REPUBLIC ....APPLICANT

VERSUS
THE CHIEF MAGISTRATE'S COURT,

NAIROBI (MILIMANI) COMMERCIAL COURT.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI (FORMERLY THE NAIROBI CITY COMMISSION).......................................2ND RESPONDENT

AND

EVANS IJESA MATUNDA............................INTERESTED PARTY

EX PARTE
MARY NJOKI KANANI..............................SUBJECT/APPLICANT

JUDGEMENT
INTRODUCTION

1.By a Notice of Motion dated 21st November 2011 filed in this Court on 29th November 2011, the *ex parte* applicant herein, **Mary Njoki Kanani**, seeks the following orders:

1 That costs An Order of Mandamus directed to the Town Clerk of the Nairobi City Council being the Chief Executive and Administrative Officer of the Nairobi City Council, compelling the said Town Clerk and all Officers of the Nairobi City Council to forthwith honour and respect the Lease executed between the Nairobi City Council and the Applicant and registered on 27th June, 2007 in which the Nairobi City Council leased to the Applicant all that piece of land measuring 0.0288 hectares comprised in Title No. NAIROBI/BLOCK 83/14/19 (FORMERLY PLOT NO. A.5 UMOJA INNECORE SECTOR II) for a term of 99 years from 1st April, 1978 and now comprised in the certificate of Lease issued to the Applicant by the Nairobi district Land Registry on the 27th June, 2007 under Title No. NAIROBI/BLOCK 83/14/19

2 An Order of Mandamus directed to the Town clerk of the Nairobi City Council being the Chief Executive and Administrative Officer of the Nairobi City Council, compelling the said Town Clerk, the director of Housing and Development Department of the City Council of Nairobi and all Officers of the Nairobi City Council to forthwith amend and/or rectify their records to indicate MARY NJOKI KANANI as the owner of the Plot formerly known as Plot No. A 5 UMOJA INNERCORE SECTOR II and now registered and comprised in the Title No. NAIROBI/BLOCK 83/14/19 and deleting the name of Evans Ijesa M. Or any other party recorded as the owner of the said plot.

3 An Order of Prohibition directed to the Town Clerk of the City Council of Nairobi being the Chief Executive and Administrative officer of the Nairobi City council, prohibiting the said Town Clerk, the Director of Housing Development Department of the City Council of Nairobi and all Officers of the City Council of Nairobi from executing another Lease in respect of the Plot formerly

known as A 5 UMOJA INNERCORE SECTOR II and now registered and comprised in Title No. NAIROBI/BLOCK 83/14/19 in favour of the Applicant and/or prohibiting the said Council from reallocating and/or re-issuing the said Plot to Evans Ijesa M. Or any other persons(s) or third party.

4 An Order of Certiorari to remove to the High court the entire proceedings and ruling or decision of the Subordinate Court, in the Nairobi Chief Magistrate's Court civil Case No. 1806 of 2011 (Evans Ijesa M. Versus Mary Njoki Kanani) for purposes of quashing the said proceedings, decision and ruling, which ruling condemned the Applicant unheard and barred the applicant from entering, developing or constructing her property formerly known as A 5 UMOJA INNERCORE SECTOR II and now registered and comprised in Title No. NAIROBI/BLOCK 83/14/19

5 An Order of Certiorari to remove to the High court for purposes of being quashed, the decision of the City council of Nairobi contained in a letter dated 2nd June, 2011 referenced HDD/4/11/212/011/JWN/mm addressed to the Chief Umoja Location alleging that Plot A5 UMOJA INNERCORE SECTOR II belongs to Mr. Evans Ijesa as well as the decision of the City Council of Nairobi contained in a beacon Certificate dated 25th May, 2011 issued to one, Evans Ijesa in respect of Plot Number A5 UMOJA INNERCORE SECTOR II now registered and comprised in title No. NAIROBI/BLOCK 83/14/19 and the decision contained in the Minutes of the City Council of Nairobi dated 2nd February, 2010 allocating Plot No. A 5 UMOJA INNERCORE SECTOR II to Evans Ijesa Matunda.

6 Costs be provided for

EX PARTE APPLICANT'S CASE

7 The application is based on the Amended Statutory Statement filed on 20th April 2012 and the affidavit verifying facts sworn by the applicant on 15th July 2011.

