



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 10 OF 2013

IN THE MATTER OF AN APPLICATION BY JOHN NGUGI

GATHUMBI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND

MANDAMUS AGAINST THE PRINCIPAL

REGISTRAR OF GOVERNMENT LANDS

AND

IN THE MATTER OF GOVERNMENT LANDS ACT, CHAPTER 280 OF THE LAWS OF

KENYA

AND

IN THE MATTER OF LAW REFORM ACT, CHAPTER 26 OF

THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. PRINCIPAL REGISTRAR

OF GOVERNMENT LANDS.....1ST RESPONDENT

2. ATTORNEY GENERAL..... 2ND RESPONDENT

AND

ABDUL WAHEED SHEIKH.....1ST INTERESTED PARTY

ABDUL HAMEED SHEIKH.....2ND INTERESTED PARTY

EX PARTE: JOHN NGUGI GATHUMBI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 5th February, 2013 filed on 7th February, 2013, the *ex parte* applicant herein, **John Ngugi Gathumbi**, seeks the following orders:
 1. **An order of certiorari pursuant to the leave granted on the 16th January 2013 to bring to this Honourable court to quash the decision of the 1st Respondent contained in a copy of the cancelled title deed certified on the 9th October 2008 and purporting to cancel and expunge entries from the Register of Government Lands relating to land belonging to the Applicant known as L.R. No. 209/73/6.**
 2. **An order of prohibition pursuant to the leave granted on the 16th January 2013 directed at the 1st Respondent, by himself, his servants, agents, and/or officers from expunging, cancelling and/or interfering with any entry in the Register of Government Lands relating to Land known as L.R. No. 209/73/6.**
 3. **An order of mandamus pursuant to the leave granted on the 16th January 2013 to compel the 1st Respondent to restore in the Register of Government Lands entries relating to the application's ownership of land known as L.R. No. 209/73/6.**
 4. **That costs of and incidental to this application be provided for.**
 5. **Such further reliefs that this Honourable Court may deem fit and expedient to grant.**

Ex Parte Applicant's Case

2. The application was supported by a supporting affidavit sworn by the applicant herein on 16th January, 2013.
3. According to the applicant, he is the registered legal owner of Land Reference Number 209/73/6 situated at Chiromo Road within Nairobi County. He averred that he is Kenyan citizen who has suffered oppression by some officers of the Ministry of Lands in corroboration with some known Asians to dispossess him of his aforementioned property. According to him, the history of his said ownership dates back in the years 1980s when he was working for one **Mr. Abdul Raof Sheikh** now deceased. On the 21st day of January 1981 while in employment and being employed by the deceased as a shamba boy the applicant got involved in a traffic road accident along Juja road and being paraplegic, he has since been confined to a wheel chair.
4. On the 25th January 1982 vide a letter dated the same date the deceased in compensation of the applicant's incapacitation and out of sheer goodwill gave/transferred to the applicant one of his Land Parcel Number 209/73/6 (hereinafter referred to as the suit land) situated at Chiromo Road in Nairobi County and on the 3rd August 2008 this Honourable court declared in HCCC Civil Suit No.3812 of 2000 between **John Ngugi Gathumbi vs. Abdul Waheed Sheikh & 3 others** that the applicant is the rightful owner of the suit land which entry was entered in the register and has always remained so.
5. Upon expiry of the applicant's lease on or about March 2002 he applied for extension thereof and it was upon the grant of the application that it was alleged that he had uttered a false document before the Land Registrar by one **Mr. Thuita** who despite recording his statement was never called to testify.
6. According to the applicant, he has always been possession of the suit property and that the land rent demand notices always reflected him as the legal and registered owner and that he has paid land rent. According to him he later learnt that this gesture of good faith by the deceased did not

