REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MISCELLENOUS CIVIL APPLICATION NO.570 OF 2017

IN THE MATTER OF APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF APPLICATION FOR AN ORDER OF CERTIORARI

IN THE MATTER OF ARTICLES 40(1), 47, 165 (6), & (7), 157(1), (4),

(6) (A),(9) & (11) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT SECTION 8 & 9

(CHAPTER 26 LAWS OF KENYA)

IN THE MATTER OF THE SUCCESSION ACT

AND

IN THE MATTER OF THE ESTATE OF JIM CHOGE (DECEASED)

BETWEEN

REPUBLIC...APPLICANT

VERSUS

CHIEF LAND REGISTRAR........................1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY

OF LANDS PHYSICAL PLANNING..........2ND RESPONDENT

PATRICK BUCHA, SECRETARY

HOUSING, MINISTRY OF TRANSPORT,

INFRASTRUCTURE, HOUSING

& URBAN DEVELOPMENT.......................3RD RESPONDENT

NAKURU LAND REGISTRAR...................4TH RESPONDENT

JUDGEMENT

Introduction

1. This judgement is the subject of a notice of motion dated 28th September, 2017 by which the ex parte applicant herein, **Noreen Shariff**, in her capacity as the administrator of the estate of **Jim Choge** (deceased) seeks an order of Mandamus to compel the Principal Secretary, Ministry of Lands, Chief Registrar, Secretary Housing Ministry Lands and Urban Development and Nakuru Lands Registrar to comply with the Court orders issued on 2nd March, 2016 by the **Honourable Justice W. Musyoka** and to issue provisional titles in respect of LR Nos. 12408 & LR Nos 32126 & 36738 and also to validate the properties belonging to the Estate of the deceased as was ordered. She also sought an order that the costs of and incidental to this application be borne by the Respondents.

Applicant's Case

2. According to the applicant, she is a joint administrator with **Eva Cherogony** and **Byron Kipngetich Gawon Choge** of the Estate of the late **Jim Choge** which Estate was the subject of litigation in Succession Cause No. 934 of 2008.

3. It was averred that on 2nd March, 2016, **Musyoka, J** issued inter alia orders that the Chief Land Registrar do issue provisional titles with respect to the suit properties. The applicant averred that she extracted the said orders and through her advocates on record served the same on the Respondents herein though the initial order had been served on the National Land Commission and the Ministry vide a letter dated 4th December, 2014 upon which the Commission requested for the searches in respect of the said order, which requests were obliged.

4. It was contended that the said Commission directed the Acting Secretary Housing Ministry of Lands and Urban Development and the Secretary Housing Department to obey the Court orders and validate the said properties pursuant to the said Court order but the advisory fell on deaf ears. Similarly the office of the Attorney General directed the 2nd and 3rd Respondents to comply with the said Court order but the said advice was ignored.

5. It was the ex parte applicant's case that despite having duly extracted and served the said orders, the Respondents have refused, failed and/or ignored to obey the same thus disabling the applicant from performing her statutory duties as the validation letters have not been issued by the Respondents as directed by the Court. It was the applicant's case that the conduct of the Respondents is manifestly deliberate and a blatant violation of the clear and unambiguous orders issued by the Court which conduct has brought the administration of justice and integrity of the judicial process into disrepute without any explanation as to why they have not complied with the said orders or even filing an appeal. The applicant therefore deposed that she was seeking an order of certiorari to bring into this Court the decision of the Respondents of failing to comply with the said Court orders to issue provisional titles in respect of LR Nos. 12408 and LR Nos. 32126 and 36738 and to validate the properties belonging to the Estate. She also indicated that she was seeking an order of mandamus to compel the Respondents to comply with the said orders and to issue provisional titles in respect of LR Nos. 12408 and LR Nos. 32126 and 36738 and to validate the properties belonging to the Estate.

6. In her submissions, the ex parte applicant reiterated the foregoing and contended that the existing jurisprudence on the subject of the order of mandamus demands that where there is a breach of public duty or power, the Court must compel the public authority to perform the duty imposed by statute. It was submitted that it is the Respondents' public duty to satisfy the ex parte applicant's orders obtained from a competent Court and that the failure to do so attracts the Court's discretion to issue an order of mandamus commanding them to do so. In support of her case the applicant relied on **Republic vs. Kenya National Examinations Council *ex parte* Gathenji & 8 Others Civil Appeal No 234 of 1996, where the Court of Appeal cited, with approval, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89.***

7. It was submitted that in the instant case the ex parte applicant has no other option of realising the fruits of her orders dated 2nd March, 2016 apart from through an order of mandamus. The applicant relied on **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 as well as Republic vs. The Commissioner of Lands and Another ex parte Kithinji Murugu M'agere Nairobi HCMA No. 395 of 2012.***

8. In the foregoing premises the Court was urged to issue an order of mandamus to compel the Chief Land Registrar, Secretary Housing Ministry of Lands and Urban Development and Nakuru Lands Registrar to comply with the Court Orders issued on 2nd March, 2016 by Musyoka, J and to issue provisional titles and also to validate the properties belonging to the Estate as was ordered as well as the costs of this application.

Respondents' Case

9. The application was opposed by the Respondents and filed the following grounds of opposition:

> **1) THAT the Honourable court lasks the jurisdiction to hear and determine the application as the same falls within the exclusive jurisdiction of the Environment and Land Court (See Owners of the Motor Vehicle " Lillian S" V Caltex Oil (Kenya) Ltd [1989]KLR 1)**
>
> **2) THAT there is no specific legal duty owed by the respondent to the applicant and as such the order of mandamus cannot issue in the circumstances.**
>
> **3) THAT the prayer sought by the Applicant is too general and Vague as it fails to disclose to the court what end the Judicial Review Remedies of mandamus would be applied.**

4) THAT the applicant is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any judicial review determination.

5) THAT the application is an abuse of court process and lacks merit and thus ought to be dismissed with costs to the respondents.

10. According to the Respondents, the allocation of the houses to the late **Jim Choge** in Nakuru district (as then was) border on irregularity/illegality as neither the procedures to acquire the same were compiled with nor was the ministry consulted. It was averred that the **Late Jim Choge** was neither a civil servant nor was he in occupation of the said properties and that the validation was meant for serving civil servants in order to encourage them to own houses and the offer was limited to one house per civil servant's family. It was averred that the necessary documents for the transfer of any property from the government to an individual include: a letter of allotment, receipts of payment made to government and an agreement of sale yet the applicant lacks all the aforementioned documents.

11. According to the Respondents, on 30th July 2008, vide an advertisement in the Standard Newspaper, the Ministry of Housing through Circulars ref.no. CHSF/EST/01/2/VOL.11/41 dated 24th January 2007 and ref.no. CHSF/EST/10/2/VOL.11/51 dated 2nd March 2007 the State Department cancelled the proposed sale of all Government houses in the districts including the applicant's properties situate in Nakuru District (as then was). Clause G(b)of the circular No. CHSF/EST/01/2/VOL.11/41 dated 24th January 2007 provides, "***where the house identified for sale has remained intact but the occupant is a civil servant who has been paying rent to the government but allocation was for the non-civil servant, the government to repossess the house and sell it to the occupying civil servant*"**. The applicant therefore did not stand to benefit from validation as the houses claimed to be owned by the estate of the late **Jim Choge** would have been sold to the occupying civil servants if validation in the district was implemented.

12. It was contended that at the time the Court Order sought to be enforced was issued (1st March 2016) the validation process had already been cancelled and that the validation process and the procedures as approved then were prepared before the Constitution 2010as well as the establishment of National Land Commission and as such there are no procedures for validation and therefore any process purporting to validates any government property would be illegal *abinitio.*

13. The Respondents' position was that the disposal of any government property must be conducted i*nter alia* according to the ***Public Procurement & Disposal Act*** which in this case has never been compiled with. In their view, there was/is no offer for the sale or otherwise from government in regard to the suit and therefore any document of title the applicant may have on the suit property is illegal null and void. They therefore contended that the suit property was not available for alienation the same having long been alienated for housing through the Ministry in charge of Housing.

14. The Respondents asserted that the nature of the matter herein is among the main abuses of law enumerated in the Ndungu's Report, *to wit* where the Commissioner of land allocated already alienated land which was designated for public utility. Their position was that the Order of 2nd March 2016 compelling the Government to validate its own houses was issued by a Succession Court under the impression that the houses aforesaid belonged to the applicant. To date the properties sought to be validated are being occupied by civil servants and they are paying rent to the government through check off system.

15. According to the Respondents, all National government property is under the custody of the Principal Secretary National Treasury who is at a better position to authorize the re-opening of validation and not the Housing Secretary as alluded by the applicant.

16. On behalf of the Respondents, it was submitted that this court lacks jurisdiction to determine this application in view of the subject matter from which this application arose. It was contended that it is trite law that where the court doesn't not have jurisdiction, it cannot proceed and the Respondents relied on the Court of Appeal decision of **Owners Of The Motor Vessel "Lillian S"V Caltex Oil (Kenya) Ltd [1989] KLR 1.**

17. In the Respondents' view, the application concerns a land matter which this court has no jurisdiction to hear or determine. The Constitution of Kenya 2010 under Article 162(2)(b) establishes the Environment and Land Court clothed with full jurisdiction to deal with matters land. This article is actualized by the establishment of the ***Environment and Land Court Act*** Cap 19 of 2011 and reference was made to section 13 of the said Act which states:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes;

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

18. According to the Respondents, from the above submission on jurisdiction alone, this court ought to down its tools and struck out these proceedings for want of jurisdiction.

19. As to whether the order sought can be granted, the Respondents relied on R**epublic vs. Kenya National Examinations Council** ***ex parte*** **Gathengi& 8 Others Civil Appeal No 234 of 1996, R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743,** and averred that where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. In the present case the applicant is yet to prove that the original titles have been lost or misplaced. Further reliance was placed on **Newton Gikaru Githiomi & Anor vs. AG/Public Trustee Nairobi HC JR 472 of 2014** and **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** and it was submitted that there is no legal duty owing to the applicant that they have neglected to perform to warrant an order of mandamus as sought by the applicant. They also relied on R**epublic vs. Attorney General & Another Exparte Wanyiri Kihoro& 5 Others [2014] eKLR**, for the position that an order of mandamus will not issue as a matter of course.

20. It was submitted that in order for the applicants to succeed in the matter they must demonstrate that the respondents failed to perform a constitutional or statutory duty. Mandamus issues to compel a person or body of persons to perform a particular duty imposed on him or them by the Constitution or statute and which duty he has refused to perform to the detriment of the applicant. Reliance was placed on **Shah vs. Attorney General No. 3 Kampala HC Miscellaneous 31/1969 [1970] EA 543,** and it was submitted that the issue of validation of properties was subject to validation circulars and /or notices as per order two of **Hon. Justice W. Musyoka** issued on 2 march 2016. In the respondents replying affidavit the deponent **Mr. Partick M. Bucha** deposed that the validation process was cancelled. Since the validation was based on government circulars, the same circulars cancelled the same thus the order fails.

21. It was the Respondents' case that since the Succession Court which issued the order of 2nd March 2016 has the status of the High Court with power and jurisdiction to punish for contempt of court, if the applicant is of the view that the Chief Land Registrar is in contempt of court orders issued on 2nd March 2016, she ought to have filed contempt proceedings in the very court.

22. It was therefore submitted that the applicant in this case does not present a matter justiciable under judicial review for the court. This is a Contempt of Court application disguised as a judicial review application. The application herein does not meet the basic tenets of Judicial Review and should be dismissed in its entirety with costs to the respondents

Determinations

23. Having considered the application, the affidavit in support of the Motion and the grounds of opposition thereto, this is the view I form of the matter.

24. The first issue for determination is whether this Court has the jurisdiction to deal with the dispute the subject of these proceedings.

25. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission

under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

26. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

27. Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

………………

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

28. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

29. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

30. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

31. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

32. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

33. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "*determine the jurisdiction and functions of the courts contemplated in clause (2)*", Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30th August 2011. Section 13 of the said Act provides as follows:

> ***(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***
>
> ***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***
>
> ***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
>
> ***(b) relating to compulsory acquisition of land;***
>
> ***(c) relating to land administration and management;***
>
> ***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
>
> ***(e) any other dispute relating to environment and land.***
>
> ***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***
>
> ***(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.***
>
> ***(5) Deleted by Act No. 12 of 2012, Sch.***
>
> ***(6) Deleted by Act No. 12 of 2012, Sch.***
>
> ***(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—***
>
> ***(a) interim or permanent preservation orders including injunctions;***
>
> ***(b) prerogative orders;***
>
> ***(c) award of damages;***
>
> ***(d) compensation;***
>
> ***(e) specific performance;***
>
> ***(g) restitution;***
>
> ***(h) declaration; or***
>
> ***(i) costs.***

34. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

> **"…it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationalistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised."**

35. Where however, it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Justice Mohammed Ibrahim** in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR**:

> **"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court".**

36. In my view it is not the mere mention of the word "land" that determines whether the matter ought to be determined by the ELC or not. It is often the case that in succession and commercial disputes it invariably happens that land is involved. That does not necessarily transmute the dispute into a land dispute. It therefore behoves the Court to determine what is the substratum of the dispute. If the land is just a collateral issue in the dispute the matter cannot be termed as a land dispute.

37. In this case the subject of litigation is not the land but rather the failure by the Respondents to carry out a duty imposed on them to obey a Court order. In other words the dispute is whether or not the Respondents ought to be compelled to comply with the Court orders the subject of these proceedings.

38. In my view whereas the ELC has powers to issue orders in the nature of judicial review, its jurisdiction to do so can only be exercised where the substratum of the matter before it is a land dispute. I agree with the position adopted by **Majanja, J** in **United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012 [2012] eKLR**, in which he expressed himself *inter alia* as follows:

> **"[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Such a situation would lead precisely to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current court …….**
>
> **[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibit the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters of their competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).**
>
> **[44] …The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it."**

39. Although the Court was dealing with an employment dispute, in my view the principles are basically the same.

40. In the premises I do not agree that this Court has no jurisdiction to determine the dispute herein.

41. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons**

by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

42. In the instant case, the applicant's position is that despite her attempts, the Respondents have not registered a lawful order of this Court. The existence of the said order is not seriously disputed. Rather the Respondents' case is that the said order is either overtaken by policy decisions or ought not to have been issued at all. With due respect to the Respondents that is a very callous and I daresay arrogant way of treating Court orders. Where the circumstances have changed since the issuance of a Court order the only option available to a party is to go back and seek to have the order reviewed since disregard of Court orders is never an option. In this case one of the national values and principles of national governance which bind all State organs, State officers, public officers and all persons is the rule of law. As was held in **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR** by **Emukule, J** at para 140:

"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action."

43. Obedience of Court orders is one of the tenets of the rule of law. It was therefore held in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

"A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion on a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

44. The matter cannot be better expressed than in the words of **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

45. In **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 0f 2014** this Court sent a warning in the following terms:

"Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law…Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute."

46. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation. Court orders I must emphasise are not subject to interpretation of the executive. Only Court's of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

47. The Respondents also argued that the ex parte applicant ought to have moved the Court for contempt. Whereas considering the attitude adopted by the Respondents that may well have been a very pleasant move, in this case it is clear that execution cannot issue against the Respondents and the only option available to the applicant for the realisation or compliance with the Court order is through proceedings of this nature. In the premises, this application is properly before this Court.

48. Having considered the issues raised herein, I do not see any legal impediment to the grant of the orders sought in the substantive Motion filed herein.

Order

49. In the result, an order of *mandamus* is hereby issued compelling the Principal Secretary, Ministry of Lands, Chief Registrar, Secretary Housing Ministry Lands and Urban Development and Nakuru Lands Registrar to comply with the Court orders issued on 2nd March, 2016 by the **Honourable Justice W. Musyoka** and to issue provisional titles in respect of LR Nos. 12408 & LR Nos 32126 & 36738.

50. The costs of this application are awarded to the Applicant to be borne by the Respondents jointly and/or severally.

51. It is so ordered.

Dated at Nairobi this 20th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munene for the Respondent

CA Ooko