8 According to the deponent she is and has been a resident of the United States of America since July 1995 and that the last time she travelled to Kenya from the United States of America was in June 2006. According to her, she is aware of **Milimani Chief Magistrate's Court Civil Case No. 1806 of 2011** (the said case) filed by **Evans Ijesa M** (the interested party) against her whose subject matter just as in this application is Plot Number Umoja Innercore Sector II-A-5 now registered and comprised in Title Number Nairobi/Block 83/14/19 (hereinafter referred to as the suit property). On moving to the USA she left her mother **Mrs Olive Kanani** in charge of the said plot and supervision of the developments thereon. However, some time in the Month of May 2011, she received information from her said mother that an unknown person who did not immediately identify himself visited the suit property claiming that he was the owner and purported to develop it. Despite being informed that the suit property belonged to the applicant the said person who is the interested party herein moved to court in the said case and secured orders of injunction against the applicant. On perusing the documents filed in the said case, the applicant's advocates found an affidavit of service sworn by one **Festus N. Kalu** on 9th June 2011 filed on 10th June 2011 purporting that the applicant was served on 7th June 2011 with the court documents in the said case on 30th May 2011. The applicant, however, states that she does not know and has never met the said person hence the averments in the said affidavit are untrue and misleading as on the alleged date, she was in the USA. Apart from that the said affidavit was defective as the *jurat* was on a separate page contrary to the rules of practice and procedure. On the basis of the said untrue affidavit, it is deposed that the court proceeded to grant the *ex parte* orders against the applicant. In her view, the orders would not have been granted had the court been aware of the fact of her residential status. It is therefore contended that the orders of injunction were granted contrary to the rules of natural justice and the applicant was condemned unheard and for this reason ought to be quashed.

9 According to the applicant the orders were given on the strength of a letter of allotment yet she was a proprietor of a lease given by the City Council of Nairobi after she met all the conditions in the letter of

allotment issued to her in 2005 culminating into the registration on 27th June 2007 and issuance of a Certificate of Lease by the Nairobi Land Registry. According to the search conducted in the Department of Lands the applicant deposes that she is the registered proprietor of the lease and that there are no encumbrances.

10 The suit property, the applicant deposes, was purportedly repossessed and reallocated by the 2nd Respondent to the interested party vide a letter dated 26th November 2008 yet she was not warned and/or notified of the said action an action which the applicant contends is unfair, unjust and against public interest in light of the fact that she regularly and continuously pays her ground rent and rates. According to her, the Constitution of Kenya entitles her to acquire and own property of any description in any part of Kenya including the suit property and the 2nd Respondent has no lawful authority or legal justification to arbitrarily deprive him of the same or any interest therein. In her view, by so acting, the 2nd Respondent is not acting in good faith and no public purpose or public interest is served or is intended to be served.

11 It is therefore contended by the applicant that the said action by the 2nd Respondent is an administrative action which offends the provisions of Article 47 of the Constitution of Kenya in that the same is not expeditious, efficient, lawful, reasonable and procedurally fair since she is adversely affected by the decision of the 2nd Respondent and no written reasons for the action have been given to him. In her view, Article 40 of the Constitution protects her right to property and the Respondents cannot arbitrarily deprive her of the property or interest therein. The said action is, she contends, contrary to her legitimate expectation.

12 In the applicant's view, the certificate of lease issued to her takes precedence over any letter of allotment issued to the interested party and that it is unfair, unjust and contrary to public interest for the 2nd respondent to issue a letter of allotment in respect of a property that it has already allocated to the applicant and executed a 99-lease in favour of the applicant and for which it continues to demand and receive ground rents and rates. It is deposed that this Court has a duty to examine the process that the 2nd respondent used to reach the decision of reallocating the suit plot to another person as there was an illegality in the process and foul play involved.

13 At the time of the alleged repossession there was no resolution by the 2nd respondent to that effect as the same was passed a year later on 2nd February 2010. Unless the orders are granted, the applicant contends that she stands to lose the property together with developments she had commenced thereon.