- augur well with some of the deceased's relatives and some members of the Asian Community and in an attempt to dispossess the applicant of the suit property **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh**, the interested parties herein and some land officials caused him to be charged in a court of law in Criminal Case No. 275 of 2005 **R –vs- John Ngugi Gathumbi** on allegations of forgery but this the court in Criminal Appeal No.311 of 2009 **John Ngugi Gathumbi –vs- Republic** quashed his conviction and set aside my sentence.
7. However, on the 9th October 2008 during the pendency of the Criminal trial some known Land Officers fraudulently/and or without authority proceeded to cancel his said title and attempted to issue one to the said interested parties. According to the applicant, the names of the said interested parties were however not entered in the register hence he is still the registered owner even though they took away his original title document and cancelled it physically.
 8. It was contended that subsequent to the applicant's release, he severally visited the 1st Respondent's offices to demand for reissue of his title in vain and a cross check by his counsel reflected that even though his title deed was cancelled the register still reflects that he is the registered owner and there is no entry of the title purportedly issued to the said interested parties. In his view, there is a lot of mischief behind the cancellation of his title document and the same deed plan number 246422 which was allegedly forged by him was re-issued to the interested parties using the same Deed plan number 246422.
 9. It was therefore the applicant's contention that the said purported unilateral cancellation is in the face of law, irregular, illegal and without merit and that the action by those involved was unlawful and infringed on his constitutional right to own property and protection of private property and unless the court compels them to re-issue him with his title deed they will not do it on their own violation because some of the land officers in cahoots with the interested parties have always eyed the suit property as it stands in a suitable commercial position and has received threats from anonymous callers to surrender the said property or lose his life.
 10. The applicant averred that on being asked in court whether they had any evidence to prove ownership before the 30th day of June 2005, the interested parties admitted they did not have a proof that their claim that they are the registered owners since 4th July, 1946 up to today is a blatant lie and any attempts by themselves to produce any document dating back then is clear indication of mischief on their part.
 11. To the ex parte applicant, the interested parties herein are misleading this honourable court by alleging they have owned this parcel of land since 1946, yet vide their own letters dated the 20th April 2004 and 10th August 2004, addressed to the commissioner of lands asking him to allot the disputed parcel of land to themselves.
 12. On filing Criminal Appeal No.311 of 2009 **John Ngugi Gathumbi vs Republic** the **Honourable Lady Justice Khaminwa** in her judgement found that there was no evidence linking him with uttering or forgery and the court ordered that his conviction and sentence be set aside he be set free unless otherwise lawfully held.
 13. To the ex parte applicant, the application before the court is made in bad faith as there is no reason adduced by the intended interested parties explaining as to why it took them 14 years down the line to query the authenticity and genuineness of the decree issued way back in 2000 which decree to date remains unchallenged. He therefore deduced that there are some members of the Asian community in cahoots with some ministry of lands officers who had plotted to dispossess him of his property as he was a vulnerable citizen with meagre resources to fight them.
 14. He reiterated that upon conclusion of the Criminal Appeal, which judgment vindicate his claim to the suit property and acquitted him of all charges of forgery that had been levelled against him by the interested parties herein with regard to the suit property, his advocates back then **P.K Mtange & Co. Advocates** notified the interested parties herein through their advocates Messrs **M. Jeevanjee Advocates** of its conclusion and of intended action of commencing investigations on how the intended interested parties herein acquired this title they claim. Thus there is inordinate delay in bringing this application and the same should not entertained.
 15. The *ex parte* applicant's position was that the purported trustees have never owned any land and the entire suit property issue belonged to one **Abdul Raof Sheikh** who transferred the same him but after his release he severally visited the 1st Respondent's offices to demand his right to have them reissue him with his title in vain but was instead told to bring a court order ordering the 1st

- Respondent to re-issue him with the title. In his view, the Honourable Court having set aside and quashed the sentence is a clear indication of his innocence from all fraud allegations and the fact that the decree in HCCC Civil Suit No.3812 of 2000 between himself and **Abdul Waheed Sheikh & 3 others** remains unchallenged, the dispute as to ownership is res-judicata hence his title having been unlawfully cancelled ought to be reinstated. He contended that the interested parties' action of bringing its application is instigated by his action of reporting them to parklands police station on the 18th September 2014, when he met them in the suit property only for them to come and file this application on the 23rd September 2014 as counter reaction.
16. According to the applicant, if this Honourable Court does not compel them re-issue him with his title deed they will not do it on their own volition because some of the land officers in cahoots with the aforementioned Asians have always eyed his said property as it stands in a suitable commercial position he has severally received threats from anonymous callers to surrender the said property or lose his life.
17. To the applicant, it is trite law that any party that brings a case in court must do so as a whole and a party should not be permitted to bring before a court his case in piece meal, thus the current application is Res-judicata since the fact on which it is based and documents annexed thereto were known to the intended interested parties at the time when the same parties made criminal complaints against the Ex-parte Applicant, the same document were relied on by the prosecution and the court made an informed decision in acquitting him of all the fraud charges levelled against him.
18. The ex parte applicant averred that he did serve the intended interested parties herein with succession court papers sometimes in the year 1997 but they ignored the same and instead chose to put an advert on the daily nation edition of the Tuesday, November 25, 1997 which was a notice to the public caveat emptor and/or buyer beware instead of taking the requisite steps if at all they knew they were rightly entitled to the said parcel of land..

Respondent's Case

19. On behalf of the Respondent the following grounds of opposition were filed:
1. **THAT the prayer for certiorari is time barred in contravention of the Law Reform Act as well as provisions of Order 53 of the civil Procedure Rules.**
 2. **THAT prayer for prohibition cannot issue as it regards past actions.**
 3. **THAT the issues raised are not amenable to judicial review as they regard ownership of land which is not within the purview of this honourable court.**
 4. **THAT the application is bad in law, incompetent and abuse of the court process.**
20. On behalf of the Respondent it was submitted that the order of certiorari cannot issue against the 1st respondent because it is time barred under Order 53 rule 2 of the **Civil Procedure Rules** the decision to cancel the title having been made on 9th October 2008 yet these proceedings were instituted on 5th February, 2013 outside the six months allowed by the rules.
21. With respect to the order of prohibition, it was submitted that the same relief can only be issued prospectively and that the Court cannot direct the 1st Respondent on the performance of his statutory and discretionary function unless he acts in bad faith or his action is substantially or procedurally ultra vires yet there is no such evidence. In support of the submissions the case of **Kenya National Examinations Council vs. Republic ex parte Gathenji Civil Appeal No. 266 of 1996** was cited.
22. According to the 1st Respondent, the 1st Respondent has not acted without or in excess of jurisdiction by cancelling the applicant's title since section 121 of the **Government Lands Act** provides for such function.
23. It was further submitted that the applicant has failed to pursue alternative remedy with respect to ownership of the land hence the application ought not to be allowed.

