



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 6 OF 2008 (JR)**

**IN THE MATTER OF AN APPLICATION BY KENNEDY BOSIRE GICHANA FOR JUDICIAL  
REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES (CAP 21 LAWS OF  
KENYA)**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (NOW REPEALED)**

**AND**

**IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK II/224**

**BETWEEN**

**REPUBLIC .....  
APPLICANT**

**AND**

**THE COMMISSIONER OF LANDS ..... 1<sup>ST</sup>  
RESPONDENT**

**THE DISTRICT LAND REGISTRAR – KISII ..... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**REGISTERED TRUSTEES, REDEEMED GOSPEL CHURCH ..... INTERESTED  
PARTY**

**AND**

**KENNEDY BOSIRE GICHANA ..... EX PARTE  
APPLICANT**

## JUDGMENT

1. The Notice of Motion application dated 11<sup>th</sup> April 2008 was brought pursuant to the leave that was granted by this court on 2<sup>nd</sup> April 2008. In the application, the ex parte applicant, **Kennedy Bosire Gichana** (hereinafter referred to only as “**the applicant**”) sought the following orders:-
  - i. **That the honourable court be pleased to issue an order of judicial review in the nature of certiorari to remove unto this court and quash the decision of the commissioner of lands vide a letter reference number 77575/97 dated 12<sup>th</sup> October, 2007 directing the district land registrar –Kisii to expunge from the records lease documents and the lease certificate in reference to the property known as LR No. Kisii Municipality/Block II/224 and thereby de-registering and dispossessing the ex parte applicant herein without complying with the provisions of SS. 142, 143 and 144 of Cap 300 Laws of Kenya.**
  - ii. **That the honourable court be pleased to issue an order of prohibition prohibiting the 2<sup>nd</sup> respondent from implementing and/or executing the said 1<sup>st</sup> respondent’s decision and/or in any other manner and way whatsoever or howsoever interfering with the registration of the ex parte applicant as the owner of the property known as LR No. Kisii Municipality/Block II/224 without complying with the due process of law.**
  - iii. **That the honourable court be at liberty to issue and/or grant such order or further relief(s) as it may be proper and expedient.**
  - iv. **That the costs of this application be borne by the respondents.**

The application was brought on the grounds set out in the statement dated 5<sup>th</sup> March 2008, verifying affidavit sworn on 6<sup>th</sup> March 2008, supporting affidavit sworn on 6<sup>th</sup> March 2008 and further affidavit sworn on 26<sup>th</sup> March 2008 which, were filed in support of the Chamber Summons application for leave. The application was also supported by a further affidavit sworn on 20<sup>th</sup> January 2009. The facts that gave rise to the application as set out in the affidavits that I have mentioned above and other material on record are as follows; at all material times, the applicant was the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block II/224** (hereinafter referred to as “**the suit property**”). The suit property is said to have been allocated to the applicant by the 1<sup>st</sup> respondent on 1<sup>st</sup> August 1999 as un-surveyed residential plot. The same was subsequently surveyed and a lease issued to the applicant which lease was registered at the Kisii District land registry on 18<sup>th</sup> November 2003. The applicant was thereafter issued with a certificate of lease on 6<sup>th</sup> June 2004. The applicant took possession of the suit property after allotment and let it out to a tenant on or about 1<sup>st</sup> April, 2001 for a period of 5 years with effect from 1<sup>st</sup> February 2001.

2. Sometimes in the year 2000, the interested party acquired a parcel of land known as **LR No. Kisii Municipality/Block II/42** (hereinafter referred to as “**Plot No. 42**”). Plot No. 42 is adjacent to the suit property. It is said that when the interested party purchased Plot No. 42 at a public auction, it was made to believe that the same extended to the area in which the suit property is situated. The District Surveyor, Kisii District who fixed the beacons of the said parcel of land (Plot No. 42) at the request of the interested party advised it that the same did not extend to the suit property. The interested party was keen to extend the boundary of Plot No. 42 to cover the area where the suit property is situated. On 9<sup>th</sup> May 2002, the interested party applied to the Municipal council of Kisii to be allocated the land next to Plot No. 42 which in essence is the suit property. It is not clear whether the interested party was aware at this point that the said parcel of land had been allocated to the applicant. The interested party’s application was approved by the Municipal Council of Kisii, the District Physical Planning Officer, Kisii District and the District Commissioner, Kisii District before it was referred to the 1<sup>st</sup> respondent for final approval and issuance of a letter of allotment. The 1<sup>st</sup> respondent issued the interested party with a letter of allotment on 27<sup>th</sup> July 2006 in respect of the suit property as an extension of Plot No. 42.
3. When this second allocation of the suit property to the interested party was being carried out by

the 1<sup>st</sup> respondent, the applicant who was the beneficiary of the earlier allotment had already been registered as the owner of the suit property and issued with a certificate of lease. The interested party accepted the terms of the allotment and made the necessary payments. Before the 1<sup>st</sup> respondent issued the interested party with a lease in respect of the suit property, it was realized that the same parcel of land had already been allocated and a title issued to the applicant. Faced with a double allocation situation, the 1<sup>st</sup> respondent had to find a way out. The 1<sup>st</sup> respondent declared the lease and certificate of lease in respect of the suit property that had been issued to the applicant as forgeries and directed the 2<sup>nd</sup> respondent to expunge the same from the record so that the 1<sup>st</sup> respondent could proceed to process title documents in favour of the interested party pursuant to the second allocation aforesaid. The directive by the 1<sup>st</sup> respondent's to the 2<sup>nd</sup> respondent was contained in a letter dated 12<sup>th</sup> October 2007.

4. It is this decision by the 1<sup>st</sup> respondent to expunge the applicant's lease and certificate lease over the suit property from the land registry records and to process another lease and certificate of lease for the suit property in favour of the interested party that prompted these proceedings. The applicant moved the court to have the said decision by the 1<sup>st</sup> respondent quashed and its implementation by the 2<sup>nd</sup> respondent prohibited. The applicant filed the application for leave on 10<sup>th</sup> March 2008. In addition to the prayers for leave, the applicant also sought an order that leave if granted do operate as a stay of the said directive by the 1<sup>st</sup> respondent to 2<sup>nd</sup> respondent. The applicant's application for leave was not heard until 2<sup>nd</sup> April 2008 when Musinga J. (as he then was) allowed the same but declined to make an order that the leave do operate as a stay. In the absence of a stay, the respondents proceeded to expunge the lease and certificate of lease that had been issued in favour of the applicant over the suit property and issued a new lease over the suit property to the interested party. The lease in favour of the interested party was registered on 25<sup>th</sup> April 2008 after the institution of these proceedings. The interested party was subsequently issued with a certificate of lease. As result of this development, the applicant applied and was allowed on 28<sup>th</sup> May 2009 to amend his statement that was filed together with the application for leave. For whatever it could be worth, the applicant amended the reliefs sought in the statement and expanded the scope of his prayer for an order of certiorari so as to cover the decision of the 2<sup>nd</sup> respondent to expunge the applicant's title documents and to open a new register for the suit property in favour of the interested party.
5. The applicant challenged the said decision of the 1<sup>st</sup> respondent on several grounds. The applicant contended that the 1<sup>st</sup> respondent did not have the power to expunge his lease and certificate of lease in respect of the suit property from the land registry records. The applicant contended that the 1<sup>st</sup> respondent's decision was made in breach of the rules of natural justice in that he was not given an opportunity to be heard. The applicant contended further that the 1<sup>st</sup> respondent was not seized of jurisdiction to determine issues of forgery. With regard to the 2<sup>nd</sup> respondent, the applicant contended that it had no jurisdiction to implement the said decision of the 1<sup>st</sup> respondent. The applicant contended that the 2<sup>nd</sup> respondent's purported implementation of the said decision was unlawful. The applicant contended that there was no reasonable justification for the said decision of the 1<sup>st</sup> respondent and its implementation by the 2<sup>nd</sup> respondent.
6. The application was served upon the respondents and the interested party. The respondents did not file any affidavit in response to the same. The application was however opposed by the interested party. The interested party filed a replying affidavit sworn on 2<sup>nd</sup> May 2008 by Pastor Moses Chengo in reply to the application. In his affidavit, Pastor Chengo explained in detail how the interested party acquired Plot No. 42 and the circumstances under which it developed interest in the suit property that was adjacent to it. Pastor Chengo stated how the interested party applied for the suit property and the approval process that its application went through until it was allocated the suit property by the 1<sup>st</sup> respondent on 27<sup>th</sup> July 2006. Pastor Chengo stated that, as the process of allocation of the suit property to the interested party progressed, it was established that the applicant and one, Cleophas Ondieki who is not a party to these proceedings had been issued with fraudulent letters of allotment over the suit property. Pastor Chengo stated that, since the letter of allotment on the basis of which the applicant's title to the suit property was issued was

fraudulent, the said title was void and the 1<sup>st</sup> respondent was entitled to demand that the applicant surrenders the same for cancellation. Pastor Chengo stated that the applicant's title to the suit property was tainted with fraud and as such cannot be a basis for seeking a discretionary remedy from this court. He stated further that the application herein has been overtaken by events, the applicant's title having been cancelled and the interested party issued with a new title over the suit property. He contended that the order of prohibition sought by the applicant cannot issue in the circumstances. Pastor Chengo stated further that the application is void for the applicant's failure to comply with the mandatory statutory requirements relating thereto. In his reply to the affidavit by Pastor Chengo, the applicant in his further affidavit sworn on 20<sup>th</sup> January 2009 contended that the registration of the suit property in the name of the interested party was carried out through fraudulent conspiracy involving the interested party and the respondents and as such was unlawful.

7. When the application came up for hearing before Makhandia J. (as he then was) on 19<sup>th</sup> May 2010, the advocates for the parties agreed that the objections that had been raised by the interested party on the competency of the application be determined prior to the hearing of the application. The objections related to the competency of the verifying affidavit that was filed with the application for leave and the alleged failure by the applicant to place before the court a copy of the decision that is sought to be quashed. The said objections were dismissed by Makhandia J. on 16<sup>th</sup> July 2010. Makhandia J. held that the application herein is properly before the court. The disposal of those preliminary issues paved the way for the hearing of the application on merit.
8. On 2<sup>nd</sup> May 2012, the parties agreed to argue the application by way of written submissions. The applicant filed his written submissions on 22<sup>nd</sup> April 2014 while the interested party did so on 26<sup>th</sup> August 2014. I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the interested party in opposition to the application. Finally, I have considered the written submissions filed by the advocates for both parties and the cases cited in support thereof. The parties have come up with different issues for determination by the court. The following in my view are the issues that arise for determination in the application before me, namely;

- i. Whether the application is properly before the court?
- ii. Whether the respondents acted without jurisdiction or in excess of their jurisdiction in expunging the applicant's title documents from the land registry records?
- iii. Whether the respondents acted in breach of the rules of natural justice?
- iv. Whether the applicant is entitled to the reliefs sought?

#### **9. Issue No. I;**

In its submissions, the interested party challenged the competency of the application herein on several grounds. The interested party contended that the verifying affidavit that the applicant had filed together with the Chamber Summons application for leave is deficient in material particulars and as such the same cannot support the application herein. The interested party contended that the applicant swore a two paragraph verifying affidavit which does not contain the facts upon which the application herein has been brought. The facts have instead been set out in the statement that was similarly filed together with the application for leave. The applicant contended that the said statement should have contained only the name and description of the applicant, the relief sought and the grounds upon which the said reliefs have been sought.

10. The interested party contended that the facts upon which the application was brought are evidential in nature and as such ought to have been set out in the verifying affidavit and not in the statement. The interested party contended that the deficiency in the applicant's verifying affidavit afore stated could not be cured because no further verifying affidavit could be lodged after the filing of the application for leave. The interested party contended that the further affidavit that was filed by the applicant subsequent to the filing of the application for leave cannot save the application herein. In the circumstances, the interested party contended that the application is incompetent for having been based on facts set out in the statement.

11. In support of these submissions, the interested party cited the Court of Appeal case of **Commissioner General, Kenya Revenue Authority –vs- Silvano Onema Owaki t/a Marengue Filling Station, Civil Appeal No. 45 of 2000 (unreported)** and this court’s decision in the case of **Republic –vs- Suneka Land Disputes Tribunal & 2 Others, Ex parte Sam Joseph Motari, Kisii HCC Misc. Application No. 92 of 2011 (unreported)**. The interested party had also challenged the competency of the application on the ground that the application for leave to seek an order of certiorari was filed out of time contrary to the provisions of order 53 rule 2 of the Civil Procedure Rules. The interested party contended that the order sought to be quashed by certiorari was made on 12<sup>th</sup> October 2007 while leave to institute the proceedings herein was granted on 2<sup>nd</sup> April 2008 outside the six (6) months time limit set out under the aforesaid provisions of the Civil Procedure Rules.
12. I am of the opinion that the interested party’s objection to the application herein on the basis of the deficiencies in the verifying affidavit is *res judicata*. The issue had been raised before Makhandia J. (as he then was) as a preliminary point and all the arguments that the interested party has put forward herein including the Court of Appeal authority cited were placed before the judge who considered the same and ruled against the interested party in his ruling that was delivered on 16<sup>th</sup> July 2010. Makhandia J. held that the applicant had sufficient affidavit evidence before the court to support his application and found the objection to be lacking in merit. The interested party having lost on that point at the preliminary objection stage, the only recourse that was open to it was to appeal to the Court of Appeal or seek review. The interested party cannot have another bite at the cherry at the hearing of the application on merit. In my decision that has been cited by the interested party, I had expressed a different view on the effect of additional affidavits that had been filed together with the verifying affidavit in support of application for leave. The fact that my views are different from the views that Makhandia J. had expressed in his ruling of 16<sup>th</sup> July 2010 on the same issue does not give me the power to make afresh determination on the issue or to ignore Makhandia J.’s decision. The said decision binds the interested party. The interested party cannot therefore be allowed to raise the issue of the competency of the applicant’s verifying affidavit once again for determination by this court.
13. On the interested party’s contention that the prayer for certiorari is time barred, I am of the opinion that the objection is not well taken. In my view, the time limit set out in Order 53 Rule 2 of the Civil Procedure Rules is for bringing the application for leave to apply for an order of certiorari. It has no effect on the time taken by the court to dispose of the application. As admitted by the interested party, the decision sought to be quashed herein was made on 12<sup>th</sup> October, 2007 while the application for leave was made on 11<sup>th</sup> March 2008. The application in my view was made within six (6) months time limit provided for under order 53 rule 2 of the Civil Procedure Rules. The fact that the court did not make a ruling on the applicant’s application for leave until 2<sup>nd</sup> April 2008 had no effect on the competency of the said application for leave that was otherwise filed within time. In the circumstances, I find no merit on this limb of objection to the competency of the application before me.

#### 14. Issue No. II;

In the 1<sup>st</sup> respondent’s letter to the 2<sup>nd</sup> respondent dated 12<sup>th</sup> October, 2007, the 1<sup>st</sup> respondent asked the 2<sup>nd</sup> respondent to take note of the fact that the lease and certificate of lease that had been issued to the applicant were forgeries and that the same did not originate from the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent directed the 2<sup>nd</sup> respondent “**to expunge the forged documents from the records**”. Section 6 (1) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) (hereinafter only referred to as “**the Act**” provides that; there shall be kept in every district land registry, a register which shall be divided into property section, proprietorship section and encumbrance section. The property section was to contain among others, brief description of the land or lease. The proprietorship section was to contain the name and address of the proprietor and the encumbrance section was to contain a note of every encumbrance and every right adversely affecting the land or lease. The other documents that were to be kept at the district land registry were, the registry map, parcel files containing the instruments which support subsisting entries in the land register, the presentation book in which the records of applications made to the registry

were to be kept, at the discretion of the chief land registrar, an index of the names of the proprietors of land, leases and charges showing the numbers of the parcels in which they are interested and, a register and a file of powers of attorney. These provisions are replicated in section 7(1) of the Land Registration Act, 2012. The district land registries were being managed by district land registrars under the overall supervision of the chief land registrar.

15. The documents referred to above which were to be kept at the district land registry were therefore under the custody and management of the district land registrars. The 2<sup>nd</sup> respondent was in charge of the district land registry at Kisii where the suit property was registered. The suit property's register, the registry map in which it was located and its parcel file were all kept at Kisii District land registry in the custody of the 2<sup>nd</sup> respondent. As stated above, the 1<sup>st</sup> respondent directed the 2<sup>nd</sup> respondent to expunge "all forged documents from the records". The 1<sup>st</sup> respondent had declared the lease and certificate of lease over the suit property that had been issued to the applicant as forgeries. What was to be expunged therefore were the records kept at the Kisii District land registry relating to the lease and certificate of lease that were issued in favour of the applicant in respect of the suit property. The records from which they were to be expunged included the register, the registry index map and the parcel file.
16. According to **Collins, Concise Dictionary, 4<sup>th</sup> Edition**, "expunge" has been defined to mean "**to delete or erase; blot out; obliterate**". The 1<sup>st</sup> respondent's direction to the 2<sup>nd</sup> respondent meant therefore that any records relating to the applicant's ownership of the suit property at Kisii District land registry was to be deleted, erased or cancelled. In effect, the direction was to have the applicant's title cancelled. The applicant's main contention in these proceedings is that the respondents had no power to cancel his title over the suit property and that in purporting to do so; they exercised power that they did not have or exceed the power that was conferred upon them by law. The applicant has submitted that the suit property was registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) ("the Act") and that sections 27 and 28 of the Act conferred upon the applicant absolute rights over the suit property subject only to the provisions of the Act. The applicant has submitted that once title over the suit property was issued to him, the same could only be cancelled by the court under section 143 of the Act. The applicant has submitted that neither the 1<sup>st</sup> respondent nor the 2<sup>nd</sup> respondent had power to cancel the title held by the applicant by expunging or deleting the registration of the applicant as the proprietor of the suit property from the land registry records. The applicant has submitted that the power given to the 2<sup>nd</sup> respondent under section 142 of the Act to rectify the register is limited only to rectifying formal matters and errors or omissions that do not materially affect the interest of any proprietor.
17. In its submission in reply, the interested party did not respond to the foregoing submissions by the applicant on the powers of the respondents. The respondents on the other hand did not oppose the application as I have stated at the beginning of this judgment. I am fully in agreement with the submission by the applicant that the respondents did not have power to cancel the applicant's title. The power to cancel a title issued under the Act was reserved for the court under the provisions of section 143 and 159 of the Act. It follows therefore that in directing the 2<sup>nd</sup> respondent to cancel the applicant's title, the 1<sup>st</sup> respondent was exercising a power that it did not have. The 2<sup>nd</sup> respondent did not also have the power to carry out the 1<sup>st</sup> respondent's said directions. The 2<sup>nd</sup> respondent's power to rectify the register was as I have stated above limited by the Act and did not extend to cancelling a title. For the foregoing reasons, it is my finding that the respondents acted without jurisdiction in purporting to cancel the applicant's title to the suit property.
18. **Issue No III;**

As I have already stated above, the respondents had no power to cancel the applicant's title over the suit property or to expunge the records relating to the applicant's title from the land registry. Since the respondents were exercising power that they did not have, whether they observed the rules of natural justice or not in the process would have been immaterial. However, assuming that the respondents had power to cancel the applicant's title; could they have done so without observing the rules of natural justice? In the case of, **Attorney General –vs- Ryath [1980] AC 718 at page 730, Lord Diplock** stated that:

**“It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority”.**

In **Harlsbury’s Laws of England, 4<sup>th</sup> Edition at page 76 paragraph 64**, the authors have stated as follows;

**“Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo iudex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication.”**

19. There is no dispute that the applicant had an interest in the suit property and that the decision by the respondents was going to affect that interest adversely. The respondents had a duty therefore to give the applicant a hearing before making the said decision. There is no evidence before me that the applicant was given an opportunity to be heard by the respondents before a decision was made that the lease and certificate of lease that had been issued in his favour relating to the suit property were forgeries and should be cancelled. The interested party has submitted that before a decision was arrived at that the lease and certificate of lease relating to the suit property held by the applicant were fraudulent, the respondents carried out investigations that involved the office of the 1<sup>st</sup> respondent and the Director of Physical Planning. That may be the case but the issue is; was the applicant involved in the said investigations? There is no evidence of such involvement. The applicants’ contention that he was condemned unheard has not been challenged by the respondents and the interested party. It is my finding therefore that the decision by the respondents to cancel the applicant’s title over the suit property was arrived at in breach of the rules of natural justice.

**20. Issue No. IV;**

As I have stated at the beginning of this judgment, the applicant has sought orders of certiorari and prohibition against the respondents. In **Harlsbury’s Laws of England, 4<sup>th</sup> Edition, page 150 at paragraph 147**, the authors have stated as follows regarding the nature of certiorari as a remedy;

**“It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury”.**

21. In the book; **Public Law in East Africa** published by Law Africa the author, **Ssekaana Musa** has stated as follows at page 250;

**“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”**

As I have stated above, the 1<sup>st</sup> respondent acted without jurisdiction when it directed the 2<sup>nd</sup> respondent to expunge the applicant’s documents of title from the land registry records. The 1<sup>st</sup> respondent having acted without jurisdiction, its decision is liable to review by this court. As stated above, the interested party has not contested the fact that the 1<sup>st</sup> respondent’s decision complained of herein was made without jurisdiction. The interested party has submitted however that the order of certiorari sought by the applicant to quash the said decision cannot issue for various reasons. The interested party has contended that the order of certiorari is not available to the applicant because the applicant has an alternative remedy under section 144 of the Act. I am of the view that there is

no merit in this contention. The law is settled that the availability of an alternative remedy is not a bar to judicial review. It is only a factor that the court has to take into account when considering whether to grant the order or not. In the circumstances of this case, I am of the view that the most appropriate remedy for the applicant was judicial review. The purported cancellation of the applicant's title over the suit property by the respondents was as I have held above illegal. Such act could not entitle the applicant to seek indemnity under section 144 of the Act. The rectification of register that entitles an aggrieved party to seek indemnity under section 144 of the Act is one that is carried out pursuant to the provisions of the said Act. The respondents were not exercising any power under the Act when they purported to cancel the applicant's title. The issue of seeking indemnity under section 144 of the Act could not therefore arise. The case of **Republic –vs- National Environmental Management Authority [2011] eKLR** that has been cited by the interested party in support of this limb of submission is distinguishable.

22. The interested party has also submitted that the 1<sup>st</sup> respondent's decision which is sought to be quashed has already been implemented by the respondents in that the respondents have cancelled the applicant's lease and certificate of lease and issued a new lease in favour of the interested party over the suit property. The interested party has submitted that it would be futile to issue an order of certiorari in the circumstances. On the material before me, I am in agreement with the submission by the interested party that the decision of the 1<sup>st</sup> respondent which is sought to be quashed has already been implemented. The applicant's title to the suit property has been cancelled and a new title for the same property issued in the name of the interested party. I am of the view however that the implementation per se of the decision sought to be quashed is not a bar to the issuance of an order of certiorari where it has been established that the decision though implemented was unlawful the same having been made without jurisdiction. I am of the view that if it is proved or demonstrated that an order of certiorari can still serve a useful purpose, it can still issue even if the decision has already been implemented. In the case before me, I am of the view that no useful purpose would be served by granting an order of certiorari. The 1<sup>st</sup> respondent directed the 2<sup>nd</sup> respondent to expunge from the land registry records, the documents relating to the applicant's title over the suit property so that a new title for the property can be issued in favour of the interested party. It is not disputed that following that directive, the applicant's title was cancelled and a new title issued in favour of the interested party over the suit property. In the circumstances, an order of certiorari even if issued would not restore the applicant's title over the suit property. It would also not cancel the interested party's title.
23. It is only an order of mandamus that can compel the respondents to cancel the interested party's title and restore the applicant's title over the suit property. No such order has been sought in these proceedings. I am of the opinion that an order of certiorari would be of no assistance to the applicant in the circumstances. In **Halsbury's Laws of England, 4<sup>th</sup> Edition at page 158 paragraphs 163**, the authors have stated as follows on certiorari that;

**“Where grounds are made out upon which the court might grant the order, it will not do so where no benefit could arise from granting it.”**

For the foregoing reasons, it is my finding that although the applicant has established good cause that warrants the granting of the order of certiorari, it would not be appropriate to grant the order in the circumstances of this case having regard to the fact that the order would serve no useful purpose.

24. I would wish to state that even if the decision sought to be quashed had not been implemented and as such there was no impediment to the granting of the order of certiorari; I would still not have exercised my discretion in favour of granting the order for another reason. In its letter to the 2<sup>nd</sup> respondent dated 12<sup>th</sup> October 2007, in which the 1<sup>st</sup> respondent called for the expunging of the lease and certificate of lease that had been issued to the applicant, the 1<sup>st</sup> respondent stated that the said documents were forgeries and did not originate from the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent did not file any response to the present application so as to justify that claim. I have however perused the letter of allotment dated 1<sup>st</sup> August 1999 that forms the basis or foundation of the

applicant's title which is the subject of these proceedings. I have noted that 1<sup>st</sup> August, 1999 was not a working day. It was a **Sunday**. This court takes judicial notice of the fact that Government offices are not open for business on Sundays. It is not possible therefore that the 1<sup>st</sup> respondent could have presided over the issuance of a letter of allotment to the applicant on a Sunday. The 1<sup>st</sup> respondent's contention is its letter dated 12<sup>th</sup> October 2007 that the applicant's title over the suit property originated from forged documents that did not originate from its office is therefore not farfetched. This court cannot close its eyes to this apparent anomaly in the letter of allotment that the applicant has put forward in support of the present application. It is a principle of public policy that no court shall lend its aid to a man who has found his cause of action upon an illegal act. I would have therefore declined to grant the order of certiorari sought so that the applicant can pursue his claim by way of a normal civil suit. I have noted that there is a pending civil suit in the High Court of Kenya at Kisumu over the suit property namely, Kisumu HCCC No. 58 of 2008 involving the applicant and the interested party. I believe that would be the best forum to interrogate how the applicant was issued with a letter of allotment on a Sunday. The less said on the issue in these proceedings the better.

25. On the applicant's prayer for an order of prohibition, I am in agreement with the submission by the interested party that the order cannot issue. It is not in dispute that the acts against which the order of prohibition is sought have already been done. As the Court of Appeal had stated in the case of **Kenya National Examination Council –vs- Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** that was cited by the interested party, an order of prohibition is powerless against an act that has been done. The direction by the 1<sup>st</sup> respondent having been executed by the 2<sup>nd</sup> respondent, an order of prohibition cannot issue against the 2<sup>nd</sup> respondent prohibiting it from doing what has already been done.

## 26. Conclusion

Due to the foregoing, the application before me is not for granting. Although the applicant has established the grounds for issuing an order of certiorari, the remedy is discretionary. For reasons that I have given above, I have exercised my discretion against granting the order. On the applicant's prayer for the order of prohibition, the applicant has failed to establish valid grounds that would justify the granting of the same. The Notice of Motion application dated 11<sup>th</sup> April 2008 therefore fails wholly and the same is hereby dismissed. In view of the peculiar nature of the application, each party shall bear its own cost.

**Delivered, signed and dated at KISII this 20<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Momanyi for the applicant

N/A for the respondents

N/A for the interested party

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**

