



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**JUDICIAL REVIEW APPLICATION NO. 4 OF 2016**

**IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI  
AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, LAW REFORM ACT, CAP 26,  
AND THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**IN THE MATTER OF NATIONAL LAND COMMISSION, COUNTY LAND MANAGEMENT  
BOARD, KAJIADO AND THE COUNTY GOVERNMENT OF KAJIADO**

**AND**

**IN THE MATTER OF ADAN ABDULLAHI KADIYE**

**IN THE MATTER OF YUSUF MUHUMED ABDI**

**BETWEEN**

**THE REPUBLIC OF KENYA.....APPLICANT**

**VERSUS**

**1. NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**2. THE COUNTY LAND MANAGEMENT BOARD, KAJIADO...2<sup>ND</sup> RESPONDENT**

**3. THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**4. THE COUNTY GVERNMENT OF KAJIADO.....4<sup>TH</sup> RESPONDENT**

**AND**

**1. YUSUF MUHUMED ABDI .....EX PARTE APPLICANT**

**2. ADAN ABDULLAHI KADIYE.....INTERESTED PARTY**

**JUDGMENT**

**The Applicants case**

1. Through an Application dated 22<sup>nd</sup> September 2015 and allowed by Odunga J on 23<sup>rd</sup> September 2015, the applicant was granted leave to commence Judicial Review proceedings against the Respondents. However, it was ordered that the grant for leave shall NOT operate as stay of the decision of the National Land Commission and the County Land Management Board, Kajiado. The main motion for Judicial Review is dated 30<sup>th</sup> September 2015. In it, the applicant has sought the following orders :-

1. That an order of Certiorari do issue to quash the decision of the National Land Commission and the County Land Management Board- Kajiado, to revoke Yussuf Muhumed Adi's ownership of plot No 1593 'A' - Business Namanga Trading Centre within Kajiado County.

2. That an order of Mandamus do issue to compel the County Government of Kajiado to restore and reinstate Yussuf Muhumed Abdi as the lawful allottee of plot No 1593 'A'- Business Namanga Trading Centre within Kajiado County.

3. That the Court makes such other and further orders as necessary and expedient in the circumstances of this case

4. That the Costs of this Application be in the Cause.

2. The Motion was based on grounds that the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to reinstate the interested party as the allottee was illegal, unprocedural and in excess of jurisdiction; That the action of the 4<sup>th</sup> Respondent to implement the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was illegal and null and void; That following the said decision the interested party has purported to take possession of and commence construction on the property.

3. The Motion was supported by an Affidavit sworn by Yususf Muhumed Abdi (ex parte applicant). The deponent stated that on 27<sup>th</sup> April 2011 he was duly registered as the lawful allottee of plot No 1593 Business Namanga Trading Centre within Kajiado County. The deponent produced YMA 1 Transfer forms and rates clearance certificate.

4. The Applicant deponed that in the same year, he transferred the property to his brother but later transferred it to himself on 28/10/11 and produced YMA2 copied of the transfer forms dated 16<sup>th</sup> May 2011 and 28<sup>th</sup> October 2011 respectively.

5. The Applicant further deponed that by Notice dated 4<sup>th</sup> June 2014, he was invited by the County Land Management Board Kajiado for a sitting on 9<sup>th</sup> June 2015 over a complaint lodged by the interested party over the said property of land. Applicant produced a copy of the notice marked YMA 3.

6. The Applicant further stated that on 9<sup>th</sup> June 2014, the matter was adjourned to 23<sup>rd</sup> June 2015 but on arrival on the said date, the Applicant was notified that the board had deliberated on the matter and decided that the property should revert back to the interested party.

7. The Applicant deponed that pursuant to the findings of the board, the County Government of Kajiado purported to revoke the transfer dated 27<sup>th</sup> April 2011 and reinstated the interested party as the allottee. The Applicant produced as **YMA 5**(Official search dated 22<sup>nd</sup> July 2015 showing the Interested party as the allottee).

### ***Interested party's case***

8. The Interested party (Adan Abdullahi Kadiye) filed a Replying Affidavit dated 2<sup>nd</sup> August 2016 and stated that he is the Lawful owner of plot No 1593(A) 1 Business, Namanga trading centre, Kajiado; that he bought the said plot from one Ngomea Kuchich on or about 12<sup>th</sup> August 2003 and produced **AAK 1 & AAK 2** copies of the Application for transfer and the subsequent transfer dated 12<sup>th</sup> August 2003 respectively.

