



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 3 OF 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

AND

IN THE MATTER OF: THE PHYSICAL PLANNING ACT

(CAP 286 OF THE LAWS OF KENYA)

IN THE MATTER OF: CITY COUNCIL OF NAIROBI

IN THE MATTER OF: AN APPLICATION FOR CHANGE OF USE OF LAND

REFERENCE NUMBERS 13114/29, 30, 31, 46 AND 47

BY

JAMES DAVID ROBINSON AND PETER HENDERSON

REPUBLICAPPLICANT

AND

CITY COUNCIL OF NAIROBI1ST RESPONDENT

PETER HENDERSON.....2ND RESPONDENT

JAMES DAVID ROBINSON.....3RD RESPONDENT

EX-PARTE:

RICHARD BELL

MARY ANNE FITZERALD

JUDGEMENT

INTRODUCTION

1. By an amended Notice of Motion dated 1st July 2011 the *ex parte* applicants herein, **Richard Bell and Mary Anne Fitzgerald**, seek the following orders:
 1. **THAT the Honourable Court do issue an order of CERTIORARI to remove into the High Court and quash the decision by the 1st Respondent approving the application for change of user of Land Reference Numbers 13114/29, 30, 31, 46 AND 47, located along Mukoma Road, Off Magadi Road, Karen from residential to commercial user, that is serviced cottages/boutique hotel.**
 2. **THAT an order of MANDAMUS be directed at the 1st Respondent to undertake afresh the process of considering the application by the 2nd and 3rd Respondents for change of user of Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen from residential to commercial user, that is, serviced cottages/boutique hotel.**
 3. **THAT the Honourable Court pleased to restrain the 2nd and 3rd Respondent's whether acting by themselves, employees, servants and or agents or through any other means or person whatsoever from constructing, developing Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen from residential to commercial user or opening the same for public use as serviced cottages until determination of these proceedings or until further orders are made by this Honourable Court.**
 4. **THAT costs of and incidental to this application be provided for.**
 5. **THAT such further and other reliefs/orders that this Honourable Court may deem just and expedient to grant.**

EX PARTE APPLICANTS' CASE

2. The application is based on the Statutory Statement filed on 11th January, 2011 and a verifying affidavit sworn on 10th January, 2011 by Richard Bell, the 1st *ex parte* applicant herein. The grounds upon which the application is based are as follows:
 1. **THAT the 1st Respondent, though the Director of City Planning, acted in excess of its jurisdiction by approving the application for change of user of Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen from residential to commercial user, that is serviced cottages/boutique hotel, in blatant ignorance and without taking into account the numerous objections raised by the residents of Kikenni Estate whose land adjoins the land the subject of this application.**
 2. **THAT the City Council of Nairobi, through the Director of City Planning acted in excess of its jurisdiction by approving the application for change of user of Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen from residential to commercial user, that is serviced cottages/boutique hotel, without placing any advertisement on the property to communicate the intended change of user to the public contrary to Section 10, 22 and 29 of the Physical Planning Act (Cap 286 of The Laws of Kenya.**
 3. **THAT in granting the 2nd and 3rd Respondents approval, the 1st Respondent was in gross violation of the law.**
 4. **THAT there are real dangers that unless the orders sought herein are granted the 2nd and 3rd Respondent will commence construction of serviced cottages/boutique hotel unlawfully.**

