REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 416 OF 2002

REPUBLIC.....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

TOWN CLERK,

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

HASHIM KAMAU ATHMAN .....1ST INTERESTED PARTY

YUSUF ALI .....2ND INTERESTED PARTY

EX-PARTE

CHRISTOPHER MWANGI KIOI

NANCY WAMBUI WAWERU

(The legal representatives to the estate of the late Mwangi Kioi)

JUDGEMENT

On 22nd May, 2002 R. Kuloba, J granted leave to commence judicial review proceedings to Mwangi Kioi in the following words:

"On what is on this file at this stage, leave is granted to apply for orders listed in the application, except the one listed in 4 which is refused leave. Costs in the intended application."

Subsequently the ex-parte applicant filed a notice of motion application on 10th June, 2002. The applicant in that application is the Republic. The Nairobi City Council and the Town Clerk, Nairobi City Council are the 1st and 2nd respondents. Hashim Kamau Athman is the 1st Interested Party and Yusuf Ali is the 2nd Interested Party.

The ex-parte applicant has since passed on and the legal representatives of his estate Christopher Mwangi Kioi and Nancy Wambui Waweru were brought in as the 1st ex-parte applicant and 2nd ex-parte applicant

respectively as per the order issued by Githua, J on 28th November, 2012. I will henceforth refer to the original ex-parte applicant Mwangi Kioi as the deceased.

Earlier on, Ibrahim, J (as he then was) had on 6th May, 2005 by consent of the parties allowed an amendment so that the names of the 1st respondent, would read the City Council of Nairobi instead of Nairobi City Council and that of the 2nd respondent would read Town Clerk, City Council of Nairobi instead of Town Clerk, Nairobi City Council. At the time of writing this judgement the parties to these proceeds are:

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VERSUS

CITY COUNCIL OF NAIROBI .....1ST RESPONDENT

TOWN CLERK,

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

AND

HASHIM KAMAU ATHMAN.....1ST INTERESTED PARTY

YUSUF ALI .....2ND INTERESTED PARTY

EX-PARTE

CHRISTOPHER MWANGI KIOI & NANCY WAMBUI WAWERU

(THE LEGAL REPRESENTATIVES TO THE ESTATE OF THE LATE MWANGI KIOI)

The pleadings have also been amended and I was told by Mr. Arusei for the applicants that the application for my consideration is the one amended and filed on 3rd October, 2006.

I have perused the court file and I am of the view that the notice of motion for the consideration of this Court is the one amended on 5th February, 2009 and filed on the same date so as to bring on board the legal representatives of the estate of the late Mwangi Kioi. As already stated the chamber summons dated 5th February, 2009 was allowed by Githua, J on 28th November, 2012. My understanding of the learned Judge's order is that the legal representatives of the deceased were allowed to amend their notice of motion and the statement of facts in order to incorporate their names in the proceedings.

For record purposes, it is noted that on 5th June, 2013 the advocates on record for the parties agreed to expunge from the court record all the pleadings and documents filed from 2009 by Mr. Gitau Kariuki for the respondents on the ground that he was not licensed to practice law. Those papers have not been considered in this judgement.

In the Notice of Motion amended on 5th February, 2009 the ex-parte applicants seek:

1. **ORDER OF CERTIORARI to remove in the High Court of Kenya at Nairobi and quash the decision of Nairobi City Council and Nairobi Town Clerk dated 30th November 2001 to subdivide unsurveyed part of L.R. 2378 P.T. where Nairobi Pumwani Bar compound has been situated from 1976 into several sub-plots and issue several letters of allotments to persons who include the ex-parte applicant and the Interested Parties in this suit, although the area involved was sold to the Applicant by Nairobi City Council in 1976 because he was**

the tenant from 1958 and the applicant has been the actual occupant of the whole area of L.R 2378 P.T. from 1958 to present day.

