REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL SUIT 273 OF 2007

IN THE MATTER OF AN APPLICATION FOR ORDERS OF

CERTIORARI, PROHIBITION AND MANDAMUS PURSANT TO ORDER

LIII RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE GOVERNMENT LANDS ACT

(CAP 280 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT

(CAP 281 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF THE SURVEY ACT (CAP 299 OF THE LAWS OF KENYA)

BETWEEN

REPUBLIC...APPLICANT

VERSUS

COMMISSIONER OF LANDS........................1ST RESPONDENT

DIRECTOR OF SURVEY.............................2ND RESPONDENT

CITY COUNCIL OF NAIROBI......................3RD RESPONDENT

AND

CAMI GRAPHICS LIMITED................1ST INTERESTED PARTY

NTEMI LIMITED...............................2ND INTERESTED PARTY

EX-PARTE

ASSOCIATED STEEL LIMITED

JUDGMENT

Introduction

The Applicant is Associated Steel Limited, a limited liability company duly incorporated in accordance with the provisions of the Companies Act, and is the registered owner of a property known as of LR. No. 209/11151 which is adjoining a parcel of land known as LR. No.209/14159, the disputed property herein . The 1st Respondent is the Commissioner of Lands within the meaning ascribed to the term by the repealed Government Lands Act. The 2nd Respondent is the Director of Survey, an office established in the public service that is in charge of the Survey Department. The 3rd Respondent is the City Council of Nairobi a local authority established pursuant to the provisions of the repealed Local Government Act. There are also two interested Parties in this suit who lay claim to the parcel of land known as LR. No.209/14159, the disputed property herein. The 1st Interested Party is Cami Graphics Limited, who were joined as a party to the suit by the Applicant. The 2nd Interested Party is Ntemi Limited, and it was joined as a party herein following its application dated 13/3/2012 seeking orders of joinder to the proceedings, which application was allowed by this Court on 26/4/2012 by consent of the parties.

Following an order by this court to file a substantive motion, the Ex-parte Applicant (hereinafter referred to as “the Applicant”) filed an application dated 27/3/2007, seeking the following orders of judicial review:

> i. An order of certiorari to remove into the High Court and quash the decision by the Respondent to allocate all that parcel of land known as LR. No. 209/14159 to the Interested Party.
>
> ii. An order of prohibition restraining the Respondents by themselves, their employees, servants and/or agents or any person or persons claiming through or under them from transferring, selling, encumbering, disposing of or in any other way howsoever dealing with all that parcel of land known as LR. No. 209/14159 in furtherance of the decision to allocate the said LR. No. 209/14159 to the Interested Party.
>
> iii. An order of mandamus to compel the Respondents to cancel the allocation of all that parcel of land known as L.R No. 209/14159 to the Interested Party or any other person.
>
> iv. An order of mandamus compelling the Respondents to cancel the letter of allotment and any certificate of lease or other title documents issued to the Interested Party or any other person in respect of all that parcel of land known as L.R No. 209/14159.

The Applicant’s Case

The Applicant’s case is set out in its Notice of Motion dated 27th March 2007, its statement in support dated 16th March 2007 and a verifying affidavit sworn on the same date by Kirit R. Patel, its Managing Director. The Applicant avers that the Respondents have irregularly and illegally allotted to the 1st Interested Party all that parcel of land known as LR. No.209/14159 (hereinafter “the disputed property”) which had been set aside as a road reserve, and that the 1st Interested Party is in the process of acquiring title to the disputed property.

Further, that the Applicant together with members of the public will be denied access that was guaranteed through the proposed road reserve. The Applicant contends that the Respondents have no power and/or

authority to allocate a road reserve to any person and/or institution, hence the said allocation is fraudulent, in excess of jurisdiction and amounts to abuse of office. Further that the said action is not only unlawful but also contrary to public policy, and in that regard, the Respondents have failed to discharge their duty to protect and preserve public interest. It is the Applicant's averment that the Respondent's action is unreasonable, and it also contravenes the Applicant's legitimate expectations.

The Applicant's Managing Director in his verifying affidavit deponed that the Applicant is the registered proprietor of LR. No. 209/11151, which is situated in the Upper Hill area of Nairobi (hereinafter "the Applicant's Property"). The deponent stated that the Applicant purchased the property on 5/4/2006 and noted upon purchase that a portion of it had earlier been hived off and set aside as a road reserve for purposes of constructing a road to join Kilimanjaro Avenue and Elgon Road. Further, that the effect was that the Applicant's property would be on the front row and have direct access to the road, a strong influence to the Applicant's decision to purchase the property. The deponent referred the court to his annexure "KRP 2", a Development Plan of August 1993 titled, "*Proposed Re-planning and Rezoning of Hill and Kilimani Areas – Nairobi*" which set out the proposals for road expansion of the Upper Hill Area.

It is deponed for the Applicant that the road reserve was set aside with the intention to expand the infrastructure in the Upper Hill area, and to cater for the exponential increase in both the vehicular and human traffic in the area. Further, that the proposed road having already been delineated on the deed plans prepared by the 2nd Respondent is an indication that the same was set aside for public purposes, and therefore unavailable for alienation and allocation to the Interested Party or any other person.

The deponent further stated that upon visits by several persons to the disputed property in October 2006 who professed an interest to purchase the same, he instructed a firm of Surveyors –M/s Geodetic Systems, to investigate and prepare a report on the alleged allocation of the road reserve. It is his disposition that from the report, the 1st Respondent allocated the proposed road reserve, describing it as un-surveyed commercial plot, to the Interested Party in October 1999. The road reserve was thereafter re-surveyed and given the L.R. No. 209/14159. Further, that the deed plan in respect of the disputed property was drawn up and approved by the 2nd Defendant on 11/9/2006, and that the Interested Party is the process of registering the disputed property in its name using the said deed plan.

The deponent referred the court to Page 2 of the report by M/s Geodetic Systems marked his "Annexure KRP3", which indicated that a search at the Physical Planning Department for the original Part Development Plan used to allocate the disputed plot was unsuccessful, and that file copies were missing. The report also indicated that the officer alleged to have prepared the said Development Plan denied knowledge of the same and the signature appearing on it. From the investigation, the deponent concluded that there was deliberate manufacturing or falsification of documents so as to fraudulently and illegally allocate the disputed plot. The deponent stated that on receipt of the report, the Applicant forwarded the same on 22/11/2006 to the 1st Respondent requesting it to conduct an investigation and subsequently revoke the irregular allocation, which letter has not been responded to date.

The deponent further stated that the road reserve is essential for the welfare and benefit of the general public and in particular the residents and inhabitants of the Upper-Hill area, including Upper Hill School, and that such an allocation will deny the Applicant frontage to a road and thereby substantially diminish the attraction and value of its property. Further, that the Applicant is aggrieved by the fact that part of its property was surrendered so as to make provision for the proposed road, and it is therefore unconscionable, unfair, illegal and fraudulent to obtain property from individuals for public purposes and subsequently allocate the same to private persons. It is the deponent's claim that once land is reserved for a public purpose, the same cannot be re-allocated to an individual or entity, and so the purported allocation of the disputed plot by the Respondents was in excess of jurisdiction and in disregard to public interest.

The 1st and 2nd Respondent's Case

Gordon Ochieng', the Chief Lands Administration Officer at the Ministry of Lands swore a Replying Affidavit on 23/5/2011 on behalf of the 1st and 2nd Respondents. He deponed that the disputed plot was planned vide Part Development Plan Number 42/16/98/4 dated 17/12/1998 and approved by the Commissioner of Lands on 22/12/1999, as well as by the City Planning & Architecture Department of the 3rd Respondent in a letter dated 12/10/1999. The deponent stated that following the valuation, a letter of allotment dated 26/6/1999 was issued to the 1st Interested Party who upon accepting the offer, made the requisite payments. Further, that a survey in respect of the subject plot was thereafter processed and approved to reflect L.R. No. 209/14159 measuring 0.0886 Hectares. Subsequently, that on 10/2/2010 the Commissioner of Lands wrote to the Director of Surveys to issue a certified deed plan in favour of the 1st Interested Party herein.

It is further deponed for the 1st and 2nd Respondents that prior to the allocation of the disputed plot to the 1st Interested Party, the same had been planned as an access road which had not been developed. However, that the said plan was superseded by Part Development Plan No. 42/16/98/4. It is further deponed that the process of planning is dynamic and changes with changing needs hence revision and re-planning is necessary. The deponent refuted the claim that the disputed property lies on a road reserve, and stated that the Development Plan referred to by the Applicant does not state that the said disputed plot is on a road reserve. He also deponed that the Applicant's claim is unmerited since it does not have *locus standi* in relation to the subject in dispute.

The 3rd Respondent's Case

C.M. Chiuri, a City Engineer of the 3rd Respondent swore a Replying Affidavit on 24/4/2008 opposing the application. He deponed that the 3rd Respondent is a statutory body incorporated under the Local Authority Act whose mandate includes *inter alia* the subdivision of any land belonging to it for the purposes of factory, industrial, business or working sites. However, that it is the Director of Physical Planning who is charged with the responsibility of advising the 1st Respondent on matters concerning alienation of land under the Government Land Act and the Trust Land Act, and also to prepare and ensure the implementation of all regional and local development plans.

The deponent referred to the Applicant's "Annexure KRP 2" and deponed that the disputed property is between land parcels L.R. 209/6500 and L.R.209/11151, and was created as a result of the re-planning of the Upper Hill Area by Nairobi Town Planning Liaison Committee constituted by the authority of the Office of the President in 1991. It was his disposition that as a member of the Liaison Committee, the 3rd Respondent was aware that re-planning of the Upper Hill Area of Nairobi had provided for several new roads to facilitate the development of office and commercial blocks, among them being a 20 metre-wide road between plots L.R. 209/6500 and L.R.209/11151.

The deponent stated that the implementation of the said physical development plan for the Upper Hill Area of Nairobi was the joint responsibility of the Commissioner of Lands and the Director of Physical Planning, and not the 3rd Respondent as insinuated by the Applicant. Consequently, the 3rd Respondent is not a party to any alleged alienation or purported subsequent allocation of the suit plot, and that the subject application discloses no reasonable cause of action as against the 3rd Respondent and should be dismissed.

The 1st Interested Party's Case

John Mukwa Mukopi, the proprietor of the 1st Interested Party, filed a Replying Affidavit and Further Affidavit sworn on 12th March 2008 and 5th September 2012 respectively in opposition to the subject application. He deponed that in June 1998, the 1stInterested Party made an application to the Commissioner of Lands to be allocated the suit plot for commercial purposes, and that on 21/12/1998 it got a no objection response from the Director of Surveys at the Ministry of Lands and Settlement which

was confirmed by the Director of Physical Planning by a letter dated 14/4/1999. The deponent stated that on being issued with the allotment letter on 26/6/1999, the 1st Interested Party made all the requisite payments due, thus making it the bona-fide allotee of the property. He deponed further that the suit plot was Government land available for allocation, and which was legally and regularly allocated by the Government before the Applicant purchased L.R. No. 209/11151 on 5/4/2006.

As regards the investigation report relied on by the Applicant, the deponent stated that at the time of carrying out the survey, the said J.V.Otieno of M/s. Geodetic Systems was not a licensed surveyor, therefore the said report should be disregarded and/or struck out. He deponed further that the said report is not a true representation of the facts as the area development plan was amended prior to the 1st Interested Party's application for allotment, thus the Applicant's apprehension that the subject property is a road reserve is unfounded as it is based on outdated information.

The deponent further refuted the claims made by the 2nd Interested Party that it is the registered owner of the disputed plot. The deponent referred the court to a letter from the Commissioner of Lands addressed to the Director of Surveys dated 2/5/2002 marked as his annexure "JM1", to the effect that the letter of allotment in favour of the 2nd Interested Party is not genuine. The deponent stated that in view of the said letter, the deed plan annexed to the 2nd Interested Party's title was also not genuine, and therefore that the documents were forgeries. The deponent also referred the court to a search application annexed to his affidavit marked "JMM2" and stated that efforts to obtain an official search of the 2nd Interested Party's Grant from the Registrar of Titles had been unsuccessful.

The 2nd Interested Party's Case

The 2nd Interested Party relied on the affidavit sworn on 13/3/2012 by G.K. Meenye, its Director, that had been filed in support of their application for joinder. The deponent stated that the 2nd Interested Party is the registered owner of the plot known as L.R. No. 209/14159 (the disputed property) under Grant No. I.R. 87101 duly issued by the Commissioner of Lands on 4/1/2001. It was his disposition that the grant was issued pursuant to an allotment letter dated 15/2/2000, and after payment of applicable stand premiums and related charges.

Further, that the 2nd Interested Party is in physical occupation of the disputed property which is adjacent to the Applicant's property. The deponent contended that the records at the Lands Registry and City Council of Nairobi indicate that the disputed property belongs to the 2ndInterested Party, which has been paying rates and rents to the council.

The deponent also stated that both the Applicant and the 1st Interested Party have failed to disclose to the court that the 2nd Interested Party is the proprietor of the disputed property. The deponent stated in this regard that the Applicant once approached the 2nd Interested Party and offered to purchase the said plot, and that the 2nd Interested Party and the 1st Interested Party have had a long standing dispute over ownership of the disputed property. The deponent further refuted the claim that the disputed property is an access road or a road reserve, and contended that the same is a prime commercial plot with a valid title.

The Issues and Determination

The parties were directed to file and exchange written submissions on the issues raised by the Applicant's Notice of Motion and the various responses thereto**.** Iseme, Kamau & Maema Advocates for the Applicant filed submissions dated 24/9/2009. C.N. Menge, Principal Litigation Counsel at the Attorney General Chambers filed submissions for the 1st and 2nd Respondents dated 23/5/2011. E.N. Omotii & Co. Advocates for the 3rd Respondent filed submissions dated 18/4/2008. In addition, S.M. Muhia Advocate for the 1st Interested Party filed submissions dated 16/12/2008, while J.M. Njengo & Co Advocates filed submissions dated 17th September 2012 for the 2nd Interested Party. The respective Advocates also

highlighted their submissions at the hearing of the said Notice of Motion on 29th May 2014.

We have carefully considered the pleadings and arguments made by the parties and find that the issues for determination are as follows:

1. Whether the Applicant has locus to bring this application.

2. Whether the prayer for certiorari was brought within time and can lie.

3. Whether the disputed property namely of LR. No.209/14159 is a public road.

4. Whether the disputed property namely of LR. No.209/14159 was available for alienation and/or allocation.

5. Whether the allocation of LR. No.209/14159 to the 1st Interested Party and 2nd Interested Party was legally made.

6. Whether the Applicant is entitled to the reliefs sought.

1. Whether the Applicant has Locus to Bring this Application

The Applicant's *locus standi* in filing the application before us has been challenged by the 1st and 2nd Respondent. It is important that we deal with this preliminary issue before delving into the main issues raised in this application. The Applicant in its verifying affidavit sworn on 16th March 2007 by Mr. Kirit R. Patel, its Managing Director stated that at the time of purchasing his property being L.R. 209/11151, he had noted that a portion of the property had been previously hived off and set aside for road reserve for the purpose of a road to join Kilimanjaro Avenue and Elgon road; that once the road was constructed its property was going to be on the road frontage with direct access thereto; the re-allocation of the road reserve to a private entity therefore diminished the Applicant's property's attraction and value; that the road reserve was set aside for public use as was shown in the development plan Number 42/16/92/7 approved by the Director of Physical Planning in 1992; and that the said road was essential for the welfare of the general public and in particular the residences of Upper Hill area and hence the Applicant's decision to purchase its property.

The Applicant in its submissions argued that it had the legitimate expectation that the road reserve would remain public land available only for purpose of construction of a public road; that the protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government's dealing with the public; and that its expectation, although not amounting to an enforceable legal right , is founded on a reasonable assumption which is capable of being protected in public law. The Applicant further submitted that the doctrine of legitimate expectation enable citizens to challenge decisions which deprive them of an expectation founded on reasonable basis.

Counsel for the Applicant referred the Court to the case of **Akaba Investments Limited –vs- Kenya Revenue Authority Misc. Civil Application No. 258 of 2007** where it was held that there are two types of legitimate expectation, procedural and substantive. Nyamu J. (as he then was) in the said decision quoted the case of **Council of Civil Service Union –vs- Minister for Civil Service, (1984) 3 All. E.R. 935** where it was held *inter alia* that;

> **"Where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefits or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law.."**

It was further held in **Council of Civil Service Union –vs- Minister for Civil Service, (supra)** that an aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority

affected him by depriving him of some benefit or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy until he was given reasons for its withdrawal and the opportunity to comment on those reasons.

In the replying affidavit of Mr. Gordon Ochieng the Chief Lands Administrative Officer at the Ministry of Lands sworn on 23rd May 2011, the said officer depones that the Applicant has no *locus standi* in relation to the subject property in dispute. The 1st and 2nd Respondents also submitted that the plan mentioned in the Applicant's application on the expansion of Upper Hill area did not show that the disputed property was on a road reserve, and further that a public road cannot pass through a public school (Upper Hill School) as alleged.

A person must have had sufficient interest to sustain his standing to sue in a court of law. In essence, such party has to show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard on that matter. Refer to the cases of: **Maathai v Kenya Times Media Trust Ltd [1989]; KLR, Raila Odinga v Hon Justice Abdul Cockar Civil Application No.58 of 1997; Law Society of Kenya v Commissioner of Lands & 2 Others (2001) 1 KLR (E&L)**

The question therefore to be answered is whether the Applicant has shown that the allocation of the disputed property has injured him over and above the injury or loss suffered by the residents and inhabitants of UpperHill area. Maraga J. (as he then was) in **Republic v Municipal Council of Mombasa and Another, Ex-Parte Uniken Marketing Services Limited, [2007] eKLR** stated as follows in this regard:

> **"The sufficiency of the interest required to give a person standing is a matter of mixed law and fact to be determined by the court upon due consideration of the facts and circumstances of each case ".**

We have set out the facts as presented by the parties herein, and after considering the said facts and the circumstances of this case, we have to ask ourselves whether the Applicant has demonstrated individual injury. The Applicant avers in this regard that:

i. It surrendered a portion of its property for a public purpose namely the construction of a road, and that it is therefore illegal and unfair to re-allocate the said portion to a private entity

ii. One of the influences of its decision to purchase the property was that the Applicant would be on the front row and have direct access to the road. Therefore, re-allocation of the road to a private entity diminished the attraction and value of its property.

In the case of **Law Society of Kenya vs. Commissioner of Land and 2 Others Civil Application No. 181 of 2002,** where the Law Society had brought an application to maintain the *status quo* in relation to land upon which the Eldoret High Court Building stood, the Society claimed that it was aggrieved by the allocation of that land to the Second Respondent therein. The Court of Appeal held that;

> **"It is arguable that the society's interests could well merge with that of the judiciary and hence it is interested in the preservation of the land upon which the High Court building in Eldoret is situated. "**

In our view, the Applicant has satisfied the criteria that it stands to suffer great prejudice as stated in the foregoing, and that the road should be reserved for the general public residing and operating businesses in Upper – Hill area. Further, it can be argued that the Applicant has an interest in the preservation of the road as a public road, and hence has the requisite *locus standi*.

2. Whether the Prayer for Certiorari was Brought within Time and Can Lie

The next preliminary issue we need to consider is whether the Applicant was required to file the

application seeking certiorari orders within six months of the decision sought to be quashed, and if so, whether its application for the said prayers is time barred. The 1st and 2nd Respondents submitted in this respect that there has been delay in filing this application since the letter of allotment was issued on 26/6/1999 whereas the application was filed on 19/3/2007. It was further submitted by the said Respondents that delay defeats equity and that the same applies to the application for judicial review; that under Order 53 rule 2 of the Civil Procedure Rules and section 9 (3) of the Law Reform Act an application for leave seeking orders of certiorari should be made within a period of 6 months from the date of the decision. The 3rd Respondent also shares the 1st and 2nd Respondents' view that the subject application offends Order 53 rule 3 of the Civil Procedure Rules.

It is not in doubt that the Applicant in its application is seeking certiorari orders to quash the decision made by the 1st Respondent through the letter of allotment dated 26th June, 1999, and that the Applicant filed its application on 19th March 2007. The Applicant however claims that it only came to know of the decision in 2006. The Applicant averred that on diverse dates in October 2006 several people came to the site seeking to meet the owner of the disputed property claiming that the same had been advertised for sale. The applicant then subsequently instructed M/s Geodetic Systems to carry out investigations and substantiate the allegations. The said firm's report dated 1st November, 2006 confirmed that a portion of the suit plot had been allocated to the 1st Interested party by the 1st Respondent in October 1999, and that the suit plot had been surveyed and given the Land Reference Number 209/14159.

Order 53 rule 2 of the Civil Procedure Rules 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."**

Section 9(3) of the Law Reform Act also provides that:

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

In the case of **Republic vs Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others Ex parte Mwalulu & 8 Others, Misc. Application 1279 of 2004**, a three judge bench of Nyamu J. (as he then was), Ibrahim J. (as he then was) and Makhandia J. (as he then was) held as follows with regard to the application of Order 53 rule 2 of the Civil Procedure Rules;

> **"this rule covers the specific matters mentioned in the marginal notes clearly saying so. In the view of the Court the six months limitation only affects the specific formal orders mentioned and nothing else."**

Further, in **Republic vs Principal Registrar of Government Land & Another, Misc. Application No. 10 of 2013,** Odunga J. cited the decisions in **R. vs. The Judicial Inquiry Into The Goldenberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 eKLR** and **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi, HC Misc. Application No. 1235 of**

1998, where it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 of the Civil Procedure Rules only applies to the specific formal orders mentioned therein and to nothing else. Therefore, that a decision to alienate or to allocate land is not formal order because the commissioner may in most cases issue titles without necessarily making the decision and the date he made the decision formal, and the time limitation cannot apply to such a decision. We hold the same view that the provision of Order 53 rule 2 of the Civil Procedure Rules specifically as to the six-month limitation period for a party to apply for order of certiorari only applies to judgments, order, decree, conviction or other like proceeding.

3. Whether the Disputed Property is a Public Road

The Applicant has relied on three documents as evidence of his claim that the disputed property was reserved as a public road. The first is the title to its property being LR No. 209 of 11151, and it is submitted by the Applicant in this regard that the road reserve had been surveyed by the 2nd Respondent and delineated in the said deed plan attached to its title. The second is a report dated August 1993 titled, "*Proposed Re-planning and Rezoning of Hill and Kilimani Areas – Nairobi*" prepared by the Nairobi Town Planning Liaision Committee, which was annexed as annexure "KRP 2" to its verifying affidavit, and which set out the proposals for road expansion of the Upper Hill Area. The Applicant stated that the proposed road was part of the Development Plan Number 42/16/92/7 which was approved by the Director of Physical Planning in 1992, The Applicant submitted that the road reserve was therefore not unalienated Government land capable of allotment.

The third document is the report by M/s Geodetic Systems annexed as annexure "KRP3" to the Applicant's verifying affidavit in which it is indicated that the 1st Respondent allocated the proposed road reserve which was described as un-surveyed commercial plot to the Interested Party in October 1999, and that the said road reserve was re-surveyed and given the L.R. No. 209/14159. Further, the said report indicated that a search for the original Part Development Plan used to allocate the disputed plot at the Physical Planning Department was unsuccessful, and that file copies were missing.

The 1st and 2nd Respondents on their part rely on a later Part Development Plan Number 42/16/98/4 dated 17th December 1998 which they submit superseded the Part Development Plan Number 42/16/92/7 and changed the disputed property into a commercial plot. The 1st and 2nd Respondent's however concede in their replying affidavit that prior to the allocation of the disputed property to the 1st Interested Party the same had been planned as an access road which had not been developed.

The 1st Interested Party urged this court to disregard the report made by M/s. Geodetic Systems on grounds that the author thereof was not a licensed surveyor at the time of making the report. The counsel for the 1st and 2nd Respondents referred the court to the list of licensed surveyors at the time of making the report dated June 2006, and to Section 2 of the Survey Act which provides that a licensed surveyor means a surveyor duly licensed under or by virtue of the provisions of the Act. From the above submissions and arguments by the Applicants and 1st and 2nd Respondents, we do not find the admissibility of the said report to be material as the two salient findings of the report, namely the resurvey and allocation of the disputed property to the 1st Interested Party, are admitted by the 1st and 2nd Respondents.

We have studied the Part Development Plan Number 42/16/98/4 dated 17th December 1998 which was annexed as annexure "GO1" to the 1st and 2nd Respondent's Replying Affidavit, and which plan was being forwarded to the Commissioner of Lands by the Director of Physical Planning for approval. It does not have any detail as to which land it relates to, and it is indicated that there is a proposed commercial plot thereon which is identified by two coordinates marked 'A' and 'B'. No land reference number of the said plot is provided or any other identifying mark, and it is therefore not possible for this Court to find that the said plan relates to the suit property.

The Third Schedule to the Physical Planning Act specifically provides what a part development plan

should contain, and states that the plan should indicate precise sites for immediate implementation of specific projects including land alienation purposes. No such precise information was provided in the Part Development Plan Number 42/16/98/4 dated 17th December 1998 produced in evidence by the 2nd and 3rd Respondents, and its authenticity is thus in question.

On the other hand, we note that although the Applicant did not produce in evidence Part Development Plan Number 42/16/92/7, the deed plan number 138623 dated 19th April 1989 attached to the title to its property namely LR No. 209/11151 shows that the area adjoining the said property was surveyed as a road. It is conceded by the Respondents and Interested Parties that it is this area that was later converted into the disputed property.

There are several procedures that applied at the time of the purported said conversion in 1999 before a road could be converted into some other use. Under section 182 of the repealed Local Government Act it was provided as follows in this regard:

"Control and vesting of public streets in municipalities and townships

(1) Every municipal council or town council shall have the general control and care of all public streets which are situated within its area, and the same are hereby vested in such local authority in trust to keep and maintain the same for the use and benefit of the public.

(2) A municipal council or town council may make, construct, alter, and repair and for any such purpose temporarily close or divert, any such street, and may make new streets.

(3) A municipal council or town council may, subject to any law relating to road traffic, by order, prohibit the driving of vehicles on any specified road otherwise than in a specified direction:

Provided that no such order shall be made unless notice of the intention to make the same shall be published in the *Gazette* at least fourteen days before the date on which it is intended to make such order, and, before making such order, there shall be taken into consideration—

(i)any objections which may have been made to the making thereof; and

(ii) the existence of alternative routes suitable for the traffic which would or might be affected by the order."

Section 192 of the said Act defined vesting in relation to a road as the transfer of the possession of the surface of the land concerned for use as a road and such material below and space above the surface as may be necessary, together with the possession of the rights of a highway authority, but shall not mean the transfer of the ownership of the land. It therefore followed that any decision to close a public road must be published in the Gazette.

In addition there are elaborate provisions in the Physical Planning Act as to the processes to be followed in the preparation or amendment of a part development plan when re-planning an area under sections 24 to 28 as follows:

> **"24. (1) The Director may prepare with reference to any Government land, trust land or private land within the area of authority of a city, municipal, town or urban council or with reference to any trading or marketing centre, a local physical development plan.**

(2) A local physical development plan may be a long-term or short-term physical development or for a renewal or redevelopment and for the purpose set out in the Third Schedule in relation to each type of plan.

(3) The Director may prepare a local physical development plan for the general purpose of guiding and co-ordinating development of infrastructural facilities and services for an area referred to in subsection (1), and for the specific control of the use and development of land or for the provision of any land in such area for public purposes.

(4) The Director may include in a local physical development plan any or all of the matters specified in the Second Schedule.

25. A local physical development plan shall consist of—

(*a*) a survey in respect of the area to which the plan relates carried out in such manner as may be prescribed; and

(*b*) such maps and description as may be necessary to indicate the manner in which the land in the area may be used having regard to the requirements set out in the Third Schedule in relation to each type of local physical development plan.

26. (1) The Director shall not later than thirty days after the preparation of a local physical development plan, publish a notice in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and at the times specified in the notice.

(2) The provisions of Sub-Part "A" relating to the making of representations or objections to the Director concerning regional physical development plans and to the consideration by the Director of such representations or objections and to appeals shall apply *mutatis mutandis* to this section.

27. (1) The provisions of Sub-Part "A" relating to the approval or disapproval of a regional physical development plan shall apply *mutatis mutandis* to the approval or disapproval of a local physical development plan by the Minister under this section. .

(2) A local physical development plan approved under subsection (1) shall not be altered in any manner without the prior written authorization of the Director.

28. The Minister shall within fourteen days after he has approved a local physical development plan cause to be published in the Gazette, by an officer authorized by him, a notice to the effect that the plan has been approved with or without modification and may be inspected at the place or places and times specified in the notice during normal working hours."

It is noted by this Court that there are specific and detailed requirements of consultation, approval and gazettement before any part development plan, which is one of the types of local physical development plans, can come into effect. No evidence of such consultation, approval or gazettement of the change of use of the disputed property from a public road to private use was provided, and this Court therefore finds that in the absence of evidence of the necessary procedures having been followed, the disputed property is still reserved and planned as a public road.

4. Whether the disputed plot was available for alienation and/or allocation.

The Applicant submitted on this issue that the 1st Respondent acted in excess of jurisdiction as the allocation of the road reserve to the Interested Party did not fall within the scope of powers delegated to it under Section 3 of the Government Lands Act with regard to un-alienated Government land. Counsel also

submitted that the said decision was unreasonable and ought to be quashed. Counsel further submitted that the Respondents acted ultra vires the authority and powers vested in them, in that they acted beyond the powers and limitations prescribed by the Government Lands Act, as they did not have powers to allocate land set aside for public purposes to a private individual.

As to what amounted to unreasonableness, and at the court's jurisdiction to interfere with a decision, counsel referred the Court to the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporations [1974] 2 All ER 680** where the Court held:

> **"The Court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority nevertheless has come to a conclusion so unreasonable that no reasonable authority could ever have come to it, and in such a case the court can interfere. "**

Before the promulgation of the Kenya Constitution 2010 and the enactment of the new land laws namely the National Land Commission Act, the Land Registration Act, and the Land Act in 2011/2012 the power and authority to alienate Government land was vested in the President, and under section 3 of the Government Lands Act (now repealed) the President had delegated authority to the Commissioner of Lands to act on his behalf. Section 3 of the repealed Government Lands Act provided as follows:-

> **"The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may-**
>
> **a. Subject to any other written law make grants or dispositions of any estates, interests or rights in or over unalienated Government land,"**

The proviso to this paragraph clearly sets out in respect of which matters the powers of the President are delegated to the Commissioner in regard to allocation of any unalienated land and include:-

> a. "**For religious charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purposes by the president,**
>
> **b. For town planning exchanges on the recommendation of the Town Planning authority Nairobi, within the total value, and subject to the conditions laid down by the president.**
>
> **c. The sale of small remnants of Land in the City of Nairobi and Mombasa municipality acquired for town planning and left over after those town planning needs have been met,**
>
> **d. ------(g)."**

The disposal and/or alienation of any town plot by the Commissioner of Lands pursuant to section 9 of the repealed Government Lands Act required that the disposal be in the prescribed manner. Section 11 of the Act set out the prerequisite conditions that the Commissioner of Lands required to meet before he could dispose of any township plot which included setting the price at which the plot would be sold, the conditions to be inserted in the lease and any special covenants that the lease may require to be subjected to. Section 12 of the Act required that leases of town plots be sold by public auction unless the President in any particular case ordered otherwise. Section 13 of the Act prescribed the manner of how the public auction sale would be conducted.

Sections 12 and 13 of the said Act provided as follows:-

> "12.**Leases of town plots shall, unless the president otherwise orders in any particular case or cases, be sold by auction".**

13**. The place and time of sale shall be notified in the Gazette not less than four weeks nor more than three months before the day of sale and the notice shall state-**

(a) the number of plots and the situation and area of each plot,

(b) the upset price at which the lease of each plot will be sold,

(c) the amount of survey fees and the cost of the deeds for each plot,

(d)the term of the lease and the rent payable in respect of each plot and

(e) the building conditions and the special covenants, if any to be inserted in the lease to be granted in respect of any plot."

As evidenced by the above legal provisions the Government Lands Act set out an elaborate procedure for the alienation of any unalienated Government Land. It is noted by this Court that the creation of the disputed plot involved owners of the neighbouring properties being required to cede portions of their parcels of land. The expansion of the road network to serve the increased vehicular and human traffic following the dezoning of the Upper Hill area from low density residential area to commercial was in the public interest, and the reservation of the disputed property as a road access was for a public purpose. There is no evidence to show that the Nairobi Town Planning Liaison Committee was involved in the replanning that the Commissioner of Lands states occurred in 1998/1999 and that recommended the disputed property to be converted from an access road to commercial. Our view is that even if there was such replanning all stakeholders needed to be involved and these would have included those persons whose parcels of land would have been affected by the conversion of what they knew to be an access road being converted to a commercial plot.

The Court of Appeal in the case of **Commissioner of Lands –vs- Kunste Limited, Nakuru Civil Appeal No. 234 of 1995** held that where the Commissioner of Lands exercises his statutory powers under the Government Lands Act if there are persons likely to be affected by such exercise of discretion such persons ought to be heard before the decision is made. The Judges of appeal in the case observed as follows:-

> **" The appellant (Commissioner of Lands) was exercising his statutory power under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision (see Mirugi Kariuki –vs- AG) Civil Appeal NO. 70 of 1991 (unreported). It is therefore our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party".**

In the present case the Commissioner of Lands was aware that some of the neighbouring owners of parcels bordering the disputed plot and in particular the Applicant's parcel of land had ceded portions of their land to create the disputed plot. Our view is that the owners of these neighbouring parcels of land ought to have been consulted before the decision to convert what had been earmarked as an access road to a commercial plot. We therefore find that the Applicant as the owner of the parcel of land adjacent to and bordering the disputed property as a party who was affected by the decision of the Commissioner of Lands to allocate the subject plot is entitled to challenge the Commissioner of Lands decision.

In addition, once the disputed plot had been designated as a road of access it ceased to be unalienated Government land as it was set aside for development of an access road for the general public. The Commissioner of Lands henceforth became a trustee in regard to this public utility Plot on behalf of the public until such time as the access road was developed as envisaged.

The doctrine of public trust has been considered by the courts and upheld in various cases notably in the

following cases **John Peter Mureithi and 2 Others –vs- Attorney General & 4 Others, (2006) e KLR**, **James Joram & Another –vs- Attorney General & Another (2007) eKLR, Dennis Kuria & others –vs- Minister for Roads & Public Works & Others (2006) eKLR, Niaz Mohammed –vs- Commissioner for Land & Others HCCC NO. 423 of 1998** and **Commissioner of Lands –vs- Coastal Aquaculture Ltd, Civil Appeal No. 252 of 1996**. Although in the referenced cases the issues raised related to parcels of land that had been compulsorily acquired by the Government for public purpose, the courts were emphatic that where land was compulsorily acquired for public purpose such land must be used for the purpose for which it was acquired and should not be allocated to private individuals for commercial purposes.

In the case of **James Joram Nyagah & Ano. –vs- Attorney General & Another. (supra)** the court relied on and approved the holding in **Niaz Mohammed –vs- Commissioner of Lands (supra)** where land had been acquired for the construction of Nyali Bridge and the Commissioner of lands had allocated the balance of the unused land to a private developer and on challenge by the original owner, Hon. Justice Waki (as he then was) held that the land had to be used for the purposes for which it was acquired and use of the land for any other purpose was illegal. In the **James Joram Nyaga Case (Supra)** the court while approving the holding in the **Niaz Mohammed Case (supra)** proceeded to hold that the suit land having been acquired for public purposes, that is, construction of a road, is held in trust for the public and could not have been allocated to the applicants who are private individuals for their private use.

It is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st Respondent for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot.

5. Whether the allocation of LR. No.209/14159 to the 1st Interested Party and 2nd Interested Party was legally made

The Applicant in this respect submitted that the Respondent's action of demarcating, surveying and allocating land set aside for public purposes to benefit a private entity is irregular and illegal. Counsel for the Applicant submitted that the Respondents' action was in blatant contravention of the law of allocation of Government Land. It was submitted for the Applicant that the Respondent's decision to allocate the suit property to the Interested Parties had no legal basis, therefore an illegality and in that regard, the said decision should be quashed.

In support of this submission counsel cited various authorities including **R V Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-parte George Saitoti, (2006) eKLR** where the Court endorsed Lord Diplock's description of illegality in the case of **Council of Civil Services Unions v The Minister for Civil Service, (1985) AC 374.** Counsel also reiterated that the allocation was contrary to public interest, since the road reserve is essential for the welfare and general public and in particular the inhabitants of Upper-Hill area.

The 1st Interested Party and the 2nd Interested Party both claim ownership of the disputed property. The 1st interested party stakes claim to the disputed property on the basis that he was allocated the land following an application that he claims to have made to the Commissioner of Lands in June 1998 to be allocated a plot in Upper Hill, Nairobi for a Commercial purpose. The 1st Interested Party in his replying affidavit paragraphs 4 deposes as follows:-

> **"4.That I had been informed that Land Reference Number 209/14159 had not been set aside for public use and was available for allocation."**
>
> **5.That it was on this basis that the interested party applied to have the said Land Reference Number 209/14159 allocated to it".**

The 1st Interested Party submitted that prior to allocation of the suit plot, an exhaustive development study of UpperHill was undertaken by the Nairobi Town Planning Liaison Committee and identified the

suit plot as available for allocation. In that regard, counsel submitted, there was no illegal or un-procedural impropriety to the allocation in favour of the Interested Party. Counsel submitted further that the road network in the Upper Hill area is clearly set out in Development Plan No. 42/16/92/7 and the subject property is not on a road reserve.

The 1st Interested Party did not avail a copy of the letter he applied to the Commissioner of Lands for allocation. In his affidavit he states he had been informed by persons whose identity is undisclosed that the disputed property was available for allocation yet when the letter of allotment dated 26/6/1999 was made it was in respect of an "**UNS. COMMERCIAL PLOT – UPPER HILL**. It is thus unclear what documentation the 1st Interested Party relied upon to make the application to be allocated the disputed property. Did the Commissioner of Lands advertise the plots for allocation and/or how did the Interested Party become aware of the existence of the subject plot?. Unless the plot was advertised for allocation the Interested Party could only have become aware of the existence of the plot if he was working in collusion with persons in the Commissioner of Lands office, who had information that the disputed property had been reserved as a public road but was undeveloped.

Gordon Ochieng, the Chief Land Administration Officer at the Ministry of Lands in his replying affidavit sworn on 23rd November 2011 on behalf of the 1st and 2nd Respondents affirms that the suit land was replanned vide part Development plan Number 42/16/98/4 dated 17/12/1998 and approval was given by the Commissioner of Lands on 22nd December 1999 annexed and marked "**GO1".** The 1st Interested Party was issued with a letter of allotment dated 26th June 1999 apparently before the Commissioner of Lands had approved the "**PDP**". Significantly Gordon Ochieng under paragraph 9 depones thus:-

> **"9. That prior to the allocation of the suit land to the interested party M/S CAMI GRAPHICS the same had been planned as an access road which had not been developed."**

Mr. Ochieng further depones under paragraph 10 of his replying affidavit thus:-

> **"10. That the said plan was later superseded by part development plan NO.42/16/98/4 which changed the use into a commercial plot."**

The 2nd Interested Party for its part contends it is the registered owner of the disputed property and holds Grant Number **I.R.8701** which was duly issued by the Commissioner of Lands on 4th January 2001. The 2nd Interested Party claims to have been allocated the subject property vide a letter of allotment dated 15th February 2000 which it accepted and having met the conditions set out therein, the Commissioner of Lands processed and issued it with the title. The 2nd Interested Party does not indicate how or when it applied to be allocated the plot and/or how it became aware of the availability of the plot. The 2nd Interested Party's case is that it is the registered owner of the suit property and was so registered at the time the Applicant instituted these proceedings and consequently the orders sought by the Applicant against it cannot be granted.

The 1st Interested Party has contested the validity of the allotment letter the 2nd Interested Party used to process its title, and refers to a letter from the Commissioner of Lands dated 2nd May 2002 annexed to the supplementary affidavit sworn on 5/9/2012 by John Mukwa Mukopi and marked "**JMI",** wherein the Commissioner of Lands stated the allotment letter to M/S Mart properties dated 14th January 1999 was a forgery. The letter by the Commissioner of Lands is addressed to the Director of Surveys and the same is reproduced hereunder:-

> **"Re: L.R. NO.209/14159- ELGON ROAD**
>
> **Please note that the letter of allotment to M/S Mart properties vide my letter of allotment ref.44805/VI dated 14th January, 1999 was a forgery. I confirm that the original deed plan NO.231981 issued to Mart Properties has not been used to register the title.**

You may therefore prepare to issue a certified copy of the deed plan in favour of M/S came Graphics of P.O. BOX 17847 Nairobi vide my letter of allotment ref.44805/VII dated 26th June, 1999.

Z.A. MABEA

For Commissioner of Lands."

The letter of allotment to the 2nd Interested Party dated 15th February, 2000 appears to have an incomplete **Ref. NO.44805**/-- and attaches what appears to be a deed plan for L.R.NO.209/14159. The Grant NO.87101 issued to the 2nd Interested Party on the other hand annexes Deed Plan NO.231981 which the Commissioner of Lands stated had been issued to Mart properties. The question then that begs for an answer is who is Mart Properties and how did the 2nd Interested Party get possession of Deed plan NO.231981 that it used to process its grant?

The 1st and 2nd Respondents did not in any specific manner respond to the competing claims to the suit land by the 1st and the 2nd Interested Parties. Their position before the entry of the 2nd Interested Party to the proceedings was that the Commissioner of Lands, had approved the replanning of the Upper Hill area in Nairobi, and resulting from the replanning the disputed property which had hitherto been reserved as an access road was converted into a commercial plot and had been allocated to the 1st Interested Party. It is this conversion and allotment of the disputed property that the Applicant challenges as having been unprocedural, illegal and in excess of jurisdiction on the part of the Commissioner of Lands.

The Applicant and the Respondents agree that during the year 1992 or thereabout the Director of Physical Planning approved Development PlanNO.42/16/92/7 (although the plan has not been exhibited) that had been prepared by the Nairobi Town Planning liaison Committee. It is also not disputed that upto the time of the alleged replanning by the 1st and 2nd Respondent the disputed property had been set aside for the development of an access road and therefore was for a public purposes. In the present case the applicant has furnished ample evidence to satisfy the court that indeed the disputed property had been set apart and/or alienated to serve as an access road in 1992 or thereabouts. The Respondents indeed concede that fact.

We have already found that as from the time when the disputed property was identified and set aside as a public plot the Commissioner of Lands did not have any power to alienate the specific plot for any other purpose as he purported to do by what he states was a replanning exercise in 1998/1999. After the designation of the disputed plot as an access road the Commissioner of Lands was constituted a trustee in respect of the same on behalf of the public and did not possess any power to alienate it for any other purpose. It would therefore follow that the Commissioner of Lands did not have any power and/or authority to issue a letter of allotment in respect of the disputed property to either the 1st Interested Party or the 2nd Interested Party. The letters of allotment issued to both the 1st and 2nd Interested Parties were thus illegal and unlawful. See the cases of **James Joram Nyagah & Ano. –vs- Attorney General & Another**. (**supra**) and **Niaz Mohammed –vs- Commissioner of Lands** (**supra**) in this regard**.**

The 2nd Interested Party has set up the grant he holds to the suit land to claim his rights of ownership are indefeasible in terms of section 23 (1) of the repealed Registration of Titles Act under which the title was issued. Our simple answer to this claim is that the Commissioner of Lands did not have the power or authority to allocate the property and/or to process and issue a title to a private entity. He acted in excess of his authority and his acts were *ultra vires* and could not confer and/or pass a good title to the 2nd Interested Party. We are of the view that the title of the 2nd Interested Party was unlawfully acquired in two respects. Firstly, the Commissioner of Lands did not follow the procedure set out under the repealed Government Lands Act in making the allotment (see sections 9,11,12 and 13 of the said Act) and, secondly, the disputed property had been set aside for a public purposes and could not be available for alienation. The allotment made by the Commissioner of Lands to the 1st and 2nd Interested Parties was therefore illegal and unlawful and could not transfer any legal interests to the allottees in the disputed suit

property.

Lastly, under Article 40 (6) of the Kenya Constitution 2010 property that is found to have been unlawfully acquired cannot be protected under the law. As we have found that the disputed property was unlawfully allocated, it is our holding that the title the 2nd Interested Party holds to the disputed property having been unlawfully and illegally acquired, is liable to be revoked and/or cancelled.

6. Whether the Applicant is entitled to the relief sought.

The 1st and 2nd Respondents on the issue of the reliefs sought submitted that an order of prohibition cannot issue as it is neither a means of reviewing the errors that have already occurred nor inquiring into the past irregularities, but only looks into the future to contain or stop an anticipated event. Therefore, that the remedy is unavailable for a decision that has already been made.

The 3rd Respondent on the other hand urged that the orders of certiorari and mandamus sought by the Applicant cannot be issued against it, since it was not involved in making the decision to allocate the suit plot to the Interested Party and also cannot be compelled to cancel the letter of allotment, or certificate of lease. Further, that the orders should be directed to the 1st Respondent. In support of the application, counsel relied on the cases of **R v Kenya National Examination Council Ex-parte Geoffrey Githinji, Civil Appeal No. 266 of 1996** where the Court held that an order of certiorari will only issue if the decision made is made without or in excess of jurisdiction or where the rules of natural justice are not complied with and in **Welamondi v Chairman Electoral Commission of Kenya, H.C Misc. Suit 81 of 2002,** where the Court stated that mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the Applicant. In summation, counsel submitted that the 3rd Respondent was wrongly joined to the suit as it was not involved in the allocation of the suit plot.

The Applicant in response submitted that there was a misapprehension of the relief sought by the Applicant, and that the order of prohibition sought was to prohibit the Respondents from dealing with the disputed property including the processing and issue of title to the same, and not from allocating the same. Further, that at the time of filing its application, it was only the 1st Interested Party who was known to have a letter of allotment, and therefore the decision in **R v Kenya National Examination Council Ex-parte Geoffrey Githinji,(supra)** is inapplicable.

Our view on the issue of relief sought is that as this Court has found that the disputed property was a public road and its alienation and allocation to the 1st and 2nd Interested Parties was unlawful and illegal, the reliefs sought as against the 1st and 2nd Respondents are merited so as to restore and maintain the disputed property to its previous state as a public road. We however agree with the 3rd Respondent that no evidence was brought of its participation in the irregular and unlawful alienation and allocation of the disputed property, and no order can therefore lie against it.

We accordingly order as follows:

> **1. That an order of certiorari is hereby issued to remove and bring into the High Court the decision by the 1st and 2nd Respondent to allocate all that parcel of land known as LR. No. 209/14159 to the 1st and 2nd Interested Parties, which decision is hereby quashed.**
>
> **2. That an order of mandamus is hereby issued compelling the 1st and 2nd Respondents to cancel the allocation of all that parcel of land known as L.R No. 209/14159 to the 1st Interested Party or any other person.**
>
> **3. That an order of mandamus is hereby issued compelling the Respondents to cancel the letter of allotment, grant, and any certificate of lease or other title documents issued to the 2nd Interested Party or any other person in respect of all that parcel of land known as L.R No.**

209/14159.

4. That an order of prohibition is hereby issued restraining the 1st and 2nd Respondents by themselves, their employees, servants and/or agents or any person or persons claiming through or under them from allocating, transferring, selling, disposing of or in any other way howsoever dealing with all that parcel of land known as LR. No. 209/14159 for any other purpose other than that of a public road.

5. As the application herein concerned a matter of public interest, each party shall bear their own cost..

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF AUGUST 2014

P. NYAMWEYA

JUDGE

R. OUGO

JUDGE

J. MUTUNGI

JUDGE

DELIVERED AT NAIROBI THIS__4th___DAY OF AUGUST 2014