3. According to the deponent, who avers that he is authorised by the residents of Kikenni Estate, to file this application on their behalf, 2nd and 3rd Respondents, together with others, are the registered proprietors of all the land known as Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen. On 5th April 2010, an advertisement was placed in *The Daily Nation* newspaper, notifying the general public that the owners of Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen proposed to change the user of the land from residential to commercial user, that is serviced cottages and develop them as a one single development without necessarily amalgamating them and invited any person with objections to submit the same in writing to the Town Clerk, the City Council of Nairobi. Similarly, on 7th April 2010, an advertisement was placed in *The Standard* newspaper, notifying the general public that the owners of Land Reference Numbers 13114/29, 30, 31, 46 and 47, located along Mukoma road, Off Magadi Road, Karen proposed to change the user of the land from residential to commercial user, that is serviced cottages and develop them as a one single development without necessarily amalgamating them and invited any person with objections to submit the same in writing to the Town Clerk, the City Council of Nairobi.
4. Following the said advertisements, the residents of Kikenni Estate, submitted their objections to the intended change of use, in letters to the Town clerk, Nairobi City council and on realizing that the residents of Kikenni Estate objected to the planned change of user, the 2nd Respondent e-mailed residents of Kikenni estate outlining the reasons for his intended change and disclosed that he had been approached by investors with proposals to run a safari business more particularly “bed and breakfast for clients travelling in and out of Nairobi”. It is further averred that in a letter dated 26th April 2010, the 1st Respondent, through the Director of City Planning, acknowledged the objection by the residents of Kikenni Estate and, amongst others, notified them that his office was yet to receive any application in reference to the change of use from residential to serviced cottages on L.R. No.13114/29, 30, 31, 46 and 47, located along Mukoma Road, Off Magadi Road, Karen. On or about the 29th April 2010, a meeting was held where residents of Kikenni Estate met with the 2nd Respondent with a view of amicably resolving the dispute and forestalling any unnecessary legal tussles that may arise due to his intention to change user of the property from residential to commercial. The residents explained to the 2nd Respondent that such a change or the construction of serviced cottages or a boutique hotel would further strain the limited amenities of Kikenni Estate and the 2nd Respondent undertook to, amongst others consult his lawyer with a view of to addressing the concerns and objections raised by Kikenni residents, particularly maintaining the user of the land as residential. Further, and with the intent of reaching a consensus, a Director of the developer for the project, **Mr. Francis Dyer**, agreed to hold a community meeting and assured that he will not commence any development on the 1st and 2nd Respondents’ property if the residents of Kikenni Estate raised objections to it.
5. However, on 4th May 2010, a letter purporting to have been written and signed on behalf of the Chairman of Karen Langata Development Association, **Mr. Vincent Kambo**, was addressed to the Director of City Planning of the 1st Respondent, alleging, amongst others, that the residents of Kikenni Estate were in favour of the development which letter, according to the deponent, was obtained without the consent of the residents and through dubious means. Sometimes in December 2010, the residents of Kikenni Estate retained the services of Plumblin Consultants, registered Physical Planners and Quantity Surveyors (the same Consultants that were retained for the purposes of obtaining the change of user on behalf of the 2nd and 3rd Respondents) for the purposes of determining the suitability of the proposed change of user and the construction of serviced cottages on the property the subject of this application who prepared a report dated December 2010 which report indicated the inconsistencies in obtaining the approval from the City Council of Nairobi to change user and further outlined the negative impact of constructing serviced cottages on the property.
6. According to the deponent, it has now come to the knowledge of the residents of Kikenni Estate that the 1st Respondent has clandestinely granted approval to the change of user from residential to commercial despite of the legitimate objections raised by the residents of Kikenni Estate despite the fact that Karengata Local Physical Development Plan 2005-2015, which was developed by Karengata residents, under which Kikenni Estate falls, has been approved by the 1st Respondent

and Ministry of Lands. According to him, the approval of the change of user by the 1st Respondent is contrary to the Town Planning Committee regulation contained in its policy on cottages approved on 19th June 2008 and that the construction or the opening of the serviced cottages/boutique hotel on the 2nd and 3rd Respondents' land will adversely affect the lives of the adjacent land owners, as the will be increased insecurity, inadequate water supply, noise pollution, extra strain on scarce resources, poor road maintenance due to increased and heavy vehicular traffic and other essential amenities will be compromised, to the disadvantage of the Applicants and the residents. Nevertheless, the 2nd Respondent, through his agents and employees has, despite of the objections raised by Kikenni residents, and the lack of an EIA Report, continued with his plans to develop the said property into served cottages/boutique hotel with a view of renting them out to visitors.