2. **ORDER OF PROHIBITION prohibiting the Nairobi City Council and Town Clerk and their officers from sub-dividing L.R. 2378 P.T. part of Pumwani Bar compound as has been from 1958 to 30th November 2001 and allocating any of the sub-plots to any person whatsoever, the whole plot having been purchased by the Applicant in 1976.**
3. **ORDER OF PERMANENT STAY of all proceedings and dealings with the part of L.R. 2378 P.T. part of Pumwani Bar compound as it has been from 1958 and 1976 to present day consisting of 0.385 Acres or 0.156 Hectares by the Respondents and the Interested Parties, their servants and/or agents and the said stay do remain in force permanently.**
4. **ORDER OF MANDAMUS directed to Nairobi City Council, its officers, servants and/or agents commanding them to immediately cancel the sub-division scheme and allocation of any part of L.R 2378 P.T which is part of Pumwani Bar Compound to any one as it was in 1958 and 1976 up to 30th November, 2001.**
5. **ORDER OF MANDAMUS directed to Nairobi City Council and Nairobi Town Clerk commanding them to get L.R. 2378 P.T. which is Pumwani Bar area surveyed; produce deed plan of the area and compound as has been known from 1958 as L.R. 2378 P.T. part of Pumwani Bar compound and instruct the Commissioner of Lands to issue the necessary lease to Mwangi Kioi with effect from 1st November, 1975 the date in the offer of sale dated 1.10.1975.**
6. **Costs of this application do be provided for.**

As stated at the outset of this judgement, leave was denied in respect of prayer No. 4 in the Chamber summons application for leave dated 21st May, 2002. I have looked at the prayers listed in the chamber summons application for leave and those listed in the amended notice of motion and find that the applicants did indeed abandon the 4th prayer in the application for leave.

Another point to note is that even with the grant of leave to amend the notice of motion the prayers remain as they were in the original notice of motion filed on 10th June, 2002. What was done in the amended notice of motion was to replace the name of the deceased with that of his legal representatives. It is also important to note that Mr. Arusei's statement that the substantive notice of motion was amended on 3rd October, 2006 is erroneous since a perusal of the court file shows that it is only the statutory statement which was amended at that time.

The amended notice of motion dated 5th February, 2009 is supported by the re-amended statement of facts dated the same date, the chamber summons application for leave dated 21st May, 2002, the verifying affidavit sworn by the deceased on 16th April, 2002, assorted documents and submissions filed on various dates by the different advocates who have been on record for the applicants.

The applicants' story as gleaned from the papers filed in Court is that the 1st respondent in 1957 leased to the deceased a parcel of land variously referred to as Pumwani Bar, L.R. 2378/P.T. or L.R. 209/2378/4R. The parcel of land measuring approximately 0.385 acres or 0.156 hectares was demarcated by a fence. The deceased paid a monthly rent of Kshs.2,000/= from 1958 up to 31st October, 1975 when the 1st respondent, with the approval of the relevant authorities, offered to sell the bar together with its compound to the deceased for Kshs.90,000/=. The deceased paid the said amount in two installments in October, 1976. Receipts have been exhibited. The monthly rent of Kshs.2,000./= ceased and the deceased started paying ground rent and rates as required.

The 1st respondent was supposed to surrender the original title (identified as L.R. 2378/P.T) in respect of the area where Pumwani Bar is located so that a sub-plot for the fenced off area could be created. The deceased who was in occupation continued utilizing the building and its compound.

On 25th December, 2001 the 1st respondent sent some people to the suit premises who claimed that they had been allocated part of the parcel of land occupied by Pumwani Bar. Out of the said plot, sub-plots

C1, C2, C3, C4, C5 and C6 had been created.

It is the applicants' case that once the parcel of land was allocated to the deceased, it was no longer available for allocation to any other person. The applicants assert that the sub-division of the plot sold to the deceased was in breach of Section 75 of the repealed Constitution and the Local Government Act (Cap 265).

The respondents and the interested parties filed notices of preliminary objection and replying affidavits.

In the replying affidavit sworn on 12th July, 2002 by G. N. Congo, an Assistant Town Clerk of the City Council of Nairobi, the respondents informed the Court that there were other Court proceedings between the parties over the same subject matter. In **Nairobi Chief Magistrate's Court at Milimani Civil Suit No. 2 of 2002** the deceased had sued the respondents seeking an order restraining the respondents from dealing with the suit property in any manner whatsoever.

In a plaint filed on 11th January, 2002 in **Nairobi High Court Civil Suit No. 42 of 2002** the deceased was seeking an order restraining the respondents from interfering, alienating or in any way dealing with the property in question. This suit was struck out by Rimita, J on 7th June, 2002 on the ground that the same was an abuse of the court process having been filed during the pendency of **Nairobi CMCC No. 2 of 2002**. The respondents' case therefore is that this matter is *res judicata.*

Further, the respondents asserted that the 1st respondent was the owner of L.R. No. 2378/PT and as such had the right to cause the sub-division of the said land into several plots and deal with it as it deemed fit.

They also contended that the 1st respondent never entered into any sale agreement with the deceased and that the deceased was a mere tenant paying rent for the use of the property.

Alternatively, the respondents averred that the deceased did not produce any evidence to show with certainty the size of the land he was purchasing as the same was not surveyed at the time of the purported purchase and the purported contract was thus unenforceable for vagueness and uncertainty.

The 1st Interested Party opposed the application through a notice of preliminary objection dated 22nd June, 2006 and filed in Court on 28th June, 2006. The grounds are:

> **"1. That an order of certiorari cannot issue when there is no decision made on 30th November 2001 capable of being quashed by this Honourable Court.**
>
> **2. That the Notice of Motion is based on a statement of fact and verifying affidavit which are fatally defective and the entire suit should be dismissed.**
>
> **3. That prayer No. 3 of the Notice of Motion for an Order of Permanent Stay is unmaintainable in law as the same cannot be granted in Judicial Review Proceedings.**
>
> **4. That an Order of Prohibition cannot issue when the land has already been subdivided and allocated to interested parties.**
>
> **5. That Judicial Review Orders of Mandamus cannot issue to compel the authority to deal with its private property L.R. 2378 against its will as the same is private act and not a public duty which is amenable to Judicial Review.**
>
> **6. That these proceedings are frivolous, vexatious and a gross abuse of the court process and should be dismissed with costs."**

The 1st Interested Party also opposed the application through a replying affidavit sworn on 6th October,

2009. In the affidavit he avers that the plot was allocated to Jehamu General Suppliers and he has been wrongly sued. He, however, admitted that he was the proprietor of Jehamu General Stores.

The 2nd Interested Party opposed the application through a replying affidavit he swore on 15th July, 2002. He averred that in 1999 he applied to the 1st respondent to be allocated a plot which is part of L.R. No. 2378 located in Pumwani. His request was approved and after subdivision he was allocated plot No. C 3 Pumwani Estate. He exhibited a letter of allotment of the said plot dated 30th November, 2001. He immediately put up rental houses and rented the same to different tenants. He averred that the deceased later filed the civil suits already mentioned by the respondents.

The 2nd Interested Party asserted that an order of certiorari cannot issue because the application was filed out of time as it was filed after the parcel of land had been sub-divided and allocated to six people who included the deceased.

The deceased responded to the replies by swearing and filing further affidavits on 16th July, 2002 and 29th July, 2002. He averred that he withdrew **Nairobi CMCC No. 2 of 2002** before it was heard and that Nairobi **HCCC No. 42 of 2002** was indeed struck out. He asserted that none of these two cases was heard and determined on merit and the issue of *res judicata* cannot arise. He reiterated that the plot that was sub-divided in 2001 and the sub-plots given to the interested parties had been sold to him way back in 1975.

The deceased swore a further affidavit on 22nd June, 2005. This was in response to the further affidavit sworn by the respondents' counsel Mr. Gitau Kariuki on 9th June, 2005 and filed on 10th June, 2005.

In further opposition to the application Mr. Gitau had averred that L.R. No. 209/2378 P.T. (Plot B) was excised and amalgamated with L.R. No 209/2378/9 in 1981 and the same leased to Pumwani Muslim Community. He averred that the land which is the subject of these proceedings was L.R. No 209/2378/4R which has been marked as 'C' in the site map covering L.R. No. 209/2378 and annexed to the affidavit. The deponent averred that No. 209/2378/4R was recommended for planning by the Town Planning Ad-hoc Sub-Committee on Old Pumwani Area in a meeting held on 15th November, 1999 and upon recommendation being tabled before a Council meeting held on 15th December, 1999, it was resolved that the report be adopted.

