



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRIOBI

MISCELLANEOUS CASE NUMBER 814 OF 2005

REPUBLICAPPLICANT

VERSUS

THE PERMANENT SECRETARY MINISTRY OF LANDS AND HOUSING.....RESPONDENT

CECILIA GACHIRU KIONGO.....INTERESTED PARTY

EX PARTE: CHARITY NASIREKU & VICTOR SAINEPU KONANA (AS PERSONAL REPRESENTATIVES OF LOIS SIANOI KONANA).

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th day of June, 2005, **Lois Sianoi Konana**, (now deceased and also referred to herein as the original applicant) sought the following orders:

1. That this Honourable Court may be pleased to grant the applicant an order of certiorari to remove into this court and quash the decision of the respondent contained on page 19 of the Daily Nation newspaper issue of 29/4/05 to allocate the Government premises known as HG 46 to Kiongo Gachiru and ordering the applicant to vacate by 27th May, 2005 or at any other time.

2. This Honourable Court may be pleased to grant the applicant an order of prohibition against the respondent prohibiting him from evicting the applicant from premises known as HG 46.

3. That this Honourable Court may be pleased to grant the applicant an order of mandamus to compel the respondent to allow the applicant to purchase the premises known as HG 46.

4. Costs be provided for.

2. During the pendency of these proceedings, the said **Lois Sianoi Konana** passed away and was substituted by **Charity Nasireku** and **Victor Sainepu Konana**, the current ex parte applicants.

Applicants' Case

3. According to the applicant, she is a civil servant employed as a lecturer in the Faculty of Education, Moi University and the occupant of the government remises known as HG 46 located in Mugoya Estate,

South C, Nairobi, which was allocated to her late husband vide a letter dated 29th April, 1994, and since then the family has lived therein.

4. According to the applicant, her late husband was a civil servant who was employed as the Head of Micro Computer Information systems in the Ministry of Finance and after the death of her husband, she was allowed to continue in occupation of the said house vide a letter dated 31st January, 2002. By a letter dated 18th August, 2004 the Permanent Secretary Ministry of Lands and Housing issued a circular directed to all permanent secretaries and heads of other government bodies offering for sale non-strategic government houses to civil servants who were occupying the same with effect from 1st September, 2004 by way of a deposit of 10% of the purchase price.

5. According to the applicant, it was indicated that the first priority would be given to the occupying civil servants who were up to date on rent payments and the applicant averred that she was such occupant since her rents were paid by way of check-off system from her salary. It was averred by the applicant that on 20th December, 2002, she did pay Kshs 320,000/= being the 10% of the purchase price and since then has been ready and willing to pay the balance.

6. It was contended by the applicant that she did buy the application form on 13th September, 2004 which she duly filled in and submitted to the Housing Committee of the Ministry of Lands and Housing but the said Ministry declined. In December, 2004, she averred that she received a letter from the Respondent dated 16th December, 2004 rejecting her application to buy the house though no reasons were disclosed.

7. The Applicant disclosed that in February, 2005, she received a letter from the Permanent Secretary in the said Ministry ordering her to vacate the premises within one month without disclosing the reasons why this was so. The applicant then appealed to the Permanent Secretary Ministry of Finance vide letters dated 8th March, 2005 and 9th May, 2005 but received no response thereto.

8. It was the applicant's case that she had met all the conditions for offer to buy the said house and had entered into a contract with the government to buy the same following the offer from the government and duly paid the said deposit.

9. The applicant disclosed that the respondent has now allocated the same house to one **Kiongo Gachiru**, the interested party herein, vide an advertisement in the *Daily Nation* of 29th April, 2005 in which the Respondent ordered the applicant to vacate the same by 27th May, 2005. It was the applicant's view that the Respondent stole a march by so allocating the said house to the said party after selling the same to her.

10. It was submitted on behalf of the Applicant that she had met the conditions for the allocation of the suit house of being a serving civil servant who had produced certified copies of the last three months' pay slips and letter of allocation for the Government quarter; was up to date in rent payments; had deposited 10% of the sale price within 60 days or provide documentary proof that he had made previous deposit payment; and was in occupation of the suit house. According to the applicant the respondent did not dispute the fact that the applicant was a civil servant as was contended by the interested party. According to the applicant it was not in doubt that she had paid the deposit hence the reason for being asked by the respondent to collect the same.

11. It was submitted that whereas the interested party contended that she made an application for allocation some time in December, 2004, the conditions for allocation provided that the completed application be returned on or before 31st October, 2004 with the 10% deposit. It was therefore contended that the interested party made the application outside the time dictated by the circular and paid the deposit on 28th December, 2004 long after the sixty days set by the circular. Further whereas civil servants not in occupation were not required to apply, the interested party admitted that she made the application.

12. It was therefore submitted that the respondent acted unreasonably, with bias and flouted the tenets of the rules of natural justice. It was further submitted that the respondent in its circular led the applicant to

understand that the terms and conditions therein would be followed in deciding whom to be allocated the suit property. In support of her case the applicant relied on the decision of **Makhandia, J** (as he then was) in **Republic vs. Minister of Lands and Housing & 3 others [2005] eKLR** in which the applicant contended that he was allocated House Number 49, Mugoya Estate, South Con 19th November, 1998 by virtue of a letter of allotment dated 14th December, 1998. Pursuant to the said letter the Applicant paid out to the Government the total amount set out in the letter. She also complied with all the conditions contained in the said letter of allotment. When the Government demanded for rents from her, she moved the Court on the ground that she was not heard by the respondent before the said decision was made. The Court held that in purporting to cancel the aforesaid sale and then unilaterally, and without hearing the Applicant re-possessing, acquiring and selling the suit premises was callous to the extreme and properly attracted the intervention of this Court. The Court expressed itself as follows:

“In the instant case the Applicant was issued with a letter of allotment, she duly complied with the conditions stipulated therein and was only awaiting the documents of title to issue from the Respondents, when the Respondents did a hasty retreat and purported revoke and or recall the letter of allotment. Their action cannot be countenanced by a Court of Justice. The Respondents as correctly submitted by the Counsel for the Applicant should be estopped from seeking to deprive the Applicant of the ownership of the suit premises. It was upto them to issue the title documents to the Applicant in respect of the suit premises. They have not done so. They cannot use that fact as an excuse to dispossess the Applicant of the suit premises. More worrying is the fact that in purporting to disposes the Applicant of the suit premises, they failed to accord the Applicant the right to be heard. To my mind therefore this is a clear case that calls for the order of Certiorari and Prohibition.”

13. According to the applicant the respondent has not disclosed any reason why it took the impugned decision.

Respondent's Case

14. The Respondent, in opposition to the application filed the following grounds of opposition:

- 1. That the application is misconceived, bad in law as the prayers sought cannot be granted by this Honourable Court.**
- 2. That the application lacks merits as the order of certiorari cannot issue. Certiorari as prayed is concerned with reviewing the merits of the Respondent's decision and not the decision making process.**
- 3. That the application is otherwise an abuse of the Court process and ought to be dismissed.**
- 4. That the ex parte application is incurably defective as the grounds advanced in statement of facts do not support the prayers sought**

15. It was submitted on behalf of the Respondent that following the unsuccessful application of the applicant, she was instructed to obtain her 10% deposit refund but she instead opted to institute these proceedings. It was the Respondent's case that the grounds advanced in the statement do not support the prayers sought while the grounds relied upon by the applicant at the hearing of the Motion were not the grounds in the statement as required under Order 53 rule 4(1) of the ***Civil Procedure Rules***.

16. According to the Respondent the respondent did not commit any action or omit any action that would amount to grounds for the grant of judicial review reliefs. It was submitted that since the suit premises had been legally allocated to the interested party, the order of prohibition cannot issue in the manner sought. It was further submitted that in the absence of an order of certiorari, prohibition cannot issue.

17. To the Respondent mandamus cannot issue to enforce the performance of a discretionary power.

18. It was further submitted that judicial review is a public law remedy that issues to supervise public officers and public bodies in the performance of their administrative duties. However in this case the applicant challenges the Respondent's decision declining to sell to her the suit house hence in breach of the contract. According to the Respondent there is no such contract as the contract would only have been concluded had the Respondent accepted the applicant's counteroffer which was not the case. It was however submitted that even if there was such a contract, judicial review remedies would still not be available to the applicant and the Respondent relied on **Zakhem Construction (Kenya) Limited vs. Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR:**

“As we said at the beginning of this judgment, the matter between the Appellant and the Respondents was purely based on a written contract. There was even an arbitration clause for the settlement of any disputes that might arise between the parties. It was not suggested before us that the Government cannot enter into a contract with individuals or some other entities such as the Appellant herein. By their contract the parties had made all the provisions they thought sufficiently covered the interest of each of them. If the Appellant thought the Respondent was in breach of the contract by issuing the notice of intention to terminate, the Appellant's remedy did not lie in public law; the remedy lay in private law where the Appellant could be awarded damages if it proved that the contract was unlawfully terminated... If parties to a contract want to have the process of judicial review applicable to their contract there is nothing to stop them from expressly providing in the written contract. We can find nothing in the provisions of Clause 44.1 which would make us think and hold that the parties intended that if one of them intended to terminate the contract the other party to the contract had to be heard first...Emukule, J was of the same view and that must be why he was prepared to hold, even without hearing the parties, that the matter lay in contract and the process of judicial review could not provide the Appellant with a remedy for an alleged breach of the contract. That holding was clearly correct and we can find no reason whatsoever for interfering with the same.”

19. The Respondent also relied on **Maurice Okello vs. Permanent Secretary Ministry of Lands and Housing [2008] eKLR** and **Frida Okoth Rawo Nairobi Misc. Application No. 544 of 2005**, in which **Wendoh, J** cited the decision of **Nyamu, J** in **Republic vs. Commissioner of Police exp Nicholas Gituhu Karia HCMisc. Appl. No. 534 of 2004** where it was held that:

“If there is a tenancy or lease, Judicial Review remedies would be out of reach and unavailable because performance of a public duty must arise from a statute and not a contract such as a tenancy or a lease.”

20. The Judge also cited **R vs. East Berkshire ex parte Walsh [1985] QB 152** where it was held that:

“An Applicant for judicial review had to show that the public have a right which he enjoyed had been infringed;...but a distinction had to be made between infringement of statutory provisions giving rise to public law rights and those that arose solely from breach of contract of employment.”

21. It was submitted based on ***Halsbury's Laws of England***, 5th Ed. Vol. 61 at page 426 that whereas a body may be amenable to judicial review by reason either of the source from which it derives its power or because it discharges public duties or performs public functions, not every act of such a body is of a type which is suitable for judicial review since it is also necessary to consider the nature of the decision of which complaint is made, the crucial consideration being whether there is sufficient public law element to a particular decision. That, it was submitted will involve consideration both of the nature of the decision and whether the decision was made under a statutory power. It was the Respondent's view that the decision in the present case is not of a type which is suitable for judicial review since it falls within the private law realm.

22. With respect to the ground of bias, it was submitted that the Applicant had not demonstrated how this ground could be sustained. Further the Applicant had no proprietary rights with regard to the suit property

as she was not the registered proprietor thereof as the property belonged to the government.

23. With respect to prohibition, it was submitted that in conducting the sale the government was not performing a public law function but a private law right to enter into a contract hence prohibition cannot issue. As regards mandamus, it was submitted that the sale of the suit property is not in the nature of a public duty and if the Court were to intervene it would be forcing the Respondent to enter into contract.

24. It was therefore submitted that in this case, the Court has no jurisdiction to entertain the application premised on contract and ought to dismiss the application with costs.

Interested Party's Case

25. According to the interested party, she is a civil servant and some time in December, 2004 she applied for the allocation and subsequent purchase of civil servant's residential houses as advertised in the local dailies and received a letter of offer dated 15th April, 2005 from the Ministry of Lands and Housing allocating her House No. HG 46 LR No. Block 146/27 Mugoya Estate within Nairobi, the suit premises herein. The said offer, according to her was for 2,560,000/= payable within 7 years at an interest rate of 5% per annum. Accordingly, she proceeded to pay Kshs 1,000/- being the application fee and a further Kshs 256,000/= being 10% deposit as required. Subsequently, she averred she remitted a total of Kshs 768,735/- being mortgage charges to the said Ministry and was issued with official receipts for the same.

26. The interested party averred that as a further precautionary measure, she took out an insurance policy with the Insurance Company of East Africa Limited in respect of the suit premises under cover no. 020/930/1/021868. However upon seeking vacant possession thereof, she was informed that the applicant was occupying the same as a tenant and had requested for time to relocate to other premises. Thereafter vide a letter dated 15th June, 2005 from the Ministry, she was informed that the applicant had instituted legal proceedings barring her from having vacant possession thereof and seeking to challenge the sale of the suit premises to her.

27. According to the interested party, the applicant is not a civil servant whose application to purchase the suit premises was rejected due to failure to meet all the conditions set forth for the purchase of the house, primarily not being a civil servant. In her view, she continues to incur expenses in terms of mortgage payments to the Ministry to date.

28. The interested party's position was that the house was not allocated to the applicant's husband for purchase but just for rental. It was therefore the interested party's case that there is no contract between the applicant and the Ministry for the purchase of the suit house and as such the applicant's reliance on the payment of the 10% is a gimmick meant to try and have the house allocated to her since the said 10% was a requirement to every interested applicant at the time of bidding.

29. It was therefore the interested party's case that the instant application is misconceived and an abuse of the court process only meant to delay her from taking occupancy of her property as the Ministry acted within its ambit. The grant of the orders sought herein, it was contended would occasion injustice to the interested party as a *bona fide* purchaser of the property.

Determinations

30. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivaling submissions, this is the view I form of the matter.

31. 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.”

32. In this case, it is the applicants' case that they fulfilled the conditions for the allocation of the subject house and that despite that the Respondent still declined to sale the same to them. The original applicant exhibited copies of the letter allocating the house to her late husband, **S Konana** dated 29th April, 1994. See also exhibited a copy of the letter dated 31st January, 2002 permitting her to continue occupying the suit house. The Applicant further exhibited a notice dated 18th August, 2004 by which the Respondent invited civil servants to apply for the allocation of the houses. According to the terms and conditions of sale, it was stated that for one to qualify under the scheme one had to fulfil the conditions specified thereunder one of which was the payment of 10% deposit of the sale price within 60 days or provide documentary proof of previous deposit payment. The applicant exhibited to the further affidavit a copy of the receipt No. 678530 dated 20th December, 2002 which was indicated to be in respect of 10% deposit for house no. 46 Mugoya Phase IV for the sum of Kshs 320,000.00. The Applicant in addition exhibited a copy of the application form for the house. The next document to be exhibited was a letter dated 17th February, 2005 from the Respondent giving the said applicant one months' notice to vacate the suit house. Also exhibited was a copy of the receipt for Kshs 1,000/- for the Application Form for the said house and a letter of appeal to the Permanent Secretary Ministry of Finance. There was also a copy of the letter dated 8th March, 2005 in which the Applicant indicated that she was enclosing a receipt for the 10% deposit.

33. By a letter dated 16th December, 2004, the Respondent notified the applicant that her application to purchase the aforesaid Government House was unsuccessful. No reasons were advanced for the said decision apart from the said bald statement.

