REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL SUIT NO. 67 OF 2007

IN THE MATTER OF AN APPLICATION FOR LEAVE BY MR. JAMES NJOROGE NJUGUNA FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS & PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

AND

DOMINIC NGARE.....1STINTERESTED PARTY

MARGARET WAMBUI KENYATTA.....2ND INTERESTED PARTY

NANCY MUGECHI NGARE.....3RD INTERESTED PARTY

JAMES MACHARIA GICHUKI.....4TH INTERESTED PARTY

CECILIA WANJIRU WAWERU.....5TH INTERESTED PARTY

PETER MUCHIRI NGATIA.....6TH INTERESTED PARTY

THERESIA WIRIMU NGATIA.....7TH INTERESTED PARTY

KAGIRI NDIRANGU.....8TH INTERESTED PARTY

AND

JAMES NJOROGE NJUGUNA.....EX PARTE APPLICANT

JUDGMENT

Introduction.

1. **Joseph Njuguna Njoroge**, (herein after referred to as the deceased) died on **21st** April 1980. By an *ex parte* Chamber Summons dated **1st** February 2007, **James Njoroge Njuguna** (hereinafter referred to as the *ex parte* applicant) sought this court's leave to apply for the following Judicial Review orders:-

a. Spent.

*b. **That** the applicant be granted leave to apply for orders of certiorari to issue removing to this honorable court for purposes of quashing all entries and fraudulent dealings made in the Register of Lands after the death of **Joseph Njuguna Njoroge** the applicant's deceased father in respect of **L.R. No. 11916/2.***

*c. **That** the applicant be granted leave to apply for orders of mandamus compelling the respondent to cancel all entries and dealings made in the Register of Lands after the death of **Joseph Njuguna Njoroge** in respect of **L.R. No. 11916/2.***

*d. **That** the grant of leave do operate as stay of any further transactions on **L.R. No. 11916/16, LR No. 11916/17, LR No. 11916/18** and **LR No. 11916/19.***

*e. **That** the costs of the application be provided for.*

2. On **22nd** March 2007, the court granted the leave to institute Judicial Review proceedings. The order granting leave was couched in the following terms:-

*"that the applicant be and is hereby granted leave to apply for orders of **Certiorari** on the terms that counsel for the ex parte applicant Peter O. Ngoge shall be liable together with the applicant in the event substantive motion herein does not succeed."*

3. Pursuant to the above leave, the *ex parte* applicant filed the Notice of Motion dated **12th** April 2007 seeking the following orders:-

*a. **That** orders of mandamus be issued compelling the Respondents herein to cancel all entries and dealings made in the Register pertaining to **L.R. No. 11916/2** after the death of **Joseph Njuguna Njoroge** the ex parte applicant's deceased father.*

*b. **That** further or in the alternative the honourable court be pleased to issue orders of certiorari to remove to this honourable court for the purposes of quashing all entries and fraudulent dealings made in the register pertaining to **L.R. No. 11916/2** after the death of **Joseph Njuguna Njoroge** the ex parte applicant's deceased's father.*

*c. **That** the Respondents do bear the costs of this suit.*

4. On **24th** February 2016, the court granted the *ex parte* applicant leave to amend his substantive application. Consequently he filed the amended Notice of Motion dated **7th** March 2016, the subject of this ruling, seeking:-

*a. **That** orders of **Mandamus** be issued compelling the Respondents herein to cancel all entries and dealings made in the register pertaining to **L.R. No. 11916/2** after the death of **Joseph Njuguna Njoroge** the ex parte applicant's deceased's father, that is to say entry **No. 13** which gave rise to **L.R. No. 11916/3** and all the subsequent entries therein.*

*b. **That** further or in the alternative the Honorable court be pleased to issue orders of **certiorari** to remove to this honorable court for the purposes of quashing all entries and fraudulent dealings made in the register pertaining to **L.R. No. 11916/2** after the death of **Joseph Njuguna Njoroge**, the ex parte applicant's deceased father, that is to say entry **No. 13** which gave rise to **L.R. No. 11916/3** and all the subsequent entries therein.*

*c. **That** the Respondents do bear the costs of the suit.*

The grounds relied upon.

5. The core grounds in support of the application as far as I can distil them from the of the face of the application, the verifying affidavit and the statutory statement are that:-

*i. **That** the ex parte applicant brings this suit in his capacity as "the personal representative of the deceased's estate and as a beneficiary to the estate." That none of the other beneficiaries of the estate had petitioned for letters of administration. That, the deceased was survived by his late mother among others.*

*ii. **That** prior to his death, the deceased owned **L.R. No. 11916/2,** situated in Karen, Nairobi measuring **5.394 ha.** and that, in or about December 1986, his late mother, a one **Felista Wanjiru Njuguna** without his knowledge or consent unlawfully and fraudulently caused **LR No. 11916/2** to be transferred into her name, in a manner that created a joint proprietorship with her father. He states that his late mother committed fraud particulars whereof he alleges are:-*

*a. Drawing a transfer instrument in her favour to be executed by his father who had died over **6** years before, presenting or causing to be presented the said transfer and or drawing or causing to be drawn and presented for registration a transfer which in the circumstances of the case was a forgery.*

b. Purporting to transfer a good title to the Interested Parties herein knowing well that her title was unlawfully and fraudulently obtained and therefore null and void.

*c. Unlawfully causing **LR. NO. 11916/3** to be sub-divided into **4** portions , namely; **(i) LR No. 11916/16** (1.226 Ha), registered in*

*the names of the **1st** and **3rd** Interested Parties; (ii) **L.R. No. 11916/17** (1.715 Ha) registered in the name of the **6** Interested Party; **LR No. 11916/18** (1.214 Ha) registered in the name of the **7th** & 8th Interested Parties and LR No. 11916/19-(1.214 Ha) Registered in the name of the 7 & 8 Interested Party and*

*d. Transferring the said sub-divisions without the consent of the Land Control Board to the first and third Interested Parties and to **James Macharia Gichuki** who in turn transferred the same to the **2th** Interested Party and **Margaret Wambui Kenyatta**.*

*iii. **That** the transactions were conducted fraudulently without letters of administration to the estate of the deceased and were meant to deprive the deceased's beneficiaries the right to inherit the estate of their deceased's father, and that consents from the Land Control Board was never sought or obtained prior to the transactions;*

*iv. **That** his late mother had no title to the suit premises, hence, as such, she could not pass title to the Interested Parties, by-passing him, a beneficiary to the estate. Further, his late mother had no letters of administration in respect of the deceased's estate, hence, as a beneficiary to the said estate, he was disinherited.*

*v. **That** he filed Nairobi HCC No. **5507** of 1993, Nairobi HCCC No. **810** of 2004 and HC Misc App No. **381** of 2004 and that he was hijacked, threatened with death and was forced at gun point and by coercion to withdraw Nairobi HCC No. **5507** of 1993, hence, he signed a letter requesting his previous advocates to withdraw the suit.*

*vi. **That** as at the time of his death, the deceased's solely owned **L.R. No. 11916/2,** but, upon registration of the transfer complained of, it was registered as **L.R. No. 11916/3**, and, that, a one **Mr. M.A. Khan**, advocate, who purported to have drawn and witnessed his father's signature has since disowned the same.*

*vii. **That** a Document examiner concluded that the transfer was a forgery, and, that his late brother, a one **Paul Waweru Njuguna** swore an affidavit stating how he assisted their late mother in forging the transfer instrument.*

*viii. **That** on or about **20th** January 1987, his late mother caused the registration of his father's death certificate on **L.R. No. 11916/3** and colluded with the Respondents to transfer the land to herself without letters of administration and consequently, subdivided the land and sold to the interested parties without the consent of the Land Control Board.*

6. Also, in support of the application is the affidavit of **Peter O. Ngoge**, Advocate. A reading of the affidavit shows that it is essentially a reaction to the order made at the time of granting leave on **23rd** March 2007 ordering that the said advocate shall be liable together with the applicant to pay costs in the event the substantive motion does not succeed. The said order still remains in force and has never been set aside, and, it is the order upon which this application stands.

First and Second Respondent's grounds of opposition.

7. The Hon. Attorney General filed grounds of opposition on **24th** May 2016 stating that:-

*i. **That** this court lacks jurisdiction to grant the orders of certiorari more than **26** years after the alleged action that is sought to be quashed was taken;*

*ii. **That** this honourable court lacks jurisdiction to hear and determine any issues of alleged fraud; since fraud is a civil claim and the provisions of the Law Reform Act expressly bar the exercise of the High Courts' civil jurisdiction in Judicial Review Matters;*

*iii. **That** this honourable court lacks the jurisdiction to hear and determine a claim of fraud since the same is statute barred by the laws of limitation of actions;*

*iv. **That** the application for orders of **Mandamus** has been Made contrary to the provisions of order **53** Rule **1 (1)** of the Civil Procedure Rules as no leave has been granted to seek the said order;*

*v. **That** the proper procedure would have been for the ex parte applicant to litigate his claim for ownership and if successful register the decision with the Respondents; and that there is no allegation that the Respondents have refused to perform their respective statutory duties;*

*vi. **That** Judicial Review applications are not the appropriate forum for determination of either ownership of land or claims of fraud since both require the adducing of viva voce evidence and cross-examination of witnesses which is not contemplated in Judicial Review proceedings;*

*vii. **That** the application has been made with utmost delay, non-disclosure of material facts as set out in the Interested Party's Replying Affidavits, and, mala fides which disentitles the ex parte applicant to favorable exercise of the discretion of this honorable courts discretion;*

*viii. **That** the application is bad in law.*

First and Third Interested Party's Replying Affidavit.

8. **Mr. Dominic Ngare**, the first Interested Party on behalf of himself and the third Interested Party swore the Replying Affidavit dated **6th** May 2016. He adopted the contents of the Replying Affidavit of **Josephine Waithira Ndirangu** dated **30th** March 2016 annexed to his affidavit. He averred that the deceased died testate and in his will, he appointed the applicant's late mother, **Felistus Wanjiru** and **Mr. M.A. Khan**, Advocate as the executors of his will. He averred that the allegation by the applicant that he brings these proceedings as the personal representative of the deceased's estate is not true, hence, he lacks the *locus standi*.