7. The same deponent on 4th July 2011 filed a supplementary affidavit sworn on 1st July, 2011 in which he deposed that the residents of Kikenni Estate had since come to learn that the 2nd and 3rd Respondents obtained an Environmental Impact Assessment (EIA) Report and Approval from the National Environmental Management Authority (NEMA) in a most clandestine manner and without due consultations with the residents of Kikenni Estate and without complying with the mandatory requirements of the environmental management and coordination Act No.8 of 1999 despite the fact that the residents of Kikenni Estate had commenced the necessary proceedings before NEMA. He further deposed that the Karen Langata District Association, a key stakeholder in the obtaining of NEMA approvals by the residents, informed the residents of Kikenni Estate that they were not consulted by the Respondents before or during the "approval process" and indeed, in a meeting held on 13th January 2011 between the residents of Kikenni Estate and the agents/developers of the 2nd and 3rd Respondents herein, the developers, though a **Mr. J.J. Mcloud**, indicated to the residents that he had been allocated the task of obtaining the NEMA approval and that they distributed the NEMA questionnaires to a list of 5 predetermined residents selected on the basis that they would not object to the project because they had "consulted" them before hand. He further deposed that the Respondents have intentionally failed to disclose to the relevant authorities, and the residents of Kikenni Estate, the correct number of beds that the development intends to hold. He deposed that based on the advert of the project, it is clear that the development is a commercial enterprise and that "serviced cottages" is an incorrect representation of the large scale hotel that is in the process of being built and opened. Whereas under the Karengata Physical Development Plan, the minimum size of each plot is set at one acre and is only permitted to have one residential unit, it can be noted that in the application for approval by the 2nd and 3rd Respondents, agenda item number 3 above, indicates that for L.R. Number 13114/47, the 2nd and 3rd Respondents applied for permission for six cottages for the said approximately three decimal six eight (3.68) acres. The maximum number of cottages allowable on such acreage would be three. According to him, for L.R. Number 13114/30, which is one decimal three nine (1.39) acres, the 2nd and 3rd Respondents applied for two cottages whilst the maximum allowable or such acreage is a single unit. In addition, the Planning Brief had allowed for five (5) cottages while the representation to the 1st Respondent is that the development will accommodate eight (8) cottages as indicated in item 3 above.
8. By a letter dated 7th February 2011, the applicants' advocates on record, **Murgor & Murgor Advocates** informed the Town Clerk of the current application before this Honourable Court and in response to the said letter, **Mr. P.T. Odongo**, on behalf of the town Clerk, responded vide a letter dated 10th February 2011 and amongst others, informed the said Advocates while taking refuge in the letter dated 4th may 2010 from the Karen Langata District Association, withdrawing its initial objection to the development, that due procedure was adhered to and that no objections were received by the 1st Respondent. Whereas in the same letter, it is indicated that the application was submitted to the 1st Respondent on 16th June 2010 and approved by the Town Planning committee Meeting held on 24th June 2010, the residents of Kikenni Estate have not been supplied with copies of the entire minutes of this meeting.
9. According to the deponent, contrary to the allegations by the Town Clerk, the residents of Kikenni Estate strenuously opposed and objected to the application for change of user and indeed,

- in response to the letter dated 4th May 2010 from the Karen Langata District Association, the 1st Respondent through a letter dated 24th May 2010 informed the Association that they shall “evaluate the proposal based on area policy for cottages as provided for in the Karengata Local Physical Development Plan”. Further in a letter dated 4th February 2011 and received by the 1st Respondent on 9th February 2011, the Karen Langata District Association objected to the proposal and highlighted several reasons, including, that the current proposal does not accord with the proposal that it was shown by the developer in May 2010 and for which it recorded its “no objection letter” to the Director of City Planning dated 4th may 2010. Therefore, contrary to the allegations by the Respondents that due process was followed in granting the approval, it is worth noting that the 2nd and 3rd Respondents had not, prior to applying for approval and receiving the notification of approval of development permission, settled their property rates, a prerequisite for change of user approval. Indeed, as at 10th February 2011, they were still in arrears. According to the deponent, in a letter dated 11th February 2011, the 2nd and 3rd Respondents, and their agents/developers, admit, and acknowledge, that if the Karen Langata District Association will withdraw its letter of objection dated 4th February 2011, they would undertake to restrict the number of cottages to conform with the present Karengata Local Physical Development Plan.
10. It was therefore the deposed that if this Honourable Court does not issue the temporary orders sought to restrain the 2nd and 3rd Respondents from constructing, opening or operating the intended serviced cottages/hotel, the residents of Kikenni Estate would suffer irreparable loss and damage and the attendant effects of environmental degradation caused by the actions of the 2nd and 3rd Respondent.

1ST RESPONDENT’S CASE

11. In response to the application, the 1st respondent on filed 14th December 2011 filed a replying affidavit sworn by **Patrick Tom Odongo**, the 1st respondent’s Director of Physical Planning Department.
12. According to him, the amended Notice of Motion is fatally defective. To him, this is a private tussle of war involving private individuals over land and the public does not come in and features nowhere hence the reason why the Motion was drawn to reflect the two individuals as applicants and not the public (sic). In his view, the issues raised therein can be challenged in a different way and not by way of judicial review. He further averred that the application lacks merit and is an outright abuse of the court process since the dispute before the court involves land belonging to private individuals. He was further of the view that the application does not disclose the source of fears alluded to by the applicants and the harm they stand to suffer if the orders are not granted.
13. According to the deponent, the applicants have not annexed a copy of the decision they seek to quash while the issues of Environmental Impact Assessment Report can be ventilated before the NEMA Tribunal by the parties adducing viva voce evidence. It was further averred that the applicants are guilty of material non-disclosure and misrepresentation of facts. Since the decision of Karen Langata Development Association is not that of a public authority the application ought to fail.

2ND RESPONDENT’S CASE

14. On the part of the 2nd respondent, a replying affidavit sworn by the 2nd respondent on 19th September, 2011.
15. According to the deponent, the 3rd Respondent is not a proprietor herein and, as he has been sued as such proprietor, his name ought to be struck out. In his view, the proceedings herein are a nullity as mandatory provisions necessary for the grant of the prerogative orders sought have been flouted with the effect that the said proceedings are for striking out. To him the grounds which warrant the striking out are that the prerogative order of “certiorari” requires the bringing before this Honourable Court a decision to be quashed which decision has been presented for quashing and in that regard certiorari cannot lie; that the prerogative order of “certiorari requires that a

particular decision made on a particular day by a public body be identified as being offensive yet the date of the decision sought to be challenged has not been stated and certiorari cannot, perforce, lie; that whereas the prerogative order of “certiorari” must be instituted within six (6) months of the date of the decision since no date of the alleged offending administrative decision has been tendered the originating application is fatally defective and is for quashing; that the change of user “no objection” certification was granted by the 1st Respondent more than six (6) months before the institution of the proceedings herein and the application for “certiorari” is, therefore, out of time; the 1st Respondent does not issue change of user but merely grants a “no objection” certificate hence the proceedings herein are a nullity in that it is the Commissioner of Lands who issues a change of user; that an order of Mandamus cannot lie if the original decision has not been quashed by way of certiorari and the said application for Mandamus is a nullity and inapplicable; that the balance of the claim is not justiciable as injunctive relief cannot be issued under Order 53; and that in any event the Claimant has admitted that Hogmead Hotel was officially opened on the 14th February 2011 and an injunctive relief would, in the circumstances be unavailable to stop that which has already happened.

16. It was further contended the Respondents do not know what case they are meant to meet as the Applicants have not identified the decision that they wish to impugn and despite this defect having been brought to the attention of the Applicants, the applicants despite attempting to remedy the same by an amendment have not taken any steps whatsoever to address the said technical objections or attempted to rectify the said defects and that this is contemptuous of the authority of this Honourable Court.
17. In the deponent’s view, based on the applicant’s own averments and exhibits, the decision having been made on the 24th June, 2010 the Applicants had up to and including the 23rd December, 2010 to challenge the said decision hence the challenge herein is clearly out of time and the proceedings herein are a nullity.
18. To the deponent the application, approval and certification of the 2nd Respondent’s project by NEMA cannot be assailed in these proceedings as NEMA has not been enjoined in these proceedings; the fact that the Applicants unequivocally assert that they “... *have commenced the necessary proceedings before NEMA*”¹ necessary means that they are disentitled to the equitable reliefs of certiorari and mandamus as there are parallel and contemporaneous proceedings before a different forum; it is not true that NEMA did not consult the Applicants’ umbrella association, **Karen & Langata District Association** (KLDA), as alleged. By letter dated 04th May, 2010 KLDA advised the 1st Respondent (with a copy of NEMA) that “KLSA therefore has no objection to this development.”; in the face of this “no objection” letter NEMA and the 1st Respondent proceeded to approve the 2nd Respondent’s development; the Applicants are members of KLDA and are bound by the decisions of the said residents association. The Applicants cannot approbate and reprobate at the same time. The Applicants cannot assert that “... *the Karen Langata District Association, a key stakeholder in the obtaining of NEMA approvals by the residents, has informed the residents of Kikenni Estate that they were not consulted by the Respondents before or during the “approval process.”*” And yet there is a KLDA letter stating the exact opposite and which indicates that KLDA has “no objection” to the 2nd Respondent’s development; the Applicants’ assertions are untrue and are altogether false; the other matters deposed to by the Applicants in relation to NEMA approvals are matters that the Applicants are at liberty to take up with the NEMA Tribunal and are not matters that can properly be laid before this Honourable Court. This Honourable Court cannot order another tribunal on how to conduct its affairs but can only ensure that in discharging its responsibilities such a Tribunal observes well-settled principles of law.
19. In his view, the Applicants do not have an objective and rationale basis for objecting to this development and have interposed their own idiosyncratic views on land planning and wish this Honourable Court to adopt these views as a basis to create a new genre of land policy and planning yet the 1st Respondent is the democratically elected body that is charged with the balancing of competing public and private interests. To him the Applicants cannot be permitted assert that it is their view of land planning which is right and that the 1st Respondent must accept the categorisations invented by the Applicants. He further deposed that the 1st Respondent has in

- the exercise of its statutory zoning power designated the development herein as one belonging to the category “*serviced cottages*.” The 1st Respondent has not designated the development as a “*commercial user*” as the Applicants wish to dictate and it is the 1st Respondent to determine the proper user and it is for the 2nd Respondent to seek such categorisations suits the needs of the intended development hence the objections being taken are capricious.
20. It was further deposed that in the overall framework of land use and planning within the Karen area there are many other developments which are similar to or more intensive than the development herein and against which no objections have been taken by the Applicants.
21. To him, the Applicants represent a fringe commune and there are many other members of the community who have been most supportive and encouraging of the development herein. There has been no complaint recorded from any person in the neighbourhood of the development herein since the establishment was opened in February, 2011 and the 2nd Respondent has invested heavily in developing the property herein and would suffer serious financial prejudice if the orders sought herein are granted. The Applicants have not tendered any security and there is no indication that the few property owners who have presented this suit are in a position of making good any loss and damage or costs that may be incurred or suffered by the Respondents in these proceedings hence it is just and fair that the Application herein be dismissed with costs.

DETERMINATIONS

22. I have considered the foregoing as well as the submissions of the parties herein.
23. The first issue for determination is whether the instant application was filed outside the statutory period. Sections 9(2) and (3) of the **Law Reform Act** provides as follows:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

24. In this case, it is clear, barring all the other submissions that the decision approving the application for change of user of Land Reference Numbers 13114/29, 30, 31, 46 and 47 was made on 24th June 2010. However these proceedings were commenced on 11th January, 2011 when the application for leave was filed. It would follow that if the instant application fell within the ambits of the said rule the application would be out of time. However, the leave herein is sought in respect of a decision made by a local authority.
25. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings

- mentioned therein and matters not mentioned are not barred by the 6 months limitation.
26. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318**, the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.
27. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
28. However, it is clear that where the remedy sought is not just limited to an order of *certiorari*, even if the application was not commenced within the said 6 months period, the whole application cannot be said to be incompetent by that mere fact. The 6 months limitation only applies to application for *certiorari* for the simple reason that in cases where an order for prohibition is sought it means that the action sought to be prohibited is still continuing while *mandamus* applies to situations where a public authority has declined to carry out a duty imposed on it.
29. In the premises it is my view at this stage that the six months limitation period may not be invoked to bar the applicants from bringing the present proceedings.
30. The next issue is whether these proceedings are incompetent for the failure by the applicant to annex a copy of the decision sought to be quashed. Order 53 rule 7(1) of the Civil Procedure Rules provides:

In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

31. What is required by this provision is that before the hearing of the motion, a copy of the decision sought to be quashed be lodged with the registrar or account be given for the failure to do so. In my view this is meant to prove to the Court that there is a decision in existence which can be quashed so that the Court does not end up quashing a decision which does not exist such as a recommendation or a mere letter communicating a decision. It also serves to show the nature of the decision sought to be quashed to enable the Court make a decision on the applicability of the limitation period. There is no requirement that the decision be lodged at the time of the application for leave as it can be lodged at any time before the hearing of the Motion. With respect to what amounts to lodging with the registrar, it was held by **Tanui, J** in **Republic vs. Land Disputes Tribunal Siaya District ex Parte Allan Mwalo Wambani Kisumu HC Misc Application No. 45 of 2003** that:

“Order 53 rule 7(1) of the Civil Procedure Rules envisages that before the hearing of an application for judicial review which seeks an Order of Certiorari, the applicant shall have lodged with the registrar a copy of the document sought to be quashed, verified by an affidavit and therefore where the hearing date is yet to be fixed the issue of lodgement of the document has not arisen....Order 53 rule 1(3) of the Civil Procedure Rules envisages a constructive notice upon the registrar when the notice is lodged or filed with the agents of the registrar who sit at the Court’s registry and the rule would be deemed to be complied with once a document is filed at the registry.”

