



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

MOMBASA LAW COURTS

CIVIL SUIT NO. 253 OF 2018

MOMBASA TECHNICAL TRAINING INSTITUTE.....APPLICANT

- VERSUS -

THE COMMISSIONER OF LANDS.....RESPONDENT

- AND -

MUNICIPAL COUNCIL OF MOMBASA.....INTERESTED PARTY

JUDGEMENT

I. INTRODUCTION

1. This suit herein was instituted vide a Notice of Motion dated 8th April 1999 by “*the Ex – parte*” Applicant herein. It was brought under the provision of Order 53 Rule 3 of the Civil Procedure Rules, 2010.

II. “The Ex Parte” Applicants case.

2. The ex - parte Applicant herein sought for the following prerogative orders from court:-

a) That this honorable court be pleased to grant the ex parte Applicant an order in the form of Mandamus compelling the Respondent herein to issue the Applicant herein with title deeds for the whole of all that parcel of land known as Land Reference Numbers Plots No. 105, 108 and 109 Section XVII, M.I and Plot No. L.R 2932 at Shanzu.

b) That this Honourable court be pleased to grant the ex - parte Applicant a Judicial review order in the form of Prohibition barring and restraining the respondent herein from allocating all or part of Plot No. 105, 108 & 109 of Section XVII, M.I and L.R 2932 to either the interested party or any other third party.

c) That this Honourable court be pleased to grant the ex - parte Applicant a judicial review order in the form of Certiorari to remove into the high court and quash the decision of the Respondent to sub - divide and allocate part of Plots No. 105, 108 & 109 of Section XVII, M.I and L.R No. 2932 to the interested party or any other third party.

d) That the Honourable court be pleased to grant the ex - parte Applicant a judicial review order in the form of Mandamus compelling the interested party to approve the past development plans of the suit premises in favour of the ex parte applicant.

e) That this Honourable court be pleased to grant the ex - parte Applicant a judicial review order in the form of Certiorari to remove into the high court any title document which have or may have been issued by the Respondent either to the interested party or any other third party and the same be declared a nullity.

f) That the costs of this application be provided for.

3. The case of the ex - parte Applicant is that, it had in its own capacity as a duly established technical training institute occupied all that parcel of land known as Plots No. 105, 108 and 109 of Section XVII, M.I the same having been reserved and allocated to it by the Government of Kenya. Pursuant to that it had embarked on several massive projects on the suit property, a hostel for accommodation and a food & beverage training department. The Honorable Court was informed that the ex - parte Applicant had also expanded the institute with a

campus at Shanzu on Plot L.R 2932, which was issued by the Respondent vide a letter of reservation reference number 76474/11/76 in July 1977 thereof.

4. For the purposes of documentation, the institute through its Board of Governors had made several requests for letters of allotment and subsequent title deeds from the Respondent but they were unsuccessful. The Interested Party had made it impossible for the Ex-Parte Applicant to further develop the suit premises on the ground that the Respondent allocated the land to them. The ex - parte Applicant averred that the Respondent had failed to issue them with the Certificates to title to the suit premises and illegally allocated the same to the Respondent. The allocation/subdivision to the Respondent and later on to the Interested Party had interfered with the ex - parte Applicant quiet and peaceful enjoyment of the suit premises. That the Respondent had declined to issue the ex - parte Applicant with title despite complying with all the necessary requirements.

5. The application is supported by the 16 Paragraphed Verifying Affidavit of E. H LEVI, the Chairman of the Board of Governors of the Ex - parte Applicant dated and sworn on 29th March, 1999 and the ten (10) annexures Marked as “A to J” annexed thereto. He annexed a map of the ex - parte Applicant and stated that it included an administration block, lecture halls, workshops, staff house and recreational faculties. He stated that the institution was allocated the suit parcels by the then Commissioner of Lands, Mr. S. M Kagwi, Ministry of Land and Settlement vide a letter dated 15th December 1997. He asserted that the Respondent had been aware of the development that the ex - parte Applicant had made on the suit premises as well as being in charge of the same even before the said allotment. He informed court that the Respondent had previously allocated land in Shanzu to the ex - parte for its expansion and issued them with a letter of allotment dated 1st December 1997 and maps thereto.

6. It was his assertion that although the ex - parte Applicant made efforts to lobby several international partners to finance the expansion of the school but the same could not happen since the Respondent had failed, refused or neglected to issue title deeds for the suit properties. He stated that around the period of February 1999, having the Ex – Parte Applicant presented development Plans it had prepared to the Interested Party. The Interested Party wrote back to the ex - parte Applicant raising objection to the said development plans on the grounds that the suit premises were instead based on land that was already allocated to the Interested Party and other third parties. It is from here they knew there was an ownership problem with the suit land. At the same time, the ex - parte applicant also came to learn that the suit premises in Shanzu, which was initially 16.5 HA (approximately 40.8 acres), the Respondent had been giving some parts of it and allocating it to third parties without seeking its consultation or consent. The ex parte Applicant argued that it stood to suffer irreparable loss and damage if the Respondent declined to allocate the suit premises and issue them with the Certificates of Title. The ex - parte Applicant urged court to grant the prayers sought, lest the illegal actions of the Respondent and the cost of the education standards in the country got compromised together. It was at this point the Ex-Parte Applicant decided to institute this suit before High Court.

7. On 6th May 2021, the ex - parte Applicant filed a 10 Paragraphed Supporting Affidavit in support of the Judicial review application sworn by ANNE MBOGO its Chief Principal. She indicated that the Ex-Parte Applicant produced education in the areas of higher learning where candidates attained diploma Certificates. She drew the attention of court to the Legal notice No. 88 dated 9th June, 2016 issued by the Honorable Fred Matiang’i, the then Cabinet Secretary to the Ministry of Education, Science and Technology, whereby the name of the Ex-Parte Applicant – “Mombasa Technical Training Institute” was changed to “Kenya Coast National Polytechnic”. Hence in the given circumstances, the title of these proceedings which reads “Mombasa Technical Training Institute” as the Ex-Parte Applicant should automatically be replaced by the name of “Kenya Coast National Polytechnic” she held that under the law the Ex - Parte Applicant had the legal capacity to own land. She averred that the Ex - Parte Applicant had the capacity to own land as per The Technical and Vocational Education and Training Act, which remained to be Kenya Coast National Polytechnic. She maintained that in the 4th Schedule of the Constitution of Kenya, 2010, where the National Government and the County Governments shared out respective mandates and functions of the devolved Governments. It was therefore provided that the Interested Party could only manage the Vocational Training Centre and Early Childhood Education (ECD); but had no mandate in matters involving the education in National Polytechnics. That the Certificate of title that was unlawfully registered in the name of the Interested Party on 25th September, 2015 as it was done in contravention of a court order dated 31st March 1999 directing the same to be registered in the name of the Ex - Parte Applicant. It he given circumstances she held the County Government of Mombasa should not be allowed to continue holding it. She referred to the consent entered on 5th June, 2001 between the Ex-Parte Applicant/Respondent.

8. Further, the Ex - Parte Applicant annexed a report from Edward K. Kiguru, a private Land Surveyors dated 20th August 2020, who surveyed the suit premises. The report recommended that the portion of land in Title No. 1717/XVII/MI amounting to 2.792 Ha, be removed/surveyed out and be consolidated with the other two un-surveyed portions, into one parcel and that formal allocation to the Ex - Parte Applicant. The deponent averred that the suit premises was reserved by the Ministry of Lands and Housing for the Ex - Parte Applicant, who was already in occupation of the same as seen from the letter dated 23rd May 1991. Which was later followed by a letter from the Ministry of Education dated 19th April 2001, confirming that the Commissioner of Lands, had no objection to granting the Ex - Parte Applicant title to the suit premises. Indeed for the Interested Party to continue holding the title for the suit land they were in contempt of court. The deponent urged court to order the Ex - Parte Applicant to be registered as the proprietor of the portion of land as recommended in the surveyors report dated 20th August 2020.

III. The Preliminary Objection by the Interested Party

9. On 18th January 2021, the Learned Counsel for the Interested Party, the Office of the County Attorney for the Interested Party General Law firm filed a Notice of Preliminary Objection dated even date to the main application dated 8th April 1999. They raised the following grounds:-

a) That the Applicant had no reasonable cause of action against the Interested Party and entire pleadings are scandalous, frivolous or vexatious and it is otherwise an abuse of the due process of the court and said pleadings should be dismissed with costs.

b) That the application offended the provisions of the law under the provision of Section 8 of “the Fair Administrative

Action Act No 4” of the Laws of Kenya.

c) That the application is misconceived, bad in law and it has been overtaken by events and the same should be dismissed with costs to the interested party.

10. At the same time, on 17th February 2021, the Interested Party also filed an 18 Paragraphed Replying affidavit sworn by ROSE MUNUPE the Acting Director of Land Administration, County Government of Mombasa and dated the same date in response to the application for judicial review. She stated that the suit premises Plot No. 105, 108 & 109 of Section XVII M.I were consolidated and a new title was issued. The Certificate of Lease issued for the suit premises was dated 24th September 2015 for Title No. MSA/BLOCK XVII/1717 and issued on the same day as entry No. 1. She annexed a copy of the said new Certificate of Title marked as “RM - 1”. She maintained that the suit property was public land being used as a football pitch used by all the Primary and Secondary School and any other Institution within the said parcel of Land. She held that the County Government Land stepped in due to the public outcry in order to safeguard and protect it as a public utility that was used by all the different learning institution in the area and could not be allocated exclusively to the Ex - parte Applicant. The deponent, contended that the claim by Ex - parte Applicant had been overtaken by events, of the issuance of the certificate of title and hence no claim could be maintained against the Interested Party.

IV. SUBMISSIONS

11. On 23rd February 2021, this matter was mentioned before Justice Yano. The Honorable Court directed that the Notice of Preliminary Objection dated 18th January, 2020 by the Interested Party be treated as part of the response by the interested party to the application, and that the application be heard by way of written submissions.

12. Subsequently, the Counsel for the ex - parte Applicant filed two (2) sets of written submissions, one on 16th July 2021 in support of the application dated 8th April 1999 and another on 29th November 2021 in response to the submissions made by the Interested Party. On 26th October, 2021 this Court directed all the Interested Party to file their written Submissions to the said Notice of Motion application dated 8th April, 1999. On 4th November, 2021 the Interested Party filed their written Submissions and the Respondent filed theirs on 29th November, 2021 respectively. The Honorable Court would consider both submissions simultaneously.

13. On 17th November, 2021 all the Parties herein were accorded brief moment to highlight their written submissions. They were very articulate and thorough. For that, this Honorable Court is sincerely grateful to the Counsels for their diligence and resourcefulness in the matter.

A. The Applicant’s Written Submissions.

14. The Learned Counsel submitted that it had not been disputed that the exparte applicant has been in occupation of the Plot No. 105,108 and 109/Section XVII Mombasa Island which was allocated by the Respondent vide a letter dated 23rd May 1991. However when the ex parte Applicant sought the approval of the Interested Party in order to construct on the suit premises, the permit was denied on the basis that the interested party owned the suit premises. Counsel contended that the Interested Party defied the court order issued on 31st March 1999 to maintain status quo and proceeded to acquire a Certificate of title to the suit premises on 24th September 2015.

15. Further, the Learned Counsel informed court that in the proceedings of this Court, on 5th June, 2001 whereby Miss. Mbiyu, the then State Counsel for the Attorney General expressly indicated that the title deeds for the suit properties were to be registered in the names of the Ex – parte Applicant. This evidence was corroborated by a letter dated 19th April, 2001 addressed to the Respondent by the Ministry of Education, Science and Technology confirming that the suit properties were reserved for the exclusive use of the Ex – parte Applicant and that the Respondent was to process the title for the same in the names of the Ex Parte Applicant. He averred that there was no evidence adduced by the Interested party to rebut to this assertion. The Learned Counsel argued that the Interested Party did not inform court the process they followed to acquire title to the suit premises. He relied on the case of “**Munyu Maina – Versus - Hiram Gathiha Maina (2008) eKLR**” where it was held that “*when the integrity of a claimant’s title to land is in question, it is not enough for the claimant to dangle the certificate of title for in such a case the claimant has a duty to prove the root of that title*”. The Learned Counsel urged court to find that the Interested Party acted unlawfully to acquire the title and have it cancelled, since the land was reserved for the exclusive use of the ex - parte Applicant. The Learned Counsel referred to the survey report which confirmed the suit premises were allocated to the ex - parte Applicant by the Commissioner of lands in a letter dated 23rd May 1991, and that the subsequent registration of the interested party was illegal, a nullity and should be nullified by court.

16. The Learned Counsel submitted that the procedural legitimate expectation, is a principle of administrative fairness that dictates a public office will follow the laid down procedure before making decisions. He argued that the exparte applicant had a reasonable and legitimate expectation that the Respondents would issue them with title to the suit premises as per the correspondence between the Ministry of Lands and that of Education. He further argued that the respondent is estopped from reneging on the assertions made in the letter dated 23rd April 1991 reserving the suit premises for the exclusive use and ownership of the ex parte Applicant.

17. The Counsel urged court to find that the title held by the interested party is manned by illegalities. The Respondent as a state organ is subject to Article 10 and 47 of the Constitution of Kenya that binds state offices to act within the principles of national values and fair administrative action. It was argued that the exparte suit was not defended by the Respondent and the Replying Affidavit of the Interested Party was mere denials of claims and did not raise any defence. The Learned Counsel urged court to nullify the certificate of lease issued to the interested party on 24th September 2015 and direct that the respondent issues the ex - parte Applicant with title to the suit property.

B. The Interested party Written Submissions

18. On 4th November 2021, the Learned Counsel for the Interested Party, the law firm of Messrs. Ameli Inyangu & Partners Advocates filed their written submissions. M/s. Azei argued that while in judicial review proceedings court was only concern with the process by which an administrative decision or action was made, the court herein is called to determine whether there was fraud in obtaining title, which would require court to determine contested issues of facts that can only be resolved after hearing oral evidence. The Learned Counsel submitted that the dispute was strictly civil that cannot be determined without viva voce evidence and as such fails outside the province of judicial review, and asked court to find the application as incompetent and dismiss it with costs.

19. The Learned Counsel claimed that title Mombasa/Block XVII/1717 arose from consolidation of four (4) plots, Plot No 106, 1003, 108 and 1469, which are not subject to these proceedings. The Counsel submitted that the exparte Applicant claims Plots No. 105, 108 and 109 and no evidence from the Land Registrar or Director of Survey or map plans brought to ascertain the plots referred in the said letter of reservation are the same as the ones claimed by the ex - parte Applicant. More to that, a letter of reservation does not confer any interest in land as held in **“Shiva Mombasa Limited – Versus - KRA (2005)eKLR**, where court held that a letter of reservation from the Commissioner of Lands does not signify any registerable interest in land no matter how long the Defendant had been in occupation.

20. The Learned Counsel further submitted that the Commissioner of Lands (National Land Commission) under the repealed Government Lands Act, had no power to alienate government other than the President of the Republic of Kenya. She relied on the provisions of Section 7 of the said Act, to submit that the Commissioner had limited powers to executing leases, conveyancing on behalf of the president. Since the commissioner did not indicate in the said letter of reservation in whose authority he was alienating the land, he acted ultra-vires making the letter null and void for lacking authority. The Counsel relied on the case of **“John Kiguru Karume – Versus - Kenya Institute of Administration & 4 others (2017)eKLR and James Joram Nyaga & another – Versus - AG & another (2007)eKLR”** to submit that the suit premises was not available for allocation since it was initially government land set apart for public use.

21. The Counsel submitted that the prayer by the exparte applicant to nullify certificate of lease issued on 24th September 2015 is not in the application dated 8th April 1999. The Learned Counsel argued that parties are bound by their pleadings and the said prayer ought to be dismissed by court for being introduced by submissions. Further to that, the Learned Counsel stated that the exparte applicant did not raise any objection when the said title was issued neither has the exparte applicant demonstrated the procedural impropriety in obtaining the said title.

22. The Learned Counsel stated that the exparte Applicant had no legitimate expectation drawn from the letter of reservation dated 23rd May 1991 since the letter refers to different plots of land not the ones pleaded by the exparte applicant. The letter of reservation was said to be ambiguous and cannot be enforced for being a nullity and contrary for being made without authorization, and that legitimate expectation has to be fulfilled here the decision maker has the authority to make that decision.

23. The Learned Counsel submitted that the interested party followed the correct procedure to obtain the lease after fulfilling all the requirements. The letter of allotment dated 24th February 1999, issued a lease to the interested party with effect from 1st April 1997 and was registered in 2015. The lease was not objected by the Applicants as they have no interest in the suit land and also did not raise any ground of the alleged fraud, making the title indefeasible as provided by Section 26 of the Land Registration Act. The Counsel argued that the exparte Applicant is not entitled to the prayers sought since the respondent, does not have authority to issue title deeds, but rather the Registrar of Lands who is not party to the suit. The Ex Parte Applicant has not shown any registerable interest over the suit premises, which has been registered in the interested party’s name, the application should then be dismissed with costs to the Interested Party.

C. The Respondents Written Submissions

24. On 29th November 2021, the Respondent herein filed its written submissions through the Office of the Attorney General. Mr. Makuto Advocate submitted and confirmed that this Honorable court on 31st March 1999 ordered for stay of proceedings pending the determination of this application.

25. He informed court that when the matter came up on 29th June, 1999, the Learned Counsel, Mr. Gikandi for the Ex – Parte Applicant, Mr. Ng’eno for the Respondent and Mr. Karisa Ihia for the Interested Party for the Interested party, Mr. Karisa informed court as follows:-

“Although we are sued as interested Party, we are not involved. The Orders sought will not affect the Interested Party in any way”.

Later on, the Learned Counsel asserted that on 5th June 2001, a consent order was entered by the parties herein before Justice Hayanga to the effect that title deed be issued in the name of the Ex - Parte Applicant. The Interested Party though claiming to have no interest in the suit land, it contravened the said orders and caused it to be issued with a title over the suit land in its favour. The Counsel submitted that the Interested Party had no basis of causing registration of the suit land which had been reserved for the ex parte Applicant.

26. The Counsel submitted that it had not been disputed that the Ex – parte Applicant was in occupation of the suit premises as a Technical training institute managed by the national government and as such, they were entitled to the orders sought. He argued that despite of the fact there was a Court Order of stay pending the hearing and determination of the hearing in existence but still the Interested party proceeded to cause the title deed to the suit properties to be issued in their favour was contrary to law and the provisions of the Constitution of Kenya.

27. He underscored that the Ex – parte Applicant was an National Technical Training Institute which fell under the mandate of the national government under the provisions of Article 186 (1) of the Constitution of Kenya and Paragraph 16 of the Fourth Schedule which reserves matters dealing with Universities, tertiary educational institutions and other institutions of research and higher learning and primary & Secondary schools, special education institutions to the national government. The Interested Party which had only the mandate of dealing with Early Childhood education (ECD) had no basis for causing registration of the suit land in their names. He urged court to find that the Ex - Parte Applicant who were in occupation of the suit land had caused massive development on it and hence attained constructive trust in favour of the Ex - parte Applicant. To buttress on this point they relied on the case of **“Twalib Hatayan Twalib Hatayan & Another – Versus – Said Saggah Ahmed Al – Heidy & Others (2015) eKLR** where court held thus:-

“According to the Black Law Dictionary, 9th edition, A Trust is defined as:-

“1. The Right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (Settlor) for the benefit of a third party (beneficiary).” Under the Trustee Act, “...the expressions “Trust” and “Trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the property....”. in the absence of an express trust, we have trusts created by operation of law. These fall within two categories; Constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A Constructive trust is an equitable remedy imposed by Court against one who has acquired property by wrong doing.....it arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A Constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his benefit.....a Resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.....This trust may arise either upon the unexpressed but presumed intention of settlor or upon his informally expressed intention.

On this aspect of law he relied on the Court of Appeal case of **“Willy Kimutai Kitilit – Versus – Michael Kibet (2018) eKLR.**

28. In the final analysis, he urged that the Honorable Court and grants the orders as sought by the Ex - Applicant.

ANALYSIS AND DETERMINATION

29. I have keenly read through and considered the pleadings in the filed Judicial Review by all the parties herein the articulate written submissions cited authorities and the relevant provisions of the law.

In order to arrive at an informed, fair and just judgment, I have framed the following three (3) salient issues to be considered for determination these are:-

a. Whether the Judicial Review filed by the Ex - Parte Applicants seeking for certain prerogative orders of Certiorari, Mandamus and Prohibition under the Provision of Order 53 of the Civil Procedure Rules 2010 and the Fair Administration of Action Act, of 2012 (FAA)?

b. Whether the Ex - Parte Applicant is entitled from the Notice of Motion dated 8th April, 1999 to the prerogative orders of Certiorari, Mandamus and Prohibition sought under the Provisions of Order 53 of the Civil Procedure Rules, 2010.

c. Who will bear the costs of the Notice of Motion application dated 8th April, 1999 by the Ex - Parte Applicant.

ISSUE NO. (a) Whether the Judicial Review filed by the Ex - Parte Applicants seeking for certain prerogative orders of Certiorari, Mandamus and Prohibition under the Provision of Order 53 of the Civil Procedure Rules 2010 and the Fair Administration of Action Act of 2012 (FAA)?

Brief facts:-

30. Before embarking on the analysis to the above framed issues its imperative the Honorable Court extrapolates on the brief facts to the case first and foremost from the filed pleadings in the year 1999, through a Chamber Summons application dated 26th March, 1999 and filed on 20th April, 1999 under Order 53 (1) and (2) of the Civil Procedure Rules the Ex-Parte Applicant moved then High Court seeking leave to apply for certain prerogative orders under the Judicial Review of Mandamus to compel the Respondent to issue the Applicant with title deeds to Plot Numbers 105, 108 and 109 Sections XVII M. I and Plot Land Reference No. 2932 at Shanzu. He attached a letter dated 23rd May, 1991 from the commissioner of Lands and according to the said letter these plots had been reserved and occupied by Mombasa Technical Training Institute. In the year 1999 the Ex - Parte Applicant applied for permits and approvals to undertake a project of constructing of new blocks on the suit property to accommodate the already increasing number of students in the institution.

31. However, the Interested Party declined to issue the said permits and approvals claiming ownership of parts of the suit land. Thus, it was for this reason that the Ex - Parte Applicant filed this case and sought the orders hereof. Further to this, the Ex - Parte Applicant sought leave to apply for an order of Judicial Review in form of prohibition barring and restraining the Respondent from allocation of these parcels of land to either the interested party and/or any other person.

32. Additionally the Ex - Parte Applicant sought leave to apply for order of Judicial Review in form of Certiorari to remove into High Court and quash the decision of the Respondent to sub-divide and allocate part of Plot No. 105, 108 and 109 of the Section XVII M.J. and Land Reference No. 2932 to the Interested Party or any other third party. It further sought leave to apply for order of Judicial Review in form of Certiorari to remove into High Court any title documents which had or may have been issued by the Respondents either to the interested party or any other third party and the same be declared a nullity.

33. On 31st March, 1999, the Honorable High Court granted the Ex - Parte Applicant leave to apply and institute Judicial Review proceedings as prayed. The court directed that there be stay of further proceedings pending the hearing and determination of the application. On 8th April 1999, the Ex-parte filed the notice of motion application. From the records, there is a legal Notice No. 88 dated 9th June, 2016 by the Cabinet Secretary for Education and Science and Technology changing the name of the Mombasa Technical Institute to Kenya Coast National Polytechnic.

The Ex - Parte Applicant erected a perimeter wall fence around the suit property to secure it and for security purposes. It is held that the same was done with the approval of the Interested Party who issued the necessary permits and approvals. The Ex-parte Applicant claims that on 24th March, 2015, while the suit was still pending before this Honorable Court, the Interested Party and the Respondent unlawfully conspired and registered the suit property in the names of the Interested Party thereby changing the title of the suit property to Plot No. Mombasa/Block XVII/1717 to the detriment of the Ex - Parte Applicant. In all these proceedings, the Honorable Court took great cognisance of the extreme honesty and openness position taken by the Respondent in the matter. That is adequate on the facts of the case.

34. Now turning to the analysis of the issue under this sub- heading. First and foremost, it is important to appreciate the meaning of Judicial Review. The concept is based on the fact that administrative excesses must be checked through Judicial intervention. Administrative law relates to decision of offices or organs of Central Government or Public Authorities which may affect the rights or liberties of the citizens and which are enforceable in or organized by the courts of law. Therefore judicial review is an integral component of administration law.

35. In our legal parlance and jurisprudence, judicial review is founded under the provisions of Order 53 Rules 1 to 7 of the Civil Procedure Rules 2010 where the prerogative orders are issued. Primarily, the provisions of Sections 8 and 9 of the Law Reform Act Cap 26 of the Laws of Kenya where the Provisions of Order 53 of the Civil Procedure Rules 2010 was borrowed from ***the case of Farmers Bus Services – Versus - Transport Licensing Appeals Tribunal (1975) E.A. 523***. And upon the promulgation of the Constitution of Kenya in 2010 Article 47 of the Constitution of Kenya introduced the Provisions of Fair Administration of justice and later on the legislation of “the Fair Administration of Action Act of 2012” which is the statutory framework governing judicial review and the Administrative law in Kenya currently.

36. The legal efficacy and scope of the statutory order of Mandamus, Prohibition and Certiorari are remedies granted by High Court to persons inferred by the exercise of administrative of judicial powers. These prerogative orders are only available against public bodies. Their origins lie in the expansion of common law in England and the jurisdiction of the Court of King Bench to acquire Superintendence over the observance of law by officials. These orders are predicated upon the fact that without law, society cannot function with fundamental values such as social order, social justice and personal freedom. Today public authorities determine an overwhelming extent how much of these values are enjoyed. Their decision affect vast numbers of people collectively and individually “***Ipso Facto***” unlawfully decision, must be available to Judicial Scrutiny hence judicial Review. The social need for how and the protection of legality is violated when a public official exceeds his/her authority or does not use his/her power in the prescribed manner.

37. The prerogative writs of “***Certiorari***” derives from the Latin word “***Certiorari***” which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made. The Order of “***Prohibition***” issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction. The order of “***Mandamus***” is derived from the Latin word “***Mandare***” meaning to command. It is issued in cases where there is a duty of a public or a quasi-public nature or a duty imposed by statute, it compels the fulfillment of a duty where there is a lethargy on the part of a body or officer concerned.

38. In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.

39. In an application for Judicial review the Applicant must be a person with a sufficient interest – (***Locus Standi***) and who commences proceedings promptly. To support this legal concept on judicial review, I have made indepth references to several literature review and court decisions – “***Pharmaceutical manufacturers Association of South Africa in re- ex parte president of Republic of South Africa - 2000 S.A. 674 CC at 33 Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic – Versus- Stanley Mambo Amuti (2018) eKLR.***”; ***the Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996.***

In the instant case, the Ex-Parte Applicant has sought all the above three prerogative Orders.

ISSUE No. 2 Whether the Ex - Parte Applicant is entitled from the Notice of Motion dated 8th April, 1999 to the prerogative orders of Certiorari, Mandamus and Prohibition sought under the Provisions of Order 53 of the Civil Procedure Rules, 2010.

40. Upon critical analysis at the pleadings by all the parties herein, this court is of the view that the Ex - Parte Applicant is entitled to the orders prayed for. It has noted that and which is not in dispute that vide a letter dated 23rd May, 1991 the then Commissioner for Lands held that the Plots No. 105, 108 and 109 were reserved and occupied by the Ex-Parte Applicant, it’s unfortunate that despite a stay of proceedings orders granted to the Ex-arte Applicant on 31st March, 1999, on 24th March, 2015, the Respondent seem to have colluded with the Interested Party and unlawfully issued the Interested Party with a Certificate of title to suit land nor Land Reference No. Mombasa Block/XVII/1717. This act was unlawful, capricious and unfair by the Respondent.

41. Indeed, the title held by the Interested Party was issued on 24th September, 2015 despite of the court order and the matter still pending hearing and final determination. In the case of ***Milligrass Works Limited –Versus- Kenya Railways Limited.***

All along several government departments have confirmed that the suit property belongs to the Ex-Parte Applicant and hence the Doctrine of *Estoppel* comes in handy here. Additionally, I fully concur with the submission by both the Learned Counsel for the Ex – parte Applicant and the Respondent herein to the effect that the County Government have been devolved and its powers and functions as found the Fourth (4th)

Schedule of Constitution of Kenya are to deal with Early Childhood Education and not any other Diploma or Degree Courses as offered by the Applicant. The consolidation of the Plots No. 105, 108 and 109 to Plot Number Mombasa Block/XVII 1717 was not only irregular, unprocedural but also illegal. Strictly speaking, if this court was to pursue the matter closely the Interested Party would fairly be cited for being in contempt of the Court order and hence made to suffer the consequences therefrom ideally border on criminality. Time without numbers, this Court has emphasized that Court orders are to be obeyed at all costs. This position is supported by the Respondent that the title deed to Interested Party was issued contrary to an existing court order of 31st March, 1999.

42. The Respondent held that the submissions by the Advocate for the Land Registrar on 2nd June, 2021, 5th June, 2021 and 4th July, 2021 were an afterthought. Article 186 (1) of the Constitution of Kenya, they held that the functions of University were for the National Government. They relied on the case of *Twalib and Another Case (Supra)* where court directed that the title deed be issued in the names of Ex-parte Applicant who had started construction of permanent structures on the land and meaning the land was theirs.

43. This Honorable Court has confirmed that on 5th June 2001 when this matter came up before Hon. Justice Hayanga and upon parties reaching a consensus the court recorded as follows:-

“By consent mention on 4th July, 2001 to confirm if title has been obtained”.

The above evidence on record shows parcel of land was registered for Ex-Parte Applicant.

From the articulate submissions and the pleadings filed hereof by the Ex-parte Applicant and supported by the Respondent its with out any doubt that the suit land legally belongs to the Ex-parte Applicant. It follows, therefore, that this court makes a direct order that they be granted and issued with the Certificate of Title deed in the names of Kenya Coast Polytechnic by the dint and strength of the Legal Notice No. 88 of 9th June, 2016 issued by the Cabinet Secretary of Education Science and Technology. Once again, this Court has recognized the profound, brave and bold decision taken by the Respondent, acting in their capacity as the public interest litigation Advocates in this matter where they strongly supported the Ex – Parte Applicant to be granted the suit land being the legal and absolute owners and proprietors to it by law. Certainly, they did all this in the interest of Justice and fairness. Its is highly commendable.

I.

ISSUE c). Who will bear the costs of the suit?

44. The Black Law Dictionary defines costs to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 gives court discretion to grant costs. It holds that Costs follow events. The events in this case are the result of the case whereby the Plaintiff has succeeded in his case. In the instant case, the results are that the Ex Parte Applicant has been successful against the Interested Party.

For that very fundamental reason, therefore, the costs of this suit will be made to the Ex Parte Applicant by the Interested Party herein.

VI. DETERMINATION

45. Ultimately, from the detailed analysis of the framed issues, the Honorable finds that the suit instituted by the Ex – Parte Applicant has merit and thus Judgement is entered in their favour Jointly and severally against the Respondent and the Interested Party with costs hereof. For avoidance of doubt, the Honorable Court do order as follows:-

a) THAT pursuant to the provisions of Section 80 (1) and (2) of the Land Registration Act, No. 3 of 2012, the Land Registrar, Mombasa Land Registry be and is hereby directed to cause the cancellation of all that Certificate of title deed in respect to all that parcel of land known as Land Reference Numbers Mombasa/Block XVII/1717 which supposedly arose from the consolidation of four (4) plots, Plot No 106, 1003, 108 and 1469 respectively and registered in the names of the Interested Party herein within the next 30 days from the date of this Judgement.

b) THAT the Ex - Parte Applicant herein, be and is hereby granted an order in the form of Mandamus compelling the Respondent herein to issue the Ex – Parte Applicant herein with a Certificate of title deeds for the whole of all that parcel of land known as Land Reference Numbers Plots No. 105, 108 and 109 Section XVII, M.I and Plot No. L.R 2932 at Shanzu in the names of “Kenya Coast National Polytechnic”, by dint of the Legal Notice No. 88 dated 9th June, 2016 by the then Cabinet Secretary of Education, Science & technology, Hon. Fred Matia’ngi.

c) THAT the Ex - Parte Applicant herein, be and is hereby granted a Judicial review order in the form of Prohibition barring and restraining the Respondent herein from allocating all or part of Plot No. 105, 108 & 109 of Section XVII, M.I and L.R 2932 to either the Interested Party or any other third party.

d) THAT the Ex - Parte Applicant herein, be and is hereby granted a judicial review order of Certiorari removing into this court for purposes of being quashed the decision of the Respondent to sub - divide and allocate part of Plots No. 105, 108 & 109 of Section XVII, M.I and L.R No. 2932 to the Interested Party or any other third party.

e) **THAT** the Ex - parte Applicant herein, be and is hereby granted a judicial review order in the form of Mandamus compelling the Interested Party to approve the past development plans of the suit premises in favour of the Ex - Parte Applicant within the next thirty (30) days from the date of this Judgement.

f) **THAT** the Ex - Parte Applicant herein, be and is hereby granted a judicial review order of Certiorari removing into this court for purposes of being quashed any title document which have or may have been issued by the Respondent either to the Interested Party or any other third party and the same be declared a nullity.

g) **THAT** the costs of this suit to be awarded to the Ex – parte Applicant to be borne by the Interested Party herein.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH MARCH 2022

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Hassan, the Court Assistant.

M/s. Gwahalla holding brief for Mr. Gikandi Advocate for the Ex – Parte Applicant.

Mr. Makuto Advocate for the Respondent.

M/s. Otuya holding brief for Mr. Adhoch Advocate for the Interested party