The respondents advocate summarized the grounds of opposition to the application by averring in paragraph 8 of his affidavit of 9th June, 2005:

"THAT therefore:-

i. **The suit property ought to be L.R. No. 209/2378/4R and not L.R. No. 209/2378/P.T. which parcel belongs to Pumwani Muslim Community.**
ii. **The decision to excise L.R. No. 209/2378/P.T. and amalgamate it with L.R. No. 2378/9 was made by full council meeting on 19th October 1981.**
iii. **The decision to plan, and therefore subdivide L.R. No. 209/2378/4R (which parcel ought to be the suit property), was made by the full council meeting on 15th December, 1999.**
iv. **Leave to commence Judicial Review proceedings in this matter was sought on 22nd may, 2002, well over 2(two) years after the decision to plan or sub divide L.R. No. 209/2378/4R.**
v. **On the date that the Ex-parte Applicant cites as the date when the decision to sub-divide L.R. No. 209/2378/P.T., namely 30th November, 2001, the Respondents only issued a Letter of Allotment in favour of the Ex-parte Applicant for one of the five plots planned for L.R. No. 209/2378/4R, the sub-division having been done long before."**

The deceased's response to the contents of Gitau Kariuki's further affidavit is that the respondents had no power to re-plan the area occupied by Pumwani Bar the same having been sold to him in 1975.

This is a very old case considering the fact that it is a judicial review application. Some objections that were raised initially have since been rectified and they no longer merit any consideration. An example is the way the respondents had initially been named. The respondents names were later amended through a consent order already alluded to in this judgement.

In my view the issues that have lived on and merit the consideration of this Court are:

1. Whether there is a proper judicial review application before this Court;
2. If there is a proper application before the Court, the next question would be whether the orders should be granted; and
3. Who should have the costs of the application?

I have already reproduced at length the positions of the parties. The respondents and the interested parties assert that the application is time barred since the decision to sub-divide the plot in dispute was made in December, 1999 and leave was granted on 22nd May, 2002, two and a half years after the decision was made. They submit that an order of certiorari cannot therefore issue to quash the decision as it would offend Order 53 Rule 2 of the Civil Procedure Rules, 2010 (CPR) which provides that:

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

The applicants hold the view that since the issue of leave was never raised by the respondents and interested parties prior to the hearing of the substantive notice of motion or through the filing of an appeal, then they should forever remain silent on this issue. The answer to the applicant's contention is found in a statement made by the Court of Appeal in **AGA KHAN EDUCATION SERVICE KENYA v. REPUBLIC & OTHERS E.A.L.R [2004] 1 E.A.1 (CAK)** where the Court stated that:

"So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature ex-parte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the superior court-see for example Secretary of State for the Home Department ex-parte Begum [1989] 1 Admin LR 110."

The applicants' argument is therefore misplaced. The respondents and interested parties have clearly indicated in the papers filed in Court that the order of certiorari is not available since leave was granted over six months from the date the impugned decision was made. No decision has been made on this issue and they are entitled to raise it now. This is an issue the Court must address.

The law is clear on the applicability of Order 53 Rule 2 of the Civil Procedure Rules. In the case of **AKO v SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER 163 [1989] KLR** the Court of Appeal expressed its opinion on the provisions of **Section 9(3) of the Law Reform Act (Cap 26)** in the following words:

"It is plain that under sub-section (3) of Section 9 of Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of Section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of sub-section (3) of section 9 of the Law Reform Act."

It is noted that **Rule 2 of Order 53 of the Civil Procedure Rules** is a replica of **Section 9(3) of the Law Reform Act.** It is clear therefore that an application for an order of certiorari must be made within six months from the date of the decision being challenged.

The applicants seek an order of certiorari to quash the decision of the respondents dated 30th November, 2001 to subdivide the plot in question. If a decision was made on 30th November, 2001 then by the time leave was granted on 22nd May, 2002 six months had not lapsed. It has however been stated by the respondents that the decision was made in December, 1999. This fact is not challenged.

However, it should be noted that the deceased was never informed of the decision until the time he received a letter of allotment in respect of one of the six sub-plots that had resulted from sub-division of the plot in dispute. The decision to allocate the sub-plot to the applicant and the interested parties is a continuation of the decision made in 1999 to sub-divide the plots. Had the allotment letters not been issued, the deceased and his heirs would still be enjoying quiet and peaceful occupation of the plot. The decision to subdivide the plot and the decision to allocate the sub-plots cannot be separated. I therefore find that the grant of leave did not contravene Order 53 Rule 2 of the Civil Procedure Rules. The application was made within six months from the date of the allocation of the sub-plots.

The application was also opposed on the ground that this matter is *res judicata.* The deceased swore an affidavit indicating that he had withdrawn the matter before the magistrates' Court. The case he had filed in the High Court was dismissed for being an abuse of the court process on the ground that there was a pending case in the magistrates' Court.

