REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRIOBI

MISCELLANEOUS CASE NUMBER 2 OF 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF LEGAL NOTICE NUMBER 98 OF 15TH SEPTEMBER 2004

AND

IN THE MATTER OF CIVIL SERVANTS HOUSING SCHEME DEVELOPMENT ON LAND REFERENCE NUMBERS 209/3170 AND 3171 RESPECTIVELY

REPUBLIC .....APPLICANT

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF HOUSING..... .....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 13th February, 2008 filed in this Court on 15th February, 2008, the *ex parte* applicants herein, **Mary Chemtai Chepkonga, Flora F K Majani, Antipas Nyanjwa Aketch and Susan Njeri Njuguna**, seek the following orders:

1. **THAT an Order of certiorari do issue to remove to this Honourable Court the decision made by the Permanent Secretary Ministry of Housing, the 1st Respondent herein and**

communicated to the Applicants vide letters dated 21st December, 2007 respectively allocating for purchase the 1st, 2nd, 3rd and 4th Applicants Government Houses at Ngara Estate for purposes of being quashed.

2. **THAT an order do issue prohibiting the Permanent Secretary Ministry of Housing 1st Respondent herein from selling, alienating, commencing any recovery proceedings and/or in any manner interfering with the Applicants' priority right of purchase of Government Houses situated at land Reference Numbers 209/3170 and 3171 respectively situated at Nyeri Road Kileleshwa Nairobi**
3. **THAT an order of mandamus do issue compelling the permanent Secretary Ministry of Housing the 1st Respondent herein to judiciously consider the Applicants' application to purchase Government Houses erected on Land Reference Numbers 209/3170 and 3171 respectively in accordance with the terms of agreement entered between the Applicants and the 1st Respondent.**
4. **THAT Costs of this application be provided for.**

APPLICANTS' CASE

2. The Motion is based on the grounds set out in the Statutory Statement and verifying affidavit sworn by **Mary Chemtai Chepkonga** on 18th January, 2008 and filed herein the same day.
3. According to the deponent, the applicants are civil servants employed in various Departments of the Government of the Re public of Kenya and as part of their respective terms of employment the 1st Respondent on behalf of the Ministry of Housing allocated to each of them wherein they occupied as tenants in Government quarters situated at Nyeri Road Kileleshwa. Sometimes in the year 2004 the applicants were notified by the 1st Respondent that its Ministry was in the process of demolishing the said houses to pave way for re-development and subsequent sale to interested civil servants. Pursuant to various correspondences the 1st Respondent vide a letter dated 9th September 2004 advised them the residential houses would be re-developed and that once the sale process is commenced the applicants would be given first priority to purchase. This position was further confirmed vide the 1st Respondent's letter dated 5th June 2006 and relying on the said agreement and assurances by the 1st Respondent the applicants duly vacated their premises to pave way for re-development.
4. Vide a notice published in the Daily Nation newspaper of 5th September 2007 the 1st Respondent notified all civil servants of their intention to sell various Government residential units including those previously occupied by the applicants and invited interested persons to apply to purchase the same. Pursuant to the said notice and the 1st Respondent's previous assurances that the applicants right to be given priority would be followed they applied to purchase units at Nyeri Road Kileleshwa and further paid their respective 10% deposits of the purchase price.
5. According to the applicants, it was a term of offer that each Applicant would specifically indicate the location of the house or unit applied for and the preferred floor and further disclose the mode of payment of the purchase price and the ability to pay.
6. However, despite having met all the requirements set out by the 1st Respondent the applicants were surprised and shocked when they respectively resumed from Christmas holidays in early 2008 and found letters dated 21st December 2007 from the 1st Respondent addressed to them and which indicated that the deponent, the 2nd, 3rd and 5th Applicants had been allocated for purchase houses at Ngara Estate Nairobi as applied while the 4th Applicant had been allocated for purchase a house at Gichugu Road Kileleshwa pursuant to her application. Equally perplexing was the fact that some of the tenants who were likewise residents at Nyeri Road Kileleshwa and who jointly expressed their interest to purchase as tenants were allowed to purchase the houses they applied for.
7. The deponent further averred that herself and her co-applicants did not apply to purchase houses at Ngara Road or Gichugu Road as suggested by the 1st Respondent in the said letters and the 1st Respondent's said decision in clearly misleading and erroneous. Despite attempts by the applicants to seek audience with the 1st Respondent on the reasons behind his said decision, the 1st

Respondent has flatly refused to meet them and has declined to respond to a letter from the applicants' advocates.