9. The Interested party deponed that since purchase he has never pawed, pledged, assigned, sold or transferred the subject matter to the applicant or any other person.

10. The Interested party further deponed that the Applicant is known to him as a friend for many years and that sometime in April 2011, the Interested party left the ownership documents under the care of the Applicant on the understanding that he would keep them safe during the interested party's absence but upon return in 2015, the Interested party was shocked to find out that the Applicant had effected multiple transfers without his knowledge or consent.

11. The interested party further deponed that he has never appended his signature on any transfer document and that the purported transfers were irregularly and unprocedurally effected and therefore fraudulent.

12. The interested party stated that he lodged a formal complaint to the 2<sup>nd</sup> Respondent through an Affidavit sworn on 25<sup>th</sup> May 2015 and three days later, he lodged a criminal complaint with the local police station through OB No. 18/28/5/2015.

13. The interested party disputes that assertion that the hearing slated for 9<sup>th</sup> June 2015 was adjourned and states that the hearing was heard exhaustively and determined in presence of all the interested parties. The interested party produced a report capturing the proceedings before the 2<sup>nd</sup> Respondent on 9<sup>th</sup> & 23<sup>rd</sup> June 2015 marked as **AAK 5**.

14. The Interested party stated that pursuant to the hearing and determination of 9th June 2015, the applicant lodged an appeal against the 2nd Respondent on 10th June 2015 and a hearing was fixed on 23rd June 2016. The deponent produced evidence marked AAK6 a letter from the 2<sup>nd</sup> Respondent dated 17<sup>th</sup> June 2015 inviting all the interested parties for the hearing on 23<sup>rd</sup> June 2016.

15. The interested party stated that on the 23<sup>rd</sup> June 2016, the Applicant did not show up and the hearing therefore proceeded in the absence of the Applicant and a determination was made that the suit property should revert back to the interested party.

16. It is the interested party's statement that the Applicant participated fully in the proceedings dated 9<sup>th</sup> June 2015 but elected not to appear for the hearing of his own appeal despite having sufficient notice.

### ***1<sup>st</sup> and 2<sup>nd</sup> Respondents Case***

17. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed their grounds of opposition dated 30<sup>th</sup> August 2016 and stated that the Applicant among others does not have any proprietary interest in the suit property as he is not the registered owner and does not hold a certificate of title.

18. That the Application does not demonstrate any proprietary rights that they hold under the property capable of protection by this court.

19. That the Applicants application is misconceived and based on a misunderstanding of the applicable law as Articles 62 and 67 of the constitution mandate the 1<sup>st</sup> Respondent to manage and administer public land on behalf of the National and County Governments.

20. That the 1<sup>st</sup> Respondent has a mandate under the constitution to apply traditional and Alternative Dispute Resolution mechanisms like it exercised in the instant case and no suit can be founded on the exercise of legitimate constitutional powers.

21. That the 1<sup>st</sup> Respondent has a mandate to investigate historical and present land injustices and recommend appropriate remedies like it did in the instant dispute.

22. That section 12 of the Land Act and section 18 of National Land Commission Act, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the allocating authority and managers of public land and by necessity and operation of law they have power to recover the same under section 14 of the National Land Commission Act.

23. That further the decisions and actions of County Land Management Boards are decisions and actions of the National Land Commission by operation of law.

24. Further that due process was accorded to all parties having appeared before the Kajiado County Land Management Board on 9<sup>th</sup> June 2015 and 23<sup>rd</sup> June 2016 and the instant suit is therefore unfounded and without substance.

25. The ex parte applicants have more efficacious remedies in a trial court more specifically the Environment and Land Court where issues of ownership of the suit land can be canvassed on their merits.

26. That judicial review does not lie as the matter before the court pertains to issues of ownership of property which cannot be adjudicated by way of judicial review but are matters for civil courts.

#### **4<sup>th</sup> Respondents Case**

27. The 4<sup>th</sup> Respondent (County Government of Kajiado) filed a Replying Affidavit dated 22<sup>nd</sup> August 2016 stating that the Applicant's Application is unfounded, baseless, speculative and an abuse of the court process.

28. The 4<sup>th</sup> Respondent stated that having perused the documents relating to the suit property, it has established the existence of a fraudulent transfer by the petitioner. The 4<sup>th</sup> Respondent also stated that the 2<sup>nd</sup> Respondent wrote to the 4<sup>th</sup> Respondent communicating their findings and produced the correspondence from the 2<sup>nd</sup> respondent marked CGK1.

