



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 10 OF 2013

IN THE MATTER OF AN APPLICATION BY JOHN NGUGI GATHUMBI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE PRINCIPAL REGISTRAR OF GOVERNMENT LANDS

AND

IN THE MATTER OF GOVERNMENT LANDS ACT, CHAPTER 280 OF THE LAWS OF KENYA

AND

IN THE MATTER OF LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL REGISTRAR

OF GOVERNMENT LANDS.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JOHN NGUGI GATHUMBI.....EX PARTE APPLICANT

ABDUL WAHEED SHEIKH & ABDL HAMEED SHEIKH.....INTERESTED PARTIES/APPLICANTS

RULING

1. By a Notice of Motion dated 23rd September, 2014, **Abdul Waheed Sheikh & Abdl Hameed Sheikh**, the interested parties herein seek that the orders made by this Honourable Court on 7th

- February, 2014 and any other consequential orders pursuant thereto be discharged, vacated, varied and set aside unconditionally forthwith and that the ex parte applicant's Notice of Motion dated with February 2013 and the proceedings herein and orders made on 7th February 2014 be struck out on the grounds of abuse of the process of the Court. They also seek orders for provision for the costs of the application.
2. The said application is supported by an affidavit sworn by **Abdul Waheed Sheikh** on 23rd September, 2014.
 3. According to him, his brother **Abdul Hameed Sheikh** and himself are the registered owners as Lessees for a term of 99 years with effect from 1st July, 2003 by virtue of Grant No. I R 99095 issued, 27th day of September 2005 registered under the **Registration of Titles Act**, Cap. 281 which they hold as Registered Trustees of **Sheikh Fazal Ilahi Noordin Charitable Trust** under the **Trustee Act** Cap 167 of Laws of Kenya and the **Trustees Rules** and the **Charitable Trusts Act** 1869 of England which Act applies to Charitable Trusts in Kenya. By Para 4 of the Vesting Order issued in High Court of Kenya Civil Suit No.699 of 1976 the Court Declared that the Trusts of the Settlement being a Charitable Trust be exercised and Administered by a simple majority of the Trustees thereby requiring a minimum of two Trustees to do so.
 4. He deposed that the Notice of Motion Application dated 5th, February 2013 filed by the Ex-Parte applicant herein is founded on a suit that is a fraud upon the Court and a gross abuse of the process of the Court by the Ex-parte Applicant who has with forged documents and concealment of true facts purported to make a claim by way of ownership and possession of the Suit property against the lawfully registered owners thereof as Trustees in succession and in continuous, un-interrupted possession of the property since July, 1946 up to today.
 5. According to the deponent, the suit property L. R. No. 209/73/6, Nairobi was acquired by the Settlor their late father, **Sheikh Fazal Ilahi** son of **Sheikh Noordin** and their late brother **Sheikh Abdul Rashid** as **Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust** (The Trust) by the Indenture dated 4th July, 1946 for the then unexpired residue of a term of 99 years Lease from the 16th day of July, 1903 expiring on 15th day of July, 2001. In his evidence, the Trust has been the registered proprietor of the leasehold interest in the suit property together with other adjoining properties which have been held by and in the name of the successive registered Trustees of the Trust for an uninterrupted period of 68 years since 1946 notwithstanding changes in the identity of the successive Trustees.
 6. He deposed that himself and his now deceased brother **Abdul Raof Sheikh** were appointed Trustees of the Trust in addition to **Abdul Ghafur Sheikh** (continuing Trustee) and in substitution for the retiring Trustee **Sheikh Mohamed Bashir** in April 1976 under and by virtue of a Vesting Order issued on the 6th day of 1976 by the High Court of Kenya in Civil Suit 699 of 1976 and that by the Deed of Appointment dated 9th January 1985 his brother **Abdul Hameed Sheikh** (the 2nd named Applicant as Intended Interested Party) was appointed as Trustee of the Trust in addition to **Abdul Ghafur Sheikh** and himself (**Abdul Waheed Sheikh**, the continuing Trustees) and in substitution for the retiring Trustee **Abdul Majied Sheikh**.
 7. He averred that approaching expiration of the Lease period aforesaid the Trustees of the Trust diligently made a timely application for extension of Lease to the Commissioner of Lands for a new term of 99 years which application after due processing was approved by the letter dated 19th October, 1998 addressed to the Trust by the Commissioner of Lands and that he acknowledged their acceptance of the extension of Lease on behalf of the Trust by letter dated 20th November 1998 formally submitting by way of surrender the documents of Title *inter alia* of the Suit property to facilitate the issuance of a fresh Grant incorporating the extended term. Pursuant to the approval and acceptance aforesaid the Commissioner of Lands issued a Letter of Allotment dated 23rd June 2004 by way of renewal of Lease and on acceptance and due compliance of the terms of the above Letter of Allotment the Commissioner of Lands issued the Grant No. I R 99095 on the 27th day of September, 2005 which was duly presented for registration at the Central Registry Department of Lands at Nairobi on 30th September 2005 and the same was registered under the **Registration of Titles Act**, Cap. 281 as No. I R99095/1 in accordance with the terms of the Letter of Allotment.
 8. It was contended that with the enactment of the **Land Act** No. 6 of 2012, Government Lands

Register (G.L.A) is now defunct and the renewed title for the extended term is registered in R.T.A. Register deemed as the Register for **Land Registration Act** 2012. It was reiterated that the Orders dated 7th February 2014 have been obtained by deceit and fraud. To him, the *Ex-parte* Applicant fraudulently purported to make a claim by way of ownership and possession against the lawfully registered owners in succession who have been in continuous and uninterrupted possession of the subject property since July 1946 up-to today. Further, the *Ex-parte* Applicant did not a full, frank and candid disclosure to this Honourable Court of all material facts, has contrived to conceal the true position and has conjured and fabricated fictitious “material facts “ and has blatantly lied to the Court. This was explained by the fact that the *ex parte* Applicant in reliance on the alleged demise of **Abdul Raof Sheikh** on 22nd August 1997:

- a. allegedly applied for Grant of Letters of Administration intestate on the same day as the alleged date of death
 - b. and obtained as well, the Certificate of Confirmation of the Grant on 25th August 1997, only 3 days after his stated date of the deceased’s demise.
 - c. allegedly obtained all these documents without any Statutory Gazette Notice having been published.
7. According to the deponent, even a cursory examination of the alleged Letters of Administration intestate of the Estate of **Abdul Raof Sheikh** in favour of the *Ex-parte* Applicant show that the same are untenable and self evident forgery in that the date of demise of the deceased is stated to be 22nd August 1997 in the alleged Certificate of Confirmation of Grant in the cited Succession Cause H.C.C.C . No. 1089 of 1997 whilst the requisite true copy of the Certificate of Death attached thereto shows the correct date of demise as being 22nd March 1988. It was therefore averred that the Application herein by Notice of Motion dated 5th February 2013 filed by the *Ex-Parte* applicant is an abuse of Court Process as it has wholly relied on lies, forged documents and alleged Court Orders allegedly made in nonexistent Court proceedings, which never took place. To the deponent, the circumstances under which the *Ex-parte* Applicant obtained Court Orders in the Suit herein fraudulently and clandestinely has given rise to imminent and impending gross miscarriage of justice in depriving the true lawful owners of the suit property and are grossly unjust unfair and intended to steal a march against the true registered owners of the subject property fraudulently and illegally. Further, the fraudulently obtained Court Orders in the Suit herein by *Ex-parte* Applicant are in gross violation of the Intended Parties’ extant and continuing ownership, occupation, use possession and quiet enjoyment of their property and their right to ownership. It was therefore asserted that the *Ex-parte* Applicant by his Notice of Motion dated 5th February 2013 and his affidavits respectively sworn on 16th January 2013 and 5th February 2013 has practiced a fraud upon this Honourable Court.
8. To the deponent, the *Ex-parte* Applicant filed the said false affidavits, false documents and fabricated evidence intending this Honourable Court to rely on the same to grant the Orders prayed for and this Honourable Court was led to making the Orders dated 7th February 2014 in reliance explicitly on the false statutory statements and fabricated evidence sworn to by the *Ex-parte* Applicant.
9. It was deposed that the purported Decree in H.C.C.C. No. 3812 of 2000 exhibited by the *Ex-parte* Applicant by which he was allegedly declared to be the rightful owner of the suit property namely L.R. No. 209/73/6 is a forgery as is the alleged Vesting Order pursuant thereto, the originals whereof have never been produced to the Court by the *Ex-parte* Applicant in any quarters or the suit herein. To him, a copy of the consequential Vesting Order dated 25th June 2001 is similarly a forgery. Further, the *Ex-parte* Applicant herein made false representations to the Court so as to conceal from the Court that he had claimed to have been the sole beneficial owner of the suit property by virtue of the letter allegedly written to him by **Abdul Raof Sheikh** and allegedly “transferring” the said property L.R.209/73/6 to him the *Ex-parte* Applicant (which it does not) full well knowing that the said property was registered in the names of the 3 Trustees named by him (**Abdul Ghafur Sheikh, Abdul Waheed Sheikh & Abdul Majied Sheikh** (the Trustees) of the Trust.
10. According to the deponent, the *Ex-parte* Applicant herein has now purported to conceal in the Suit

herein that he had maintained having obtained a **Grant in Succession Cause H.C.C. C. No. 1089 of 1997** on foot of **Raof's** alleged letter aforesaid and has deliberately misled the Court by concealing and calculatedly omitting to make the Court aware of his having obtained the purported Grant of Letters of Administration by neither mentioning the circumstance nor producing and exhibiting the purported Grant of Letters of Administration allegedly issued to him in the Estate of **Abdul Raof Sheikh**.

11. It was further contended that the *Ex-parte* Applicant made further false representations to the Court that he filed Suit H.C.C.No. 3812 of 2000 against the Trustees aforesaid and allegedly obtained a Vesting Order aforesaid in respect of L.R.209/73/6 the property of the Trust thereby clandestinely shifting the basis of his alleged entitlement to ownership of the suit property by operation of the alleged Vesting Order purporting to transfer the property, belonging not to **Abdul Raof Sheikh** the alleged author of the letter, but (for no reason or consideration) that owned by and registered in the names of the 1st & the 2nd named Intended Interested Party Applicants herein as the Trustees of the aforesaid **Sheikh Fazal Ilahi Noordin** Charitable Trust.
12. According to the deponent, they were notified by a copy of a letter dated 10th September 2003 written by **Mr. Richard Okore** OC/E.C.C.U CID Headquarters Nairobi addressed to the Commissioner of Lands Vesting Orders through Civil Suit 3812 of 2000, and an assignment dated 28th day of June did not originate from Court and were pure forgeries. Pursuant thereto the *ex-parte* Applicant was charged and convicted in Criminal Case No. 275 of 2005 and his conviction was subsequently quashed in the High Court Criminal Appeal 311 of 2009. However to the deponent, a decision in a Criminal Case does not determine ownership and/or Title and that the Onus of proving the claim to ownership squarely lies on the *Ex-parte* Applicant.
13. The deponent reiterated that the Applicant failed to candidly and honestly inform the Court that High Court Civil Case No. 3812 of 2000 does not in fact exist and lied and made further false representations to the Court that he allegedly obtained a Vesting Order in respect of L.R.209/73/6 the property of the Trust in the non-existent Suit 3812 of 2000 against the Trustees aforesaid and has led the Court to believe that he did in fact file the High Court Civil Case No. 3812 of 2000 against the 3 Trustees named therein. Further, the *ex-parte* Applicant has impliedly also led the Court to believe that there exists a wholesome set of Pleadings in the alleged High Court Civil Case No. 3812 of 2000 and that service of Process was effected on the 3 Trustees named as Defendants by the *Ex-parte* Applicant and that proof thereof or affidavit of Service was filed but calculatedly glossed over all the foregoing circumstances by way of successful concealment and misleading of the Court by not producing and not exhibiting the alleged Vesting Order in respect of the suit property L.R.209/73/6 nor copies of the pleadings or proof of service of process.
14. It was deposed that the *ex-parte* Applicant lied to the Court in his sworn Affidavits aforesaid leading the Court to believe that he had obtained Judgment and ensuing Vesting Orders in H.C.C. No. 3812 of 2000 as being authentic full well knowing that there was no such case other than as an instrument of his fraudulent scheme to defraud the true owners of the property and did not candidly and honestly inform the Court what is the connection or linkage between **Raof's** letter and the High Court Civil Case No. 3812 of 2000 and the ensuing Decree.
15. It was averred that the *Ex-Parte* Applicant did not honestly and candidly produce to the Court evidence of application for extension of lease in support of the alleged extension of lease of the suit property nor produce the requisite Letter of Allotment by way of Extension of Lease which is issued only after rigorous administrative procedures. Instead he produced calculatedly omitting the vital page 2 thereof which page would show the dates of issuance and presentation and also the signature of the Commissioner of Lands and attestation thereof thereby denying the Court the opportunity of scrutinizing the same as to authenticity.
16. The interested parties' position was therefore that the *ex-parte* Applicant practiced an abuse of due Process and the Court should unconditionally set aside and vacate the Orders made believing him to have truthfully made out his case and added that the *ex parte* applicant tried to forcibly gain possession of the Suit Property before any registration of his Title by bringing police officers from Parklands Police Station to the Property on 19th September 2004.
17. On behalf of the interested parties it was submitted while reiterating the contents of the supporting affidavits that the orders of 7th February, 2014 were obtained through fraud and in gross violation of their existing and prevailing right to ownership, continuous occupation use and quiet possession of their property since 1946. According to them the suit property has never at any time been

- owned by the their deceased brother **Abdul Raof Sheikh** as an individual.
18. Based on **The King vs. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington ex parte De Polignac [1917] 1 KB 486** it was submitted that once the Court is satisfied that the applicant suppressed or misrepresented the facts material to the application, there is a power in the Court to discharge the order and refuse to proceed with the examination on merits and that the rule applies to an application for a writ of prohibition. The interested parties also relied on **Tiwi Beach Hotel Ltd vs. Juliane Ulrike Stamm [1990] 2 KAR pages 37-52** and **Osiebo Trading Co. Ltd vs. Pickwell Properties Ltd HCCC No. 4611 of 1989.**
 19. On the authority of **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] e KLR,** it was submitted that even where it is not expressly conferred, the Court has residual jurisdiction to reopen a decided matter in cases of fraud bias, or other injustice with a view to correct the same. According to the interested parties had the applicant been candidly truthful, this Court would not have granted the order sought to be vacated hence this Court ought to strike out the proceedings on the ground of concealment of, deceit, gross fraud and abuse of the process of Court.
 20. In highlighting the submissions **Mr. Pheroze Nowrojee**, Senior Counsel submitted that the letter relied upon the applicant was not capable of being a conveyance or an assignment of beneficial interest. It was further submitted that though aware of the interested parties' interest in the suit land, the applicant neither joined nor served the interested parties with these proceedings.

Ex Parte Applicant's Case

9. In opposition to the application the ex parte applicant filed a Notice of Preliminary Objection in which the following issues were raised:
 1. **That the application is fatally defective, bad in law and in facts an abuse of the court process and lacks merit.**
 2. **That the matter in issue is res-judicata thus the same is in contravention of Section 7 of the Civil Procedure Act and that the application ought to be struck out with costs to the Ex-parte Applicant.**
10. The ex parte applicant also filed a replying affidavit sworn on 14th October 2014.
11. According to the said affidavit, contrary to the unsubstantiated allegations by the intended interested parties herein, since he was the registered and legal owner of Land Reference Number 209/73/6 situated at Chiromo Road within Nairobi County, if the orders as sought by the intended interested parties herein were allowed it would greatly infringe upon his rights as an innocent Kenya citizen who has suffered oppression by some officers of the Ministry of Lands in corroboration with the intended interested parties herein to dispossess him of his said property.
12. He deposed that the history of his ownership dates back in the years 1980s when he was working for one **Mr. Abdul Raof Sheikh** now deceased. On the 21st day of January 1981 while in the said employment as a *shamba* boy he got involved in a traffic road accident along Juja road and had since been confined to a wheel chair as he was paraplegic. On the 25th January 1982 vide a letter dated the same date the said **Mr. Abdul Raof Sheikh** in compensation of his incapacitation and out of sheer goodwill, given his many dedicated years of service gave/transferred to him one of his Land Parcels Number 209/73/6 situated at Chiromo road in Nairobi County, which letter the trial court in criminal case no. 295 of 2005 was held to be admissible by the trial court thus making it an authentic document.
13. He averred that on the 3rd August 2008 this Honourable court declared in HCCC Civil Suit No. 3812 of 2000 between Himself and **Abdul Waheed Sheikh** & 3 others that he was the rightful owner of Land Parcel Number 209/73/6 which decree to date remains unchallenged. The said entry, he added was entered in the register and has always remained so.
14. Upon expiry of his lease on or about March 2002 he applied for extension of lease and the same was granted and it was at this point that it was alleged that he had uttered a false document before a Land Registrar by the name **Mr. Thuta** who despite recording his statement was never called to

- testify because he knew the honest truth that land Reference Number 209/73/6 belonged to him. According to him, he always had possession of the suit property to date and that the land rent demand notice which he settled always reflected him as the legal and registered owner.
15. According to the applicant, he later learnt that this gesture of good faith by the deceased did not augur well with some of his relatives and some members of the Asian community and in an attempt to dispossess him of his property one **Abdul Waheed Sheikh, Abdul Waheem Sheikh** and some land officials caused him to be charged in a court of law in Criminal Case No. 275 of 2005 **R -vs- John Ngugi Gathambi** for allegations of forgery but this Honourable court in Criminal Appeal No. 311 of 2009 **John Ngugi Gathambi -vs- the Republic** quashed his conviction and set aside his sentence. On the 9th October 2008 during pending of the said Criminal trial some known Land Officers fraudulently/ and or without authority proceeded to cancel his said title and attempted to issue one to **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh**. However, the title to **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh** was not entered in the register clearly reflecting mischief as the said title to the two was only used in court during his criminal trial and all that was produced during the trial was only a photocopy and not the original, despite the honourable court demanding to see the original title. He therefore deposed that the current and last entry in the register shows that he was still the registered owner even though they took away his original title document and cancelled it physically.
 16. The ex parte applicant further added that even lady **Justice Khaminwa** in her judgement judge questioned the authenticity of the interested parties' title over the suit property which was issued on 30/9/2005 during the pendency of the criminal trial and for which no corresponding changes were made in the volume N19 and N20 at the lands registry. He therefore contended that the title deed of 30th September, 2005 held by the intended interested parties is creation of forgery on their part as no supporting documentation was been exhibited by themselves.
 17. Upon his release, he severally visited the 1st Respondent's offices to demand his rights to have them reissue him with his title in vain and a cross check by his counsel reflected that he was the registered owner and there is no entry of the title purportedly issued to **Abdul Waheed Sheikh** and **Abdul Hameed Sheikh**. According to him, there was a lot of mischief behind the cancellation of his title document as the same deed plan number 246422 which was alleged that he had forged was re-issued to **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh**.
 18. He therefore asserted that the said purported unilateral cancellation was on the face of law, irregular, illegal and without merit since the said **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh** on being asked in court whether they had any evidence to prove ownership before the 30th day of June 2005 they said they did not have a proof that the interested parties' claim that they are the registered owners since 4th July, 1946 up to today is a blatant lie and any attempts by themselves to produce any document dating back then is clear indication of mischief on their part.
 19. To the ex parte applicant, the interested parties herein are misleading this honourable court by alleging they have owned this parcel of land since 1946, yet vide their own letters dated the 20th April 2004 and 10th August 2004, addressed to the commissioner of lands asking him to allot the disputed parcel of land to themselves.
 20. On filing Criminal Appeal No.311 of 2009 **John Ngugi Gathambi vs Republic** the **Honourable Lady Justice Khaminwa** in her judgement found that there was no evidence linking him with uttering or forgery and the court ordered that his conviction and sentence be set aside he be set free unless otherwise lawfully held.
 21. To the ex parte applicant, the application before the court is made in bad faith as there is no reason adduced by the intended interested parties explaining as to why it took them 14 years down the line to query the authenticity and genuineness of the decree issued way back in 2000 which decree to date remains unchallenged. He therefore deduced that there are some members of the Asian community in cahoots with some ministry of lands officers who had plotted to dispossess him of his property as he was a vulnerable citizen with meagre resources to fight them.
 22. He reiterated that upon conclusion of the Criminal Appeal, which judgment vindicate his claim to the suit property and acquitted him of all charges of forgery that had been levelled against him by the interested parties herein with regard to the suit property, his advocates back then **P.K Mtange & Co. Advocates** notified the interested parties herein through their advocates Messrs **M.**

- Jeevanjee Advocates** of its conclusion and of intended action of commencing investigations on how the intended interested parties herein acquired this title they claim. Thus there is inordinate delay in bringing this application and the same should not be entertained.
23. The ex parte applicant's position was that the purported trustees have never owned any land and the entire suit property issue belonged to one **Abdul Raof Sheikh** who transferred the same to him but after his release he severally visited the 1st Respondent's offices to demand his right to have them re-issue him with his title in vain but was instead told to bring a court order ordering the 1st Respondent to re-issue him with the title. In his view, the Honourable Court having set aside and quashed the sentence is a clear indication of his innocence from all fraud allegations and the fact that the decree in HCCC Civil Suit No.3812 of 2000 between Himself and **Abdul Waheed Sheikh** & 3 others remains unchallenged, the dispute as to ownership is Res-judicata hence his title having been unlawfully cancelled ought to be reinstated. He contended that the interested parties' action of bringing its application is instigated by his action of reporting them to parklands police station on the 18th September 2014, when he met them in the suit property only for them to come and file this application on the 23rd September 2014 as counter reaction.
24. According to the applicant, if this Honourable Court does not compel them to re-issue him with his title deed they will not do it on their own volition because some of the land officers in cahoots with the aforementioned Asians have always eyed his said property as it stands in a suitable commercial position he has severally received threats from anonymous callers to surrender the said property or lose his life.
25. To the applicant, it is trite law that any party that brings a case in court must do so as a whole and a party should not be permitted to bring before a court his case in piecemeal, thus the current application is Res-judicata since the facts on which it is based and documents annexed thereto were known to the intended interested parties at the time when the same parties made criminal complaints against the Ex-parte Applicant, the same documents were relied on by the prosecution and the court made an informed decision in acquitting him of all the fraud charges levelled against him.
26. There was a supplementary affidavit sworn by the ex parte applicant on 31st October, 2014 in which he deposed that the interested parties' application is fatally defective, incompetent, misconceived, frivolous, vexatious and otherwise an abuse of the court process for interested parties having ignored the court's decree and did not file any appeal and just rushed to court to forestall the execution process and an attempt to frustrate the court's judgment having been aware of the said decree and all the court proceedings as early as from the year 1997. He therefore deposed that the interested parties are guilty of inordinate and unreasonable delay in bringing this kind of application before the court and are not honest and candid enough to this Honourable Court as they have been aware that all through the *ex parte* Applicant has trailed to court for many years in trying to acquire what legally is his, but chose not to appear before the court and defend themselves.
27. He averred that he did serve the intended interested parties herein with succession court papers sometimes in the year 1997 but they ignored the same and instead chose to put an advert in the daily nation edition of the Tuesday, November 25, 1997 which was a notice to the public caveat emptor and/or buyer beware instead of taking the requisite steps if at all they knew they were rightly entitled to the said parcel of land.
28. It was submitted on behalf of the applicants by **Mr Meme** while reiterating the contents of the replying affidavit that the interested parties were guilty of inordinate and unreasonable delay since all through they have been aware of the dispute as far as the suit parcel was concerned. It was submitted that since the deceased **Abdul Raof** was one of the registered owners of the suit parcel, the letter which gave the land to the applicant was authentic hence the issue of forgery cannot stand and is *res judicata* the same having been determined in the criminal case.
29. It was submitted that there is a presumption of the authenticity of certified documents hence the documents emanating from the court ought to be taken as valid. To the applicant the applicant having been acquitted in the criminal case, the interested parties ought not to be permitted to prosecute their case piecemeal more so as the decree has never been challenged and there ought to be an end to litigation.

Rejoinder by the interested parties

30. In his rejoinder **Mr Nowrojee** submitted that evidence in criminal case is not the same as evidence in a civil case even if arising from the same dispute and it has no probative effect in the instant case. He submitted that in a criminal case the standard of proof and the weight of the witnesses' evidence are different. He submitted that a criminal case does not establish the rights or status in relation to ownership which are determined by statutes.
31. On the applicability of the doctrine of *res judicata*, it was submitted that the same is defined under section 7 of the **Civil Procedure Act** and talks of a former suit and suit under the Act applies to civil proceedings hence section 7 does not apply at all. In any case the suit must be between the same parties yet the criminal case was not between the applicant and the interested parties herein but between the Republic and the applicant. Further under the said section 7 "court" is defined as court when exercising its civil jurisdiction. Apart from that the title of the Act applies to civil proceedings since it is civil courts which determine the status and disputes regarding them.

Determinations

32. The first issue for determination, based on the submissions filed on behalf of the parties is whether the doctrine of *res judicata* applies to these circumstances. Section 7 of the **Civil Procedure Act** provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

33. Consequently, it is a condition precedent that for the doctrine to be successfully invoked there must be a former "suit" and a "suit" is defined under section 2 of the same Act to mean :

"...all civil proceedings commenced in any manner prescribed."

34. It is therefore clear that a suit for the purposes of section 7 aforesaid does not include criminal proceedings.
35. The relevancy of criminal proceedings in a civil proceedings was dealt with by the Supreme Court of Uganda in **Masembe vs. Sugar Corporation and Another [2002] 2 EA 434**, where it was held:

"It is trite and rudimentary that proceedings in criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes for instance to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim."

36. The second issue is whether this Court has jurisdiction to review, set aside or vary its orders made after the hearing of a judicial review application. The question whether the Court can revisit its decision made on a judicial review was dealt with by the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** where the Court held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the **Civil Procedure Act** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the Civil Procedure Act is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

37. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
38. I therefore find that this Court has power to revisit its decision made on judicial review and whether such course is referred to as review, vacation of orders or setting aside in irrelevant in my view.
39. That brings me to the merits of the present application. The interested parties' case is that although they have interest in the suit property, they were never served nor joined to these proceedings. The ex parte applicant on the other hand seems to be of the view that as a result of inordinate delay on the part of the interested parties in taking the necessary steps to protect their interests, this Court ought not to exercise its discretion in their favour.
40. Order 53 rule 3(2) of the ***Civil Procedure Rules*** provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

41. It is therefore a mandatory requirement that the notice of the application ought to be served on all persons directly affected. In this case, it is contended that the interested parties are persons directly affected by the decision sought to be set aside since they were jointly registered as proprietors with their deceased brother who purportedly transferred or assigned the suit land to the applicant. A perusal of the record clearly shows that the interested parties were neither parties to the application which gave rise to the said orders nor were they served.
42. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the

interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio." [Emphasis mine].

43. It is therefore clear that it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him since under Article 19 of the Constitution the right to be heard is a fundamental human right that is not given by the State as human rights are generally universal and inalienable rights of human beings only given recognition by the Constitution.
44. Therefore the omission to afford the interested parties an opportunity of being heard by omitting them from the proceedings altogether was a breach of their fundamental rights as envisaged under Article 47 of the Constitution and that is a reason to set aside the proceedings herein.
45. Apart from that it is alleged that the decree and vesting order which formed the basis of the decision sought to be vacated did not exist as there were no proceedings in which such decree and order could have been given. The interested parties have exhibited letters from the then Registrar of the High Court now a Judge of this Court as well as the Deputy Registrar who purportedly signed the vesting order disputing the authenticity of the same.
46. The consequences of obtaining a judgement by fraud were considered in **Ramdev Malik vs. Lionel Albert Callow HCCA No. 2 of 1958 [1958] EA 99** where the Court expressed itself as follows:

"The court has jurisdiction to set aside a judgement obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing, but such a judgement will not be set aside upon mere proof that the judgement was obtained by perjury in which case his remedy lies in seeking a review of the judgement... The principle is that where a decree has been obtained by fraud practised upon the other side, by which he was prevented from presenting his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the court by which it was passed; but it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of the other party, which is of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the court and alleging in his plaint that the first decree was obtained by perjury of the person in whose favour it was given. To hold so would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that which relates to *res judicata* as well... it is clear that in a proper case the court has jurisdiction to set aside a decree which has been obtained by fraud practised on the court. If, for instance, the existence of certain evidence has been stoutly denied by one party, and the court has been induced to frame its decree on the basis that that evidence did not exist, then, if that evidence is afterwards discovered, and it is of such nature that if it had been before the first court, the probabilities are that the court would have arrived at a different conclusion, then, it may well be, when all the circumstances are looked at, that in that case the court would set aside the original decree... If, for instance a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud."

47. Having considered the allegations herein I am satisfied that the allegations of fraud are serious enough to justify the re-opening of these proceedings. Whereas at this stage I cannot hold with certainty that fraud was actually committed by the applicant I am satisfied that the order made herein ought to be set aside not only on the allegation of fraud but also on the breach of the rules of natural justice.
48. With respect to the issue of non-disclosure, the law is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. However, what is material and what is not must depend on the particular circumstances of the case. The

issue was deliberated upon at length in Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where the Court of Appeal stated:

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed... In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted

that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted”.

49.It is the interested parties’ case that had the applicant disclosed to this court all the material facts the court would not have granted the orders herein.

Order

50.Therefore whereas I am at this stage not satisfied that these proceedings ought to be struck out the order which commend itself to me and which I hereby grant is that the orders made by this Honourable Court on 7th February, 2014 and the consequential orders pursuant thereto are discharged, vacated, varied and set aside. The costs of the application shall however be in the cause.

Dated at Nairobi this 17th day of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Meme for the ex parte applicant

Mr Chege for the interested party/applicant

Miss Odhiambo for the Respondent

Cc Richard