REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APP. JR NO. 77 OF 2012

R E P U B L I C

VERSUS

KENYA PORTS AUTHORITY ….....RESPONDENT

EX PARTE

MAKUPA TRANSIT SHADE LIMITED

MAT INTERNATIONAL LIMITED...….....APPLICANTS

AND

MULTIPLE ICD (K) LIMITED.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The matter before the court is the Notice of Motion for Judicial review orders of prohibition and mandamus dated 24th September 2013, along with the Preliminary Objection dated 8th January 2014. The two were argued simultaneously before the court on 9th January 2014, on 12th February 2014 and on 25th of February, 2014 and judgment was reserved.

2. The applicants are part of the TAL Group of Companies, registered in Kenya as limited liability companies. The first applicant conducts the business of a Container Freight Station (CFS) and is duly licensed by the respondent public body - Kenya Ports Authority (KPA) and the Kenya Revenue Authority (KRA) to operate on Mombasa/Block 1/437 and 438 in Mombasa. The second applicant is the owner of the Mombasa/Block 1/437 and 438 and was in the process of transferring the Mombasa/Block 1/437 and 438 to the first applicant through an internal arrangement that had been approved by the respondent.

3. The subject matter of the suit is the piece of land now known as Plot No. Mombasa/Block 1/ 691 (the suit plot) which was reclaimed from the sea and is adjacent to their plots Mombasa/Block 1/437 and 438. The suit plot had been offered for lease to the second applicant in the year 2002 following which the

second applicant claims to have undertaken developments on it. The suit plot was initially 1.2Ha (19th August 2002) but the respondent has since enlarged it through reclamation to 6.475Ha as at the time of issuance of the title on the lease on 17th February 2012.

4. The issuance of the lease title was for undisclosed reasons delayed by until 2012, when it was issued to the respondent. Shortly thereafter, the applicants got wind of an intended plan by the respondent to transfer the lease/ sub-lease to another party, one Multiple ICD, for the purpose of building a public access road and bridge. Hence the application before the court.

THE APPLICATION

5. The applicants filed the Notice of Motion application dated 24th September 2012 seeking the following orders:

> *"2.1. An order of PROHIBITION to prohibit the Respondent from granting a lease or other interest in land to the parcel of land adjoining Mombasa/Block 1/437 and Mombasa/Block 1/438 to any person or persons other than the second applicant, or any one of the applicants.*
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> *2.2 An order of MANDAMUS to compel the Respondent to grant a lease over the parcel of land adjoining Mombasa/Block 1/ 437 and Mombasa/Block 1/438 to the second applicant, or anyone of the applicants.*
>
> *2.3 Costs of the suit."*

6. The applicant's application was supported by the affidavit of Twalib Hatayan sworn on 20th September 2012, with a further affidavit sworn on 12th February 2013. The court in granting leave to the applicants to apply for judicial review on 21st September 2012 ordered that such leave do operate as a stay of the proceedings in question for 14 days and this has been extended from time to time.

7. The application is opposed. For the Respondent, one Abdullahi M. Samatar, the respondent's General Manager, Infrastructure Development swore affidavits on its behalf dated 5th November 2012 and 8th March 2013. The respondent's head of litigation Mr. Turasha swore an affidavit dated 8th November 2013 in response to the interested party's application dated 23rd October 2013, and this affidavit along with the others filed in reply by the respondent and the interested party is subject of the preliminary objection.

8. The interested party opposed the application, and through John Diro its legal officer filed affidavits in reply sworn on 6th May 2013 and 20th December 2013, stating that it was not seeking any proprietary interest over the suit plot but rather a non-exclusive permission to build a public road and bridge for the benefit of all members of the public for ease of access to the port. It further claimed that its expansion and operations had been frustrated by the respondent through this and numerous other suits and actions. The interested party sought the court's protection from what it termed as abuse of court process, adding that it's Kshs.9b project had stalled as a result of court orders, occasioning it heavy financial penalties from contractors and financing banks.

PRELIMINARY ISSUE

9. There are preliminary issues on the competency of the affidavits filed for the Respondent and for the ex parte applicant, respectively relating to want of authority for employee to swear an affidavit on behalf of his employer company and lack of leave of court to file further affidavit. By notice of preliminary objection dated 8th January 2014, the applicants challenged the affidavits of Abdullahi M. Samatar sworn on 5th November 2012 and 8th March 2013 and the affidavit of John Turasha sworn on 8th November 2013 stating that they are unlawful, incompetent, contrary to section 61 the KPA Act and should be struck out. The affidavit of John Diro sworn on 6th May 2013 for the interested party was also challenged on the ground that it was made without requisite authority of the company contrary to the Civil Procedure Rules

and should be struck out. Counsel for the applicant, Mr. Abed, however dropped his opposition to the affidavit filed on behalf the Interested Party during oral submissions on 9th January 2014. Counsel further submitted that the affidavits sworn by the General Manager and junior lawyers who do not sit in Board meetings were irregular since no evidence had been presented to show that they had been authorised to swear such affidavits by the board under section 61 of the KPA Act.

10. Mr. Kyandhi for the respondent in rejoinder argued that the KPA board could under section 61(2) delegate its powers to an authorized employee, without need for evidence in the form of a power of attorney. He urged the court to find that it was enough that the deponents were employees of KPA and each swore at paragraph 2 of their respective affidavits that they were duly authorized to make the affidavit. Reference was made to ***Republic v Public Procurement Administrative Review Board & 2 others [2013] eKLR***, HC Nairobi Judicial Review Application No. 382 of 2013 where Odunga, J stated as follows:

12. "…....It is also contended that the supporting affidavit to the application under consideration is defective since there is no authority under seal as required under Order 4 rule 1(4) of the *Civil Procedure Rules*. First and foremost, it must be made clear that the provisions of the *Civil Procedure Act* as well as the Rules made thereunder do not ordinarily apply to judicial review proceedings since the *Civil Procedure Act* is expressed to be "An Act of Parliament to make provision for procedure in civil courts" yet judicial review proceedings are neither civil nor criminal proceedings. See Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995; Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003.

13. In any case I had an occasion to deal with a similar objection in Nairobi HCCC (Commercial & Admiralty Division) No. 122 of 2011 between Mavuno Industries & Others vs. Keroche Industries Limited in which I expressed myself as follows:

> "As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in *Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR* and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage."
>
> 14. Accordingly I do not accede to the submission that the supporting affidavit is incurably defective and incompetent on that score."

11. The requirement for authority under seal in verifying affidavits under Order 4 rules 4 and 5 of the Civil Procedure Rules relate to the filing of suits by way of plaint and counter-claims for purposes of demonstrating the authority to sue. In the present circumstances of replying affidavits in Judicial review proceedings, an employee at any level who is conversant with the issues in dispute depending on the matter at hand may be duly authorized to make a affidavit for the employer corporation and there is no requirement for the authority of the employee to swear an affidavit on behalf of a company should be produced before or together with an affidavit sworn in that behalf. That an employee has sworn an affidavit stating to be duly authorized to make the affidavit is sufficient in the absence of any repudiation from the company or corporation.

Further Affidavit filed for the ex parte applicant without leave of the Court

12. Counsel for the respondent and the Interested Party submitted that the affidavit of Twalib Hatayan filed on 16th December 2013 was filed without leave of court and the applicant has extensively referred to it in the submissions stating that it has not been controverted. Counsel for the respondent, Mr. Kyandhi, explained that neither the respondent nor the interested party has had time to respond to the facts in that affidavit, adding that there must be a definite end to the filing of documents in court or else there will be a vicious cycle of documents. Mr. Ndegwa for the interested party submitted objecting to the affidavit of Twalib Hatayan filed on 16th December 2013 stated that it was contrary to the agreement that the matter proceeds to hearing on the basis of the affidavits on record, and was filed without leave of court. He urged the court to expunge the affidavit stating that the respondent and interested party would be prejudiced if the affidavit is entered to introduce matters that were not before the court when the directions were given as to hearing. The court was urged to strike out the affidavit from the record.

13. The applicant's counsel responded to this had been that under Order 53 Rule 4, the court has discretion to allow further affidavits and may also order that certain evidence be disclosed in order to make a fair determination. It was said that the evidence disclosed was not additional grounds but simply more evidence to buttress earlier evidence, and which evidence was already within the knowledge of the respondents.

14. This court finds that although there is discretion in allowing the filing of additional affidavits under Order 53 rule 4 of the Civil Procedure Rules, the same must be exercised judicialy giving an opportunity for the other parties to respond, if necessary, to the matters raised in the further affidavits. The ex parte applicants' affidavit filed after directions had been given for the hearing of the matter did not afford the respondent and the interested party any opportunity to respond to it. In promotion of the right to fair hearing under Article 50 (1) of the Constitution, leave of the Court to deem the further affidavit of 16th December 2013 as properly filed is declined and the same is rejected for having been filed without leave of the court.

Analysis of the facts

15. The applicant is challenging a decision of the respondent allegedly to allocate the suit plot to the interested party instead of itself. The applicant annexed as evidence of this decision, an internal memo from the respondent company (exhibit TH2) which states at page 8 that *"the strip of land adjacent to Kapenguria is not available as the same has been allocated to M/s Multiple ICD (Kenya) Ltd. for the purpose of constructing a bridge/ railway to the port"*. This the respondent argues was not in fact the decision allocating the plot, since the plot had been allocated to the interested party vide decision of the board made on 4th December 2008 (TH20). The respondent argued that prohibition cannot issue to restrain an action that has already been executed, as in this case.

16. On 14th May 2002, the applicant wrote to the Respondent applying to lease a 1.2 Ha piece of land adjacent to Mombasa/Block 1/438 (former dumping site). The management of the respondent's directors' Finance and Audit Committee directed on 7th June 2002 that the lease be approved subject to commercial terms, and in the alternative management should "... *allow MAT International to rehabilitate the unsurveyed area without granting a lease but grant them an undertaking that Kenya Ports Authority will not lease it to any other party...*".

17. It is not shown that any such undertaking was given, but on 19th August 2002, the respondent informed the applicant that the application was successful though subject to certain conditions among them appointment and cost of a surveyor and valuer, payment 5% of USV (Unsurveyed Value) as annual rent, and payment of all legal fees, as well as other conditions to be specified in the lease agreement. The agreement was however not produced, and it is safe to conclude that the parties did not sign one.

18. The respondent through the Replying Affidavit of Abdullahi M. Samatar sworn on 5th November 2012 avers at paragraph 24 that the applicants failed to pursue the conditions for the grant of the lease, leading to the respondent offering the lease to the interested party. However, the initial charges for the lease of the suit plot stood at Kshs.249.6M, for which acceptance was required prior to preparation of a

lease agreement. The interested party contended that this was exorbitant considering that the area was being considered for the purpose of constructing a public access road, it therefore counter-offered for a way-leave instead, to which the respondent agreed.

Issues for determination

19. From the pleadings, affidavits and submissions of the parties highlighted above, the following issues arise for determinations by the court:

a. What is the decision challenged in the Judicial Review proceedings.
b. Whether the decision not to grant a lease to the applicants and offer it to another party contravenes the provisions of the Constitution of Kenya, 2010 and *ultra vires*
c. Whether the applicants had a legitimate expectation for grant of lease.
d. Whether prohibition will issue to prohibit the implementation of a decision of a statutory body without quashing impugned decision and mandamus to compel it to grant a lease on its property to the ex parte applicant.
e. What orders should be made in the circumstances of this case.

What is the decision under challenge?

20. The Verifying Affidavit of Twalib Hatayan sworn on 20th September 2012 at paragraph 3 states "*...I am aggrieved by the decision of the Respondent as published in a circular by the Managing Director to the Board of Directors dated May 2012 as it goes against a grant of Lease or Agreement to Lease of a parcel of land adjacent to our lands within the Port thus conferring an equitable or beneficial interest in the said subject land. . .*" The circular under reference is TH2 which is a confidential management report to the Board of Directors of the respondent company dated May 2012 giving recommendations as follows:

"...Plots No. MSA/BLK/1/437 & 438

- *Consolidation of the two plots to a single parcel be granted.*
- *Transfer of leases from m/s Mat International to M/s Makupa Transit Shade Ltd be granted.*
- *Requests for construction of bridge access linking the two plots was declined on grounds that another firm M/s Multiple ICD had been granted permission to do a public road/ bridge in the same area. This was to be reviewed, if applicant was not satisfied as it was deemed to be a waste of resources.*
- *Extension of the lease to 33 years from a current date of 1st January 2012.*

The firm was informed of the above decisions and has since conveyed their acceptance of the recommendations with the exception of the approval to construct a bridge link being a condition imposed by Kenya Revenue Authority..."

21. The applicants' prayer for prohibition is directed to the intention of the respondent's board of directors issuing a lease over the suit plot to the interested party because the suit plot belongs to them, having been vested in them in 2002 hence they enjoy a beneficial interest. At paragraph 27 of the verifying affidavit, Twalib Hatayan swears that, *"...I am apprehensive that the Respondents are about to hold a board meeting this coming Friday of 21st September 2012 and that the Board will be duped into approving the Lease to the third party in ignorance or disregard of the earlier resolutions giving us the right to the said parcels of land adjoining our properties."* The evidence before the court however shows that on 20th September 2012, the interested party sought a way-leave and not a lease, in view of the heavy rental terms of Ks. 249.6 million as stand premium and annual rent.

22. The Mr. Kyandhi for the respondent submitted that there was no decision to be challenged since the decision that ought to have been challenged is not the one before court. Mr. Ndegwa for the interested party submitted that there has not been any decision, proceedings, action or anything that can be

prohibited towards granting the interested party a lease or any other interest, and for this reason, the application is incurably incompetent. He argued that the decision made on 4th December 2008 was on the issue of granting the interested party an access road. A certiorari has not been sought and prohibition cannot prevent what had already been done in 2008. With regard to TH2, the memo simply refers to permission to construct a public road, which had been granted prior to May 2012.

23. The court finds that the decision that the ex parte applicants should have challenged is the decision of 2008 by which the Board of the Respondent approved a proposal by the interested party to construct an access road. The Minutes of the 264th Meeting of the Board of Directors of KPA held on 4th December 2008 attached in the ex parte applicants verifying affidavit as TH 20 resolved at Minute 113.09 on the matter of an access road linking KPA to Main Mombasa Highway via Kapenguria proposed by M/S Multiple Hauliers as follows:

> ***"113.09: The Board considered the recommendations for implementation of the prioject and gave the following directives:-***
>
> - ***Multiple Hauliers should obtain the necessary approvals from Government and other institutions prior to commencement of the project.***
> - ***KPA should incur no financial obligations from construction of the Road.***
> - ***The additional lane at Kibarani Hill should be preconditioned for construction of the bridge road.***
> - ***KPA's approval should not influence approval by other government bodies/institutions.***
> - ***KPA should be involved in supervision and drawing of specifications for the road.***
>
> ***The Board resolved that a no-objection letter be given for the project in principle subject to all other approvals being sought and obtained as applicable."***

24. Without challenging this 2008 decision by an order of certiorari, the position with regard to the granting of the permission to construct an access road to the interested parties will remain intact and valid.

> **Whether the decision not to grant a lease to the applicants and offer it to another party violates / contravenes the provisions of the Constitution of Kenya, 2010 and *ultra vires***

25. Counsel for the applicants faulted the manner in which the 'decision' to NOT grant a lease to the applicants and instead grant it to another party violates the constitutional protection from discrimination. It was argued that the respondent as a public body is expected to undertake its functions in a fair, lawful and transparent manner but have in their actions deprived the applicants of their property right and therefore acted ultra vires the constitution, as read with sections 8(2)(e) and 12 (2) (k) of the Kenya Ports Authority (KPA) Act. The alleged approved work said to be the construction of a bridge and road were faulted also for lack of approvals and stated to be ultra vires the provisions of section 11 (d) of the KPA Act and section 144 of the Lands Act, 2012 which vests the power to allow a private developer to build a public road, way, bridge or rail link in the National Land Commission only. It was also submitted that the process of granting the interested party a lease of the subject property was done through un-procedural methods. The issue of an easement was said to have been introduced as an afterthought and was beyond the scope of the respondent's mandate in any event. The respondent's defence that the 2002 agreement would not hold as against the requirement of the Public Procurement and Disposal Act of 2005 was said to be without merit for the reasons that first, the Act could not be applied retrospectively to negate the 2002 agreement made before it was enacted and secondly, that the same requirements then ought to equally be applied to the dealings between the respondent and the interested party in 2008 – which would also fall under the statute. The court was urged to find that Article 227 of the Constitution which imposes a strict requirement for procedural fairness in the procurement of services by public bodies has been violated, and therefore quash it as an illegal decision.

26. For the respondents, Mr. Kyandhi submitted that the documents containing the decisions in 2008 demonstrated that the application process was processed within the confines of the law – per section 11

(d) of the KPA Act. It was stated that the applicants at no point acquired any property rights over the suit plot, owing to their delay in complying with the conditions imposed. No lease had been approved or granted. The court was urged to find that the applicant's claim should fail because no lease was granted to the interested party and as such the applicant was neither discriminated nor unfairly treated. The land was not being contemplated for allocation and if it was then even the Land Act and the Public Procurement and Disposal Act of 2005 would have to be applied before the applicant can be granted the lease as prayed. Granting the orders sought, it was cautioned would also contravene section 144 of the Land Act and translate in the applicant obtaining an unfair benefit. The wayleave granted to the interested party in 2008 did not come under the Land Act, which was only enacted in 2012. In refuting that the applicant had been subjected to undue disadvantage, the respondent pointed out that the applicant's proposal had been to build a bridge/access road from the applicant's freehold land to Makupa Causeway which would not be accessible to the public.

27. Mr. Ndegwa for the interested party accused the applicants of attempting to maintain a monopoly on the container business by sabotaging its competitors – the interested party. The 2008 decision which was followed up in 2012, he stated was an application for a no-objection to the construction of a bridge and public road whose landing was on a plot separate from the 1.2ha which the applicants had unsuccessfully applied for in 2002. Thereafter, in 2011 when the applicants first wrote in the letter TH12 dated 20th July 2011 about their intention to build a bridge and road, they were answered by the respondent in TH13 but failed to supply documentation requested and by 2012, it emerged that approval had been given to somebody else. As such, the applicant's application to build a bridge was never approved.

28. From the foregoing, the applicant is seeking orders of the court to compel the respondent to lease the suit plot, the respondent's property, to the applicant and no one else. Such an order would have the effect of determining the merits of the applicant’s case to the grant of a lease. It is trite law that the judicial review jurisdiction is concerned only with the decision making process and not the merits of the decision itself. The court cannot arrogate to itself the role of making determinations which are within the statutory mandate of the respondent to grant or not to grant a lease over its property.

29. Moreover, under Section 8(2) of the Kenya Ports Authority Act the board is required to secure the fullest development without giving undue advantage to any one party. In this instance, the evidence indicates that the applicant had opportunity since 2002 to develop the suit plot but no evidence has been produced of any development it undertook during the period. It would therefore be within the mandate and authority of the respondent to give the same opportunity to the interested party or any other party.

30. In agreeing with the applicants that the Public Procurement Act 2006 did not apply to any agreement to lease or lease in 2002, its effect on a transaction after it came into effect in 2006, such as the 2008 no-objection to the interested party’s application for permission to construct a road access/bridge, is a matter of the merits of the case in the implementation of the decision not of the process of making the decision to grant a no-objection, way leave or lease which decision is the subject of the present judicial review proceedings.

31. As no formal lease was concluded between them and the respondent, the ex parte applicants did not acquire proprietary rights in the suit property, and they therefore cannot maintain claims of any constitutional protection to property rights or discrimination or unfairness in the subsequent grant of an no-objection to the interested party.

32. Moreover, there is merit in the objection that the submission by the interested party that the matter of proprietary right on the suit property should be litigated through a procedure other than judicial review. Even if a formal contract had been concluded, claims in contract are private law disputes which should have been enforced by injunction in a civil suit suit. As held in *R v. Commissioner of Police ex parte Karia,* (2004) 2 KLR 506, per Nyamu, Ibrahim JJ & Makhandia Ag. J., it is improper for an applicant to combine judicial review relief application with a constitutional application, as the two jurisdictions are separate and distinct. See also *Kanu v. The President and Ors.* Nairobi HC Misc Application No. 128 of 2003 (2005) eKLR.

Whether the applicants had a legitimate expectation for grant of lease.

33. Mr. Abed for the applicants submitted on the principles of legitimate expectation, with reference to the case of ***Abdulwaheed Sheikh and another vs Commissioner of Lands and 3 Others***, Misc. Civil Case No. 1531 of 2005. He submitted that the respondent was permitted under section 12 (2) (k) of the KPA Act to dispose of any property they did not require and having conferred the suit plot to the applicants way back in 2002, vested them with an interest in the land. The respondent was obliged to issue a legal interest to the applicant once they obtained a title deed under the principle of legitimate expectation imposing, a legal duty on the respondent and the order of mandamus was should to compel them to fulfill their part of the written agreement which was duly approved by their board in 2002.

34. Mr. Kyandhi for the respondent submitted that the authority offered a lease over the suit property (which it was argued was not clear since in 2002 it measured 1.2ha but when registered in 2012 was 6.4ha and could not be as described by the applicant since it was not entirely adjacent to Mombasa/Block 1/ 437 and 438) on the conditions upon specified conditions. He referred to the case of ***David Njuguna Ngotho vs. Florence Wanjiru Muthee & 4 Others (2006) eKLR*** wherein Osiemo, J. held that an agreement stipulating future conditions which are not fulfilled cannot be construed as a valid legal contract. He also submitted in relation to exhibits TH 3, 12, 13 and 14 that the applicant had been guilty of laches for inaction spanning from 18th September 2002 to 20th July 2011. It was finally submitted that the applicant had not brought any evidence of reclaiming the suit land as alleged and coupled with the lack of agreement to lease and the fact that the adequate communication from the respondent on the matter did not create a legitimate expectation as pleaded.

35. Mr. Ndegwa for the interested party stated that no amount of correspondence can create an interest in land unless there is a sale or transfer. He cited section 3 of the Law of Contract Act and section 38 of the Land Act, 2012 which prohibit the filing of a case without a memorandum in writing signed by both parties and verified or attested. In any event, he added, if the claim could be brought, it ought to have been brought within 6 years of the decision in 2008 and as such it was time barred. The doctrine of legitimate expectation he submitted would not apply and cannot apply to allow a public officer to violate a statute – ***R. v. Secretary of State for Education and Employment ex parte Begbie (2000) 1 WLR 1115***. Further, mandamus cannot enforce claims arising from contract, and only applies to enforce public duties entrusted to public officers by statute – ***Obadiah Nyatondo Ochilo vs KBC***, HC Nairobi, Misc. Application. No. 971 of 2000.

36. The want of a concluded formal contract to which the respondent's offer to lease to the ex parte applicants was expressly subject, takes away any legitimate expectation and any claim to a right to be heard because legitimate interest is only created by legal rights. See ***Nairobi Permannet Markets Society v. Salima Enterprises Ltd,*** Court of Appeal Civil Appeal No. 185 of 1997. No legal rights are created by offers and counter offers to contract, the agreement being subject to contract. Moreover, as held in ***ex parte Begbie*** case, supra, courts will not give effect to legitimate expectation that would require a public authority to act contrary to statute. Without getting into the merits of the case, there may be reasonable defence to a claim for grant of lease whether by these proceedings or proceedings in the civil court for specific performance, that the matter is barred by statute of limitation the cause of action having arisen in 2002. There would also be a question as to what the extent of this legitimate expectation in view of the varied sizes of the land as the applicants sought and was, in principle, granted at 1.2 ha. and the extent of the land today shown as 6.4 ha. Would the ex parte applicant justify a grant of more than he sought and was allegedly granted in 2002? I think not; the suit property is a different property from that for which the parties transacted in 2002, and a lease must be for a specific area and time.

Whether prohibition will issue to prohibit the implementation of a decision of a statutory body without quashing the impugned decision and mandamus to compel the statutory body to grant a lease on its property to the ex parte applicant.

37. The first prayer was for an order of *PROHIBITION to prohibit the Respondent from granting a lease or other interest in land to the parcel of land adjoining Mombasa/Block 1/437 and Mombasa/Block 1/438 to any person or persons other than the second applicant, or any one of the applicants.* Title to the suit

plot herein was issued to the respondent, and whatever offer may have been made to the interested parties is no longer on the table.

38. This prayer is overtaken by events, and the applicants submit that *"this prayer has been compromised by the Respondents and Interested parties new concession that KPA will not grant a lease or other exclusive interest to the interested party and the Interested Parties position that it does not require a lease or other interest in the land but merely a non exclusive right of way.... KPA made a decision to grant a Lease to Multiple. That decision was not final as it required the acceptance of Multiple. It remained subject to challenge by prohibition. Multiple, rejected the Lease, and at that juncture the current proceedings were filed."*

39. The respondent is a state corporation capable of owning property in its own name. As such it has exclusive right of proprietorship of the suit plot, and to restrict them in perpetuity from granting a lease over the suit plot to any person other than the applicant is to curtail its property rights under Article 40 of the Constitution.

40. The prayer for MANDAMUS seeks to compel the Respondent to grant a lease over the parcel of land adjoining Mombasa/Block 1/ 437 and Mombasa/Block 1/438 to the second applicant, or anyone of the applicants. The applicant in 2002 accepted a grant of lease conditional on it fulfilling a set of requirements, which have not been proved to have been met. Without this proof, it would not be possible to state with certainty that a legitimate expectation calling for an order of mandamus to compel the grant of a lease arose.

41. This issue is governed by the authority of ***Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njorogre & Ors.,*** Civil Appeal No. 266 of 1996 (1997) eKLR when defining the scope of the remedies of Certiorari, Prohibition and Mandamus held 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 of, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings….***
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> ***The Order of Mandamus is of 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 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….***
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> ***These principles mean that an order of mandamus compels the performance of a public duty 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 wrongly performed i.e. that the duty had not been performed according to law, then mandamus is the 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 n excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

42. I have also noted, and I agree with the same, decisions of Odunga J. in ***R. v. Chairman, Kakuzi Land Disputes Tribunal and Anor. ex paarte John Kitonga Mutisya,*** 2013) eKLR and ***Lawrence B. Keitany v. Retirement Benefits Appeals Tribunal and Anor.*** (2013) eKLR both applying the Court of Appeal authority of ***ex parte Geoffrey Gathenji Njoroge,*** supra. See also ***R v, KRA ex parte Aberdares Freight Services*** (2004) 2 KLR 530, and ***R v. Ministry of Finance and Anor. ex parte Nyong'o*** (2007) 2 KLR 299.

43. There being no prayer for an order of certiorari to quash the decision of the respondent to grant a lease or no-objection to the interested party to construct an access road, an order of prohibition cannot issue to quash what has already been done. In addition, from the facts there is intention to grant a lease to the interested party what has been sought by the letter of 20th September 2012 is a way leave and not a lease. Even though the application for an order of prohibition was made before the 20th September 2012, it would not be granted in the light of the facts as they exist on the date of the Judgment because it would be in vain as no intention to grant a lease exists.

44. With regard to Mandamus, the order must be directed to the performance of a public duty. None has been shown. There is no duty to grant a lease to the ex parte applicant or to any person. As a registered proprietor of the suit property, the respondent has power under section 12 of the KPA Act to dispose its assets by transfer or lease but there is no obligation to do so in any way or to any person. There may be an obligation in the civil court for specific performance, if a valid enforceable contract can be demonstrated but there is definitely no public duty to dispose of the suit property to any person or in any particular manner, be it a lease, way-leave or outright transfer. See also ***Obadiah Nyatondo Ochilo vs KBC***, HC Nairobi, Misc. Application. No. 971 of 2000 and ***Kadamas v. Municipality of Kisumu***, (1985) KLR 954.

What orders may issue

45. For the reasons set out above, the court makes the following orders:

1. **The Notice of Motion dated the 24th September 2012 is declined.**
2. **The order for stay made upon the grant of leave to file judicial review proceedings herein is discharged.**
3. **The ex parte applicants will pay the costs of the proceedings to the respondent and the interested party.**

Conclusion

46. The private nature of the transaction the subject of these proceedings takes away any justification for the grant of the public law remedies of Prohibition and Mandamus. See ***Mureithi and 2 Ors. v. AG and 5 Ors.*** (2006) 1KLR 443. However, as a problem-solving court, consistent with Article 159 of the Constitution principle to do justice in every case before it, this court, having visited the *locus* on an application for contempt of court against the respondent, and having noted that the *ex parte* applicant and the interested party have each constructed own road accesses obviously at considerable cost both poised to land on the suit parcel of land – indeed both just 20-30 metres shy of the coastline on the suit property - the respondent should consider granting the *ex parte* applicants, upon terms to be agreed, a way-leave on the suit property in similar fashion as with the Interested Party.

Dated, Signed and Delivered this 11th day of August, 2014.

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EDWARD M. MURIITHI

JUDGE

In the Presence of:

Mr. Mohamed Ali for Mr. Abed for the Ex Parte Applicants

Mr. Kyandhi for the Respondent

Mr. Ndegwa for the Interested Party

Miss Linda - Court Assistant