



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 313 OF 2014**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF SURVEY.....1<sup>ST</sup> RESPONDENT**

**CHIEF REGISTRAR OF TITLES.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**SAYANI INVESTMENTS LIMITED.....EX-PARTE APPLICANT**

**JUDGMENT**

1. The exparte applicant in this case is **Sayani Investments Ltd** and is the registered owner and in actual occupation of all that property described as LR No. 209/923, 209/924 and 209/925 “*the suit property*,” and a commercial building erected thereon commonly known as Caxton House. The three leases took effect from 1st January 1911 and the terms for each of the leases were to expire on 1st January 2010.

2. In 2007, and prior to the expiry of the leases in issue, the exparte applicant applied for their renewal or extension. According to the exparte applicant’s Notice of Motion dated 22<sup>nd</sup> August 2014, the grounds in support thereof, the chamber summons for application for leave to apply and statutory statement as well as the verifying affidavit sworn by Nazlin Jetha on 7<sup>th</sup> August 2014, the exparte applicant complied with all the conditions for renewal of the leases and so it embarked on following up on the issuance of the new grants. However, the original title files vanished from the Lands Registry at Ardhi House. The exparte applicant’s founding director also died on 12<sup>th</sup> March 2012 hence there was delay in the issuance of the grants.

3. Strangely, as alleged by the exparte applicant, the Director of Surveys by a letter dated 2<sup>nd</sup> July 2013 informed the applicant that the applicant could not be issued with the Deed Plans for the suit properties because the three parcels had allegedly been amalgamated into LR No. 209/18869 and another Deed Plan issued in respect of the suit properties.

4. Another letter dated 31<sup>st</sup> March 2014 to the applicant by the Director of Surveys informed the

applicant that the earlier letter of 2<sup>nd</sup> July 2014 was typed erroneously and that the correct Deed Plan was 356256 amalgamated into LR 209/20737. It followed that fresh grants were being prepared to be issued to a different person from the exparte applicant; without consulting the exparte applicant and that indeed the Deed Plan 356256 was issued to a stranger.

5. That despite repeated demands, the respondents had refused and or neglected to exercise their statutory duty to issue the renewal of or extension of the grants or leases hence, the institution of these proceedings seeking Judicial Review Orders of Certiorari, Mandamus and Prohibition vide the notice of motion dated 22<sup>nd</sup> August 2014.

6. The exparte applicant obtained leave to commence these Judicial Review proceedings vide leave granted on 13<sup>th</sup> August 2014 by Honourable Lady Justice M. Ngugi.

7. The Judicial Review application by way of notice of motion was filed on 26<sup>th</sup> August 2014 within the 14 days granted. The main prayers sought are:

***1) An order of Certiorari to remove into the High Court for purposes of being quashed Deed Plan No. 356256 issued by the Director of Surveys for the consolidation/ amalgamation of all the properties known as LR Numbers 209/923, 209/924, and 209/925 together into LR 209/20737;***

***2) An order of Mandamus to compel the National Land Commission and the Chief Registrar of Titles to issue grants to the applicant in respect of the suit properties for a renewed term of 99 years.***

***3) An order of Prohibition to stop the National Land Commission and Chief Registrar of Titles from issuing grants in respect of the suit properties or a grant in respect of LR Number 209/20737 to any other person or persons other than the applicant, or dealing with the suit properties in any manner that will deprive the applicant proprietary rights and interest in the suit properties.***

***4) Costs of the Judicial Review proceedings.***

***5) Any other further and consequential orders and or directions that may be given.***

8. The facts and grounds of the exparte applicant's claim are found in the grounds, statutory statement and the verifying affidavit of Nazlin Jetha the director of the exparte applicant company Sayani Investments Limited.

9. In a summary, the exparte applicant states that it is the registered owner of the suit properties and is in occupation thereof, with a commercial building erected thereon called Caxton House and which the exparte applicant has over the years been leasing to several tenants.

10. That the term for the respective suit properties/leases is 99 years from 1<sup>st</sup> January 1911 hence the leases were to expire on 1<sup>st</sup> January 2010 but that prior to such expiry, the exparte applicant did in 2007 apply for renewal/extension of the leases and vide two letters dated 14<sup>th</sup> January 2008 the then Commissioner of Lands did confirm that the leases would be renewed for a further 99 years. That the applicant duly complied with the conditions for renewal of the leases and submitted all the required documents to the then Commissioner of Lands for Issuance of the new grant.

11. However, that the original file went missing and vide letter dated 31<sup>st</sup> March 2014 the Director of Surveys informed the exparte applicant that the suit property had by Deed Plan No. 356256 been amalgamated into LR 209/20737 which amalgamation was done without the consent of the exparte applicant and the new Deed Plan issued to a stranger.

12. It is averred that the National Land Commission and the Chief Registrar of Titles are under a duty to renew leases and issue new grants to the applicant but that they have refused to do so, which refusal, according to the *ex parte* applicant, is an abuse of statutory powers and duties and hence, *malafides*.

13. The applicant further avers that it has a legitimate expectation to continue enjoying proprietary rights and interests and the benefits of the investments in the said properties which will be jeopardized unless the court intervenes by issuing Judicial Review orders of Certiorari, Mandamus and Prohibition against the respondents, to ensure that they do not misuse or abuse their statutory powers, and in the interest of justice.

14. The respondents, despite being served with the notice of motion for Judicial Review orders, they neither entered appearance nor filed any grounds of opposition or replying affidavit to the notice of motion.

15. The *ex parte* applicant therefore filed submissions in urging the Judicial Review orders sought. The submissions dated 16<sup>th</sup> June 2015 and filed in court on 17<sup>th</sup> June 2013 mirror the grounds, statutory statement and verifying affidavit depositions as filed by the *ex parte* applicant.

16. On the applicable law, the *ex parte* applicant's counsel submitted that at all material times to these proceedings the suit properties were registered under the Government Lands Act and that the then Commissioner of Lands was responsible for the statutory obligations on land and as public officer, the Commissioner of Lands was charged with the performance of public acts and duties pursuant to Sections 3,5 and 7 of the Government Lands Act.(repealed).

17. That Section 3 of Government Lands Act empowered the Commissioner of Lands to make grants or dispositions of any estates, interests or rights over un-alienated Government Land as defined under Section 2 of Government Lands Act. That the three parcels of land subject matter of these proceedings were private properties belonging to the applicant by lawful acquisition and that the *ex parte* applicant's right to the suit properties is protected under Article 40 of the Constitution, which Article expressly prohibits the State from depriving a person of property of any description or any interest in, right over, property of any description, unless the deprivation results from an acquisition in accordance with the provisions of the Constitution or is for public purposes and carried out in accordance with the Constitution. The *ex parte* applicant further submitted that the National Land Commission having succeeded the Commissioner of Lands following the repeal of the Government Land Act on 2<sup>nd</sup> May 2012 with the enactment of National Land Commission Act and the Land Registration Act, the functions of the Commissioner of Lands were transferred to the National Land Commission which include renewal of leases to the *ex parte* applicant's pieces of land. In the premises, that the respondent could not re-alienate the suit parcels but to renew the leases and issue fresh grants to the applicant.

18. Further, that even if the said lands were available for re-alienation, Section 13 of the Land Act stipulates that where any land reverts to the Government after expiry of the leasehold tenure, the National Land Commission has a statutory duty to first offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land. Reliance was placed on Halsbury's **Laws of England 4th Edition VOL 1(1) paragraph 59.**

19. It was also the submissions by the applicant's counsel that the respondent's acts and omissions are illegal in that under Article 67 of the Constitution, Section 108 of the Land Registration Act and Section 30 of the National Land Commission Act, it was not open to the respondents to purport to re-alienate the suit properties by purporting to issue Deed Plan 356256 or a grant in respect of suit properties to any other person(s) other than the applicant hence the Deed Plan 356256 issued for LR 209/20737 being an amalgamation of the three titles to any other person other than the applicant is void *ab initio*.

20. Reliance was placed on the case of **Insurance Company of East Africa for East Africa Ltd**

**Vs Attorney General & Others Mombasa HCC 151/97** (unreported) where the court( Waki J (as he then was) upheld the proposition that once a parcel of land has been alienated, it was not open for the Commissioner of Land to re-alienate the same and any such purported alienation is void *ab initio*.

21. The applicant also relied on the decisions in **Kenya Ports Authority V Commissioner of Land & Another Mombasa HCC 124/2001 LLR 3367**; and **Wreck Motor Enterprises v Commissioner of Lands & 3 Others Nairobi CA 71/1997**( unreported) where the Court of Appeal held that title to land comes into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions held. ( see also **Dr Joseph N.K. Songok V Justice Moiwo Ole Keiwa & 4 Others Capp No. Nairobi 60 of 1997**) page 6 of that judgment.

22. It submitted that any attempts by the respondents to issue grants to any other person is ultra vires the above cited provisions of the law and therefore courts of law must intervene to ensure that the powers of public decision making bodies are exercised lawfully, so that such a body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction.

23. Further reliance was placed on **Republic vs Kajiado Land Disputes Tribunal, Senior Resident Magistrate's Court Kajiado & 3 Others HCC 689/2001** where Nyamu J (as he then was) applied the principles set out in the **Anismic Vs Foreign Compensation [1969] 2 AC 147** that out of nothing comes nothing.

24. It was also submitted that the respondents acted malafides and in abuse of statutory powers in that although the applicant acted well in advance of expiry of the said leases by applying for their renewal in 2007, which application for renewal was approved, the files relating to the suit properties went missing from the offices of the Commissioner of Lands, hence the respondents are estopped from issuing the grant to any other person. Reliance was placed on **Halsbury's Laws of England 4<sup>th</sup> Edition VOL 16(2) paragraph 1082** and **Commissioner of Lands Vs Kunste Hotel Ltd KLR [E&L] 249 (CA)** where it was held, inter alia, that the exercise of discretion by the Commissioner of Lands affected the legal rights of the applicant. It was therefore judicial in nature and so the Commissioner of Lands was obliged to hear all those who were likely to be affected by his decisions.

25. The applicant further submitted that it had a legitimate expectation of being issued with new grants to the suit properties for the renewed terms as was held in **Karume Investments Ltd V Kenya Shell Limited & The Commissioner of Lands CA 201/2008; Halsbury's Laws of England 4<sup>th</sup> Edition VOL 1(1) paragraph 92**, that where the Government approves of the renewal of the applicant's leases, then the respondents did not have to secretly purport to issue a grant to another person other than the applicant as that would be dishonest, malicious and a deliberate improper purpose and motive of depriving the applicant its legally acquired property hence subject to review by this court.

26. Further reliance was placed on **Republic Vs Commissioner of Cooperatives Exparte Kirinyaga Tea Growers [1999] 1EA 245** where it was held that:

*“It is s axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily capriciously or in bad faith.”*

27. The applicant also relied on **Republic V The Minister for Local Government & Another 2008 e KLR** citing **Republic Vs Ministry of Planning & Another Exparte Professor Mwangi HCC Miscellaneous Application No. 1769/03** where the court quashed a decision of a statutory body for failure to comply with the legislative purpose. The applicant prayed for the Judicial Review orders of Certiorari, Mandamus and Prohibition to issue as prayed, in the interest of justice.

### **Determination**

28. I have carefully considered the Notice of Motion dated 22<sup>nd</sup> August 2014 and all the grounds and accompanying statutory statement, verifying affidavit, annexures and detailed useful submissions by the exparte applicant's counsel supported by constitutional provisions, statutory as well as case law decided.

29. To succeed in an application for Judicial Review, an applicant must demonstrate that the decision or indecision complained of is tainted with illegality, irrationally and procedural impropriety. Illegality manifests itself when the decision making authority commits an error of law in the process of making that decision complained of. Instances of illegality in decision making include acting ultra vires, or contrary to the statutory provisions or established principles of law.

30. On the other hand, irrationality manifests itself when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have reached such a decision. In other words, a decision is irrational or unreasonable if it defies logic and acceptable moral standards. Procedural impropriety occurs when there is failure on the part of the decision making authority to act fairly in the process of decision making.

31. Unfairness manifests itself in the failure to adhere to the Rules of Natural Justice or to act with procedural fairness towards the person affected or to be affected by the decision. It may also involve failure to comply with the procedural rules expressly set out in a statute or regulation by which the authority exercises jurisdiction to make a decision, as was held in **Pastoli V Kabale District Local Government Council and Others [2008] 2 EA 300**.

32. The issues for determination in this Judicial Review notice of motion is whether the exparte applicant is entitled to the Judicial Review orders of Certiorari, Mandamus and Prohibition as sought.

33. Section 8(1) of the Law Reform Act Cap 26 Laws of Kenya denies the High Court the power to issue orders of Mandamus, Prohibition and Certiorari while exercising civil or criminal jurisdictions. It follows that in exercising the power to issue or not to issue Judicial Review Orders, the court is neither exercising civil jurisdiction nor criminal jurisdiction. It would be exercising special jurisdiction. Judicial Review is concerned not with 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 **Commissioner of Lands Vs Kunste Hotel Ltd** (supra).

34. Applying the above principles to these proceedings, the exparte applicant avers that it is the lawful owner/occupier and registered proprietor of the three suit properties LR No. 209/923, 209/924 and 209/925 on which a commercial building called Caxton House is constructed and occupied by tenants. That the leases for the said properties expired in 2010 but before such expiry, the applicant sought for renewal of the leases when they expired and that vide letters dated 13<sup>th</sup> August 2007, the respondents through the Director of Physical Planning approved the renewal thereof after inspection of the properties. By letter dated 4<sup>th</sup> December the Commissioner of Lands approved extension of the leases on LR 209/923 and 925, 924 for a term of 50 years from 1<sup>st</sup> December 2007 on conditions that the applicant:

- 1) *Surrenders the original title in exchange for a new one.*
- 2) *Submits a new Deed Plan duly signed and sealed by the Director of Surveys.*
- 3) *Pays legal fees and enhanced annual rent to be determined by a government valuer.*
- 4) *Payment of shs 5,000 being approval fees.*

35. Vide letter dated 14<sup>th</sup> January 2008 to the applicant, the Commissioner of Lands communicated that the valuation for the said plots had been done and new ground rent given for LR 209/923 with effect

from 1<sup>st</sup> December 2007 as shs 480,934/- inclusive of conveyancing fees, rent, registration fees, stamp duty and approval fees; and valuations for Plot LR 209/924 was shs 1522,480 whereas valuation for plot LR 209/925 was shs 404,300.

36. On 12<sup>th</sup> March 2010, the Director of the applicant company died aged 92 years as per death certificate issued on 7<sup>th</sup> April 2010, cause of death being cardiac failure due to cardiomyopathy.

37. Then on 2<sup>nd</sup> July 2013 the Director of Surveys informed Mr S.O. Ambani a licensed surveyor tasked by the applicant that the three parcels had earlier been amalgamated into LR 209/18869 (Deed Plan 291430) and extension of lease done. It is however not indicated in whose favour the lease was extended and or who made the request for such amalgamation.

38. The Director of Surveys however wrote another letter dated 31<sup>st</sup> May 2014 to Mr Ambani, further to the letter of 2<sup>nd</sup> July 2013 after nearly 8 months, indicating that the earlier letter of 2<sup>nd</sup> July 2013 had typing errors regarding the three amalgamated parcels and the Deed Plan, giving LR 209/20737 (DP No. 356256).

39. According to the exparte applicant, the file went missing after the approval for extension of the leases was given by the Commissioner of Lands in 2007.

40. By letter of 15<sup>th</sup> April 2014 the applicant's advocates Kaplan & Stratton complained to the Acting Chief Land Registrar, Ardhi House and by a letter of 24<sup>th</sup> July 2014 the Director of Surveys responded to the effect that the matter was being investigated and the applicant's counsel's would be informed of the outcome of the investigations as soon as possible. To date, there has been no communication on what transpired and or whether the Deed Plan 356256 had been presented for issuing of a letter of allotment or new title to any other person.

41. In the intervening period between 2007 and 2014, the constitutional and statutory provisions changed. It is also not clear when the amalgamation of the three titles were done, on whose request and in whose favour. The Ministry of Lands has remained silent.

42. All the above matters complained of have not been controverted by the respondents. Albeit the Judicial Review application is not opposed, there are certain factors that the court must take into account in granting Judicial Review orders sought since Judicial Review remedies are discretionary and the court may not grant them in certain circumstances even if the same are merited. In **Halsbury's Laws of England 4<sup>th</sup> Edition VOL 1(1) paragraph 12 page 270**, it is stated as follows:

***“ The remedies of quashing orders ( formerly known as orders of certiorari), prohibiting orders ( formerly known as 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 relief or 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 fulfillment. 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.”***

43. An in responding to prayers for Judicial Review remedies, the court should always opt for a lower rather than the higher risk of injustice.( see **Suleiman V Amboseli Resort Limited [2004] 2 KLR 589**).

44. In **Municipal Council of Mombasa vs Republic & Umoja Consultants, CA 185/2001**, it was held that:

***“Judicial review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters of did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into such as whether there was or there was not sufficient evidence to support the decision. It is the duty of the decision maker to comply with the .....in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it moreso where the decision maker is not a limited liability company created for commercial purposes but is it a statutory body which can do what is authorized by the statute creating it and in the manner authorized by statute.”***

45. It is not in dispute that the suit properties were registered in the name of the applicant on leasehold basis for a term of 99 years ending 1<sup>st</sup> January 2010. It is also not in dispute that three years before the tenure of the said leases, the applicant sought for extension for a further term and that the Commissioner of Lands did approve the renewal of the leases for a further 50 years with effect from 1<sup>st</sup> December 2007 vide his letter dated 4<sup>th</sup> December 2007. What is surprising is that after the said approval for renewal of the subject leases, the file relating to the three titles vanished from the lands office. When it resurfaced in 2013 July 2<sup>nd</sup>, the Director of Surveys returned documents (plan F/R 544/9 representing survey/re-establishment for the suit properties with remarks that the three parcels had earlier been amalgamated into LR 209/20737 (DP 356256 ( as corrected vide letter of 31st March 2014) and extension of lease done.

46. The Director of Surveys does not provide details of, on whose request the amalgamation was done and in whose favour the leases were extended. Despite requests by the applicant for more information, the Director of Surveys and the Chief Land Registrar were and remained nonresponsive and todate they have not bothered to respond to these Judicial Review proceedings.

47. In my humble view, the exparte applicant deserved to be treated fairly. Being the registered owner of the suit properties, any decision by the Commissioner of Lands to amalgamate, re-establish the titles or to re allocate the plots to any other person should have been made only after according the exparte applicant a fair hearing, in view of the earlier representations to the exparte applicant that the renewal of the leases had been approved way back in 2007, which representations the exparte applicant acted upon by complying with all the conditions for renewal of the leases.

48. Failure to accord the applicant a hearing in my view, was in flagrant disregard of the assurance that the suit leases would be renewed.

49. In addition, and as correctly submitted by counsel for the exparte applicant, Section 3 of the Governments Lands Act (repealed) but which was then applicable clearly provided that the Commissioner of Lands could only make grants or dispositions of any estates, interests or rights over unalienated Government land. Under Section 2 of the said Act, unalienated Government Land was defined as:

***“Land which is not for the time being leased to any other person, or in respect of which the***

***commissioner has not issued any letter of allotment.”***

50. In the instant situation, the three suit properties were alienated in 1911 when leases were granted to David Goldberg, Richard Mannall, Greater and Ethel Sarah Learn. The ownership thereof severally changed hands before the exparte applicant finally acquired titles thereto as shown by the annexed copies of indentures and assignments exhibited as NJ1, NJ2 and NJ3. In addition, the Commissioner of Lands confirms extending the leases for 50 years from 1<sup>st</sup> December 2007.

51. It therefore follows that any re-alienation or deprivation of the exparte applicant of the suit properties as at 2013 when the decision on amalgamation and re-alienation was made, must be in compliance with Article 40 of the Constitution. Section 40 of the Constitution expressly guarantees every person the right to own property of any description in any part of the county.

52. Under Article 40(3) the Constitution prohibits the State from arbitrary deprivation of property unless such deprivation results from acquisition in accordance with the provisions of the Constitution or for public purposes and in accordance with the Constitution.

53. As the suit properties were not amenable to any form of alienation, what the respondents were obliged to do, in their discretion, was to issue fresh grants for the renewed period of 50 years from 1<sup>st</sup> December 2007. Accordingly, the purported alienation of the suit properties is *ultra vires*.

54. Even assuming that the respondents could re-alienate the suit properties, Section 13 of the Land Act is clear that where any land reverts to the Government after expiry of the leasehold tenure, the National Land Commission is under a statutory duty to first offer to the immediate past holder of the leasehold interest pre-emptive rights of allocation of the said land. Accordingly, I find that the purported renewal of the expired lease to any other person without first according the applicant an opportunity to be reallocated the lands which are fully developed is *ultra vires* the provisions of the statute. It follows that the deed plan 356256 for LR No. 209/20737 being an amalgamation of 3 suit properties which was done without according the applicant a hearing was done in breach of the Rules of Natural Justice and therefore amenable for quashing.

55. In **Insurance Company of East Africa Ltd Vs Attorney General & Others** (supra) Honourable Waki J (as he then was) held that land once alienated, it was not open for the Commissioner of Lands to re- alienate the same and therefore any purported alienation is void *ab initio*.

56. Furthermore, in **Wreck Motor Enterprises V The Commissioner of Lands & 3 Others** (supra). The Court of Appeal held that title to land comes into existence after issuance of the letter of allotment, meeting the conditions stated in such letter an actual issuance thereafter of title document pursuant to provisions held.

57. In this case, the Commissioner of Lands having approved the renewal of the leases in favour of the exparte applicant, which approval was acted upon by the applicants, the respondents are estopped from denying that the requisite approval was given, and moreso, they have not attempted to deny that such approval was given for renewal of the leases for a further 50 years.

58. In **Commissioner of Lands Vs Kunste Hotels Ltd** (supra) the Court of Appeal while dealing with a similar issue to the one at hand observed that:

***“ The appellant was exercising his statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision ( see Mirugi Kariuki V Attorney General CA 70/91 (unreported). It is our view and we so hold, that the hotel along with the other parties before he decided to allot the plot to the interested party. He was aware if the request Mr Kagiri had***

***made in 1976. Consequently, it does not lie in the appellant's or anybody's else's mouth to argue, as counsel for the interested party sought to do, that in absence of registration the interest Kunste Hotel seeks to protest was nonexistent, and it was, therefore disentitled to a hearing before the plot was allotted to the interested party. Rimita J was therefore right in the conclusions he came to and we accordingly affirm his decision and dismiss this appeal with costs."***

59. In the same vein, I find that in this case, the Commissioner of Lands having known and approved the interests of the exparte applicant herein for renewal of the leases to the suit properties in 2007, it was incumbent upon the respondents herein to consult the exparte applicant before deciding in 2013 or thereabouts, to re-allienate and or re-allocate the suit properties and or re-renew the leases thereto in favour of any other person (s) since the discretionary power to renew the leases clearly affected the legal rights of the exparte applicant hence the respondents were obliged to hear all those who were likely to be affected by that exercise of discretion.

60. In **Karume Investments Limited is Kenya Shell Limited & Commissioner of Lands** (supra). The Court of Appeal following the case of **James Joram Nyaga & Another V Attorney General 2007eKLR** stated that the powers of the Commissioner of Lands were ministerial and did not include the issuance of land.....but only limited to executing the leases.

61. The Court of Appeal further found in the above Karume Investments Ltd case that “ ***the respondent having complied with the conditions for extension of the lease as per the letter of approval by paying all the charges required, it was unreasonable for the Commissioner of Lands to grant such approval of the lease to shell, requiring them to fulfill certain conditions, then turn around and impose new conditions purely for creating a reason for granting the lease or letter of allotment the appellant."***

62. Just like in the present case, I find it unreasonable and irrational that the Commissioner of Lands would approve renewal of the lease in favour of the exparte applicant by requiring it to comply with certain conditions but after the exparte applicant had complied with such conditions, the Commissioner of Lands or his successors in title, now the respondents herein, would turn around and purport to amalgamate the suit properties, issue a new Deed Plan and purport to renew the lease for the amalgamated parcels in favour of a person who is not even disclosed todate, despite the exparte applicant making efforts to know the position of the new title, to no avail.

63. In my humble view, the respondents acted not only unreasonably and irrationally, but that they failed to take into account or consideration relevant matters in that, they failed to consider that the exparte applicant had been given an approval for the extension of the leases for the three suit properties; The exparte applicant had fulfilled the conditions for the extension/renewal of the leases for the suit properties and surrendered the original leases; That while the exparte applicant was waiting for the extension/renewal of the said leases, and having surrendered the original leases, and while it was waiting for the new grants, the relevant file went missing at the lands office before the new grant could be issued.

64. By failing to consider the above matters, and instead purport to amalgamate the three titles into one and issuing a new Deed Plan and renewal of the leases in favour of any other person other than the exparte applicant, I am of the view that the respondents considered irrelevant factors which came after the conditions for extension of the three leases were fulfilled namely, that the exparte applicant was, infact, in actual occupation of the suit properties which parcels were fully developed.

65. In addition, I am persuaded beyond any doubt that the Commissioner of Lands letter approving the extension of the leases for the suit properties created a legitimate expectation on the exparte applicant's part, that after complying with the conditions precedent to the extension of the leases, the leases would be granted. Therefore, denying the exparte applicant the extension of the leases after the expectation was created amounted to unfair treatment. In such circumstances of unfair treatment, courts have issued Judicial Review orders of Prohibition, to prohibit a public authority from

exercising power that amounts to unfair conduct.( see **Regina V Liverpool Corporation exparte Liverpool Taxi Fleet Operation Association [1972] 29 KB, 299.**

66. The Court of Appeal in the **Njenga Karume Investments Ltd** (supra) case appreciated the trial Judge's observation that:

*“It is the responsibility of this court to ensure that executive action is exercised responsibly and as Parliament intended so as to uphold the rule of law. The manner in which the respondent acted is not consistent with what Parliament intended of a public officer like the respondent. The respondent having agreed to extend the applicant's lease by virtue of the letter dated 19<sup>th</sup> March, 1999 and given conditions for the said extension, had exercised his discretion he could not renege on it once the applicant met the conditions of the lease by payment of the requisite fees for his rights to an extension of a lease came into being and the same can be enforced by an order of mandamus. In Madowo's case (supra) the court said that an order of mandamus should not be sought to determine rights but ought to be used to enforce.....”*

67. This court entirely agrees with the above position as adopted by the Court of Appeal in the **Karume Investments Limited** (supra) case and add that the exparte applicant in this case was not only subjected to unfair treatment but was not given an opportunity to be heard before the decision to amalgamate the titles was made and a purported re-establishment done through a new Deed Plan and a new Land Reference number given to the amalgamated titles and the lease renewed in favour of a non disclosed person ( if at all it was renewed). There is nothing to show what procedure was adopted to cancel the approval for extension of the leases in favour of the exparte applicant. I therefore concur with the exparte applicant's averment that there was a legitimate expectation created on its part that was thwarted by the respondents thereby entitling the exparte applicant to seek for a Judicial Review remedy(ies), which remedies are vested in this court to exercise the power to check on the excess of exercise or authorities or persons in authority, but not to interfere with the mandate of the respondents under the Constitution or other written law.

68. I find that had the respondents acted reasonably, and fairly, they could not have arrived at the decision that they did to amalgamate the titles and renew the lease in the name of an unidentified person. In **Republic V Commissioner of Co-operatives exparte Kirinyaga Tea Growers Co-operative Savings & Credit Society Ltd CA 39/97 [1999] EALR 245** the Court of Appeal warned that:

*“.....it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allowed anyone on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith.”*

69. The exparte applicant avers that the respondents' impugned omissions to issue the applicant with grants for the renewed terms was malafides and an abuse of statutory power in that immediately after the approval for renewal of the leases, the files went missing from the Lands Ministry only to resurface, after expiry of the lease period with an amalgamated title nearly five years later, and that the refusal to exercise their mandate under Article 67 of the Constitution, Section 108 of Land Registration Act and Section 30 of the National Land Commission Act to issue grants in respect of the renewed leases in the applicant's favour was in bad faith hence they should be compelled to do so. In **HC Miscellaneous Application 1769/2003 Nairobi Republic Vs Ministry of Planning and Another Exparte Professor Mwangi Kimenyi**, the court held, concerning malafides:

*“ So, where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors into account in reaching its decision or based its decision on irrelevant factors the court would intervene that on the ground that the body has in each case abused its power. The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that parliament intended it to act in a particular manner.”*

70. Thus, the refusal of the respondents in this case to issue the grants for the suit properties after approval of renewal of the leases, in my humble view is not only unreasonable, but malafides and arbitrary hence it must be checked by Judicial Review orders.

71. Irrationality and unreasonableness on the part of the respondents is a ground for Judicial Review to issue as was held in **Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation [1947] 2 ALL ER 680** inter alia that:

*“ Bad faith, dishonesty- those, off course, stand by themselves- unreasonableness, attention given to extraneous circumstances disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration.....unreasonableness is frequently used to describes things what must not be done. For instance, a person entrusted with discretion must direct him properly in law. He must call his own attention to the matters which he is bound which he is bound to consider. He must exclude from his considerations matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting “unreasonably”. Similarly you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”*

72. Where a public authority or body acts in bad faith, then he/it abuses discretion or jurisdiction and it is therefore unlawful and the High Court shall not hesitate to quash such exercise of discretion in bad faith. In **Halbbury’s Laws of England 4th Edition 1(1) paragraph 82**, it is stated inter alia that:

*“.....A decision is taken in bad faith if it is taken dishonestly or maliciously, although courts have equated bad faith with any deliberate improper purpose.”*

73. In this case, I am persuaded that the respondents’ actions of refusal to issue grants in favour of the applicants as per the renewals was done unreasonably, irrationally and in bad faith with a deliberate improper purpose. The disappearance of the original files for the suited parcels of land and only for their resurfacing after expiry of the three leases with a new Deed Plan and an amalgamation into one parcel is, in my view, a manifestation of how decayed our public institutions are and how the officers serving therein can be used to abuse their powers for personal financial gain.

74. In the end, I find that the exparte applicant has on the material placed before the court established that the respondents did not, in the exercise of their discretion to extend and later cancel the extension of the leases to the three suited properties follow the established procedures of the law.

75. In addition, I find that the respondent’s decisions to amalgamate the three titles into one and on purporting to issue extension of the leases in favour of an indetified person(s) without according the applicant an opportunity to be heard was unlawful and in breach of the rules of natural justice.

76. Accordingly, the order that commend itself to issue in this case is that the exparte applicant’s notice of motion application dated is allowed in terms of prayers No. 1 and 3 of the Notice of Motion dated 22<sup>nd</sup> August 2014.

76. With regard to prayer No. 2, as the decision to issue grants after renewal of the leases is mandatory and not discretionary I order that a Judicial Review Order of Mandamus do issue to compel National Land Commission and Chief Registrar of Titles to consider issuing grants to the applicant in respect of the suit properties for a renewed term of 50 years as per the approval for renewal granted in 2007 with effect from 1<sup>st</sup> December 2007.

77. The exparte applicant shall have costs of these Judicial Review proceedings and for the application for leave to apply, to be paid by the respondents jointly and severally.

78. Dated, signed and delivered in open court at Nairobi this 21st day of September 2016.

**R.E. ABURILI**

**JUDGE**

**In the presence of :**

**Mr Kotonya** h/b for Muthui for the exparte applicant

**Miss Kerubo** from Ministry of Lands for the Respondents, (appearing for the first time in these proceedings after notice of judgment was served on the respondents)

**CA: Adline**