32. On my part I associate myself with the decision of the learned Judge and find that nothing turns on this issue.
33. Related to this issue was the contention that the date of the decision sought to be quashed was not contained in the statement. In fact there was robust submission that the purpose of affidavits in a judicial review application is to support the grounds and prayers sought in the Statutory Statement

but not to amend the facts and prayers as sought in the statutory statement. Whereas I accept that the affidavit cannot amend the relief sought which ought to be in the statement, in my respectful view to submit that the facts are contained in the statement cannot be correct. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000**, the Court of Appeal held:

“We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: ‘The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’ At page 283 of the report of the case of *R v. Wandsworth Justices*, Viscount Caldecote CJ said: ‘The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.’”

34. It follows that in my view there was nothing wrong in stating the date of the decision in question, a factual matter, in the affidavits.
35. An issue was taken with respect to prayer 3 of the amended motion which seeks restraining orders. It was contended that such reliefs cannot be granted in judicial review proceedings. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**,

“...judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Section 8 of the *Law Reform Act* specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”

36. Therefore there is no room for grant of other orders such as injunctions and declarations. Apart from that under Order 53 rule 4(1) of the *Civil Procedure Rules* it is provided that:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule

provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

37. Therefore once leave is granted to apply for specific orders, those are the orders which are to be sought in the Notice of Motion. In other words no other substantive orders may be sought in the Motion for which leave was not sought except for such consequential order as for costs which is in the discretion of the Court. In this case, it is clear that the only reliefs which were indicated were the reliefs forming prayers 1 and 2 of the present Notice of Motion. As leave was not sought and granted to apply for prayer 3 the same cannot be granted even assuming the same could be competently granted in judicial review proceedings.
38. It is also contended that the 2nd and third respondents being private individuals it is not competent to seek relief against them. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, Nyamu, J (as he then was) held:

“What does an order of prohibition do and when will it issue? It 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 herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange 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 ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”

39. I agree that judicial review orders are not available against the 2nd and the 3rd respondents herein. Such persons could only be joined as interested parties under Order 53 rule 6 of the ***Civil Procedure Rules***.
40. That brings me to the issue of the decision made by the 1st respondent. As already stated judicial review does not deal with the merits of the challenged decision but only deals with the decision making process: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. Once these are complied with an aggrieved person ought to invoke the appellate procedure if an appeal is available but ought not to use judicial review as an avenue of an appeal.
41. Having considered the affidavits and the submissions it is my view that the only issue that falls for determination within the purview of judicial review is whether the law relating to objections under the ***Physical Planning Act*** was adhered to. Section 41(3), (4) and (5) of the said Act provides:

(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.

(4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the applicant of such objections or representations and shall before the application is determined by it afford the applicant an opportunity to make representations in response to such objections or representations.

(5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1). (6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:

Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal: Provided further that the appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

42. It is the ex parte applicants' case that despite their objection, the 1st respondent proceeded to issue a change of user without determining the said objection. If the 1st respondent proceeded in the manner alleged by the ex parte applicant without determining the objection taken by the ex parte applicants that would not only be *ultra vires* but also unreasonable. It would also be contrary to the aforesaid provision and its action would hence be tainted with illegality. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**

43. Vide letters dated 14th April 2010 and 15th April 2010 addressed to the 1st respondent's Town Clerk, **Tanya Carr-Hartley, Dr. Michael Norton-Griffiths and Mary Anne Fitzgerald** objected to the intended change of user. I have not seen any objection by the 1st ex parte applicant. Whereas the ex parte applicants contend that the 1st respondent acknowledged receipt of their objections vide the letter dated 26th April 2010, the letter dated 26th April 2010 was addressed to Karen & Langata District Association rather than the ex parte applicants. The 1st respondent's position is that the ex parte applicants' objection was not received by the 1st Respondent. From the record, there is no evidence that the said objection was sent to the 1st Respondent leave alone that it was received. As was held by **Ringera, J** (as he then was) in **Gandhi Brothers Vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**:

“Where service of summons is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.

44. In the premises I am unable to find that valid objections were lodged with the 1st respondent.

45. Apart from that in **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence

a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

46. In this case it is contended that the developments have been undertaken. In my view, it would not be efficacious to grant the orders sought herein even if I had found the application merited.

47. In the premises, I decline to grant the prayers in the amended Notice of Motion dated 1st July 2011.

ORDER

48. In the result the amended Notice of Motion dated 1st July 2011 fails and is dismissed with costs to the respondents.

Dated at Nairobi this day 30th day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Ouma for the ex parte applicant