None of the cases that had been filed earlier was heard on merit. The substantive issues raised by the applicants have never been addressed by any Court. This matter cannot therefore be said to be *res judicata* and the respondents and interested parties' contention that this case is *res judicata* is dismissed.

I will now proceed to consider the application itself. The objections of the respondents and the interested parties can be summarized into two namely that the plot in question was not allocated to the deceased and was therefore available for sub-division and that judicial review is not the most efficacious remedy in the circumstances of this case. These two issues form the main question as to whether the plot in question had already been sold to the deceased at the time of the sub-division.

I have carefully gone through the lengthy submissions of the parties herein. The deceased exhibited several documents to show that the plot was indeed offered to him in 1975. He did not pay for it immediately but there is evidence that he completed payment in 1976 or 1977. The payment was confirmed through several letters and one of them is dated 19th August, 1988. The letter which was addressed to the deceased on behalf of the treasurer of the 1st respondent states:

"RE: SALE OF PUMWANI BAR

With reference to your letter on the above subject, I wish to confirm that the sale price of Shs.90,000/= (Shs. Ninety Thousand Only) was paid in full in October, 1977."

The letter was copied to the Chief Valuer of the 1st respondent.

There is clear evidence therefore that the plot was indeed sold to the deceased and he paid for it. The claim by the respondents and the interested parties that the plot did not belong to the deceased has no basis.

What remained was only the issuance of title documents for the property. In fact through a letter dated 12th July, 2001 from F. M. Muraa the Chief Valuer, the deceased was being asked to avail **"all relevant documents including letter of allotment and payment receipts to facilitate action on survey and registration of the property".** This confirms the deceased's assertion that the plot had not been surveyed.

The deceased averred that his plot had been fenced and the fence was only pulled down when the interested parties invaded it. This evidence was never rebutted. The deceased's plot was therefore identifiable.

There was contention by the respondents and the interested parties that there was confusion as to the exact parcel of land the deceased was referring to. In my view, the deceased clearly identified the plot as that on which Pumwani Bar is located and the surrounding piece of land which had been fenced off. This is the plot that was sub-divided into six sub-plots and some of the sub-plots allocated to the interested parties. It is not correct to say that the deceased's plot was amalgamated with the plot allocated to the Muslim Community at Pumwani. The plot allocated to the Pumwani Muslim Community is quite different from the one sold to the deceased. The respondents' cannot be allowed to claim that the plot was amalgamated with the one allocated to the Muslim Community and at the same time claim that the same plot is the one that was sub-divided into six plots.

The applicants are clearly challenging the decision of the respondents to sub-divide a plot that was already in private hands. The respondents had no authority to pass any resolution over the said plot and they also did not have powers to allocate the same to the interested parties or any other person. The plot was already private land at the time the respondents purported to subdivide it. They had not acquired the plot through compulsory acquisition as was provided by the law. In order to massage their guilty consciences, the people who wanted to grab the deceased's land allocated him a piece of his plot. The absurdity of it all is that the respondents purported to allocate the deceased a plot he had not applied for. That is the height of impunity. Judicial review was conceived to take care of such abuse of power.

Warsame, J (as he then was) was in the case of **RUKAYA ALI MOHAMED v. DAVID GIKONYO & ANOTHER, Kisumu High Court Civil Appeal No. 9 of 2004** confronted with a situation in which the Municipal Council of Kisumu had issued allotment letters for the same parcel of land to two people. Confirming that the first allotment was the one recognized by the law, he stated that:

"It is my view that the suit plot was alienated on 27th April 1998 and the plaintiff having compiled entirely with the provisions of the offer, it was not available for any subsequent allocation and no benefit could be derived from any such allocation thereafter. There is evidence that the plaintiff's letter of allotment preceded that of the defendant and having made payment in fulfillment of the offer granted to her, a consideration set out therefrom moreso when there is no evidence of fraud alleged against her letter of allotment. If there is no challenge to its validity then the said plot became alienated and was not subject to subsequent alienation by giving another letter of allotment. The plaintiff acquired a legal interest which could not be defeated by a subsequent alienation of the plot that was not available to the defendant and he can claim no title or interest in that illegal allotment.

In my understanding, the earlier allotment takes precedence of the subsequent and suspicious allotment. And it is supreme to any other right allegedly acquired by the defendant/respondent. There can never be any allocation unless the land is an unalienated land and since this particular land was allotted to the plaintiff earlier she is entitled to a better right as claimed by the defendant. The land was not available for allocation and the Commissioner of Lands lost his powers to alienate plot No. 87 situate at Kaloleni within Kisumu on 27th April 1998, when he allocated it to the plaintiff hence there was nothing capable of being allotted to the defendant and there was no

interest that could be derived from such a nullity.

The earlier letter of allotment takes priority and confers a better interest which I must recognize and must bestow to the plaintiff. As at on 29th April, 1998, there was a prior commitment on the said plot, therefore it was not available to the defendant to seek allotment and the authority who issued his letter of allotment had no such powers to grant the same. It was an illegal transaction, it amounts to no allotment and in total there was no benefit, no interest, no legal right which could be derived from an act which amounts to nothing."

I agree with the reasoning of the learned Judge that once a parcel of land is allocated, the same becomes private property and is no longer available for allocation to another person. The deceased's plot may have been big to the extent that it attracted the land pirates who descended upon open spaces at a certain period in our history. Their acts were however futile and sterile for they did not bestow any ownership rights upon the beneficiaries of the sub-plots. The land in question for all intents and purposes became the property of the deceased when he paid for it.

There was an argument that not all the interested parties are before the Court. This is a case where the respondents allocated private land. The beneficiaries were aware that they were invading another person's land since they had to pull down a fence before accessing the land. Those who were allocated the plots cannot be allowed to benefit from a clear illegality. The respondents' actions cannot be defended and no interest could arise from such abuse of power.

The respondents and interested parties submitted that this is a land dispute and judicial review is not the most efficacious remedy. I agree with them that in a situation where the facts are in dispute thereby necessitating the calling of witnesses then judicial review is not the most efficacious remedy. This principle was restated recently by the Court of Appeal (W. Karanja, JA) in the case of **FUNZI ISLAND DEVELOPMENT LIMITED & 2 OTHERS v. COUNTY COUNCIL OF KWALE & 2 OTHERS [2014] eKLR** where she stated that:

"I would only wish to comment on the suitability of the subject matter herein being disposed of by way of Judicial Review. I do not entertain any doubt whatsoever that the High court was properly seised of this matter in its Judicial Review jurisdiction as the primordial issue for determination before the Court was the legality of the allocation of the parcel of land in question. It is common ground that the subject matter herein is property worth a substantial amount of money. There were also serious and weighty arguments, for instance, whether the property in question was Trust Land or not; whether it was forest land or not; whether it formed part of Funzi Island or it formed part of the foreshore which could not be set aside for allocation.

In my view, a court sitting in its civil jurisdiction would have been better suited to hear all these issues and make its ruling on the same. As we all appreciate, a court sitting on Judicial Review exercises a *sui genesis* jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.....

In my view, a matter such as this ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the Registration of Titles Act (R.T.A), and other disputed facts would have been fully canvassed and conclusive determinations made on the same.

Having said so however, I am in agreement with my brother Judges that as the property in question was not Trust Land, then the 1st respondent lacked the requisite jurisdiction to set it aside for allocation to anybody."

In the case before me, it is clear that the land that the respondents purportedly proceeded to sub-divide and allocate to the interested parties was no longer available for allocation. The respondents had no

jurisdiction over this particular piece of land. Judicial review is therefore an appropriate remedy in the circumstances of this case.

An order of certiorari will therefore issue removing into Court the decision of the respondents to sub-divide the unsurveyed part of L.R. 2378 P.T. on which the Pumwani Bar and its compound are located and quash the said decision together with all the letters of allotments issued for the sub-plots as a result of the sub-division.

Secondly an order of mandamus is also issued directed at the respondents or their successors commanding them to cancel the sub-division scheme of the said parcel of land.

Thirdly, an order of mandamus will also issue directed at the respondents or their successors to produce a deed plan for the plot in question measuring 0.385 acres or 0.156 hectares or thereabouts so that a lease can be issued to the applicants.

The Commissioner of Lands was not a party to these proceedings and no orders can issue to that office.

The prayers for an order of prohibition and an order of permanent stay have either been overtaken by events or are superfluous and they will therefore not issue.

The respondents and the interested parties will meet the applicants' costs of these proceedings.

Dated, signed and delivered at Nairobi this 22nd day of May , 2014

W. KORIR,

JUDGE OF THE HIGH COURT