Interested Parties' Case

24. On behalf of the interested parties' it was contended that the allegations by the applicant are fabricated, untrue, fanciful, without merit, deliberate lies, irrelevant and devoid of any lawful basis for claiming ownership of the suit property. According to the interested parties, they are the registered owners as Lessees for a term of 99 years with effect from 1st July, 2003 by virtue of Grant No. I R 99095 issued 27th day of September 2005 registered under the **Registration of Titles Act**, Cap. 281.
25. They averred that they hold the said property as Registered Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust under the **Trustee Act** Cap 167 of Laws of Kenya and the Trustees Rules and the Charitable Trusts Act 1869 of England which said Act applies to Charitable Trusts in Kenya. According to the interested parties, by Para 4 of the Vesting Order issued in High Court of Kenya Civil Suit No.699 of 1976, the Court Declared that the Trusts of the Settlement being a Charitable Trust be exercised and administered by a simple majority of the Trustees thereby requiring a minimum of two Trustees to do so. It was the interested parties' case that the applicant's claim was founded on a suit that is a fraud upon the Court and a gross abuse of the process of the Court by the ex-parte Applicant who, with forged documents and concealment of true facts purported to make a claim by way of ownership and possession of the suit property against them, the lawfully registered owners thereof as Trustees in succession and in continuous, un-interrupted possession with title of the property since July, 1946 up to date.
26. The interested parties explained that the suit property L. R. No. 209/73/6, Nairobi was acquired by the Settlor, their late father, **Sheikh Fazal Ilahi** son of **Sheikh Noordin** and their late brother **Sheikh Abdul Rashid** as Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust (The Trust) by the Indenture dated 4th July, 1946 for the then unexpired residue of a term of 99 years Lease from the 16th day of July, 1903 expiring on 15th day of July, 2001. According to them, the Trust has since then continuously been the registered proprietor in occupation of the leasehold interest in the suit property together with other adjoining properties which have been held by and in the name of the successive registered Trustees of the Trust for an uninterrupted period of 68 years of ownership and occupation since 1946 notwithstanding changes in the identity of the successive Trustees. It was their averment that **Abdul Waheed Sheikh**, the 1st named Interested Party herein and their deceased brother **Abdul Raof Sheikh** were appointed Trustees of the Trust in addition to **Abdul Ghafur Sheikh** (continuing Trustee) and in substitution for the retiring Trustee **Sheikh Mohamed Bashir** in April 1976 under and by virtue of a Vesting Order issued on the 6th day of 1976 by the High Court of Kenya in Civil Suit 699 of 1976. By the Deed of Appointment dated 9th January 1985, **Abdul Hameed Sheikh**, the 2nd named Interested Party, was appointed as Trustee of the Trust in addition to **Abdul Ghafur Sheikh** and **Abdul Waheed Sheikh**, (the continuing Trustees) and in substitution for the retiring Trustee **Abdul Majied Sheikh**. Approaching expiration of the Lease period aforesaid the Trustees of the Trust diligently made a timely application for extension of Lease to the Commissioner of Lands for a new term of 99 years which application after due processing was approved and the interested parties intimated the acceptance of the extension of Lease on behalf of the Trust by letter dated 20th November 1998 formally submitting by way of surrender the documents of Title *inter alia* of the suit property to facilitate the issuance of a fresh Grant incorporating the extended term. Pursuant to the approval and acceptance aforesaid the Commissioner of Lands issued a Letter of Allotment dated 23rd June 2004 by way of renewal of lease and on acceptance thereof and due compliance of the terms of the above Letter of Allotment the Commissioner of Lands issued the Grant No. I R 99095 on the 27th day of September, 2005 which was duly presented for registration at the Central Registry Department of Lands at Nairobi on 30th September 2005 and the same was registered under the **Registration of Titles Act**, Cap. 281 as No. IR 99095/1 in accordance with the terms of the Letter of Allotment.
27. It was the interested parties' case that with the enactment of the Land Act No. 6 of 2012, the former Government Lands Register (G.L.A) is now repealed and defunct, and the renewed title for the extended term is registered in R.T.A. Register deemed as the Register for Land Registration Act 2012. To them, the *Ex-parte* Applicant has no right and/or title to or interest in ownership of the suit property and has never had any lawful or valid right, title or interest therein but has

fraudulently purported to make a claim by way of ownership and possession against the lawfully registered owners in succession who have been in continuous and uninterrupted possession of the subject property since July 1946 up-to today. The *ex parte* applicant was accused of having failed to make a full, frank and candid disclosure to this Honourable Court of all material facts, of having contrived to conceal the true position and of having conjured and fabricated fictitious “material facts “ and blatantly lied to the Court.

28. According to the interested parties, the *ex parte* Applicant in reliance on the alleged demise of **Abdul Raof Sheikh** on 22nd August 1997 allegedly applied for Grant of Letters of Administration intestate on the same day as the alleged date of death and allegedly obtained as well, the Certificate of Confirmation of the Grant on 25th August 1997, only 3 days after his stated date of the deceased’s demise. These documents, it was contended were obtained all these documents without any Statutory Gazette Notice having been published. Even a cursory examination of the alleged Letters of Administration Intestate of the Estate of **Abdul Raof Sheikh** in favour of the *ex-parte* Applicant show that the same are untenable and are a self evident forgery in that the date of demise of the deceased is stated to be 22nd August 1997 in the alleged Certificate of Confirmation of Grant in the cited Succession Cause H.C.C.C . No. 1089 of 1997 whilst the requisite true copy of the Certificate of Death shows the correct date of demise as being 22nd March 1988, some 9 years earlier. It was averred that copies of the alleged Grant of Letters of Administration, Confirmed Grant and Death Certificate in respect of **Abdul Raof Sheikh** were not produced to this Honourable Court by the *ex-parte* Applicant herein, which he was under a judicial duty to do.
29. It was the interested parties’ position that the Application herein by Notice of Motion dated 5th February 2013 filed by the *ex-Parte* Applicant is an abuse of Court Process as it has wholly relied on lies, forged documents and alleged Court Orders allegedly made in nonexistent Court Proceedings, which never took place. Further, the alleged circumstances under which the *ex-parte* Applicant is purporting to claim ownership are fictitious whereby he is fraudulently and clandestinely bent on depriving Title and Proprietorship of the suit property to the true lawful owners and which is grossly wicked, unjust, unfair and intended to steal a march against the true registered owners of the subject property fraudulently and illegally. According to them, the orders fraudulently sought in the Suit herein by the *ex-parte* Applicant are in gross violation of the Interested Parties’ extant and continuing ownership, occupation, use possession and quiet enjoyment of their property and their right to ownership as Trustees of the said Trust.
30. To the interested parties, the purported Decree in H.C.C.C. No. 3812 of 2000 exhibited by the *Ex-parte* Applicant by which he was allegedly declared to be the rightful owner of the suit property namely L.R. No. 209/73/6 and upon which his claim is based is a forgery as is the alleged Vesting Order pursuant thereto, the originals whereof have never been produced to this Honourable Court by the *ex-parte* Applicant in any quarters or the suit herein. The interested parties asserted that the *ex-parte* Applicant herein has made false representations to the Court so as to conceal from the Court that he had originally claimed to have been the sole beneficial owner of the suit property by virtue of the letter allegedly written to him by **Abdul Raof Sheikh** and allegedly “transferring” the said property L.R.209/73/6 to him the *ex-parte* Applicant (which it does not) as a means of fraudulently claiming ownership of the property. The *Ex-parte* Applicant did so full well knowing that the said property was registered in the names of the 3 Trustees named by him (**Abdul Ghafur Sheikh, Abdul Waheed Sheikh & Abdul Majied Sheikh** (the Trustees) of the Trust. However, the *ex-parte* Applicant herein has now purported to conceal in the Suit herein that he had maintained having obtained a Grant in Succession Cause H.C.C. C. No. 1089 of 1997 on foot of **Raof’s** alleged letter aforesaid and has deliberately misled the Court by concealing and calculatedly omitting to make the Court aware of his having obtained the purported Grant of Letters of Administration by neither mentioning the circumstance nor producing and exhibiting the purported Grant of Letters of Administration allegedly issued to him in the Estate of **Abdul Raof Sheikh**.
31. It contended further that the *ex-parte* Applicant herein has made further false representations to the Court that he filed Suit H.C.C.No. 3812 of 2000 against the Trustees aforesaid and allegedly obtained a Vesting Order aforesaid in respect of L.R.209/73/6 and thereby clandestinely shifted the basis of his alleged entitlement to ownership of the suit property to the alleged Vesting Order purporting to transfer the property, belonging not to **Abdul Raof Sheikh** the alleged author of

- the letter, but (for no reason or consideration) to that belonging to and registered in the names of the 1st & the 2nd Interested Parties herein as the Trustees of the aforesaid Charitable Trust. According to the interested parties, they were notified by a copy of a letter dated 10th September 2003 written by **Mr. Richard Okore** OC/E.C.C.U CID Headquarters Nairobi (Ref: CID/IS/ECCU/SEC/4/4/VOL.1/205) addressed to the Commissioner of Lands Re: CID INQUIRY FILE 42/03 LR NO. 209/73/6 in which it was disclosed that investigations carried out confirmed that these documents registered at the lands office did not originate from Court and were pure forgeries. Pursuant to the above investigation the *ex-parte* Applicant was charged and convicted in Criminal Case No. 275 of 2005 and his conviction was subsequently quashed in the High Court Criminal Appeal 311 of 2009. It was however the interested parties' position that a decision in a Criminal Case does not determine ownership and/or Title in all the circumstances set out herein or at all and that the onus of proving the claim to ownership squarely lies on the *ex-parte* Applicant, which burden the *ex-parte* Applicant has not discharged since High Court Civil Case No. 3812 of 2000 does not in fact exist. Further, there is no evidence that the Trustees who were alleged to have been parties to the alleged suit were served. The *ex parte* applicant was accused of having calculatedly glossed over all the foregoing circumstances by way of successful concealment with a view to mislead the Court by not producing and not exhibiting the alleged Vesting Order in respect of the suit property L.R.209/73/6 nor copies of the pleadings or proof of service of process. He further lied to the Court in his sworn Affidavits aforesaid intending to mislead the Court to believe that he had obtained Judgment and ensuing Vesting Orders in H.C.C. No. 3812 of 2000 as being authentic, full well knowing that there was no such case and has not candidly and honestly informed the Court what is the connection or linkage between Raof's letter and the High Court Civil Case No. 3812 of 2000 and the ensuing "Decree.
32. It was further averred that the *ex-Parte* Applicant has not honestly and candidly produced to the Court evidence of his alleged application for Extension of Lease in support of the alleged Extension of Lease of the suit property nor produced any resultant requisite Letter of Allotment by way of Extension of Lease which is issued only after rigorous administrative procedures. Instead he has produced as title, a fragment of an incomplete document and calculatedly omitting the vital page 2 thereof which page would show the dates of issuance and presentation and also the signature of the Commissioner of Lands and attestation thereof thereby denying and continuing to deny the Court the opportunity of scrutinizing the same as to authenticity.
33. This was Court was therefore urged to dismiss the Application dated 5th February 2013 with costs to the Interested Parties.
34. On behalf of the interested parties it was submitted while reiterating the contents of the supporting affidavits that the orders of 7th February, 2014 were obtained through fraud and in gross violation of their existing and prevailing right to ownership, continuous occupation use and quiet possession of their property since 1946. According to them the suit property has never at any time been owned by the their deceased brother **Abdul Raof Sheikh** as an individual.
35. Based on **The King vs. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington ex parte De Polignac [1917] 1 KB 486** it was submitted that once the Court is satisfied that the applicant suppressed or misrepresented the facts material to the application, there is a power in the Court to discharge the order and refuse to proceed with the examination on merits and that the rule applies to an application for a writ of prohibition. The interested parties also relied on **Tiwi Beach Hotel Ltd vs. Juliane Ulrike Stamm [1990] 2 KAR pages 37-52** and **Osiebo Trading Co. Ltd vs. Pickwell Properties Ltd HCCC No. 4611 of 1989.**
36. On the authority of **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] e KLR**, it was submitted that even where it is not expressly conferred, the Court has residual jurisdiction to reopen a decided matter in cases of fraud bias, or other injustice with a view to correct the same. According to the interested parties had the applicant been candidly truthful, this Court would not have granted the order sought to be vacated hence this Court ought to strike out the proceedings on the ground of concealment of, deceit, gross fraud and abuse of the process of Court.

Determinations

37. I have considered the application, the affidavit on record as well as the grounds of opposition and the submissions filed.

38. The first issue for determination is whether the application for the remedy of certiorari is time barred. This determination is crucial to the determination whether or not the other two remedies of prohibition and mandamus would lie. In Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR the Court of Appeal held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....an order of prohibition.....cannot quash what has already been done...Only an order of certiorari can quash a decision already made.”

39. In this case it is contended that the application for certiorari is time barred. Section 9 of the *Law Reform Act* provides:

9. (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

(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.

40. In R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR and Republic vs. The Commissioner of Lands

- Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and therefore a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.
41. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318**, the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.
42. I am of the view that a Court of law ought not to drive a litigant from the seat of justice unless the law is clear that the cause of action is time barred under the relevant limitation statute. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
43. The decision complained of herein similarly was a decision alienating land which the applicant contends was unlawful. It is therefore my view and I so hold that the six months’ time bar does not apply to these proceedings.
44. In this case the applicant seeks orders of certiorari, prohibition and *mandamus*. According to the applicant, he is the rightful owner of the suit parcel of land which was bequeathed to him by the deceased **Abdul Raof Sheikh**. According to him following the death of the deceased he applied for grant of letters of administration which were granted to him and subsequently, filed a suit in which a vesting order was issued to him. It was therefore his case that the decision of the respondent in cancelling the entries from the register relating to his proprietorship of the suit land was illegal hence the said decision ought to be quashed and the respondent prohibited from interfering with the same. Accordingly he sought an order compelling the respondents to restore to the register the said entries.
45. On behalf of the interested parties, it was intended that the documents relied upon by the applicant were not genuine and that they were in fact fraudulent. It was contended that the suit land belonged to the Charitable Trust and not to the deceased hence the same was not capable of being bequeathed to the ex parte applicant. Further it was contended that there were material nondisclosures and discrepancies in the documents relied upon by the applicant hence the orders sought herein ought not to be granted.
46. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a

wrong decision on the merits of the proceedings.....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

47. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

“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.”

48. 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 4th Edition Vol (1)(1) Para 60.*

49. It must be remembered that judicial review is 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. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

50. The law is that where a person shows that he is the registered proprietor of a parcel of land his title ought not to be cancelled without the due process of the law being followed. To do that in my

view is illegal and unconstitutional. Article 40(3) of the Constitution provides:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

51. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

52. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution.

53. In my view if the Respondent deprives the applicant of his interest in the suit property without being afforded an opportunity of being heard the respondent's action would not only be made in excess of jurisdiction but also tainted with illegality and procedural impropriety since it would have been made in breach of the rules of natural justice.

54. It must however be remembered that the decision whether or not to grant judicial review reliefs is no doubt an exercise of discretion. As is stated in *Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270*:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’” [Emphasis added].

55. This position was reiterated by this Court in Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR where it was held that:

“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

56. Further in Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014 it was held that:

“It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.”

57. In this case, the applicant’s claim to the suit land stems from an alleged bequest by the deceased. This bequest is however seriously contested by the interested parties based on the fact that the suit property did not belong to the deceased. The applicant also contends that the property was in fact given to him by the deceased. There are however serious issues raised with respect to the manner in which the applicant applied for and obtained the alleged grant which bestowed upon him the interests in the suit property. The date of the deceased’s death, the date of the grant of the letters of administration and the confirmation thereof are subject of serious dispute. There are glaring discrepancies raised herein which cannot be resolved in these kinds of proceedings where the Court does not delve into the merits in order to resolve conflicting factual matters such as fraud which is alleged in these proceedings. This was the view adopted by Sir Udo Udoma, CJ in Uganda General Trading Co. Ltd vs. N T Patel Kampala HCCC No. 351 of 1964 [1965] EA 149 where he expressed himself as follows:

“On the face of the plaint and the statement of defence filed in the present action, there is a dispute as to the facts in issue, since the facts pleaded in the plaint have been expressly traversed in the statement of defence. There was also a charge of fraud. It would have been inappropriate to seek to establish such controversial issues by an

affidavit, which of necessity would accompany an application by summons. The burden of establishing fraud is a heavy one and would be difficult to discharge by mere affidavit evidence. The matter ought to be thoroughly aired in open court for which an action would appear to be the best forum.”

58. Apart from that there is the issue whether there were in fact legal proceedings on the basis of which the applicant obtained the vesting order. Documents emanating from the Court have repudiated the existence of the said proceedings and orders. If the said proceedings and orders in fact never existed, then the purported vesting order through which the ex parte applicant acquired interests in the suit property would similarly cease to exist.
59. Apart from orders of certiorari and prohibition the applicant seeks orders of mandamus. *Mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. Fortiori it should be an appropriate remedy to compel the performance of a constitutional duty. For an order of *mandamus* to issue, an applicant must bring himself within the holding in the case of **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano**; Civil Appeal No.24 of 1985 where the Court of Appeal stated:-

“The person seeking *mandamus* must show that there resides in him a legal right to performance of a legal duty by a party against whom the *mandamus* is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

60. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself *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* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”

61. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie**,

J expressed himself, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. 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.”

62. This position was appreciated in **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194**, in which Chesoni, J (as he then was) stated:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant *mandamus*. Adequate alternative remedy is an important limitation to the availability of an order of *mandamus*. The purpose of *mandamus* is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.”

63. In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743**, Lord Goddard C. J. said -

“It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges.”

64. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441**, it was held:

“The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not

contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution”.

65. This position is even more relevant to situations such as the instant one where the applicant seeks *inter alia* an order of *mandamus*. In R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "

66. The same position was adopted in the case of The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194, in which Chesoni, J (as he then was) stated:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.”

67. In my view where serious issues have been raised which go to the root of the proceedings before the Court, to grant discretionary orders of judicial review would be an abhorrent affront to judicial conscience. This is more so where the purported root is alleged to be non-existent Court proceedings and orders, as is alleged in these proceedings otherwise Courts of law which ought to be temples of justice would be construed shrines of refuge for wrongdoings.

68. In these proceedings I must make it clear that this Court is not making a decision as to the merits of the applicant’s claim. That the applicant was acquitted in the criminal proceedings however does not answer the issue of the authenticity of the title which the parties before me lay claim to. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

“It is trite and rudimentary that proceedings in criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes for instance to contradict a witness by facing him with what the witness had stated in the

trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim.”

69. In the circumstances of this case, it is my view that the serious issues raised before me ought to be resolved. Those issues can only be resolved in a merit review by way of civil proceedings where the Court would be in a position to make declaratory orders after considering the evidence presented before it. In those proceedings the existence of the disputed civil proceedings would be determined once and for all in proceedings where the parties would adduce evidence of the existence of the said proceedings and the authors of the letters disputing the same availed for the purpose. I associate with the position adopted in *Halsbury's Laws of England* (supra) that:

“Another consideration in deciding whether or not to grant relief is the effect of doing so...The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”

70. In my view in light of serious allegations brought to light in these proceedings, it would prick the conscience of any court of equity if the orders sought herein were granted without resolving the said conflicts some of which question the justice system itself.

Order

71. In the premises, without determining all the issues which were raised before me so as not to prejudice any proceedings which may be instituted hereafter to determine the said conflicts, in the exercise of this Court's discretionary powers, I decline to grant the orders sought herein and disallow the Notice of Motion dated 5th February, 2013.

72. However taking into account the fact that the interested parties seem not to have taken the necessary steps to rectify the records and the unprocedural actions of the respondent, there will be no order as to costs.

73. Orders accordingly.

Dated at Nairobi this 25th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chege for the interested parties

Cc Mwangi