34. I have considered the authorities cited on the issue whether or not judicial review remedies can issue in cases revolving around allegations of breach of contract. To my mind, the contention that judicial review remedies can never issue in such circumstances cannot be entirely correct under the current jurisprudential regime as expounded by the Court of Appeal in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3 I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

35. I associate myself with the position adopted by **Prof Sir William Wade in his Book *Administrative Law*** that:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

36. This was the position adopted by Nyamu, J (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** in which the learned Judge cited **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC** and expressed himself as follows:

“A power which is abused should be treated as a power which has not been lawfully exercised... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority

in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd* [1982] AC 617 that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council* [2001] EWCA 607, [2002] WLR 237, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

37. It is now clear that judicial review remedies can be granted on grounds of ultra vires, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See *Judicial Review Handbook* 6th Edition by **Michael Fordham**.

38. Therefore judicial review is a constitutional supervision of subordinate courts and public authorities exercising judicial and quasi-judicial functions where there is a challenge to the legal validity of their decision, actions and inactions whether undertaken, threatened or not. It however, does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case, unless the decisions are claimed to be irrational or violate the principle of proportionality. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland** [1999] 2 AC 512.

39. It is important to note that Article 47 of the Constitution codifies the right to fair administrative action, a clear indication that the right to fair administrative action is now entrenched in the Constitution and is no longer a mere discretion. In my view, the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced

the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

40. However, where the circumstances give rise to legitimate expectation, a party ought to disclose material from which the existence of legitimate expectation may be inferred.

41. With respect to legitimate expectation in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240 it was held that:

“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.....Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”

42. Similarly in De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6th Edn. Sweet & Maxwell page 609 it is stated that:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

43. Similarly in Rank vs. East Cambridgeshire District Council EWHC 2081 Admin, it was held:

“One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process...But it is also important for the purpose of securing public confidence in the operation of the development control system....The potential relevance arises because consistency is desirable and inconsistency may occur if the authority fails to have regard to a previous decision.”

44. Hence in R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR, it was held:

“Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires.”

45. However it was held in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] that:

“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body

to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”

46. See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].**

47. It is therefore clear that where an authority represents to a person that upon fulfilment of certain conditions, the person will enjoy certain benefits, and that person on reliance on the said representations fulfils the stated conditions, unless there is a change in circumstances that make it impossible to fulfil the promise, the authority must be held to the terms of the representation. However, it is upon the applicant to satisfy the Court that the conditions precedent to the accrual of the benefits were fulfilled by him. In this case one such condition was the payment of the 10%. According to the Notice dated 18th August, 2004, “first priority will be accorded to occupying Civil Servants who are up to date on rent payments”. The word “priority” according to ***Black’s Law Dictionary***, 9th Edn. By Bryan A. Garner means: “The status of being earlier in time or higher degree or rank; precedence.” In my view this means that the first consideration was to be given to those in occupation such as the original applicant as opposed to the interested party herein. Whereas this did not automatically mean that the applicants would be allocated the same since if they failed to meet the required criteria it, if the applicants do meet the criteria set by the respondent, one would expect that the applicants would be allocated the subject house and this is where legitimate expectation arises. The Notice in fact was clear that those who were not in occupation such as the interested party herein, were to be notified of the available houses on a later date under certain terms and conditions.

48. In **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004, Warsame, J** (as he then was) held *inter alia* that:

“It is trite law that when two parties are competing for the same property the law requires that the first allotment should be given priority...A temporary occupation licence issued by the Municipal Council cannot supersede or override a right acquired through a letter of allotment from the Commissioner of Lands as a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or mis-representation or that the allotment was out rightly illegal or it was against public interest...There is a difference between title to land and title document and one acquires title to land the moment a letter of allotment is issued and you meet the conditions in that letter...Once the conditions are met, the land is no longer available for alienation.”

49. In this case, the original applicant has adduced evidence showing that she complied with the conditions set out by the Respondent in the Notice dated 18th August, 2004. According to that Notice the applications were to be returned on or before 31st October, 2004 with the required minimum deposit. As for the interested party, from the receipt for application form, the same seem to have been issued on 14th December, 2004 while the receipt for the deposit is dated 28th December, 2004. The Respondent did not disclose any reason why the applicant’s application was rejected. In **Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3, Lord Denning** expressed himself as follows:

“If it appears to the Secretary of State? This, in my opinion, does not mean that the Minister’s decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong.”

50. In **Congreve vs. Home Office [1976] QB 629**, the same Judge expressed himself *inter alia* as

follows:

“But now the question comes: can the Minister revoke the overlapping licence which was issued so lawfully? He claims that he can revoke it by virtue of the discretion given to him by section 1(4) of the Act. But I think not. The licensee has paid £12 for the 12 months. If the licence is to be revoked – and his money forfeited – the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for £12 which was dishonoured, or if he had broken the conditions of the licence – the Minister could revoke it. But when the licensee had done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of power conferred on him by Parliament: and these courts have the authority – and I would add, the duty – to correct a misuse of power by the Minister or his department, no matter how much they resent it or warn us of the consequences if we do. Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997 is proof of what I say. It shows that when a Minister is given a discretion – and exercises it for reasons which are bad in law – the courts can interfere so as to get him back on to the right road.” [Emphasis added].

51. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court expressed itself as follows:

“The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution “in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property...The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law...The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons.” [Emphasis added].

52. Section 4(2) of the ***Fair Administrative Action Act, 2015*** provides that every person has the right to be given written reasons for any administrative action that is taken against him. In this case the original applicant lodged a complaint to the Respondent in respect of the Respondent’s decision. Despite that the respondent still failed to furnish the reason for the decision. Even in these proceedings, the Respondent has failed to enlighten the Court on the reasons which led to the decision to refuse the applicants’ application. Instead the interested party took it upon herself to attempt to explain the same. There is no basis upon which the interested party argued that the original applicant was not a civil servant when the Respondent who ought to have known better kept a loud silence on the matter. The applicant having complained about the action the Respondent, the Respondent was obliged to furnish her with the reasons for the decision. Section 6(4) of the aforesaid Act provides that subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

53. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

54. To hold that the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.

55. In the absence of any reasons forthcoming from the Respondent and as the application for the allotment by the interested party was, on the face of her own documents, made outside the period stated in the notice, one can only conclude that the Respondent's action was arbitrary and amounted to abuse of power. Similarly, it can from the circumstances be inferred to have been taken in bad faith and was meant to frustrate the legislative purpose.

56. Having considered the material placed before me herein, I find merit in the Notice of Motion dated 17th day of June, 2005.

Order

57. In the premises I grant the following orders:

- 1. An order of certiorari removing into this Court for the purposes of being quashed the decision of the respondent contained in the *Daily Nation* newspaper issue of 29th April, 2005 to allocate the Government premises known as HG 46 to Kiongo Gachiru, the interested party herein, and ordering the applicant to vacate by 27th May, 2005 or at any other time which decision is hereby quashed.**
- 2. An order of prohibition against the respondent prohibiting him from evicting the applicant from premises known as HG 46 on condition that the Applicants make reasonable arrangements to pay the balance of the agreed purchase price.**
- 3. An order of mandamus to compelling the respondent to allow the applicant to purchase the premises known as HG 46 upon payment of the said balance.**
- 4. The costs of these proceedings are awarded to the Applicant and the interested party to be borne by the Respondent.**

58. Orders accordingly.

Dated at Nairobi this 18th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kiranga for Mr Mwangi Chege for the applicant

Miss Maina for the Respondent

Mr Karanja for Mrs Ligunya for the interested party

Cc Mwangi