9. **Mr. Ngare** also averred that the *ex parte* applicant instituted these proceedings pursuant to leave granted on **22nd** March 2007 in respect of **L.R. No. 11916/2,** hence, the order cannot apply to **LR No. 11916/3.** He further averred that the *ex parte* applicant's amended Notice of Motion is incurably defective, incompetent and bad in law because*; **(a)** that the orders sought are not inconformity with leave granted by this honorable court**; (b)** that the amended Notice of Motion is founded on allegations of fraud against the ex parte applicant's late mother, yet her estate has not been enjoined in these proceedings; **(c)** that the limited grant of letters of administration ad litem granted to the ex parte applicant on **15th** January 2004 in P & A Cause No. **69** of 2004 the basis upon these proceedings were brought was obtained fraudulently and through concealment of material facts since the deceased died testate, hence these proceedings are a nullity; **(d)** that the leave granted to the ex parte applicant was to apply for orders of **certiorari** and not orders of **Mandamus** now sought.*

10. **Mr. Ngare** also averred that the allegation by the *ex parte* applicant that he was forced at gun point to withdraw NBI HCC No. **5507** of 1993 which he had sued him and his late mother is untrue in that the *ex parte* applicant voluntarily withdrew the said suit after he was paid **Ksh. 100,000/=** by his late mother as compensation which amount he duly acknowledged on his letter dated **7th** January 1994 marked **DN2** in his affidavit.

11. He further averred that together with his wife, they purchased **LR. No. 11916/16**, a sub-division of **L.R. No. 11916/3** from the *ex parte* applicant's late mother at a price of **Ksh. 241,000/=**, hence, they are *bona fide* purchasers for value. Further, he averred that, before they purchased, they conducted due diligence and confirmed that the property was free from encumbrances.

12. **Mr. Ngare** also averred that he has since developed the plot and they live there, and that the property is currently worth **Ksh. 120,000,000/=.** He further averred that after the transfer and sub-division of **LR No. 11916/3,** (after the deceased's death), which is alleged to have been a forgery, the *ex parte* applicant caused part of his inheritance to be transferred to **Gabriel Mungai Kiarie** and **Eliud G. Gatei (LR No. 11916/13)** and **Mrgaret Wambui Kenyatta (L.R. No. 11916/14)** respectively, yet, he is not challenging the said titles.

13. **Mr. Ngare** also averred that the transfer of **L.R. No. 11916/13** for and on behalf of the *ex parte* applicant was pursuant to a sale agreement dated **9th** September 1981 signed by M.A. Khan Advocate and the *ex parte* applicant's late mother, **Felista Wanjiru** as the executors of the deceased's will as shown by his annexture **DN-4 (a) & (b),** and therefore the allegation by the *ex parte* applicant that the deceased died intestate is a blatant false hold, and, that, these proceedings are an abuse of court process; that they were brought after the death of the applicant's mother who is alleged to have committed the fraud, yet the *ex parte* applicant omitted to enjoin her estate, and, that the applicant is guilty of inordinate delay.

The Second Interested Party's Replying Affidavit.

14. **Njomo Kamau,** a manager of the second Interested Party's estate and a co-executor of the estate of the late **Patrick John Kamau** swore the Replying Affidavit dated **14th** June 2016. He averred that the *ex parte* applicant's father died in April 1980 and left a valid will in which he appointed the applicant's late mother **Felista Wanjiru** and **Mohamed Akram Khan** as executors. He annexed a copy of the will to his affidavit. He also averred that only the executor of an estate can legally represent a deceased's estate, and, that the *ex parte* applicant is not the executor of his late father's estate, hence, he lacks the *locus standi* to bring this suit.

15. Further, he averred that the leave granted to the applicant was to apply for an order of *certiorari* yet, the applicant is seeking an order of *mandamus* whose leave was denied.

16. Also, he averred that the *ex parte* applicant's allegations of fraud are made in respect of **LR No. 11916/3** (Original No. **11916/2/2**) which was registered in the name of the applicant's late mother, and was subsequently sub-divided into four parcels all of which were eventually sold and transferred to the Interested Parties, and, that the second Interested Party purchased **L.R. No. 11916/18** being one of the sub-plots from his late mother at a consideration of **Ksh. 1,500,000/=** and was issued with a Certificate of Title. Further, he added that the deceased's advocate, **Mr. Khan** swore the affidavit annexed to the Replying Affidavit of the fourth and eight Interested Parties stating that the deceased had signed blank transfer documents to several people including the applicant's own piece of land as well as the portion bequeathed to his own mother.

17. **Mr. Kamau** also averred that the *ex parte* applicant's piece of land as well as the parcel sold to the second Interested Party by his late mother were transferred and registered after the death of the deceased using the said blank transfer documents. Further, he averred that the transfer to the testator and his wife was valid and upon the death of the testator, the applicant's late mother became the sole proprietor of the property by operation of the law, hence, the applicant's late mother had all the power and authority to deal with the said piece of land.

18. **Mr. Kamau** averred that the Certificate of Title issued to the second Interested Party was conclusive evidence that she was the absolute and indefeasible owner of the said parcel of land and cannot be challenged in court except on grounds of fraud or misrepresentation to which she is proved to have been a party, and that no evidence has been tendered that the second Interested Party committed fraud in acquiring the property. He also averred that the applicant was not disinherited (as he alleges) as attested by the will which shows that the applicant was bequeathed a large piece of land compared to his siblings measuring approximately **10.81** acres.

19. Also, **Mr. Kamau** averred that the applicant is guilty of non-disclosure of information since there was a settled law suit being HCCC No. **5507** of 1993 he filed against his late mother and other family members relating to his late mother's property, the subject of this suit, which was settled out of court and a consent filed whereby he withdrew the suit unconditionally after being paid a compensation of **Ksh. 100,000/=.** He further averred that the filing of this suit after the death of his mother, and the omission to enjoin her estate, since, she

concluded the transactions, the subject matter of these proceedings is an attempt by the applicant to defraud the Interested Parties of their validly acquired land for valuable consideration. He further added that the presentation of the duly executed transfer documents after the death of the transferor does not negate the validity of the title since the transferor duly completed the transfers.

Fourth and Fifth Respondent's Replying Affidavit.

20. **Josephine Waithira Ndirangu**, the Admnistratrix of the estate of the eighth Interested Party averred that in spite of the limited grant of letters of administration *ad litem* granted to the *ex parte* applicant on **15th** January 2004 in P & A cause No. **69** of 2004, the *ex parte* applicant cannot purport to be an administrator of the deceased's estate because the deceased left a valid will in which he appointed the *ex parte* applicant's late mother **Felista Wanjiru Njuguna** and **Mr. M.A. Khan** Advocate as executors, and, that the *ex parte* applicant was a beneficiary of the will. She adopted the contents of the affidavits of **James Macharia Gichuki,** the fourth Interested Party, and **Mohamed Akram Khan** both sworn on **22nd** March 2017 and added that the allegations of fraud are only made against the *ex parte* applicant's late mother, yet the administrator of her estate has been deliberately left out in this suit. Further, she relied on the contents of the affidavit of **Mohamed Akram Khan** referred to above in which he averred that he is the one who prepared the conveyances for all the deceased's properties including the portion transferred to the *ex parte* applicant, hence, the allegations of fraud are without basis and are meant to defraud the eight Interested Party of her validly acquired property.

21. She also averred that the leave sought by the *ex parte* applicant herein was only to apply for orders of *certiorari* but not the *mandamus* sought. Further, she averred that the claim for fraud is time barred, and, that, the eighth Interested Party purchased **L.R. No. 11916/17** in January 1992 at a consideration of **Ksh. 5.5** Million from the fourth Interested Party, and, before purchasing, he conducted due diligence and physically visited the premises and established that it had no encumbrances, and added that the eighth Interested Party is an innocent purchaser for value.

22. **M/s Ndirangu** further averred that the filing of these proceedings after the death of the *ex parte* applicant's mother and the omission to sue her estate, yet she received the purchase price for the land in full is an attempt by the *ex parte* applicant to defraud the Interested Parties of their properties validly acquired at valuable consideration. Further, she averred that these proceedings were filed after more than **29** years from the date the property was transferred to her predecessor in title, the fourth Interested Party, and **24** years since they purchased the property.

23. **James Macharia Gichuki**, (whose affidavit is annexed to **M/s Ndirangu's** affidavit, and which she adopted), is the fourth Interested Party. In the said affidavit dated **22nd** March 2011 in support of the successful application to set aside the judgment entered against him in this case on **26th** October 2010, **Mr. Gichuki**, averred that until **12th** January 1992, he was the registered owner on **LR. No. 11916/17** which he purchased from the *ex parte* applicant's mother, and, that he sold and transferred it to the late **Dr. Kagiri Ndirangu** (the eighth Interested Party) on **10th** January 1992 for a consideration of **Ksh. 5.5** Million.

24. **Mr. Gichuki** averred that this suit is based on falsehoods, among them, the *ex parte* applicant alleges that he is the administrator of the deceased's estate, yet the deceased left a valid will, and, that, the executors were his late mother and **Mohamed Akram Khan**, the deceased's advocate. Further, he averred that it's not true that the *ex parte* applicant's mother disinherited him when she sold a portion of the property bequeathed to her. He also averred that the *ex parte* applicant inherited a parcel of land measuring **10.81** acres which was later sub-divided into two portions and registered as **L.R. No. 11916/13 & 14**. He averred that the *ex parte* applicant sold one portion to **Gabriel Mungai Kiarie (L.R. No. 11916/13** and the other parcel to **Margaret Wambui Kenyatta (L.R. No. 11916/14.** Further, **Mr. James Macharia Gichuki** gave a detailed tabulation at paragraph **15 (c)** of his affidavit showing how the deceased distributed his property, and stated that the *ex parte* applicant got a bigger share than his other brothers, but he sold it to **Gabriel Kiarie** and **Gitumbi Gatei (L.R. No. 11916/13)** and **Margaret Wambui Kenyatta (L.R. No. 11916/14).**

25. He also averred that the *ex parte* applicant's inheritance under the will was a **10** acre parcel of land which was later subdivided into two parcels, namely, **LR No. 11916/13 & 14** which he had agreed to sell to a **Major Ikenye**, but this sale did not materialize, but, the two parcels of land were subsequently sold to **Kiarie & Gatei** and the other parcel to **Margaret Kenyatta** as stated above. A copy of the sale agreement is annexed to his affidavit.

26. He averred that the deceased had signed blank transfer instruments to several people including the *ex parte* applicant's own parcels **(LR. Nos. 11916/13 & 14)** as well as the portion bequeathed to his mother who also sub-divided and sold to him and other interested parties. Further, he averred that the transfer to the testator was valid since it was procured using blank signed forms and, that his mother was registered as joint proprietor with her late husband, hence the transfer was by operation of the law upon the death of her husband. He exhibited a letter from the Registrar of Titles explaining how the Land Control Board Consents were obtained.

27. **Mr. Gichuki** also averred that the *ex parte* applicant filed HCC No. **5507** of 1993 against his late mother and other family members relating to her land, the subject of this case, which was settled and the *ex parte* applicant withdrew it and was paid **Ksh. 100,000/=** in full and final settlement of any claims against his mother.

28. She also annexed the affidavit of **Mohamed Akram Khan**, an advocate of the High Court of Kenya dated **22nd** March 2011 the contents of she adopted. **Mr. Khan,** averred that he acted for the deceased who owned a piece of land in Karen which he sub-divided and sold to various parties over a period of time. **Mr. Khan** further averred that prior to his death, the deceased had instructed him to write a will a copy whereof is attached to the affidavit of **Mr. Gichuki**, and that in the will, he was appointed the executor together with the deceased's late wife.

29. **Mr. Khan** also averred that during his life time, the deceased had distributed properties to his family members but he had not transferred all the respective portions because of the delay in the conclusion of the subdivision and issuance of the respective titles. He averred that the deceased had also sold some parcels to third parties but had not transferred the same to all the purchasers for the same reason. **Mr. Khan** averred that the deceased had prior to his death given him instructions to deal with the residue of his estate in respect of the remaining parcels

of land, and that, prior to his death, the deceased had signed various blank transfers documents which he was to use to transfer to the various purchasers and members of his family after the completion of the subdivision. He averred that one of the blank transfers related to transfer to the deceased and his wife jointly measuring **5.39** hectares which was subsequently registered as **L.R. No. 11916/3** (Original No. **11916/2/2).**

30. He averred that the law then required payment of estate duty amounting to **Ksh. 1,109,146.55.** Hence, he was not able to obtain a formal grant, and in any event, save for the property left for his wife, the estate had no other assets because the deceased had already sold most of his land to third parties and distributed the remaining portion to his children including the *ex parte* applicant who was given **10.8** acres as his inheritance which he was in the process of selling.

31. **Mr. Khan** averred that eventually, he obtained exception of estate duty on **16th** May 1986, and he applied for Land Control Board Consent to enable him transfer to the deceased's wife her land in respect of which he held blank transfer instruments. He averred that he explained to the Land Control Board the circumstances that forced him to apply for the consent after the death of the deceased and he subsequently obtained the consent after which the transfers were registered and a Certificate of Title issued.

32. He averred that after the death of one of the joint owners to a property in undivided shares, the surviving party becomes automatically by operation of the law, the owner of the whole property upon the registration of the death certificate. He also, averred that subsequently, the deceased's wife sub-divided the property and sold to various parties among them the fourth Interested Party.

33. **Mr. Khan** averred that the *ex parte* applicant was at all material times aware that his father had left a will in which he himself was a beneficiary of **10.8** acres, and, that the *ex parte* applicant entered in to a contract to sell his inheritance as evidenced by the sale agreement marked **MAK,** which agreement the applicant's mother and **Mr. Khan** signed as the executors of the will and the *ex parte* applicant signed as a *beneficiary* of the said sale and the purchasers signed. He averred that this particular sale aborted, but the applicant subsequently sub-divided the land and sold.

34. **Mr. Khan** also averred that the applicant is not the executor of his fathers' estate or his personal representative since his father left a will and that after the death of his mother, there was no other property pending distribution since all the transfers were effected using the blank transfer documents signed by the deceased prior to his death. He also averred that the deceased's wife sub-divided her aforesaid parcel of land and transferred the various portions to innocent third parties.

Sixth and Seventh Interested Parties Grounds of objection.

35. The sixth and seventh Interested Party's filed grounds of objection stating:-

*a. **That** the application is fatally defective because the application for Madamus was made without leave;*

*b. **That** the Certificates of Titles issued to the sixth and seventh Interested Parties for **LR. Nos. 11916/18** and **19** are conclusive evidence that they are the absolute and indefeasible owners and their titles are not subject to challenge except on grounds of fraud or misrepresentation to which they are proved to have been a part to;*

*c. **That** the applicant has not shown fraud or misrepresentation by which the sixth and seventh Interested Parties acquired titles for **L.R. No. 11916/18** & **19** or that they were parties to or complicit in such fraud or misrepresentation;*

*d. **That** the deceased left a will appointing his lawyer **Mohamed Akram Khan** and his wife **Felista Wanjiru** as the joint executors and trustees of his estate;*

*e. **That** the application is fatally incompetent for want of capacity to file this suit, and that, as a beneficiary of his father's estate, in the will, he was provided for and given his own share but he sold his inheritance of **5.71** acres to **Gabriel Mungai Kiarie** and **Eliud Gitumbi** on **13th** November 1981 and another **5.10** acres to **Magaret Wambui Kenyatta** on **17th** November 1984;*

*f. **That** because his father and mother were joint proprietors in undivided shares, the moment he died she became the sole proprietor by operation of the law;*

*g. **That** the Land Control Board consents were sought and obtained, and that the transfer was effected the same way his was effected;*

*h. **That** the issues raised herein are res judicata having been raised and determined in HCCC No. **5507** of 1993;*

*i. **That** the amended Notice o Motion is incompetent since it seeks to cancel all the entries in the register of **L.R. N. 11916/2** after the death of his father yet the entries include six transfers of LR Nos. **11916/9,10,11,12,13 & 14** to **Gabriel Kiarie** and **Eliud Gatei**, **Patrick Kamau**, **Margaret Wambui Kenyatta** and his brother **Ephrahim Njoroge**, yet the said parcels are not sub-divisions of **L.R. No. 11916/3** and have nothing to do with his mother's alleged fraud.*

*j. **That** the applicant ought to serve **Gabriel M. Kiarie**, **Eliug Gatei**, his own **brother Ephrahim Njoroge Njuguna** and the estate of the late **Patrick John Kamau** since they are the persons likely to be affected by the orders sought;*

*k. **That** the application is bad in law for non-joinder because despite the serious allegations of fraud against his own mother, he failed to join her estate in this case; and that the sixth and seventh interested parties sold the properties to other persons many years ago;*

*l. **That** the application is founded on deception and misrepresentation.*

Issues for determination.

36. Upon carefully analyzing the facts presented by the parties and the submissions rendered by the respective advocates, I find that the following issues fall for determination.

a. Whether the ex parte applicant lacks the locus standi to institute these proceedings.

*b. Whether this suit offends Section **9 (2)** of the Law Reform Act and Order **53** Rule **2** of the Civil Procedure Rules, 2010.*

c. Whether this court can grant a Judicial Review order for which leave was not granted.

d. Whether this suit is barred by the doctrine of res judicata.

e. Whether this suit is barred by the doctrine of estoppel.

f. Whether this suit is a "civil suit" disguised as a "Judicial Review proceeding."

g. Whether this suit is barred by the Limitation of Actions Act.

h. Whether the Interested Parties' Titles are Indefeasible.

i. Whether the ex parte applicant is guilty of concealment of material facts and abuse of court process.

j. Whether the ex parte applicant is entitled to any of the Judicial Review orders sought.

*a. **Whether the ex parte applicant lacks the locus standi to institute these proceedings**.*

37. **Mr. Njogu,** the *ex parte* applicant's counsel's argued that the *ex parte* applicant brings this suit as a legal representative of the estate of his late father pursuant to a grant of letters of administration *ad litem* issued to him on **15th** January 2004, and, as a beneficiary of his father's estate, hence, he has the requisite legal capacity to bring these proceedings.

38. **Miss Chimau** for first and second Respondent's did not specifically address this issue in her submissions, but in their grounds of opposition the Hon. A.G. stated that this suit is bad in law.

39. **Mr. Kimondo Mubea**, the first and third Interested Party's counsel submitted that the *ex parte* applicant has no *locus standi* to bring these proceedings on behalf of the estate of his father. He argued that it is not in dispute that the deceased died testate and that the *ex parte* applicant's mother and the deceased's lawyer were the executors to his will. He referred to a copy of the will exhibited to the affidavit of **James Macharia Gichuki** and the Affidavit of **Mr. Khan.**

40. **Mr. Mubea** also submitted that pursuant to the said will, the *ex parte* applicant entered into sale agreements in respect of his **2** parcels of land, namely **L.R. N. 11916/13 & 14,** and, even though the agreements aborted, they were signed by the executors and the *ex parte* applicant as a *beneficiary*, hence, the *ex parte* applicant cannot commence these proceedings as the personal representative to his father's estate.

41. **Miss Areri** instructed by the firm of **Mr. Waweru Gatonye & Co** Advocates for the second Interested Party adopted their written submissions in which they argued that:- **(i)** the deceased died testate and left a valid will in which he appointed his wife, **Felista Wanjiru Njuguna** and **Mohamed Akram Khab** as the executors; **(ii)** that a legal representative as defined in the Civil Procedure Actis equivalent to the definition of a personal representative as defined in section **3** of the Law of Succession Act.They cited *Mary Nanjala Muhalya vs Ambrose Kipruto* in which the court upheld the said definition and argued that the applicant lacks the legal capacity to bring these proceedings.

42. **Mr. Riunga Raiji**, counsel for the fourth and eighth Interested Parties submitted that the *ex parte* applicant is not the legal representative to his late father's estate. He argued that the *ex parte* applicant was aware that his father died testate leaving a will. He also referred to the sale agreement dated **9th** September 1981 executed by executors, the *ex parte* applicant and the purchasers in which the *ex parte* applicant was selling his land which he inherited from his late father under the said will. **Mr. Raiji** submitted that one of the executors to the will is still alive and he is the one with the capacity to represent the estate. He submitted that the *ex parte* applicant has no capacity to represent the estate of the deceased, and that he obtained the limited grant by concealing material facts.

43. **Mr. Murage** for the sixth and seventh Interested Parties submitted that the *ex parte* applicant cannot become a legal representative, because he did not comply with section **62** of the Law of Succession Act.

44. It is trite law that any person intending to institute proceedings must have the necessary *locus standi* in law to do so. The general rule is for the party instituting proceedings to allege and prove that he or she has *locus standi*, the onus of establishing that issue rests upon the applicant. It must accordingly appear *ex facie* the particulars of claim (founding affidavit) that the party suing thereof has the necessary *locus standi.*

45. When it comes to deceased's estates, The general rule is that an *executor* is the only person who can represent the estate of a deceased person. Where a person dies intestate, then the person suing must obtain a grant of letters of administration. In regard to the legal status of both the deceased's estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purpose of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has *locus standi* to sue or to be sued.There is however an exception to the general rule. In instances where the trustee fails in his duties, or has renounced his executorship.

46. There is no argument before me that the deceased did not leave behind a valid will. In fact, the existence of the will is not contested at all. There is evidence that the *ex parte* applicant was provided under the will. He received his entitlement and sold it. There is on record an undisputed sale agreement signed by him as a *beneficiary* selling the property he inherited under the will. The agreement was signed by the executors in that capacity. The *ex parte* applicant is described as a beneficiary in the said agreement in which he was to be the beneficiary of the proceeds of the sale There is uncontested evidence that he sold his inheritance under the will. He cannot now turn around and purport to claim that he is the legal representative of the estate when he knew that the deceased left a will.

47. In any event, a will, which is regular and complete on the face of it, is presumed to be valid until its invalidity has been established. The circumstances under which the *ex parte* applicant obtained the grant of letters of administration *ad litem* supposedly to secure the *locus standi* to commence these proceedings are suspect and to say the least out rightly illegal and a gross abuse of court processes. Section **62** of the Law of Succession Act provides in peremptory terms that:-

"When a person who has been appointed by a will is an executor thereof has not renounced the executorship, letters of administration ***shall not be granted*** *to any other person until a citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will:*

> *Provided that:-*
>
> *i. when one or more of several executors have proved a will, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved; and*
>
> *ii. there may be such limited grants of letters of administration in accordance with the provisions of section* ***54*** *of this Act as may, in the opinion of the court, be necessitated by any special circumstances.*

48. *First,* there is nothing to show that the deceased's wife and Mr. Khan renounced the executorship. On this ground alone, the purported grant obtained by the *ex parte* applicant is incompetent. Had he disclosed to the court that there existed a valid will, the court would have declined his application for a limited grant.

49. *Second,* a grant cannot be obtained until a citation has been issued. The operative words here are *shall not be granted*. According to *Black's Law Dictionary*, the term *"shall"* is defined as follows:-

> *"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."*

50. The definition continues as follows:-*"but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense." So "shall" does not always mean "shall." "Shall sometimes means "may*."

51. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions keeping in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

52. The Court has a duty to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

53. It is important to point out that a provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.

54. In a recent decision I observed that the word *"shall"* when used in a statutory provision imports a form of command or mandate. It is not

permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote an obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. The following guidelines laid down by Wessels JA. are useful:-

> *"…. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…- Standard Bank Ltd v Van Rhyn (1925 AD 266).*

55. A reading of section **62** of the Law of Succession Act leaves me with no doubt that the provision is couched in mandatory terms that no grant shall be issued, unless the executor has renounced the executorship. The only exception to the section is provided in the proviso in paragraphs **(i)** and **(ii)** above.

56. The *first e*xception applies when one or more of several executors have proved a will, then, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved. The *ex parte* applicant did not cite this proviso nor does it apply in the circumstances of this case.

57. The *second* exception is that there may be such limited grants of letters of administration in accordance with the provisions of section **54** of the Act as may, in the opinion of the court, be necessitated by any special circumstances. Section **54** of the Law of Succession Act provides that *"A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."* Again, the *ex parte* applicant did not bring his case under the ambit of this exception. I have carefully examined the circumstances of this case, section **62** of the Law of Succession Act and I have no doubt in my mind that it is beyond argument that the special circumstances enumerated in the fifth schedule do not apply in the circumstances of this case.

58. From the above provisions, it is beyond argument that the grant of letters of administration *ad litem* obtained by the *ex parte* applicant on **15th** January 2004 in P & A Cause No. **69** of 2004 offends the provisions of section **62** of the Law of Succession Act. There is nothing to show that any of the special circumstances contemplated under section **54** of the act as read with the Fifth schedule to the act are present in the circumstances of this case. It was procured in total violation of the law. It follows that it is invalid and of no legal effect. It was obtained fraudulently and or through deliberate misrepresentation and/or concealment of material facts and in total abuse of court process. The conclusion becomes irresistible that the *ex parte* applicant lacks the legal capacity to institute these proceedings. Consequently, these proceedings instituted on the strength of the grant of letters of administration *ad litem* granted to the *ex parte* applicant on **15th** January 2004 in P & A Cause No. **69** of 2004 are incompetent and un sustainable. On this ground alone, this suit fails.

b. Whether this suit offends Section 9 (2) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010.

59. Notwithstanding the fact that this issue was raised by all the for Respondents and the Interested Parties, the *ex parte* applicant's counsel did not address it in his submissions.

60. The Respondent' counsel submitted that this Judicial Review application was filed outside the six months period provided under the Law Reform Act and Order **53** Rule **2** of the Civil Procedure Rules.

61. **Mr. Mubea** cited Order **53** Rule **2** and section **9 (2)** of the Law Reform Actand argued that this application is time barred, hence unsustainable. To support his argument, he drew the court's attention to the fact that the transaction registered as entry No. **13** in the Certificate of Title No. IR **33975**, i.e. **LR No. 11916/2,** on the strength of which the *ex parte* applicant's mother **Wanjiru Njoroge** allegedly caused one of the sub-division plots that is **L.R. No. 11916/3** to be transferred to herself and her late husband, the deceased in these proceedings was effected on **30th** December 1986. He also pointed out that the *ex parte* applicant's application for leave to apply for orders of *certiorari* and *mandamus* was filed on **21st** March 2007, after a period of **20** years and three months which delay is inordinate and has not been explained. To buttress his argument, **Mr. Mubea** cited *Republic vs Kiambu Land Disputes Land Tribunal & 2 Others ex parte Wambui Chege Macharia & 2 Others* where it was held that Judicial Review being exceptional in nature should not be made available to indolent who sleep on their rights.

62. **Mr. Mubea** also cited *Raila Odinga & 6 Others vs Nairobi City Council* where it was held that an application for Judicial Review, may it for an order of *mandamus, prohibition* or *certiorari* should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose. He further cited *John Peter Mureithi & 2 Others vs Attorney General & 4 Others* where it was held that where the decision being impugned has been implemented and third parties have come into the scene, the court should not intervene because speed and promptness are the hallmarks of Judicial Review and that hardship to third parties should keep the court away.

63. **Mr. Raiji's** argued that these proceedings are statute barred. He submitted that under Order **53** Rule **2,** the proceedings should be made within **6** months. He pointed out that the transfer of **LR No. 11916/3** to the *ex parte* applicants mother was effected on **30th** December 1986, and **LR No. 11916/17** (a sub-division of **LR No. 11916/3**) was effected on **12th** March 1987 to the fourth Interested Party who subsequently transferred the portion to the eighth Interested Part on **10th** January 1992, over **20** years, and that these proceedings were filed in April 2017.

64. **Mr. Murage** also argued that this claim is time barred by dint of section **9 (3)** of the Law Reform Act.He cited *Republic vs Kiambu Land Dispute Tribunal & 2 Others ex parte Wambui Chege & 2 Others* in which it was held that the six months limitation is not just a procedural issue but a matter which goes to jurisdiction. He also cited *Laban Kibinga Kimondo & 5 Others vs Attorney General & 3 Others* where the court held that order **53** Rule **2** is couched in Mandatory terms.

65. Order **53** Rule **2** of the Civil Procedure Rules, 2010 which provides :-

*"Leave **shall** not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

66. This provision is derived from section **9 (2) (3)** of the *Law Reform Act* which provides that:-

***(2)** Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.*

***(3)** In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave **shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law;** and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*

67. The word *shall* is used in the above provisions. While addressing the first issue hereinabove, I discussed the meaning of the word *shall and concluded that it is mandatory.* When a statute has imposed a time limit for commencement of proceedings for Judicial Review, and has made no provision for grant of extension of time, the statute may be interpreted as having restricted the jurisdiction of the court of review.There are, however, Australian and Canadian decisions to the effect that similar provisions do not affect a court's jurisdiction to review on the ground of jurisdictional error.In contrast judges of the Supreme Court of Victoria have taken the view that similar provisions deprives the court of jurisdiction to review once the prescribed time limit has expired, whatever the grounds for seeking review.

68. There has been a difference of judicial opinion about the effect of statutory provisions which impose a time limit on the time within which the validity of specified acts or decisions may be contested before the courts and which then go on to provide that those acts or decisions cannot be called into question in any legal proceedings. English courts have construed such provisions as precluding Judicial Review after the specified time has expired, even if review is sought on jurisdictional grounds A 1982 decision of a judge of the New South Wales Land and Environment Court adopted a similar view. But a later decision of the State's Court of Appeal accorded a more limited effect to such a provision. The court's position was essentially that a provision of this kind will not protect decisions which have not been made in a *bona fide* attempt to exercise the relevant statutory power, or which do not relate to the subject matter of the empowering legislation, and are not reasonably capable of reference to the statutory powers the decision-maker has been given.

69. Back at home in *Mokombo Ole Simel & Others vs. County Council of Narok & Others* the Court expressed itself as follows:-

"If the limited time is prescribed under the Civil Procedure Rules or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the Law Reform Act. Order 49 rule 5 of the Civil Procedure Rules cannot be invoked to supersede the express provisions of the Act...Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament...The long established tradition in commonwealth countries is that we look in the main to the legislature rather than to the courts for the development of our law. Moreover it is a different thing if a statute is ambiguous and capable of different interpretations. Here in this case the legislation is clear and certain and not open to any conflict on interpretations. The duty of the court is to expound what the law is and not what in view of social changes it should be. To change the law according to social dictates of society is the function of legislature. The court cannot strike down or disregard the express provisions of section 9 of the Act and therefore the applicant's application for leave to apply for an order of judicial review to quash the resolution is rejected...But a copy of the ruling should be forwarded to the Honourable the Attorney General since the provisions of section 9 should be amended so that the court is given jurisdiction to enlarge the period of six months in deserving cases."(Emphasis added).

70. The High Court in *APA Insurance Company vs Vincent Nthuka* addressed the issue under consideration in the following words:-

26. In my view the failure to apply within the time prescribed by the law cannot be ignored pursuant to the provisions of Article 159 of the Constitution. It is my view Article 159(2)(d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. In my view it is not meant to destroy the law but to fulfill it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law. Dealing with the said Article of the Constitution, the Supreme Court in Petition No. 5 of 2013, Raila Odinga versus Independent Electoral and Boundaries Commission & Others [2013] eKLR expressed itself as follows: -

> *"...Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality."*

27. An issue that goes to jurisdiction cannot, in my view be termed a mere technicality. To the contrary the issue goes to the root of the matter since without jurisdiction the Court has no option but to down its tools.

28. The Court of Appeal for East Africa dealing with the policy behind statutory limitation periods in Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 expressed itself as follows:-

> *"The overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, and it has been the policy of the courts to lean against stale claims. There is no reason why the legislature in this particular instance should enlarge the time within which the personal representative of a deceased plaintiff should have himself brought on the record. Such a construction as canvassed by counsel for the respondent would not only make article 175A nugatory or redundant in the 1877 Act, but would also operate to the prejudice of a defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence...The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible."*

71. In *Ako vs Special District Commissioner, Kisumu & Another* the Court of Appeal was emphatic that *"it is plain that under sub-section **(3)** of section **9** of the Law Reform Act leave shall not be granted unless application for leave is made inside six months after the date of the judgment."* The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time.

72. Similarly, the Court of Appeal in *Wilson* ***Osolo -Vs- John Ojiambo Ochola & Another*** the Court of Appeal expressed itself thus:-

> ***"It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act". There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.''***

73. It is undisputed that the registration which is being challenged was effected on **30th** December **1986.** The application seeking leave was filed on **21st** March 2007. A simple calculation shows that twenty one years had lapsed as at the time the application for leave was filed. This is outside the six months period provided for instituting Judicial Review proceedings. The delay is inordinate and inexcusable. It would be travesty of justice for a court to entertain a Judicial Review proceeding filed over twenty years from the date the impugned decision was made. The leave granted to the applicant cannot cure the legal defect that the proceedings were time barred as at the time the leave was granted. Additionally, the fact that leave was granted is not a bar to the Respondents and the Interested Parties to raise the issue since it's a point of law. The court can also raise the issue *suo motto.* It is my finding that this suit offends the provisions of Order **53** Rule **2** of the Civil Procedure Rules, 2010, and section **9 (2)** and **(3)** of the Law Reform Act.Accordingly, it is unsustainable and on this ground, it fails.

c. Whether this court can grant a Judicial Review order for which leave was not granted.

74. It is common ground that the court granted conditional leave in the following terms:- *"That the applicant be and is hereby granted leave to apply for orders of **certiorari** on terms that counsel for the ex parte applicant Peter O. Ngoge shall be liable together with the applicant in the event substantive motion herein does not succeed."*

75. It's clear that the *ex parte* applicant was <u>not granted leave</u> to apply for an order of <u>*mandamus.*</u> Pursuant to the leave granted, the applicant filed the substantive Notice of Motion dated **12th** April 2007 and included a prayer for *mandamus.* Subsequently, the *ex parte* applicant sought and obtained leave to amend his substantive application. The amended Notice of Motion filed pursuant to the leave to amend seeks also includes a prayer for <u>*mandamus.*</u> It is this prayer that has attracted severe objection from the Respondents and the Interested Parties counsels. The contestation is that an applicant in a Judicial Review proceedings cannot apply for a relief for which leave was not granted. Such a prayer, the Respondent's and Interested Parties counsels argued, offends the mandatory provisions of the Law Reform Act and the Civil Procedure Act which provide in peremptory terms that "no application for an orders of *mandamus, prohibition* or *certiorari* shall be made unless leave therefor has been granted in accordance with order **53** Rule **1** of the Civil Procedure Rules."

76. **Mr. Njogu's** submission on this issue was brief. He argued that once leave is granted that is sufficient.

77. The Respondents' counsels' submission on this issue is that since the applicant did not obtain leave to institute Judicial Review orders of *mandamus* in his application for leave, the court should <u>not</u> consider the prayer for *mandamus* for which no leave was granted. To buttress his argument, he cited *CAPRI Holding Ltd vs Kailimu Enterprises & Others vs The Commissioner of Lands.* He argued that under Order **53** of the Civil Procedure Rules, 2010, no application for Judicial Review can be made unless leave of the court is sought

78. **Mr. Mubea** argued that the summons dated **20th** March 2007 sought leave to apply for an order of *certiorari* to quash all the entries and fraudulent dealings made in the Register of Land after the death of **Joseph Njuguna Njoroge**, the *ex parte* applicant's deceased's father in respect of **L.R. No. 1196/2** and leave to apply for *mandamus* compelling the respondent's to cancel all entries and dealings made in the Register of Lands after the death of **Joseph Njuguna Njoroge** in respect of **L.R. No. 11916/2.**

79. **Mr. Mubea** further submitted that the *ex parte* applicant's Notice of Motion filed pursuant to the leave to amend seeks an order of *mandamus* yet leave was not granted for the same. He submitted that the application is outside the scope of leave granted. To buttress his argument, he cited *Republic vs Attorney General & Others ex parte No. 85214 PC Robert Magige* and argued that the inclusion a prayer for *mandamus* goes to the substance of the matter and outside the scope of the leave granted. To further buttress his argument, he referred to explanation **5** of section **7** of the Civil Procedure Act and *Republic vs Business Premises Rent Tribunal & Another ex parte Westlands Sundries Limited & 2 Others* where the court considering the above provision held that it applies to orders as well, and, that a relief in an application which is not expressly granted is similarly deemed to have been refused.

80. Counsel for the second Interested Party argued that the application does not comply with the leave granted, and, that the applicant cannot present an application which goes beyond the specific facts and reliefs sought. To fortify his argument, counsel cited *Bespoke Insurance Brokers vs Philip Kisia, The Town Clerk City Council of Nairobi & Another* and *Republic vs Attorney General & 4 Others ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji* where the said argument was up held.

81. **Mr. Raiji** pointed out that conditional leave was given only for the order of *certiorari*. **Mr. Murage** argued that the applicant did not obtain leave to apply for an order of mandamus, hence this court has no jurisdiction to grant the said order.

82. Order **53** Rule **1 (1)** of the Civil Procedure Rules, 2010 provides in peremptory terms that " No application for an order of mandamus, *prohibition* or *certiorari* **shall** be made unless leave therefor has been granted in accordance with this rule."

83. This case was filed in 2007, before the promulgation of the Constitution of Kenya, 2010, a charter that has been hailed as highly transformative, liberal and progressive, a charter that shook and changed the legal landscape, governance and jurisprudence in this country. It is therefore important to appreciate the law governing Judicial Review proceedings then, and the law and jurisprudence under the current constitutional dispensation.

84. Traditionally, Judicial Review was governed by common law principles imported to Kenya by the provisions of sections **8** and **9** of the Law Reform Act.This case having been filed in 2007, is governed by the traditional common law principles and jurisprudence. Under these common law principles, the requirement for leave before instituting Judicial Review proceedings was is mandatory and had a purpose. The purpose and importance of obtaining leave in a Judicial Review applications was eloquently captured by **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others* cited by the Respondent's Counsel where the learned Judge said:-

> *" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."(Emphasis added)*

85. In *Meixner & Another vs A.G,* it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

86. At the leave stage an applicant must show that:- **(i)** he/she has **'sufficient interest'** in the matter otherwise known as *locus standi*; **(ii)** the applicant must demonstrate that he is affected in some way by the decision being challenged; **(iii)** An applicant must also show that he has an arguable case and that the case has a reasonable chance of success; **(iv)** the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; **(iv)** the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated. Had the applicant disclosed to the court which issued him the limited grant, he would not have satisfied the requirement for *locus standi.*

87. At the leave stage, the *ex parte* applicant has the burden of demonstrating that the decision is *illegal, unfair* and *irrational*. The applicant must persuade the court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further. The leave stage is the acid test which the application had to pass, but only one prayer passed this test.

88. Explanation **(5)** of section **7** of the Civil Procedure Act provides that *"Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused."*

89. The order granting leave is very clear. The *ex parte* applicant was not granted leave to apply for an order of *mandamus.* The fact that the applicant was granted leave to amend his Notice of Motion was not a blank ticket to introduce a substantive prayer contrary to Order **53** Rule **1 (1)** of the Civil Procedure Rules, 2010 for which leave was declined. The *ex parte* applicant is now seeking before this court a relief which is barred by explanation **(5)** above. The relief of *mandamus* is deemed to have been refused. On this ground alone, the relief or *mandamus* is improperly sought and cannot be granted. This prayer also offends the doctrine of *res judicata* discussed below.

90. It is however important to spare some ink and express my thoughts on the question whether leave in Judicial Review proceedings is still a requirement under the current constitutional dispensation which guarantees access to justice. As stated above, Order **53** of the Civil Procedure Rules, 2010, is borrowed from Sections **8** and **9** of the Law Reform Act which provisions are premised on the common law Jurisdiction governing Judicial Review remedies and procedure for applying for Judicial Review orders. Article **19(3)** provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights and are subject only to the limitations contemplated in the Constitution.

91. Article **22** of the Constitution guarantees the right to institute Court proceedings to enforce the Bill of Rights. Article **23** grants the Court the authority to uphold and enforce the Bill of Rights. More important is the fact that Article **23 (3)** provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article **22,** the Court can grant appropriate relief including a declaration of rights, an injunction, a

conservatory order, invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

92. This discussion cannot be complete without mentioning Article **48** which guarantees the right to access court and Article **258** which provides that every person has a right to institute Court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.**

93. Judicial Review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. As this court stated in *Republic vs Speaker of the Senate & Another Ex parte Afrison Export Import Limited & Another* "No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail."

94. As stated above, the applicant was denied leave to apply for an order of *mandamus.* That remains the position, hence, it was improper to sneak into the substantive application and the amended application a relief for which leave was sought and declined. On this basis, the prayer for *mandamus* fails.

d. Whether this suit is barred by the doctrine of res judicata.

95. It is common ground that the *ex parte* applicant filed HCCC No. **5507** of 1993 against his late mother **Felista Wanjiru Njuguna, Dominic Ngare** (the first Interested Party herein), **Nancy Mugechi Ngare** (the third Interested Party herein), **James Macharia Gichuki** (the fourth Interested Party herein), **Margaret Wambui Kenyatta** (the second Interested Party herein), **Cecilia Wanjiru Waweru** (the fifth Interested Party herein), **Peter Muchiri Ngatia** (the sixth Interested Party herein) and **Teresia Wairimu Ngatia** (the seventh Interested Part herein).

96. In the said suit, just like in this case, the *ex parte* applicant alleged *inter alia* that at the time of his death, his father owned **L.R. No. 11916/3.** He also alleged that the said land was subject to the Land Control Board, and, that, his mother fraudulently transferred half share of the suit premises to her, which transfer was registered after his fathers' death. Among the reliefs sought in the said suit are that the transfer to his mother be declared null and void; that the deceased died intestate in so far as the said premises is concerned; an order directed to the Registrar of Titles to cancel all the entries and dealings made in the Register after the death of the deceased and an order declaring transfers made in favour of the Respondents therein (now Interested Parties in this suit) to be null and void.

97. It is not contested that the issues in the said case involved the same transactions under challenge in these Judicial Review proceedings. It is not contested that the said proceedings were compromised and withdrawn. The point of departure is the argument advanced by the *ex parte* applicant that he was coerced at gun point to withdraw the said suit. Additionally, the *ex parte* applicant's counsel submitted that the issues raised in HCC No. **5507** of 1993 were not heard and determined by a court of law since the matter was withdrawn under duress, and any person aggrieved has liberty to sue.

98. Counsel for the second Interested Party submitted that this suit is *res judicata* because it involved the same land and, that, the *ex parte* applicant cited the same allegations of fraud against his mother as in this case, and, that the suit was amicably settled and withdrawn upon the *ex parte* applicant being paid **Ksh. 100,000/=** compensation.

99. **Mr. Murage** reiterated the above argument and submitted that *res judicata* applies even where a matter is withdrawn by consent. He relied on *Kamunye vs Pioneer Assurance Ltd.*

100. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case. As **Somervell L.J**. stated *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

101. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.

102. The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.'

103. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.

104. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the

jurisdiction of the Court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning.The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.

105. Also known in the US as claim preclusion, *res judicata* is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

106. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are:- ***(i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit***.

107. In ***Gurbachan Singh Kalsi vs. Yowani Ekori*** the former East African Court of Appeal stated as follows:-

> ***"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."***

108. It is trite that the mere addition of parties in a subsequent suit or omission of a party or party's as has happened in this case does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.

109. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive.

110. Clearly, this Judicial Review Application is founded on a subject matter and issues that were raised in the former suit which was compromised and a consent recorded. He was paid pursuant to the consent. The copy of the letter dated **7th** January 1994 the *ex parte* annexed to his court papers carefully omitted some crucial details which cannot escape the court's hawk eyes. He carefully omitted the hand written acknowledgement he signed confirming receipt of the **Ksh. 100,000/=** as shown in exhibit DN2 annexed to the affidavit of **Mr. Ngare.**

111. He now alleges that he was coerced to withdraw the case. The consent was recorded in 1994. He filed this suit in 2007, after thirteen years. All these years, he never applied to set aside the consent order on the alleged grounds or on any other ground. An order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the court made otherwise than by consent and not discharged on appeal. A party bound by a consent order must, when once it has been endorsed by the court, obey it, unless and until he can get it set aside in proceedings duly instituted for that purpose. *In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands unless and until it is discharged on appeal*.

112. It is my finding that *res judicata* applies in this case since the issues settled in the said case are the same issues raised in this case. The said order has never been set aside. The *ex parte* applicant cannot re-litigate over the same issues disguised as a Judicial Review proceedings. On his ground this case fails.

e. Whether this suit is barred by the doctrine of estoppel.

113. The *ex parte* applicant's counsel did not address this issue at all.

114. **Mr. Murage** submitted that this suit is barred by the doctrine of *estoppel*. To buttress his argument, he cited *ET vs The AG & Two Others* whereby a party had filed a Petition in disregard of a withdrawal order. It was held that issue *estoppel* is a broad principle of law that prevents a party from re-litigating an issue of fact or law that has been determined by a prior judgment or order. He also argued that a consent is binding.

115. It is convenient to state that estoppel generally means *"a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."*There are three kinds of estoppels:- ***(a)*** *by deed*; ***(b)*** *by matter of*

record; and ***(c)*** *by matter in pais (by conduct)*.

116. *Estoppel* by deed "prevents a party to a deed from denying anything recited in that deed…" *Estoppel* by record means that "when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it into question, and have it tried over again…, so long as judgment or decree stands un reversed. *Estoppel* by conduct,is the principle by which a party who knows or should know the truth is absolutely precluded … from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed.

117. The whole doctrine of equitable *estoppel* is a creature of equity and is governed by equitable principles."Equity in turn denotes fairness and justice. This parallel between justice and equitable *estoppel* is very important. This concept evolved as a tool to prevent fraud and injustice and must serve this purpose. When claiming that the doctrine of equitable *estoppel* should be applicable to the facts and circumstances of a particular situation, no matter whether in private or administrative law, the following elements of the doctrine must be proved:- ***(a)*** *conduct that amounts to a false representation or a concealment of material facts and* ***(b)*** *the person knows or should know the real facts and* ***(c)*** *intends or expects the other party to act upon such representation,* ***(d)*** *there must be another party who does not know the truth and who in fact acts in good faith in reliance upon such representation,* ***(e)*** *results in his detriment.* All these elements must be present and proved to establish the applicability of the doctrine of equitable estoppel. If any of these elements is missing, the equitable estoppel cannot be asserted.

118. A study of the above statement indicates that the doctrine's elements can be phrased in three separate questions:- ***(i)*** *Was there a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?* ***(ii)*** *Did the promise induce such action or forbearance?* ***(iii)*** *Can injustice be avoided only by enforcement of the promise?*

119. Broadly speaking, there must:- **(a)** exist some form of legal relationship or is anticipated between the parties; **(b)** a representation or promise by one party; **(c)** Reliance by the other party on the promise or representation; **(d)** The party relying on the promise must suffer a detriment; **(e)** Unconscionability. A party seeking to raise estoppel must make out a clear case and show that it would be unconscionable for the promisor to go back on their promise. Unconscionability is really the backbone of estoppel.

120. Lord Cairns summarized the doctrine of *estoppel* in the following words:-

> *"It is the first principle upon which all Courts of Equity proceed if parties, who have entered into definite and distinct terms involving certain legal results . . . afterwards by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties."*

121. This principle of equity laid down by Lord Cairns made sporadic appearances in stray cases now and then but it was only in 1947 that it was disinterred and restated as a recognized doctrine by Justice Denning (as he then was) in *Central London Property Trust Ltd vs High Trees House Ltd* (or the *High Trees case*) in which he held that estoppel is applicable if:-

"... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on."

122. The true principle of promissory *estoppel*, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

123. A reading of the facts in this case, and the facts and circumstances under which the earlier suit was withdrawn leaves me with no doubt that all the elements of *estoppel* stated above have been satisfied in this case. It follows that the *ex parte* applicant is *estopped* from raising the same issue against his late mother or her estate or the Interested Parties relating to the same dispute on the land in question.

f. Whether this suit is a "civil suit" disguised as a "Judicial Review proceeding."

124. The crux of the *ex parte* applicant's case is captured in **Mr. Njogu's** submissions that the applicant brings the suit as a beneficiary of the estate of the deceased. He claims that at the time of his father's death, he owned **LR No. 11916/2**. The entire case stands on the allegation that on **30th** December 1986, his mother, six years after his father's death, fraudulently transferred the land the subject of this case into her name. He argues that the transfer was fraudulent and illegal for want of the Land Control Board Consent and absence of grant of letters of administration and that the Transfer documents were forged. Further, it is alleged that, **M.A. Khan** advocate who prepared the transfer disowned it. The allegations of fraud are against his late mother. He questions the subsequent subdivision and transfer of the respective parcels of land to the interested parties and claims they were done illegally. He argues that as a beneficiary, he was denied his share of the estate. He backs the allegations of fraud with a document examiner's report which terms the transfer to her mother as a forgery. In other words, he argues that his father's signature was forged by none other than his own mother.

125. The Respondent's counsel submitted that a Judicial Review Court lacks jurisdiction in civil claims. He argued that to the extent that the *ex parte* applicant's application is premised on allegations of *fraud* and *ownership to property*, this court lacks jurisdiction to hear and determine this matter. He cited *Republic vs District Land Registrar, Mombasa & 5 Others ex parte Nova Properties Limited* where the court

citing authorities held *"that judicial Review is not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected…."*

126. The Respondent's counsel further argued that the common law doctrine finding on the legality or lack thereof of the *ex parte* applicant's title and whether the same was procured fraudulently and irregularly or not can only be determined by a civil court after receiving *viva voce* evidence on the title. He submitted that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue of fraud which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. He argued that to prove fraud there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can conclude that fraud has been committed and that the applicant had participated in it to warrant revocation of title by the court.

127. She cited *Livingstone Kunini Ntutu vs Minister for Lands & 4 Others* where the court held that *"..judicial review is not the most efficacious remedy where the process under which a title was obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy."* He submitted that the court in the said case was emphatic that in judicial Review proceedings, the court can only determine the process not the legality of the ownership, which is a function of the environment and land court in a process that permits the parties to present their claims on merit.

128. **Mr. Mubea** argued that the *ex part* applicant's application though couched as a Judicial Review proceeding, is aimed at recovering land, i.e. **L.R. No. 11916/3** and the subsequent sub-divisions, registered in the name of the Interested Parties who are *bona fide* purchasers for value without notice. He argued that the *ex parte* applicant's complaint is on ownership. He pointed out that there is no specific complaint against the Respondents, hence, his remedy falls under private law,

129. **Mr. Raiji,** citing *Muriithi vs Attorney General & 4 Others* argued that this case is not seeking a public law remedy but a private law right. He argued that the fourth Interested Party is the registered proprietor of **L.R. No. 11916/17** having purchased it from the applicants late mother in March 1987 while the eighth Interested Party purchased it from the fourth Interested Party in 1992, and he enjoyed peaceful and quiet possession for **15** years before these proceedings were commenced.

130. He submitted that this application is an abuse of court process and whereas the *ex parte* applicant states that the properties were transferred without succession proceedings, in the amended motion he singled out entry no. **12** which gave rise to **L.R. No. 11916/3** and all the subsequent entries as opposed to the prayer in the original motion which sought cancellation of all the entries in **LR No. 11519/2**, an order that could have affected himself and the persons he sold properties to and his own brothers, hence, his intention in the amendment was to target properties sold by his mother. He argued that this suit targets specific properties.

131. **Mr. Murage's** submission on the issue under consideration was that this is an ordinary suit as opposed to Judicial Review proceedings. He maintained that the claim lies in private law and not public law, hence, it should not have been brought as a Judicial Review Application.

132. It is common ground that the *ex parte* applicant seeks Judicial Review remedies, hence, the rules governing grant of Judicial Review orders do apply. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the Rule of Law.

133. Judicial Review Remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments. Judicial review is the procedure used by the courts to supervise the exercise of public power. It is a means by which improper exercise of such power can be remedied and it is therefore an important component of good public administration.

134. Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied. *First*, the body under challenge must be a public body whose activities can be controlled by Judicial Review. *Secondly*, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.

135. A clear reading of the facts presented by the *ex parte* applicant and the arguments presented by **Mr. Njogu** leaves no doubt that the applicant is advancing private rights. He is using these proceedings to claim land. All allegations of fraud or impropriety are directed against his late mother. None have been cited against the Respondents. No allegations of illegality, irrationality, *ultra vires* or procedural impropriety have been alleged against the Respondents. There is no evidence before the court that the Respondents acted outside their powers or have refused to act. This case is purely a private dispute between the applicant and his late mother. It does not raise or cite any public law wrongs to qualify to be a Judicial Review proceeding. The application does not qualify to be a Judicial Review matter but it is essentially seeking to advance purely private rights. It is a misuse of Judicial Review jurisdiction of this court. On this ground, this application is must fail.

f. Whether this suit is barred by the Limitation of Actions Act.

136. The *ex parte* applicant's advocate did not address this issue.

137. **Mr. Murage** argued that to the extent that the *ex parte* applicant's claim is based on allegations of fraud against his late mother, then it is an action in tort which ought to be filed in court within three years under section **4 (2)** of the Limitation of Actions Act. Likewise, he submitted that this case is an action for recovery of land which must be instituted within **12** years as provided under **7** of the Limitation of Actions Act. He argued that recognizing this fact, the *ex parte* applicant in March 2004 filed an originating summons being NBI HC Misc App No. **381** of 2004 -OS, seeking leave to file suit out of time. **Mr. Murage** argued that upon being granted the leave sought, he filed NBI HCCC N. **810** of 2004 in September 2004 which was eventually dismissed. He argued that as a claim based on tort, it ought to have been filed in court in 1989, and, as a claim for recovery of land, it ought to have been filed in court 1998.

138. To buttress his argument, **Mr. Murage** cited *Solomon M'rurua Mathiu vs Stanley M' Kiungu Ikiara* in which Emukule J stated *"the plaintiffs claim is found upon tort of fraud. Section **4 (2)** of the Limitation of Actions Act provides that an action on fraud must be instituted within **3** years. This action was not. So the claim is time barred and the plaintiff is strictly non-suited…In addition the plaintiffs claim is also recovery of land…a claim for recovery of land may only be instituted within **12** years from the date of accrual of action…"*

139. Section **7** of the Limitation of Actions Act provides that *"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

140. The copies of the Title show that entry number **13** being challenged in this case was registered on **30th** December 1986. This suit was filed in **2007**, after a period of **twenty one** years.The record also shows that the *ex parte* applicant's mother sub-divided the land and transferred to the various purchasers (the Interested Parties). For example, **L.R. No. 11916/16** was transferred on **18th** March 1987, **L.R. No**. **11916/17** and **LR No. 11916/18** were transferred on **12th** March 1987, **L.R. No. 11916/14** was transferred on **17th** April 1984, **L.R. No. 11916/13** was transferred on **13th** November 1984, **L.R. No. 11916/9** , **L.R. No. 11916/11** and **L.R. No. 11916/12** were transferred on **28th** July 1981, **L.R. No. 11916/10** was registered on **21st** November 1981. A simple calculation reveals that the last transfer in the above plots was effected in 1981, **twenty six years before this suit was filed.** The earliest transfers were effected in 1987, **twenty years before this case was filed**. The *ex parte* applicant's case is hopelessly time barred. On this ground, this Judicial Review application which seeks to recover land outside the period prescribed under the law is fatally and hopelessly incompetent and therefore is bound to fail. It is struck off on this ground.

h. Whether the Interested Parties' Titles are Indefeasible.

141. **Mr. Njogu's** argued that the property of a dead person cannot be lawfully dealt with unless the person is authorized by law.

142. **Mr. Mubea** submitted that the titles held by the first and third interested Parties can only be impeached on grounds of fraud to which they are shown to be parties to, and, that, fraud requires a high standard of prove. He also argued that under the Registration of Titles Act,the only way a registered title can be rectified is by proof of fraud to which the registered proprietor is shown to have participated.

143. Counsels' for all the Interested Parties were unanimous on one issue, namely, that the allegations of fraud were made against the *ex parte* applicant's mother, and not the Interested Parties. They also argued that the estate of the *ex parte* applicant's mother was not enjoined in this suit yet the allegations of fraud are against her. Further, the argued that fraud must be specifically pleaded and the particulars stated. and that the onus of proving fraud is much heavier than in ordinary civil cases.

144. Citing section **23** of the Registration of Titles Act, the Interested Parties counsels' submitted that their clients' are protected under the sanctity of title and in any event the transferee must be guilty of the fraud or must have known of such act or must have taken advantage of it.

145. Section **23** of the Registration of Titles Act-Repealed provides as follows:-

***23. (1)** The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*

146. The above position is replicated in section **26** of the Land Registration Act in the following words:-

26. Certificate of title to be held as conclusive evidence of proprietorship

> ***(1)**The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*
>
> ***a.** on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
>
> ***b.** where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*
>
> *(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

147. *First,* its trite that under the above provisions, a Certificate of Title once issued is taken as conclusive evidence that the person named is the absolute and indefeasible owner thereof, subject to encumbrances, easements, restrictions and conditions contained therein or endorsed thereon. *Second,* the Title of the registered proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

148. Our jurisprudence is awash with numerous pronouncements upholding the above position. **Mr. Murage,** cited *Nairobi Permanent Markets Society & 11 Others vs Salima Enterprises & 2 Others,* and *Republic vs Taita Taveta District Registrar & Another* in which the above provisions were up held.

149. It is not in dispute that the Interested parties have Certificates of Title for their respective parcels of land. It is not in dispute that they purchased the properties from the *ex parte* applicant's mother or in some cases, from persons who purchased from her. Curiously, there is no allegation of fraud against any one of the Interested Parties nor has it been suggested that any one of the Interested parties or their predecessors in title acquired his or her title fraudulently. All the allegations of fraud are leveled against the *ex parte* applicant's mother. The allegations are target one transaction, namely, the transfer and registration of the land into the names of the deceased and the *ex parte* applicant's mother, and, the subsequent sale and transfer to the Interested Parties.

150. Fortunately, on record is the Affidavit of **Mr. Khan,** the deceased's Advocate. He averred that the deceased had sub-divided his land, and, that the process of sub-division and issuance of titles took long. **Mr. Khan** averred that prior to his death the deceased had executed blank transfer instruments. **Mr. Khan** also averred that he had instructions from the deceased to transfer the various portions to the purchasers. Further, **Mr. Khan** averred that the deceased had left a will distributing his land to his children, among them the *ex parte* applicant who got his land and sold. He averred that using the blank transfers signed by the deceased for the purposes of transferring the various portions to the purchasers and the family members, he transferred the various portions to the deceased's children among them the *ex parte* applicant who got over **10** acres as per the will, but he sold it. I find this affidavit elucidating and of great help in resolving this matter.

151. Further, **Mr. Khan** averred that the portion transferred to the *ex parte* applicant's mother was to be registered jointly in her name and the deceased, her late husband. She registered it in their joint names, thus creating a joint proprietorship in undivided shares. Further, **Mr. Khan** averred that, as the law provides, upon registering the deceased's death certificate, the property was lawfully registered in the name of the *ex parte* applicant's mother, who sub-divided it, sold, and lawfully transferred the various portions to the Interested Parties who are innocent purchasers for value, hence they are genuine purchasers for value.

152. I find it strange that the *ex parte* applicant is questioning the transfer to his mother using the blank Transfer Instruments signed by his late mother, but he says nothing about his own portion which was transferred to him in the same manner. He also carefully omitted his land which he sold and the properties which went to his brothers. In the original application for leave and the substantive application, he had included all the properties. However, after obtaining leave to amend, in the amended application he removed the said properties only to target the ones now owned by the Interested Parties. This raises a fundamental question, that is, if the his portion and his brothers were transfers using blank transfers signed by his father, why did he amend his application to conveniently omit the said properties from this suit.

153. This Transfer of a jointly owned title was explained by **Mr. Khan.** Upon presentation of a death certificate in a joint proprietorship in undivided shares, the Registrar can remove the name of the deceased, and this is what happened in this case.

154. In any event, there is no mention whatsoever of any *fraud* or *impropriety* on the part of any of the Interested Parties or the holders of the various titles under challenge. They have not been shown to have been party to the alleged fraud. On this ground alone the Interested Parties Titles are protected by section **23** of the Registration of Titles Act and section **26** of the Land Registration Act Reproduced above.

155. Further, the *ex parte* applicant's allegations of fraud are directed against his late mother. He failed to enjoin her estate, conveniently so. But more fundamental is the fact that he placed reliance on a Report by a document examiner dated **22nd** September 2003 in which the document examiner claims he found no agreement with signatures he allegedly examined. The document examiner refers to "instructions" but does no state from whom! Sadly, he states he compared the questioned typescripts on the Document marked "A" with the known typescripts on the document marked "B", but he carefully avoids mentioning which documents he was examining. The document examiner then proceeded to make his conclusions, that there was no agreement in the signatures.

156. The Document examiner's report, in my view forms the basis upon which the applicant states that the transfers or transactions pertaining to the above properties were effected fraudulently.

157. **Miss Areri** submitted that the applicant relied on the report by a document examiner, yet the alleged documents which were examined were not exhibited nor were the credentials of the document examiner. She also pointed out that the Criminal Investigation Department expressly refused to be involved as evidenced by pages **73** to **76** of the original motion.

158. Simply put, a Document Examiners report falls under the category of expert evidence and the general rule is that questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *First,* there was no attempt to establish the qualifications of the author other than exhibiting the document to the *ex parte* applicant's affidavit. *Second,* expert testimony must be subjected to vigorous examination and ought to be weighed along with all other evidence.

159. *Third,* the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions. Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of the experts is to give their opinion based on their analysis of the available evidence. The court is not bound by that opinion, but can take it into consideration in determining the facts in issue.

160. The expert must be able to provide *impartial, unbiased, objectiv*e evidence on the matters within their field of expertise. I find useful guidance from a passage from a judgment by **Sir George Jessell MR** in the case *Abringer v Ashton* where he described expert witnesses as *"paid agents*." Almost **100** years later **Lord Woolf** joined the list of critics of expert witnesses in his Access to Civil Justice Report, when he said:-

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."(Emphasis added)

161. The fundamental characteristic of expert evidence is that it is opinion evidence. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence.

162. It is important to bear in mind the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this as reiterated by this court in the case of *Stephen Wang'ondu vs The Ark Limited*.

***Firstly**, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.*

***Secondly,** a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.*

***Thirdly,** where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.*

***Fourthly**, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.*

163. A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine the expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minories Finance Ltd. and Another* Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. That is exactly what happened in this case.

164. A court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.

165. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based.

166. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. This can best be achieved by way of *viva voce* evidence. I respectfully agree with the finding by the Supreme Court of South Africa that courts are enjoined to apply caution before accepting handwriting expert evidence. Perhaps I should add the words of Cresswell Jon the duties and responsibilities of experts in relation to the court which include:-

> *i. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.*
>
> *ii. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise.*
>
> *iii. An expert witness should state the facts or assumption on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion.*
>
> *iv. An expert witness should make it clear when a particular question or issue falls outside their expertise.*
>
> *v. If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report.*
>
> *vi. If, after exchange of reports, an expert witness changes their view on the material having read the other side's expert report or*

for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.

vii. Where expert evidence refers to photographs, plans, calculations, analyses, measurements survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

167. I have already exposed serious gaps in the above document. I am persuaded that the report is not build on a sub-strum of facts which are proved to the satisfaction of the court according to the appropriate standard of proof. Expert evidence must be read together with the rest of the evidence but not independently. The evidence by the document examiner in the opinion of this Court does not establish that it is *'highly probable'* that the documents in question were forged. An issue that cannot go unnoticed is that under the will the *ex parte* applicant's mother was given land. The e*x parte* applicant and his brothers were also given land. All the transfers including the transfer to the *ex parte* applicant were done in the same manner using the same transfers signed by the deceased before his death. One wonders why the *ex parte* applicant isolated what went to the mother using the same transfers. More significant is the fact that the *ex parte* applicant does not dispute that the land was left to his mother nor does he question the validity of the will under which he benefitted.

168. As concluded earlier, I hold and find that no allegations of fraud have been alleged against any of the Interested Parties nor has it been shown that any of the Interested Parties was a party or privy to any fraud. Further, the strength of the alleged fraud against the *ex parte* applicant's mother stands on the Document Examiner report I have discussed and dismissed as totally unreliable.

169. I am satisfied that the Interested Parties are all *bona fide* purchasers for value for their respective parcels of land and that their respective Titles have not been shown to have been illegally acquired, hence, I find and hold that the process of acquiring their titles has not been shown to have been tainted with any illegalities. Accordingly, their titles are indefeasible as the law provides.

i. Whether the ex parte applicant is guilty of concealment of material facts and or abuse of court process.

170. **Mr. Njogu** did not address this issue in his submissions.

171. **Mr. Murage** argued that the *ex parte* applicant is guilty of concealment of material facts. He submitted that at the *ex parte* stage, the *ex parte* applicant had a duty to make a full and frank disclosure of all the material facts. In particular he stated that the *ex parte* applicant did not disclose that his father left a will, but instead lied that his father died intestate. He also submitted that the *ex parte* applicant concealed that his father had left an estate of **42** acres to be shared by his family members. **Mr. Murage** argued that the *ex parte* applicant lied that his father only left **13.32** acres of land only, that is **L.R. No. 11916/2.**

172. **Mr. Murage** further submitted that the *ex parte* applicant lied that he was disinherited by his mother who he alleged fraudulently sub-divided the land and sold to the Interested Parties, yet from his father's will, he inherited **10.81** acres of land. **Mr. Murage** also stated that the *ex parte* applicant's land was more than **25%** of the **42** acres left for his family, and, that each of his two brothers got **9** acres and the remaining **13.32** acres, the subject of this suit went to his mother. Further, he argued that the *ex parte* applicant concealed from the court the relevant and important fact that he sold his entire inheritance of about **11** acres in November **1981** and April **1984**. Further, he argued that the *ex parte* applicant concealed the existence of an agreement he entered into with his mother on **7th** January 1994 settling his first case (HCC No. **5507** of 1993) touching on the same issues raised in this case and that he was paid **Ksh. 100,000/=** as compensation. **Mr. Murage** also pointed that the *ex parte* applicant falsified the letter he produced in court by erasing his handwritten acknowledgement of receipt for payment of **Ksh. 100,000/ =** as compensation.

173. He argued that a litigant has a duty to make a full disclosure. He cited *Republic vs Registrar of Societies Ex parte Lydia Cherubet* and added that a person who approaches the court *ex parte* has a duty to make the fullest possible disclosure, and, if he does not, then he cannot obtain any advantage from the proceedings. hence, the applicant is guilty of abuse of court process and that this suit is groundless and fanciful, and that the court will not allow its process to be used as a forum for such ventures.

174. **Miss Areri** also submitted that the applicant is guilty of material non disclosure**. Mr. Raiji** argued that the entire estate of the deceased was transferred using transfer forms signed by the deceased prior to his death, not **LR. No. 11916/3**, hence, the orders sought herein should affect all the titles.

175. It is settled law that a person who approaches the court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.

176. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.The *ex parte* applicant was under a solemn duty to bring to the attention of the court the existence of all the facts highlighted by all the counsels above at the earliest opportunity possible and leave it to the court to determine the merits or otherwise of his case. *First*, he applied for letters of administration *ad litem* and failed to disclose to the court that the deceased left a will. *Second*, he concealed the fact that he was a beneficiary under the will and he personally received his share of land under the will and sold it. *Third*, he concealed the fact that under the will, his own mother, had received the land now he is claiming. *Fourth*, he failed to disclose that all his brothers were beneficiaries of the will and their respective parcels of land were transferred to them in the same manner and using the blank Transfer instruments executed by his father.

177. The list on non-disclosures is long. He concealed the fact that the transfer documents used to transfer to himself and his brothers were part of the blank transfer forms signed by his late father, yet he purported to question the transfer to his mother which was to be registered in

her name and her late husband's name. He also failed to disclose that he had sued her mother over the same land and he was paid **Ksh. 100,000/=** and the case was settled and withdrawn. Instead, he states that he was coerced to withdraw. The court notes that it took an application to set aside a judgment and a court order to serve some purchasers, yet, at all material times he knew there were purchasers in occupation. In other words, he failed to disclose at the *ex parte* stage that there were people in occupation for many years.

178. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applied not only to material facts known to the *ex parte* applicant, but also to any additional facts which he would have known if he had made inquiries.

179. The question that inevitably follows is whether the non-disclosure in this case was innocent, in the sense that the facts were not known to the *ex parte* applicant or that their relevance was not perceived. In my view, the non disclosure in this case cannot be said to be innocent because all the concealed facts were within his knowledge at the time he filed this case.

180. I have on numerous decisions of this court observed that "It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:

a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right.

d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.

181. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two or more court process. In other words, a party by the two or more court process is involved in some gamble; a game of chance to get the best in the judicial process. In this case, there was the earlier suit that was compromised. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

182. Considering the above information which the *ex parte* applicant withheld from the court, which information, if had been disclosed, the court could have declined granting the leave at the *ex parte* stage. I find no difficulty in concluding that the *ex parte* applicant is guilty of material non-disclosure. Further, this suit is premised on a grant of letters of administration *ad litem* which was procured in total violation of section **62** of the Law of Succession Act It is an abuse of court process. I find and hold that the *ex parte* applicant is not entitled to any of the Judicial Review reliefs sought.

j. Whether the ex parte applicant is entitled to any of the Judicial Review orders sought.

183. **Mr. Njogu** summed up his arguments by arguing that the *ex parte* applicant is properly before this court, and that this case has merits and urged the court to grant the orders sought. To fortify his argument he cited *In the matter of the estate of Veronica Njoki Wakagoto-Deceased* and *Monica Achien Akumu & 3 Others vs Dishon Nyamondo & 2 Others.* In both cases, the court held that the property of a dead person cannot be lawfully dealt with unless such a person is authorized to do so by the law. He also cited Paulina *Chemtai Chirchir vs Kipyegon Arap Sang & 3 Others* in which it was held that a title to land that has been acquired illegally may be cancelled.

184. The Respondents counsel maintained that the application is without merit, hence ought to be dismissed. **Mr. Raiji** correctly distinguished the authorities cited by the *ex parte* applicant's counsel and pointed out that none of them is relevant to this case. In particular he stated the case of *The Estate of Veronica Njoki Wakagotho-deceased* related to intermeddling with free property, while the facts in the case of *Monica Achieng Akumi* supports the Interested Parties Case. He also pointed out that the facts in *Alice Chremuti Too* are different, while in *Paulina Chemutai Chirchir* the matter was not contested.

185. **Mr. Mubea** submitted that Judicial Review is concerned with decision making process, but not merits. He also argued that there is no allegation of illegality against the Respondents, and, there is no complaint against the Interested Parties. He argued that the duty of the Respondents is to register a transfer if all the requirements are met. He added that to succeed in Judicial Review, an applicant must show that

the decision complained of is tainted with illegality.

186. **Mr. Murage** reiterated that the remedy sought requires the court to take evidence before it can decide on merits, and, that Judicial review is concerned with the decision making process and not merits. He cited *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others* whereby the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. **Mr Murage** also submitted that fraud must be distinctly pleaded and strictly proved, and this can only be done in a forum where the litigating parties have an opportunity to present their evidence and also test the evidence of their opponents by way of cross examination.

187. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

188. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji-*

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

189. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.* These two tests have not been established in this case. In fact, there was no attempt at all to do so. No allegations were raised against the Respondents. As stated earlier, this is not a Judicial Review case but a civil dispute, hence, the Judicial Review orders sought cannot issue.

190. In any event, the discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, (as in this case), or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued or more important where the applicant lacks candor and has deliberately withheld information from the court (as is evident in this case). Thus, even if the court were to find for the applicant, the reliefs sought, being discretionary in nature, the court would be perfectly inclined to decline exercising its discretion in his favour, which I hereby do.

Summary of findings and final orders.

191. In summary it is my finding that:-

*a. **That** the grant of letter of administration ad litem obtained by the ex parte applicant on **15th** January 2004 in P & A Cause No. **69** of 2004 was issued contrary to section **62** of the Law of Succession Act,hence, the ex parte applicant lacks the locus standi to institute these proceedings.*

*b. **That** this suit offends the provisions of Section **9 (2) (3)** of the Law Reform Act and Order **53** Rule **2** of the Civil Procedure Rules, 2010.*

c. ***That** the leave granted on **23rd** March 2007 was to apply for an order of certiorari only, hence the prayer for mandamus included in the amended application cannot be granted.*

*d. **That** this suit is barred by the doctrines of res judicata and estoppel.*

*e. **That** the issues in this suit disclose a civil dispute as opposed to a Judicial Review case.*

*f. **That** this suit is barred by the provisions of the Limitation of Actions Act.*

*g. **That** the Interested Parties titles are indefeasible by dint of section **23** of the Registration of Titles Act and section **26** of the Land Registration Act.*

*h. **That** the ex parte applicant is guilty of willful and deliberate material non-disclosure and this suit is an abuse of court process.*

*i. **That** the ex parte applicant has not established any grounds for the court to consider and grant the Judicial Review orders sought.*

192. In view of my analysis, determination and conclusions herein contained, the conclusion becomes irresistible that the *ex parte* applicant's amended Notice of Motion dated **7th**March 2016 is ill conceived, lacks substance both in law and in fact, it has no merits at all and that the same is fit for dismissal.

193. Consequently, I dismiss the *ex parte* applicant's amended Notice of Motion dated **7th**March 2016 with costs to the Respondents and the and the Interested Parties.

Right of appeal.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **22nd** day of **October** 2018

John M. Mativo

Judge.