8. According to the applicants, the 1st Respondent acted without powers when he made a decision to allocate them houses which they did not apply to purchase and that the 1st Respondent's action amounted to an abuse of his powers. They further contend that the 1st Respondent's action to allocate some of their colleagues units at Nyeri Road Kilelleshwa pursuant to the right of priority as tenants is discriminatory and amounts to a breach of their fundamental rights. They further believe that the 1st Respondent's conduct is in breach of rules of natural justice which require that they be given a chance to be heard or give our representations and or be given reasons for the 1st Respondent's irrational decision.
9. According to the applicants, the 1st Respondent intends to allocate for purchase to other preferred persons the units they applied to purchase at Nyeri Road Kileleshwa and they urge the Court to protect their legitimate rights by issuing interim orders barring such sale pending hearing and determination of the proceedings herein and restrain the 1st Respondent form implementing his decision communicated through the letters dated 21st December 2007 pending hearing and final determination of our claim. To them, they stand to lose their rights to purchase the residential houses which they have lived in for more than 10 years if the 1st Respondent is not restrained from proceeding with its action which will occasion them irreparable harm and damage as they would not be able to find similar houses at the same price and location in the likely event that their cause is upheld by the Court.

RESPONDENTS' CASE

10. In response to the application, a replying affidavit was on 14th February, 2008 filed sworn by **Tirop Kosgey**, the Permanent Secretary Ministry of Housing on 14th February, 2008.
11. According to the deponent, he is the custodian and trustee of all Respondent houses and maintain register of all its buildings and houses. According to him, the Respondent under the Civil Servants Housing Scheme Fund constructed residential housing units in among other estates Nyeri Road Kileleshwa, Gichugu Road Kileleshwa site 1 and Desai Road Ngara in Nairobi. The Respondents developed 40 residential flats in Nyeri Road Kileleshwa on the Respondent's land namely land Reference Number 209/3170 and 3171 after demolishing the old maisonettes which stood on the aforesaid land. He is however aware that the applicants herein are civil servants who were previous tenants of the Respondent's and were occupying the old premises that stood on the above named land but the Respondent terminated the applicants' tenancy to pave way for the development of the new modern flats which are now the subject of this suit. According to him, the Respondent in its communication to the tenants requiring them to vacate the premises and who included the applicants herein stated that they would be allowed to apply for the purchase of the new modern when they would be put up for sale but averred that the said communication did not in any way guarantee the applicants' the right to be sold for the houses as alleged in paragraph 6 of the affidavit.
12. On 5th September, 2007 the Respondent advertised for the sale of its residential housing which included the 40 residential units in Nyeri Road Kileleshwa and invited interested civil servants to apply for houses commensurate with their grade and within then capacity to repay at a price of Kshs 4.5 million. However, at the close of the time for submission of the application forms on 31st October, 2007 at 5.00 pm 232 applicants had returned their forms with evidence of the repayment of the 10% deposit in respect of Residential units at Nyeri Road Kileleshwa while 696 applicants had returned the same in respect of houses at Desai Road Ngara. To him, the applicants herein were amongst those who submitted their application for the purchase of residential units at Nyeri Road Kileleshwa and had paid the 10% percent deposit of Kshs.450,000/=. The deponent averred that the process of the sale of the Respondent's houses were followed by the Respondent's Housing Scheme Management Committee dealt with the applicants' application for sale of the houses on among other issues the criteria for allocation o the developed housing units for allocation of the same to the applicants. It was averred that one of the criteria for scoring and ranking the applicants was that those tenants who vacated the houses to pave way for the

demolition and development of new houses be accorded priority if they met other conditions, a criteria which the applicants herein fell in. However, after evaluation of the applicants' applications the Scheme Housing Committee resolved and agreed that applicants herein be allocated houses where they qualify as follows; **Flora Majani** – Ngara 3 bed roomed; **Susan N. Njuguna** – Ngara 3 bed roomed; **Chepkonga Chemutai** – Ngara 3 bed roomed; and **Nyanjwa Aketch** – Ngara 2 bed roomed.

13. In his view, the Scheme Management Committee above decision was guided by the fact that none of the four applicants herein, **Mary Chepkonga** – Job Group L, **Flora Majani** – Job Group M, **Antiphas Nyanga** – Job Group K and **Susan N. Njuguna** – Job Group L, qualified for the sale of the houses they applied for as they did not meet the criteria for allocation of the residential units at Nyeri Road Kileleshwa which was for those applicants who are in Job Group P and above. Apart from that the said four applicants did not also meet the affordability criteria that was necessary to conform with section 21 of the Code of Regulation for civil Servants which provides that no civil servant should have financial commitments which are more than 2/3 of their salary as such indebtedness affects the officer's performance. Therefore, the Scheme Management Committee having found none of the four applicants herein met the affordability criteria was of the view that allocating them houses they had applied for at Nyeri Road would have resulted in pecuniary embarrassment which was contrary to the provisions of the Civil Service Code of Regulations and hence the decision to allocate the applicants' houses in Ngara instead of denying them any allocation as they did not qualify for where they had applied for was informed by the earlier commitment given to the applicants by the Respondent that they would be considered for allocation of houses of the new housing development.
14. It was contended that the decision of the Respondent to allocate the applicants houses in Ngara was informed by the fact that Civil Service Scheme Fund had to take a prudent decision to safeguard its finances against default as it was evident that the applicants could not repay their monthly repayments from their salary and after the Respondents made a decision to allocate the applicants herein houses in Ngara it communicated to each applicant individually and sent them a letter of offer inviting them to signify their acceptance of the same by signing and returning them to the Respondent on or before 15th January, 2008. To him, the sale of the 40 residential units at Nyeri Road Kileleshwa is complete and the successful applicants have been issued with letters of offer and hence the sale having been concluded and the successful applicants having been offered the residential units at Nyeri Road for sale, the applicants' application herein has been overtaken by events.
15. The Respondent further contends that it was within his powers and discretion to allocate to the applicants residential units at Ngara and therefore the issue of excess jurisdiction as alleged by the applicants does not arise as the Respondent owed no statutory duty to sell its houses to the applicants and therefore the issue of rights does not arise. To the Respondent, it is groundless to allege bias and discrimination as the applicants have purported to do as at all material times the Respondent proceeded to act within the laid down procedures and regulations hence the applicants are seeking orders to prohibit the Respondent from carrying out is functions which is illegal and that the Respondent cannot be compelled by way of judicial review to sell its property to the applicants and or be stopped from selling to another hence the applicants' application is incompetent and bad in law and should be dismissed.

APPLICANTS' SUBMISSIONS

16. On behalf of the applicants, it was submitted that the applicants are entitled to an order of certiorari since the Respondents allocated to the applicants houses other than the ones the applicants applied for without giving reasons in breach of the rules of natural justice. It was further submitted that since the 1st respondent had set out a specific criteria in its application form for the purchase of its houses, which criteria did not give the 1st respondent discretion, by declining to consider the applicant's application, the 1st respondent exercised a discretion it did not have instead of considering the said applications in accordance with the terms set out therein and the assurances it had given to the applicants hence the applicants are entitled to the order of mandamus. Based on the foregoing it was submitted that the applicants are similarly entitled to the order of prohibition.

17. In support of the submissions the applicants relied on **Kenya National Examination Council vs. Republic ex parte Geffrey Njoroge Civil Appeal No. 266 of 1996**, **Republic vs. Electoral Commission of Kenya ex parte Nyoike and 3 Others [2004] KLR 385** and **Republic vs. KRR ex parte Aberdare Freight Services Ltd and 2 Others [2004] 2 KLR 530**.

RESPONDENTS' SUBMISSIONS

18. On behalf of the Respondents it was submitted that the applicants being civil servants ought to have sought the consent of the Attorney General as required under Regulation G 40 of the Code of Regulations Revised 2006 which mandates that such a consent be obtained before instituting civil proceedings.
19. It was further submitted based on R **vs. Commissioner of Police ex parte Nicholas Kaaria Misc. Appl. No. 534 of 2003**, **Frida Okoth Orawo vs. Ministry of Lands and Housing Misc. Appl. No. 544** and **Maurice Okello vs. Ministry of Lands and Housing Misc. Appl. No. 816 of 2005**, that the issues raised are not issues for judicial review since they revolve around leases, tenancy and sale of property as the applicants seek to enforce their private rights under a contract of sale of houses.
20. According to the Respondents, The letter relied upon by the applicants did not constitute an allocation of the houses but was a mere offer. Further the applicants' application was considered on merits hence the respondents' decision was not irrational, malicious or unreasonably. According to the respondents, on the authority of **R vs. Judicial Service Commission ex parte Pareno Misc. Civil Appl. No. 1025 of 2013** the orders sought by the applicants cannot be granted since judicial review is not concerned with the merits of the decision but with the decision making process.
21. According to the respondents what the applicants seek to quash is not a decision but a communication of a decision.
22. It was submitted that with respect to mandamus the court cannot compel the respondents to act in a specific manner. In any case the decision whether or not to grant the orders sought herein is discretionary hence ought not to be granted in this case as the applicants' remedy lies in a civil court for enforcement of a contract.

DETERMINATIONS

23. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivalling submissions, this is the view I form of the matter.
24. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision..... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..... The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that**

justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way..... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

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

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

26. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
27. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
28. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **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** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural

impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is 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 made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

29. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

30. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.
31. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the

changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

32. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century.
33. The first issue for determination by this Court is whether it was necessary for the applicants to obtain the consent of the Attorney General before commencing these proceedings. According to the Respondents, under Regulation G 40 of the Code of Regulations Revised 2006, it is mandatory that such a consent be obtained before instituting civil proceedings by civil servants. Assuming that provision is correct, the said requirement would only apply to civil proceedings. It is now trite that 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. Judicial review being only concerned with the reviewing of the decision making process the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**
34. In my view, in determining judicial review applications the High Court is exercising "any other jurisdiction, original or appellate, conferred on it by legislation" under Article 165(3)(f) of the Constitution."
35. It follows that that ground of objection cannot be sustained and fails.
36. The applicants however hinge their case on the letter dated 9th September, 2004. In that letter the 1st Respondent informed the applicants that "after re-development of the Nyeri Road area, the residents will be given first priority".
37. The word "priority" according to ***Black's Law Dictionary***, 9th Edn. By Bryan A. Garner means: 'The status of being earlier in time or higher degree or rank; precedence." In my view this meant that the first consideration was to be given to the applicants in allocation of the re-developed houses. This, however, did not automatically mean that the applicants would be allocated the same since if they failed to meet the required criteria it would not be proper to nevertheless direct the 1st respondent to allocate them the said houses. On the other hand if the applicants and other applicants met the criteria set by the 1st respondent, one would have expected that the applicants be allocated the said houses.
38. In this case, it is contended by the 1st respondent that the applicants did not meet the criteria set out by the Housing Scheme Management Committee since they did not fall within the job groups which would enable them to make the required monthly repayments in accordance with the Code of Regulation for civil Servants. At the time of writing the letter dated 9th September, 2004, the 1st respondent must have been well aware of the job group in which the applicants fell. This ought to have been taken into consideration when the said offer was being made by the 1st respondent. By making the said offer the 1st respondent made the applicants to believe that notwithstanding the applicant status they would be given priority in the said allocation. In other words the applicants

had legitimate expectation that their applications would be prioritised. In fact in its letter dated 5th June, 2006, the 1st respondent clearly stated that "the affected tenants be allowed to pay the 10% deposit for the purchase of the flats ***of their choice*** in advance if they opt to do so." [Emphasis mine]. By now introducing the issue of the job group to lock out the applicants from the said allocation, the 1st respondent was in effect changing goal-posts. As was held in as was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**.

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

39. In any event, there is no evidence at all that the applicants were given an opportunity to show that apart from their salaries, they were able to secure other sources of finance in order to enable them comfortably meet their financial obligations to the 1st respondent. It is therefore clear that the decision made by the 1st respondent was abruptness, arbitrariness, oppressiveness, unreasonable and in breach of Article 47(1) of the Constitution. That the 1st respondent was exercising administrative power is not in doubt. The said provision provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where a decision is arbitrarily made which goes contrary to legitimate expectation of a person without that person being afforded an opportunity of being heard, it is my respectful view that such a decision amounts to an abuse of power.
40. Whereas I agree with the decision of my learned sister, **Wendoh, J** in **Frida Okoth Rawo vs. Permanent Secretary Ministry of Lands & Housing Nairobi HCMA No. 544 of 2005** that if the issue is one of lease or tenancy, there is no remedy available in Judicial Review as there is no public duty arising from a statute, as already indicated above the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions hence where the principle of legitimate expectation applies, I do not see the reason why the Court cannot even in such matters issue judicial review remedies.
41. It is therefore my view and I so hold that the action of the 1st respondent amounted not only to procedural impropriety but was both an illegality and unreasonable.
42. That however is not the end of the matter. I am, however, cognisant of the position stated in ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. 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 prerogative 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, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

43. In this case it is contended that the flats in question have been allocated to third parties who are obviously not parties to these proceedings. To grant the orders sought herein will not only amount to condemning the said parties unheard but is likely to cause administrative chaos and public inconvenience. I therefore agree that this forum is not the right one to determine the issues raised by the applicants. In my view the applicants if still minded can commence appropriate actions in the ordinary civil courts for determination of their grievances and for appropriate reliefs.
44. In the premises, I find that the judicial review orders sought herein are not the most efficacious remedies in the circumstances of this case and it is for this reason that I decline to grant the prayers in the Notice of Motion dated 13th February, 2008.

ORDER

45. In the result the Notice of Motion dated 13th February, 2008 fails and is dismissed but I award the costs of the application to the applicants to be borne by the 1st respondent.

Dated at Nairobi this day 22nd day of January 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties