the suit properties were not empty plots as it had erected a commercial building thereon which it had rented out to more than 30 tenants. The applicant submitted that the issuance of the impugned deed plan to the interested parties was irrational and fraught with procedural impropriety as the suit properties were not available for allocation. The applicant submitted that the disputed deed plan was a product of fraud and thus illegal as was admitted by the 1st, 2nd and 3rd respondents in their replying affidavits filed in the previous suit. The applicant submitted that the fraud culminating in the issuance of the disputed deed plan and subsequently the title to the interested parties, with the connivance of the respondents, could not give rise to a valid interest in the suit



properties in favour of the interested parties. In support of this submission, the applicant relied on the case of *Simon Mbugua v. County Government of Trans-Nzoia & 2 Others* [2022] eKLR.

- 35 The applicant submitted that the process leading to the issuance of the impugned deed plan to the interested parties was irregular and illegal. The applicant submitted that the court should exercise its supervisory jurisdiction and issue an order of certiorari to quash the disputed deed plan through which the suit properties were consolidated/amalgamated to form L.R. Number 209/20737(the amalgamated parcel).

Analysis and Determination:

- 36 As mentioned earlier, what is before the court for determination are the applicant's amended Notice of Motion dated 7th October 2021 and the interested parties' Notice of Preliminary Objection dated 18th March 2021. I mentioned at the outset that this court has already made a determination in the previous suit on the legality of the disputed deed plan. All the parties herein were parties to the previous suit and save for the submissions made in relation to the issues raised in the interested parties' Notice of Preliminary Objection, the arguments that have been put forward herein in support of and in opposition to the applicant's application for an order of certiorari to quash the disputed deed plan are primarily the same arguments that I considered in the previous suit.

- 37 I have considered the applicant's application and the interested parties' preliminary objection and the responses thereto. In my view, the issues arising for determination by the court are the following;

- a. Whether this Court has jurisdiction to hear and determine the application.
- b. Whether the applicant is entitled to the orders sought in the application.
- c. Who is liable for the costs of the application and the preliminary objection?

- 38 On the issue of jurisdiction, I find no merit in the interested parties' argument that the High Court should not have transferred High Court Misc. Civil Application No. 313 of 2014 to this court for hearing and determination. As correctly submitted by the applicant, the High Court and this court are courts of equal status and there is nothing wrong in the High Court transferring a matter wrongly filed before it to a court of equal status where the matter should have been filed and vice versa. In *David N Mugendi v. Kenyatta University & 3 others* [2013] eKLR the Court of Appeal stated as follows:

“.....in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only mete and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”

- 39 Guided by the foregoing authority, it is my finding that this suit was properly transferred to this court from the High Court and as such this court has jurisdiction to hear and determine the same. I wish to



add that even if the interested parties' objection to the transfer of this suit from the High Court to this court had a basis, the objection in my view should have been taken in the High Court or the Court of Appeal and not before this court. This court has no jurisdiction to conduct a merit review or to sit on appeal against the decision of the High Court which is a court of equal status. The interested parties' objection was in the circumstances taken in the wrong forum. For the foregoing reasons, I find no merit in the interested parties' preliminary objection.

40 On the merit of the application, the applicant has sought an order of Certiorari to quash Deed Plan No. 356256 (disputed deed plan) through which the suit properties were consolidated into L.R No. 209/20737(the amalgamated parcel). In *Municipal Council of Mombasa v. Republic*[2002] eKLR, the Court of Appeal stated as follows on judicial review:

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

41 In the previous suit, I held that the title that was issued to the interested parties over the suit properties was irregular, null and void and issued an order quashing the same. I know that my decision was appealed to the Court of Appeal and the matter is pending before that court. However, I still hold the same view. I have reproduced part of my judgment in the previous suit earlier in this judgment. There is no new material before me that can persuade me that the interested parties obtained the disputed deed plan on the basis of which they were issued with a Certificate of Title in respect of the amalgamated parcel lawfully. The circumstances under which the interested parties acquired or obtained the disputed deed plan remain the same. The said deed plan was prepared following a survey that was carried out by a licensed surveyor, Patrick Opiyo. Patrick Opiyo carried out the survey on the strength of a letter dated 12th September 2008 from the Commissioner of Lands that called for a deed plan amalgamating the suit properties. The letter was addressed to the applicant whose lease renewal in respect of the suit properties had already been approved by the Commissioner of Lands. The letter was not addressed to the interested parties. Patrick Opiyo claimed that he carried out a survey that amalgamated the suit properties on the instructions of one, Catherine Maranga to whom he handed over the deed plan on 23rd August 2013 after the same was approved by the 1st respondent. Neither Catherine Maranga nor Patrick Opiyo were instructed by the applicant to survey and amalgamate the suit properties. There was also no authority or instructions from the Commissioner of Lands to Catherine Maranga, Patrick Opiyo or the interested parties for the suit properties to be surveyed, amalgamated and a deed plan for the amalgamated plot produced in favour of the interested parties. The interested parties were purportedly issued with a letter of allotment for the amalgamated parcel on 4th October 2013 while the disputed deed plan was issued on 23rd August 2013. It is not disputed that the letter of allotment should have been the authority to the surveyor to survey the suit properties for the purposes of coming up with a deed plan. There is no doubt that the survey that was carried out by Patrick Opiyo on the authority of a letter from the Commissioner of Lands dated 12th September 2008 that was addressed to the applicant was not meant for the extension of the leases of the suit properties in favour of the applicant which had received approval for such extension in 2007. The



Commissioner of Lands could not have issued authority on 12th September 2008 for a deed plan to be prepared for an allocation of land to the interested parties that was to be done five (5) years later on 4th October 2013. I am still persuaded that the process of extension of the applicant's leases for the suit properties was high jacked by shadowy figures that were operating in the corridors of Ardhi House who through manipulation of records and forgery made extension of leases a nightmare for innocent Kenyans. For the reasons that I have given, the disputed deed plan cannot be defended. Deed plans for allocation of land or renewal of leases are prepared on the strength of either a letter of allotment or a letter approving extension of a lease by the Commissioner of Lands. It is not disputed that the disputed deed plan was prepared pursuant to a letter dated 12th September 2008 by the Commissioner of Lands that called upon the applicant to provide a deed plan. Since the disputed deed plan was not prepared at the instance of the applicant who was authorized to prepare a deed plan by the Commissioner of Lands and was not used for the purposes for which it was intended, the same was for all intents and purposes irregular, null and void. In my judgment in the previous suit, I observed as follows:

“There is no doubt that the survey and amalgamation of the suit properties were carried out on the basis that it was for the purposes of extending the term of the applicant's leases over the suit properties and amalgamation of the said properties. That is what the letter dated 12th September, 2008 which Patrick Opiyo used as authority to survey and amalgamate the suit properties states on the face of it. There is no explanation as to how a survey that was carried out for the purposes of extending the leases for the suit properties in favour of the applicant and amalgamating the same ended up being used for the purposes of allocating the suit properties to the interested parties and issuing them with a new grant in respect of the said properties.”

- 42 I need not say more. It was irregular, fraudulent and unlawful for the 1st and 2nd respondents to permit or aid the interested parties to use the letter from the Commissioner of Lands dated 12th September 2008 addressed to applicant regarding the extension of its leases, to survey and amalgamate the suit properties for allocation to the interested parties. As I held in the previous suit, the suit properties were not available for allocation to the interested parties. The allocation was illegal and likewise the title that was issued to the interested parties. The disputed deed plan was in the circumstances created unprocedurally and illegally. The same is therefore subject to the judicial review jurisdiction of this court.
- 43 In the final analysis and for the foregoing reasons, I hereby make the following orders on the amended Notice of Motion dated 7th October 2021 and the preliminary objection dated 18th March 2021;
1. The preliminary objection dated 18th March 2021 is dismissed.
 2. The Deed Plan No. 356256 issued by the Director of Surveys for the consolidation / amalgamation of all those parcels of land known as L.R No. 209/923, L.R No. 209/924 and L.R No.209/925 into L.R Number 209/20737 is brought to this court and quashed.
 3. Costs of the judicial review application and the preliminary objection are awarded to the applicant to be paid by the interested parties.

Delivered and Dated at Kisumu on this 18th day of April 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:



Mr. Muthui for the Applicant

Mr. Oduor h/b for Mr. Bwire for the Interested Parties

N/A for the Respondents

Ms. J. Omondi-Court Assistant

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