#### **SUBMISSIONS**

##### **1<sup>st</sup> respondents written submissions**

29. The 1<sup>st</sup> respondent in their submissions seek to know whether the judicial review orders sought by the applicant can issue. They argue that the applicant is trying to ingenuously move the court into making a pronouncement and determination on the question of ownership of land which jurisdiction lies in a trial court more specifically the Environment and Land Court.

30. It is their submissions further that whereas it is true that the underlying dispute herein is ownership of land judicial review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for *vivavoce* evidence

31. The 1<sup>st</sup> respondent further states that the foundation of this suit is a disputed contractual agreement which is in the realm of private law and not public law. It is therefore further averment that there is even no written agreement for sale of land capable of enforcement by a court of law as required by law

32. It is further the assertion by the 1<sup>st</sup> respondent that the ex parte applicants have no proprietary interests over the suit land capable of protection by this court and have referred me to the provisions of Article 40 of the constitution and Section 26 of the Land Registration Act which stipulates that a party who is not the registered owner of land cannot claim or seek to assert proprietary interests over land. I am drawn to the case of **Evans Kafusi Mcharo v Permanent Secretary, Ministry of Roads, Public works and housing and another(2013) eKLR** where the Honourable court at paragraph 30 observed that the distinction is based on the fact that the right to property under the law and the constitution is afforded to the registered owners of land; that a letter of allotment is not proof of title as it is only a step in the allocation of land

33. The 1<sup>st</sup> respondent also contends that the orders sought cannot issue as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have complied with all the procedural safeguards on fairness and due process and the determination was made by a body with jurisdiction.

34. The 1<sup>st</sup> respondent avers that this court has jurisdiction to entertain and determine the dispute herein primarily under the Constitution and the National Land Commission Act which they state that where the commission finds that the title was irregularly acquired, the commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

35. It is their submissions that parties were invited for a hearing under the head of alternative dispute resolution as stipulated by article 159 of the constitution and parties attended the same and the ex parte applicant being dissatisfied with the findings of the 2<sup>nd</sup> respondent appealed its ruling but failed to show up on the date set for him to prosecute his appeal.

#### **4<sup>th</sup> Respondents Submissions**

36. Counsel for the 4<sup>th</sup> Respondent submitted that in exercise of the mandate under the National Land Commission Act, to manage Public land, The County Land Management board invited the Applicant and the interested party for a meeting to resolve the ownership of plot Number 1593 A and ruled in favour of the interested party and communicated the decision to the 4<sup>th</sup> Respondent.

37. Counsel submitted that the issues revolve around non-disclosure of material facts by the Applicant and the diligent investigations carried out by the 2<sup>nd</sup> Respondent established that there was fraud in the manner in which the property changed hands in favour of the Applicant. It is counsels' further submissions that the issues herein do not call for judicial review intervention. Counsel further submits that the dispute is not about the impropriety or flawlessness of the 2<sup>nd</sup> respondent's administrative exercise of its mandate but a litigant intent on using the court process to sanctify illegal acquisition.

#### **The interested party's submissions**

38. Counsel for the interested party in his submissions opposes the Notice of Motion Application dated 30<sup>th</sup> September 2015 and states that the respondents have jurisdiction to entertain this matter and also that the applicant was accorded a fair hearing in line with the principles of natural justice.

39. Counsel for the interested party further contends that the objective of Judicial Review proceedings is to address the jurisdiction of the institutions concerned and the process employed by such institutions in arriving at their decisions. Counsel further submits that the Applicant has principally petitioned this court to interfere with the decisions of the Respondents on the basis that the 2<sup>nd</sup> Respondent arrived at the subject decision without according the Applicant an opportunity to be heard. The interested party has drawn my attention to **Annexure AAK5** paragraph 17 of the interested party's submissions where the right to be heard was in fact extended to the applicant by invitation. Counsel further submits that the ex parte applicant not only participated fully in the proceedings dated 9<sup>th</sup> June 2015 but also elected to not to appear for subsequent hearing of his own appeal lodged on 10<sup>th</sup> June 2015 and heard on 23<sup>rd</sup> June 2015 despite having sufficient notice thereof. It was counsel's further submissions that the applicant cannot be heard to beseech this court to intervene on his behalf based on the ground that he was denied the opportunity to be heard and contends that such a prayer is manifestly misleading, dishonest, frivolous and a blatant abuse of the court process.

40. Counsel further submitted that the court before arriving at its decisions should ask itself the following questions, whether the Respondents exceeded their powers; whether they erred in law; whether they have committed a breach of natural justice; whether they have reached a decision which they would reasonably not be expected to have reached and whether they have abused their powers *malafides*. Counsel contends that based on the evidence submitted by the Applicant through affidavit then this court should answer these questions in the negative and have urged me to dismiss the Applicants Application.

## **Exparte Applicant's submissions**

41. The Applicant contends through his counsel in his submissions that Article 64 of the Constitution 2010 defines private as a registered land held by any person under any free hold tenure; land held by any person under lease hold tenure and any other land declared private land under an act of parliament.

42. The ex parte Applicant submits that he became the lawful allottee of the subject property in April 2011 having purchased the same from the interested party who denies having transferred the same to the ex parte Applicant.

43. Counsel submits that unless the allegation of fraud *viz a viz* the transaction between the two parties is proven to the required standard and finding is made against the exparte applicant, his rights as a private land owner must be protected by the Constitution and other statutory laws.

44. Counsel relies on section 14 of the National Land Act which mandates the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to probe the legality of disposition of public land into the hands of private citizens. Counsel further contends that this is not the issue for determination by the 2<sup>nd</sup> Respondent in this case. Counsel further submits that disputes between private citizens arising over private land can only be determined by the application of private law. He further submits that the 2<sup>nd</sup> Respondent acted *ultra vires* in purporting to hear a private dispute over subject property and in doing so the 2<sup>nd</sup> Respondent usurped the powers of the Environment Land Court which is mandated to hear such disputes.

45. Counsel for the *exparte* applicant has drawn my attention to the case of **R v National Land Commission & 4 others ex parte Fulson Company Limited & Ano. (2015)** paragraph 22 & 24 of his judgement.

***“Section 14 aforesaid relates to public land and not private land. In any event review of disposition of public and is under article 68(1) (v) subject to enactment by parliament of legislation to enable review of all grants or dispositions of public and to establish their propriety or legality.”***

46. He further states Para 24

***“In this case Kilifi Beach Properties Limited the exparte Applicant is a Private Limited Liability Company, Shah Sese and Edward Mzee Karezi are all private individuals. There is no material from the National Land Commission to rebut the claim that the subject land is private land. How the exparte applicant acquired it from the interested parties is a matter of claim under private law between those parties. The National Land Commission has neither the legal authority to review and much less to revoke titles relating to private land. On this ground alone the exparte applicant succeeds in its application for issue of an order of certiorari to quash the Commissions purported review and revocation of the exparte applicant title.”***

47. According to counsel for the ex parte applicant, the first issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent breached rules of natural justice. He contends that the decision of the 2<sup>nd</sup> Respondent is tainted with illegality and procedural impropriety because the interested party had alleged fraud on the part of the exparte applicant and that the 2<sup>nd</sup> Respondent ought to have subjected the documents to proper scrutiny in the circumstances

48. Finally counsel for the exparte Applicant submitted that the gist of the above decision is that the decision maker in the present case is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents must be genuine in their quest to deliver justice and must conduct their proceedings in a manner that is fair to all parties by taking into consideration all relevant matters pertaining to the case without which the process will be subject to abuse and a source of great injustice. Counsel therefore submits that the 2<sup>nd</sup> Respondent failed to act accordingly and as such was unfair to the exparte Applicant.

**Determination**

49. I have considered the Application, the Affidavits both in support of and in opposition to the Application and the rival submissions made by all the parties herein and proceed as follows:

**i. Was the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s decision *ultra virus* and in excess of jurisdiction?**

50. Article 67 of the Constitution provides that there is established the National Land Commission and therein goes to stipulate its functions under sub article 2 as follows;

- a) *To manage public land on behalf of the national and county governments*
- b) .....
- c) .....
- d) .....
- e) *To initiate investigations , on its own initiative or on a complaint , into present or historical land injustices and recommend appropriate redress*

51. Section 14 of the National Land Commission Act provides that;

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

52. Section 14 (6) further provides that

*“where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.”*

53. Section 15 of the National Land Commission Act provides that

*“Pursuant to Article 67 (3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.”*

54. From the foregoing provisions of the Constitution and National Land Commission Act it is manifestly clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had jurisdiction to entertain this matter.

55. Consequently it is noteworthy that the interested party contends in his replying affidavit that he had never pawed, pledged, assigned, sold or transferred the subject matter to the Applicant or any other person. It is clear that the interested party alleges fraud in the manner the transfer was effected by the Applicant to warrant the investigations and make consequential orders therein regarding the process of transfer. From the foregoing it is therefore evident that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had jurisdiction in the first instance to seat and determine the dispute between the exparte Applicant and the interested party herein which jurisdiction is derived from the National Land Commission Act and the Constitution of Kenya.

56. The Respondents were therefore well within their powers in entertaining dispute raised by the Ex-parte Applicant.

**ii. Can the court grant the orders for Judicial Review as sought by the Applicant?**

57. I now turn my attention to the issue whether the orders sought are capable of being granted. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

*“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”*

58. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that;

*“the remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the Application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.”*

In **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation 59. Prison [2007] 1 EA 354** it was stated that:

*“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits...Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.”*

60. Judicial Review is, therefore, concerned not 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.

61. Turning to the relief of certiorari, it was set out in prayer 1 of the Application dated 22<sup>nd</sup> September 2015. It read:-

**“That an order of Certiorari do issue to quash the decision of the National Land Commission and the County Land Management Board- Kajiado, to revoke Yussuf Muhumed Adi's ownership of plot No 1593 'A' - Business Namanga Trading Centre within Kajiado County.**

62. In **Kenya Anti-Corruption Commission v Republic & 4 others [2013] eKLR** the Court of Appeal stated that:-

**“The question we have to ask ourselves is whether the learned Judge’s observations and findings reflected above are within the parameters set by applicable principles of law for the issuance of the relief of “certiorari”. As observed above, from the content of extracts of Hallisburrys Laws of England (Supra) “certiorari lies to bring a decision of an inferior Court, Public Tribunal, Public Authority or any other body of persons before the High Court for review, so that the Court may determine whether they should be quashed or to quash such a decision.... Certiorari is concerned with decisions in the past....Certiorari will issue to quash a determination for excess or lack of Jurisdiction, error of law on the face of the record, breach of the rules of Natural Justice or where the determination was procured by fraud, collusion or perjury. See also the cited authority of Kenya National Examination Council versus Exparte Republic exparte Geoffrey Gathanji Njoroge & 9 others (Supra).where it was held, inter alia, that:-**

**“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reason”**

63. Was the applicant therefore accorded a fair hearing? My answer is in the affirmative. I note from the interested party’s affidavit that indeed he lodged a complaint with the 2<sup>nd</sup> respondent and both parties i.e. the Applicant and the interested party were called for a meeting and upon hearing the dispute the 2<sup>nd</sup> respondent came up with its findings and a decision. It is noteworthy that the applicant was not satisfied with the decision of the Board and he elected to appeal on the 10<sup>th</sup> June 2015, in which the 2<sup>nd</sup> respondent gave a hearing date for the Appeal on the 23<sup>rd</sup> June 2015 through its letter Annexure AAK6. It is manifestly clear that the exparte Applicant did not attend the meeting for 23<sup>rd</sup> June 2015 despite him having been fully notified of the same.

64. Based on the fact that the Respondents had jurisdiction to entertain this dispute and from the evidence adduced, it is clear that the Ex-parte Applicant was accorded a fair hearing, the order of Certiorari as prayed by the Applicant in Prayer 1 of the Application dated 22<sup>nd</sup> September 2017 cannot issue.

65. The scope of the Judicial review Remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathanji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** in which the said Court held *inter alia* as follows:

**“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order**

**of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

66. Similar position was adopted in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

**“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.”**

67. Similarly, in **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707** it was held:

**“A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary...The order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”**

68. It is therefore clear that a person seeking an order of *mandamus* must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the Respondent is under a duty whether at common law or by statute to perform. Where there is no such duty or it is not clear to the Court that such a duty exists the Court would be reluctant to grant such an order.

69. As to prayer 2 of the Application dated 22<sup>nd</sup> September 2015 seeking an order of *Mandamus* to compel the County Government of Kajiado to restore and reinstate the exparte Applicant of the Lawful

alotee of plot No 1593'A', I find that this order has already been spent by virtue of the fact that the Applicant's order of Certiorari has not been granted.

70. Of importance to note is that throughout this Application there has been allegations of fraud. Determination of this issue would require parties to adduce *viva voce* evidence and production of documents including expert witnesses who will ascertain whether the signatures indeed in the transfer instruments were forged or otherwise. This however is the task of the Environment and Land Court.

**Order**

71. I therefore dismiss the Notice of Motion Application dated 22<sup>nd</sup> September, 2015 with no order as to costs.

72. It is so ordered.

**Dated at Kajiado this 31<sup>st</sup> day of January, 2017**

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**R. NYAKUNDI**

**JUDGE**

***Delivered in the presence of:***

Ms. Karumba – present

Mr. Apolo – present

Mr. Mateli Court Assistant - present