2ND RESPONDENT'S CASE

14 The 2nd respondent opposed the application vide a replying affidavit sworn by **Jane Ndong'a**, its Director of Housing Development Department. According to her the application is without merit, misconceived, frivolous, vexatious and is made in bad faith. She deposes that **Mr Mohamed Ishar Khan** made an application to purchase the suit property Nairobi/Umoja Block 83/14/19 (previously known as Plot No. A 5 Sector II) vide application number 905 and pursuant thereto Umoja Council of Committee held a meeting on the 23rd June 1978 and accepted his application which acceptance was confirmed by a letter dated 3rd July 1978. Subsequent to balloting an offer letter was issued to the said **Mr Khan** containing the terms of the offer to be fulfilled by him. Although he fulfilled the first term of the letter of offer he failed to discharge the other part of the agreement and made a request that the property be transferred to his mother and sister, **Mrs Mariam Yasim Khan** and **Mrs Noor Begum Khan** respectively vide a letter dated 14th January 1980 which request was denied on the ground that he had not paid the requisite deposits and was given 14 days within which to comply and in default the property would be repossessed.

15 According to the deponent, where a person seeks prerogative orders, he must show that there resides in him a legal right to performance of a legal duty by the party to whom prerogative orders are being sought. Since the applicant does not have a legal right not being the proprietor of the suit property it is averred that the application stand. According to her, the letters of allotment purporting to grant ownership

to the applicant and the interested party do not emanate from Housing Development Department charged with the responsibility of dealings in land in Nairobi. In light of the fact that all the alleged documents issued to the applicant and the interested party are based on the allotments which are forgeries, the deponent avers that they cannot be said to be valid and reliable and that both the applicant and the interested party are victims of fraudulent actions and neither of them own the suit property hence the application cannot be sustained. Further it is the deponent's position that the application is hinged on a wrong provision of the law and hence the orders sought cannot be issued and the application should ne dismissed with costs.

1ST RESPONDENT'S CASE

16On behalf of the 1st respondent the following grounds of opposition were filed on 29th October 2012:

1. This Honourable Court lacks the jurisdiction to entertain these proceedings as the same are civil in nature involving ownership of land.

2. The applicant has not demonstrated any case against the respondents and particularly the 1st respondent herein and has no prima facie case to warrant the issuance of the judicial review remedies in her favour.

3. That the issues raised herein do not warrant issuance of judicial review orders as the same can be canvassed before the court that heard and determined the matter.

4. Judicial review remedies are public in nature and cannot be issued to enforce private law rights.

5. Judicial review is only concerned with the decision-making process and procedure but not on the merits of the decision.

6. The application is defective and an abuse of the court process as the applicant has failed to pursue the available remedies hence the Respondents prayer for the same to be dismissed.

APPLICANT'S FURTHER AFFIDAVIT

17 By a further affidavit sworn by the applicant on 19th September 2012, the applicant deposes that the suit property was given to her by her aunt **Mary Njoki** as a gift and that she could not remember signing any transfer documents since it was an informal arrangement. The letter of allotment was however issued to her said aunt on 22nd October 1992 when she was still a minor. However after she was given the plot on attaining the age of majority she carried out all the processes culminating into her being issued with the Title. Following the challenge on the process of her acquisition of the suit property, she requested the said aunt who swore affidavit confirming the process through which the applicant acquired the suit property. According to her belief the applicant contends that the suit property must have been allocated to her aunt after the same was repossessed from Mr Khan. She reiterated that the 2nd respondent having accepted rates and rents, she has a legitimate expectation that her constitutional right to protection of property will not be thwarted or violated.

APPLICANT'S SUBMISSIONS

18 The application was prosecuted by way of written submissions. It is, however, regrettable that the *ex parte* applicant decided, quite unprocedurally, to annex certain documents to the submissions. Whether or not the same documents had been annexed to the affidavits in support of her case, it was not in order for documents upon which she intends to rely to be annexed to the submissions. Submissions is a form of address only that it is a written address rather than oral and ought not to be converted into an avenue for production of evidence. A party who in his submissions decides to introduce documents is in effect seeking to deprive the other party of the opportunity to deal with the new documents and that cannot be condoned.

19 To make matters worse, the applicant urges the Court to take judicial notice of the fact that under Kikuyu Custom that relatives such as an aunt and a niece share names. The court is not aware that such fact has acquired such notoriety that the court ought to take judicial notice of the same.

20 It is submitted that since the issue herein is not merely one of double allocation, the issue of the applicant pursuing her remedy in the civil court does not arise. In this case, the applicant having been issued with a good title her title takes precedence over all other alleged equitable rights to the title and in support of this submission reliance is placed on **Dr Joseph N K Arap Ngok vs. Justice Moijo Ole Keiwua and 4 Others Civil Application No. Nai. 60 of 1997**.

21 In any case, it is submitted based on **Bahajj Holdings Ltd vs. Abdo Mohamed Bahajj and Company Limited and Another Civil Application No. Nai 97 of 1998**, that the existence of an alternative remedy such as the avenue of appeal is no bar to an application for judicial review. Further reliance is placed on **David Mugo T/A Manyatta Auctioneers vs. Republic Civil Appeal No. 265 of 1997** and **Commissioner of Lands and Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996**. The rationale of this according to the applicant is to be found in **Republic vs. Milimani Commercial Court & Others *ex parte* AIG Insurance Company Ltd [2010] KLR** and **O'reilly vs. Mackman [1982] 3 All ER** and this is because of the nature of judicial review remedies which deal not with the merits of the case but the fairness of the process by which a decision was reached with a view to bringing out faster but more effective results.

22 It is submitted that the issuance of a letter of allotment is an administrative decision by the 2nd respondent, a public body, and the decision of the said respondent adversely affects the rights of the *ex parte* applicant hence the decision is amenable to judicial review. According to the applicant the controlling jurisdiction of this Court is being invoked on the grounds that the 2nd respondent has a duty to act fairly and in the circumstances of this case, it has departed from the rules of natural justice and acted in excess of its legal authority hence on the face of it, this application demonstrates the existence of illegality, irrationality and impropriety of procedure on the part of the public body and that alone is sufficient to invoke the judicial review jurisdiction of the court.

23 Based on **Peter Oketch Kadamas & Another vs. Municipality of Kisumu [1982-88] 1 KAR** it is submitted that where there is a clear infringement on the public right or rights of a citizen to fair treatment, an applicant is correct in seeking an order of prohibition to restrain the 2nd respondent and that where the applicant has reasons to believe that there is likelihood of an irregularity against rules of natural justice, she does not have to wait until the final decision is made. According to the applicant the lower court does not have the final word when it comes to matters of jurisdiction. According to the applicant the issues raised in this application revolve around excess of jurisdiction, public interest and public policy considerations, legitimate expectations, unfair administrative action, natural justice, ultra vires, abuse of power, unreasonableness and bias.

24 It is submitted that under section 27 and 28 of the repealed ***Registered Land Act*** (Cap 300), the applicant having acquired the suit plot in accordance with the law had acquired legally protected rights which were not liable to be defeated by any other person and/or interest because to do so would negate the public policy as envisaged by Parliament.

25 On the authority of **R vs. Kenya Revenue Authority *ex parte* Aberdare Freight Services Limited [2004] 2 KLR 530**, it is submitted that the applicant had legitimate expectation, which is founded on a basic principle of fairness that legitimate expectation ought not to be thwarted and that in judging a case, a Judge should achieve justice and weigh the relative strengths of expectation of the parties; having complied with the conditions and executed a lease between herself and the 2nd respondent the applicant had a indefeasible title to the property. In repossessing and reallocating the suit property it is submitted based on **Council of Civil Service Union vs. Minister for Civil Service [1985] AC 374**, the said action was contrary to Article 47 and in breach of Wednesbury unreasonableness principle.

26 While citing **Lord Wrenbury** in the case of **Roberts vs. Hopwood [1925] AC 578**, it is submitted that a person in whom is vested a discretion must exercise his discretion upon reasonable grounds and that

discretion does not empower a man to do what he thinks but what he ought to and that he must by use of his reason ascertain and follow the course which reason directs and must act reasonably.

27 Having not afforded the applicant a hearing it is submitted that the 1st respondent breached the rules of natural justice and cites **Republic vs. Kigara [1998] KLR 819** to the effect that rules of natural justice are inherent in all proceedings be they judicial or administrative unless there is an express provision barring the hearing of any interested party. It is submitted that the 2nd respondent acted unfairly, unjustly, discriminatory and with malice when it purported to repossess and reallocate the *ex parte* applicant's plot on account of arrears, a decision which was misguided as the *ex parte* applicant did not have any arrears yet they did not repossess and re-allocate the same plot when the interested party had arrears for over two years. Relying on **Prime Salt Works Ltd vs. Kenya Industrial Plastics Ltd quoted in Peterson Njue & Another vs. Maralal Senior Resident Magistrate [2010] eKLR** it is submitted that implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be a judge on his own cause and that no man shall be condemned unheard; that these two principles of natural justice must be observed by the courts save where their application is expressly excluded. Citing **R vs. Commission for Racial Equality *ex parte* Hillingdon London Borough Council [1982] AC 779 at 787** para E and F it is submitted that where an Act of Parliament confers upon an administrative body functions which involves making decisions which affect to their detriment the rights of other persons...there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision.

28 It is submitted that with respect to acting ultra vires, the 2nd respondent had no legal power or authority to repossess and reallocate the *ex parte* applicant's plot to any other person while she was the lawfully registered proprietor of the leasehold interest in the suit plot.

29 According to the applicant, ultra vires doctrine is not confined to cases of plain excess of power but also governs abuse of power and that an improper motive or a flawed step in procedure makes an administrative act just as illegal as does a flagrant excess of authority. In this case the act of receiving payments from the *ex parte* applicant while embarking on double allocation of the suit property is an abuse of power.

30It is submitted that since a decision to reallocate the suit property to the interested party has been made prohibition is not the right remedy. It is submitted that the questions involved in this suit are purely questions of law and the relevant facts are straightforward as not to require proof by oral evidence thus judicial review orders are an appropriate remedy in the instant matter because the *ex parte* applicant is questioning the exercise of a public power by public bodies and there being no alternative recourse that is beneficial, convenient or effectual to the *ex parte* applicant hence the orders sought ought to be granted.

1ST RESPONDENT'S SUBMISSIONS

31 On behalf it is submitted that from the facts adduced, the *ex parte* applicant has neither particularised the action of the 1st respondent which is in excess of jurisdiction and further in contravention of the laws of Kenya nor has she demonstrated any grounds indicating that the principles of natural justice, excessive and or abuse of power have been violated to warrant an order of certiorari against the 1st respondent. In addition the grounds upon which the application is premised are basically inclined to the contested facts whereby in this case it is the issue of double allocation of land by the 2nd respondent to two different parties and both parties happen to have letters of allocation with regard to the same parcel of land. It is submitted that the contested facts in this case are not amenable to judicial review application.

32 According to the 1st respondent, the instant application raises not the process of review by the 1st respondent or whether the *ex parte* applicant was accorded unfair treatment by the 1st respondent rather it in fact raises issues based on the merits of the decision of the 1st respondent in which only an appeal can issue. Having considered that the 1st respondent accorded fair treatment to the *ex parte* applicant as required by the law, took into consideration all evidence adduced, gave reasons for the decision made and

which decision was supported by law, it is submitted that the same cannot issue in judicial review application. In support of the submission the 1st applicant relies on **Kenya National Examinations Council vs. R Civil Appeal No. 266 of 1996** and **Republic vs. Furnished Houses Rent Tribunal *ex parte* Kendal Hotels Limited [1947] All ER 448**.

2ND RESPONDENT'S CASE

33 On the part of the 2nd respondent, it was submitted that since the applicant is not the allottee /registered owner of land Title No. NAIROBI/BLOCK 83/14/19 as per the 2nd respondent's record, she is not entitled to orders sought in the instant application. According to the 2nd respondent neither the applicant nor the interested party is the legal owner of the suit property and that the property belonged to **Mohamed Ishar Khan** and that this was the only allotment in respect of the suit property. Following the failure by Khan to fulfil his obligations under the letter of allotment, it is submitted that the 2nd respondent resolved that the suit property among others be repossessed. It is submitted that the suit property was never allocated to the applicant and that there are no records with the 2nd respondent reflecting the applicant as the registered owner of the suit property. It is submitted that there exists no valid and legally binding lease executed between the applicant and the 2nd respondent to warrant the payments by the applicants and that the 2nd respondent has not received any such payments.

34 It is therefore submitted that the applicant not being an allottee of the suit property does not deserve the orders sought. According to the 2nd respondent the applicant is not in occupation of and has not developed the suit property and that the documents exhibited by the applicant are forgeries. It is submitted that an attempt to allocate land which is not available for allocation has no legal effect and any title issued in such cases is void an initio.

35Relying on **Republic vs. Lina Jepkemboi Lagat & 5 Others [2010] eKLR** it is submitted that judicial review proceedings cannot be used to determine issues of ownership and that such disputes can only be handled by a civil court. Without prima facie evidence of ownership of the property, it is submitted that the applicant has no locus to bring the application. It is, however, submitted that should the court find that the 2nd respondent did allocate the suit land to the applicant in 1978 and repossessed the same in 2008, the orders sought will similarly not issue. Citing **Kimeo Stores Limited vs. Minister for Lands & 2 Others [2011] eKLR**, it is submitted that the scope of the orders of certiorari, mandamus and prohibition were clearly outlined by the Court of Appeal in **Kenya National Examinations Council vs. Republic *ex parte* Geoffrey Gathenji Njoroge & 9 Others Civil Appeal No. 266 of 1996**. In the 2nd respondent's view, the entire proceedings by the applicant are an abuse of the court process, are unmeritorious, null and void and should therefore be dismissed with costs

DETERMINATIONS

15. Having considered the foregoing this is the view I form of the matter.

16. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

17. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of

which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

18. Judicial review is, therefore, concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

19. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

20. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercisedand the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties or buyer for value without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D** **Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

21. In ***Ex parte*** **Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

22. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits......Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…….It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles."

23. Therefore even where the threshold for the grant of judicial review orders has been met, ***Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508***, states that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the

evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

24. If I understood the *ex parte* applicants' dispute correctly, her case against the 1st Respondent is that the first respondent granted *ex parte* orders without affording her an opportunity of being heard based on untrue affidavit of service. Whereas she has not mentioned the steps she took to regularise the proceedings in the lowers court, in the submissions filed herein it is contended that when she made an application for setting aside the said orders the court directed that she ought to appear for cross-examination. The general rule is that *ex parte* orders are provisional and a party affected by an *ex parte* order can apply to have it discharged. Whereas the existence of an alternative procedure does not necessarily bar the remedy of certiorari, the fact that a remedy exists which has not been resorted to is a factor which the Court takes into account in deciding whether or not to award the discretionary remedy of certiorari. Here the applicant could apply for setting aside the *ex parte* order and if declined, she would still have the right to appeal. It has not been alleged that the said options are less convenient, beneficial and effectual.

25. That the Magistrate's Court had the power to grant the orders sought both at the *ex parte* and interpartes stage is not in doubt. The mere fact that it made one decision and not the other, does not necessarily render the decision liable to be quashed on an application for judicial review. In reaching its determination the Respondent had jurisdiction to err and the mere fact that a Court errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. Whereas the decision may be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.......Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence,

or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

26. Accordingly whereas the Respondent may on appeal be held to have reached a wrong decision that is not the criteria to be met in an application for judicial review and accordingly I find that the applicant's challenge to the orders of the decision of the 1st respondent is unmerited.

27. With respect to the decision of the 2nd respondent, the *ex parte* applicant has exhibited a copy of a Certificate of Lease which shows that he was registered as the proprietor of a leasehold in respect of suit property. Whether the said registration was lawful or not, the effect of that registration was to be found in section 27(b) of the repealed ***Registered Land Act***, Cap 300 pursuant to which that registration was done. The said provision provides that:

the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The registration of a leasehold title therefore confers an interest in the subject parcel of land. Article 40 of the Constitution of Kenya protects the right to property and before that right can be abrogated Article 47(2) thereof provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

29. Article 40(3) of the Constitution provides:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

30. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

31. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. To do so Article 24(1) provides:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

32. It is therefore clear that under both the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard.

33. Whereas before the promulgation of the current Constitution, the law was that section 28 of the ***Registered Land Act*** donated an absolute and indefeasible title to the owner in the absence of fraud or misrepresentation to which the owner is proved to be a party, with the advent of the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution nolonger extend to any property that has been found to have been unlawfully acquired. The effect of this provision, according to my understanding is that any title to land is nolonger indefeasible and may be challenged if found to have been unlawfully acquired. In other words the Torrens System which has been with us for decades is now subject to Article 40 of the Constitution and we are nolonger bound to apply it line, hook and sinker. This in a nutshell is the respondents' and interested parties' case.

34. However, it is important to note that the said Article employs the use of the words ***"found to have been unlawfully acquired"***. Therefore there must be a finding that the property in question was unlawfully acquired. Under the repealed Registered Land Act, Cap 300, the power to cancel questionable titles was expressly reserved for the court under section 143 of the Act. The moment a Land Registrar has performed his duty by issuing a title deed he become *functus officio* and hence he cannot undo the same by cancelling and the remedy to such a person is to seek for redress in the civil process or other lawful means to cancel the title. If the Registrar had no such powers, the 2nd respondent similarly had no powers to cancel the title much less to purport to reallocate a land in which title had been issued under the Registered Land Act since such land was nolonger available for reallocation. In fact where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. See **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004**.

35. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister would then be based an irrelevant matter. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by**

Bukoba Gymkhana Club [1963] EA 478 at **479.**

36. To hold that a public authority is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. It must always be remembered that under Article 25 of the Constitution one of the rights and fundamental freedoms which cannot be limited is the right to a fair trial. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.

37. As was held in **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112:**

"The remedy of judicial review is concerned with the reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question.... Section 31 vests the power to make the decision and to impose conditions on Kenya Anti-Corruption Commission. The mandate of the Court is to ascertain if the implied duty to act fairly has not been discharged and if the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that KACC can make it again in accordance with the law. The Court cannot, however substitute its own decision and impose its own conditions, as this would be a usurpation by the Court of the power clearly vested in KACC. Similarly, KACC's decision an conditions can be attacked on being unreasonable or that irrelevant considerations taken into account or relevant considerations having been ignored."

38. On the issue of legitimate expectation, it was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** that:

"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation…..Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way……Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

39. I have no doubt at all in my mind that the decision by the 2nd respondent to reallocate the suit property was tainted with illegality irrationality and procedural impropriety.

However, the parameters of judicial review of an order of mandamus must always be kept in mind. The Court of Appeal held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** that:

"an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter."

40. Similarly, in **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707** it was held:

"A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary…The order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual."

41. Having considered the facts of this case as well as the relevant law, it is my view that the prayers number 1 and 4 in the said Notice of Motion cannot be granted.

42. It is however not lost to the Court that the 2nd respondent has itself disowned the interested party's claim to the suit property.

ORDER

43. Consequently, I find merit in the Notice of Motion dated 21st November 2011 and in the result:

1. An Order of Mandamus issued directed to the Town clerk of the Nairobi City Council being the Chief Executive and Administrative Officer of the Nairobi City Council, compelling the said Town Clerk, the director of Housing and Development Department of the City Council of Nairobi and all Officers of the Nairobi City Council to forthwith amend and/or rectify their records to indicate MARY NJOKI KANANI as the owner of the Plot formerly known as Plot No. A 5 UMOJA INNERCORE SECTOR II and now registered and comprised in the Title No. NAIROBI/BLOCK 83/14/19 and deleting the name of Evans Ijesa M. Or any other party recorded as the owner of the said plot without adhering to the due process.

2. An Order of Prohibition is hereby issued directed to the Town Clerk of the City Council of Nairobi being the Chief Executive and Administrative officer of the Nairobi City council, prohibiting the said Town Clerk, the Director of Housing Development Department of the City Council of Nairobi and all Officers of the City Council of Nairobi from executing another Lease in respect of the Plot formerly known as A 5 UMOJA INNERCORE SECTOR II and now registered and comprised in Title No. NAIROBI/BLOCK 83/14/19 in favour of the Applicant and/or prohibiting the said Council from reallocating and/or re-issuing the said Plot to Evans Ijesa M. Or any other persons(s) or third party without adhering to the due process of the law.

3. An Order of Certiorari to remove to the High court for purposes of being quashed, the decision of the City council of Nairobi contained in a letter dated 2nd June, 2011 referenced HDD/4/11/212/011/JWN/mm addressed to the Chief Umoja Location alleging that Plot A5 UMOJA INNERCORE SECTOR II belongs to Mr. Evans Ijesa as well as the decision of the City Council of Nairobi contained in a beacon Certificate dated 25th May, 2011 issued to one, Evans Ijesa in respect of Plot Number A5 UMOJA INNERCORE SECTOR II now registered and comprised in title No.

NAIROBI/BLOCK 83/14/19 and the decision contained in the Minutes of the City Council of Nairobi dated 2nd February, 2010 allocating Plot No. A 5 UMOJA INNERCORE SECTOR II to Evans Ijesa Matunda.

4. **The applicant will have the costs of this suit to be borne by the 2nd respondent.**

Dated at Nairobi this day 25th day of April 2013

G V ODUNGA
JUDGE
Delivered in the presence of: