REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION JR NO. 294 OF 2011

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CETIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA

BETWEEN

JITESH SHAH & HIGHLAND TEXTILES LIMITED ...APPLICANTS

AND

NAIROBI DISTRICT LANDS REGISTRAR .....RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 28th May 2012 filed the same day, the *ex parte* applicants herein, **Jitesh Shah & Highland Textiles Limited** seek the following orders:

1. **That the Honourable court does grant an order of certiorari to quash the Respondent's decision of registering restrictions in relation to title Numbers Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304 on the 28th of August, 2010.**
2. **That the Honourable Court does grant an order of mandamus to compel the Respondent to remove the restrictions registered on the 26th of August, 2010 in relation to parcels Numbers Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304.**
3. **That the Honourable court does grant an order of prohibition to prohibit the Respondent from restricting or in any manner or encumbering the titles registered as Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304 in the future as the said parcel comprise private not public land.**
4. **That the honourable court does order that the registration of the restrictions encumbering title number Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303 and Nairobi/Block 92/304**

be cancelled as their registration was a mistake.

5. **That the costs of this application be provided for.**

EX PARTE **APPLICANT'S CASE**

2. The application is based on the Statement filed on 22nd November 2011 and the affidavit sworn by **Jitesh Shah**, one of the applicant herein on 21st November 2011 and filed with the Chamber Summons seeking leave on 22nd November 2011.
3. According to the deponent, he is registered as proprietor in common alongside **Highland Textiles Limited** as the owners of all those parcels of land registered as Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, Nairobi/Block 92/304. According to him the applicants purchased the said properties on the 15th of July, 1995 from **J. K. Chepkony** and others and paid Kshs 5,100,000/=. That the vendors, according to the deponent, were selling this property in pursuance to letters of allotment dated 23rd June, 1995 referenced 4964/11/24 issued to them by the Commissioner of Lands. Shortly after the payment by the applicants of the parcels then designated as "A" "B" and "C" the Commissioner of Lands surveyed the plots and properly alienated the same in the applicants' favour in pursuance of previously issued letter of allotment. Upon the execution of the sale agreement of 15th July 1995 the vendors signed relevant transfer instruments and 99 year leases were issued by the Commissioner of Lands on the 9th August, 1995 for the parcels namely Nairobi/Block 92/293, Nairobi/Block 92/294 and Nairobi/Block 92/296. The said parcels were later properly amalgamated vide a consolidation and then a subsequently subdivision, where after the Nairobi district Land registrar issued certificates of lease on the 26th of March, 1998.
4. However, sometime in 2009 it came to the applicants' knowledge that the land the subject matter of these proceedings was also the concern of the Minister of Lands who instructed the Nairobi District Lands Registrar to "preserve" the plots by placing restrictions until such time as proper determination is made. Sometimes on the 28th of august, 2010 the respondent without cause or notice registered restrictions against all the six titles thereby effectively defeating the applicants' right to deal with the said land. Upon seeking legal advice from the applicants' advocates on record, the applicants were advised that the said registration of the said restrictions is irregular, illegal and arbitrary and that the said restrictions amount to a deprivation of the applicants' rights over the property and is inconsistent with the Constitution of Kenya and the provisions of the ***Registered Land Act*** Cap 300 (hereinafter referred to as the Act). It is deposed that the applicants only learnt of the said restrictions around September 2011 when they were informed by their bankers that they could not charge one of the parcels.
5. The applicants are therefore intent to seek the review of the Nairobi District Land Registrar's arbitrary decision in the High court and now seek that they be granted leave by way of enlargement of time in order to seek leave to file for orders to certiorari mandamus and prohibition. According to them they have not inordinately delayed in seeking the court's intervention as their advocates did actually write to the respondent and the Chief Lands Registrar but as is usual with government officers no response was received. It is their position that unless they are granted an order of enlargement of time to challenge the arbitrary actions of the Respondent their fundamental constitutional rights to property will be adversely affected and their right of ownership defeated.
6. The applicants further contend that they have consistently paid land rent and therefore do not comprehend the Respondents arbitrarily actions. The actions of the 1st Respondent, according to the applicants in restricting the titles were unprocedural, arbitrary and unlawful.
7. Although the Respondent was served, there was no response filed to the application despite the Court having extended an indulgence for the said purpose. Further, no submissions were made on behalf of the Respondent.

EX PARTE **APPLICANT'S SUBMISSIONS**

8. On behalf of the applicant, however, it was submitted that in restricting the applicants' titles, the respondent acted without cause, notice and failed to comply with the legal prerequisites

enumerated by the provisions of section 136 of the ***Registered Land Act***, Cap 300 which Act provides that a restriction encumbering any land or lease may be registered for the prevention of fraud or improper dealings or for any other sufficient cause. Before registration of any restrictions encumbering a title, it is submitted that the registrar is required to direct inquiries, upon service notice, and to hear such an interested and affected person, to whom notice of intention to restrict the title must be issued. It is submitted that the legal requirement is that is that the registered proprietor should be heard prior to the registration of the restriction. In the applicant's view the effect of the failure to serve notice, direct inquiries or hear a person registered as a proprietor can only be interpreted as an arbitrary exercise of power. Relying on section 154 of the Registered Land Act, it is submitted that in situations where as per the Act, a thing is to be or may be done after giving a person an opportunity of being heard that person shall be deemed to have been given such an opportunity (a) if he attends to the Registrar personally or by an advocate or other agent and is given such an opportunity; (b) if he intimates, personally or by an advocate or other agent that he does not wish to be heard or; (c) if he has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which he will if he attends before the Registrar be heard.

9. The applicant submits that the Respondent ignored the mandatory provisions of the ***Registered Land Act*** and acted arbitrarily and with impunity and that had he directed inquires as he was required to do under section 136(1), he would have discovered critical facts and obtained important information on how to exercise his powers of restricting titles as provided in section 136.
10. It is therefore submitted that the respondent's action resulted in an illegality and that the respondent acted unreasonably, in bad faith and *ultra vires* by failing to direct inquiries and/or hear the applicants prior to registration of the restrictions. It is also submitted that Article 47(2) of the Constitution requires written reasons of all administrative action touching on person's rights such as the right to own property as per Article 40 of the Constitution and a right to own property of any description. According to the applicant, the fact that the property in question was previously unalienated government land is immaterial as the said property was subsequently alienated by the Commissioner of Lands in exercise of his powers as provided by section 7 of the ***Government Lands Act***. It is contended that the Respondent's action breached both statutory and constitutional provisions such as section 28 of the ***Registered Land Act*** with respect to the rights of a proprietor of land since the land in question is not a public land as defined under Article 62 of the Constitution. To restrict the titles is therefore to deprive the applicants of their right to property therefore violating Article 40(3) of the Constitution in the guise that the land is 'public" yet the applicants have consistently paid land rent for the land as required by the law
11. The applicant's case is that there having been a failure to adhere to due process by the respondent, the three fundamental grounds for the grant by the court of judicial review orders of illegality, irrationality and procedural impropriety exist in that the Respondent failed to properly follow the procedure provided by the law hence the orders sought in the amended Notice of Motion. In support of their submissions, the applicants rely on **Council for Civil Service Union vs. Minister for State for Civil Service [1985] 374 GCHQ**.
12. It is submitted that the applicant's right to property and his right to be heard and the right to natural justice have been breached as well as their legitimate expectation to be heard and a mere fact that a restriction would have affected their right to the suit land is sufficient to have warranted the respondent to follow the provisions of section 136(1) of the Registered Land Act hence the respondent failed to act fairly. Citing **Knight vs. Indian Head School division 19 [1990] ISCR 653 SC Canada**; **Ridge vs. Baldwin [1963] UKHL 2 1964 AC 40 HL**; **R vs. Electricity Commissioners ex parte London Electricity Joint Committee Co. [1920] Ltd [1924] 1 KB 171 HC KB (England & Wales)**, it is submitted that where an administrative body is to make a decision on the rights of citizens, there is a duty to act fairly and judicially and that where administrative power affects rights or interests of citizens as in this particular case, acting fairly and judicially obligates the administrative body to follow a judicial type procedure in arriving at a decision as stipulated in sections 136 and 137 of the ***Registered Land Act*** which the Respondent ignored.

DETERMINATIONS

13. I have considered the application, the verifying affidavit and submissions made on behalf of the applicants. Since the Respondent did not challenge the factual allegations made by the applicants, the court finds that the ex parte applicants are the registered proprietors of the suit parcels of land based on the copies of the documents exhibited. From the copies of the certificate of official searches exhibited it is clear that on 26th August 2010, restriction was registered in respect of the suit properties. The present application was, however, filed on 22nd November 2011 which was more than a year after the registration of the said restrictions. Section 9(3) the ***Law Reform Act***, Cap 26 Laws of Kenya provides:

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

14. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**
15. In **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.
16. These proceedings were instituted out of time and as was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**:

    "Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or

certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

17. The applicants must have recognised this fact hence their earlier attempts to seek for enlargement of time to enable them seek leave to commence these proceedings. However, the said prayer was, as already stated hereinabove abandoned.
18. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy 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 or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way… These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully 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 without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

19. It is therefore clear that an order of mandamus cannot be sought in order to quash a decision. It cannot also be sought to compel the exercise of a discretion in a certain manner. Where a decision

has already been made, unless that decision is quashed mandamus would not be an efficacious remedy. In other words in those circumstances an order of mandamus cannot stand alone without an order of certiorari. It is also my view that a party ought not to seek an order of mandamus in such a manner as to achieve what ought to have been sought by way of certiorari since the period for seeking the latter is restricted by statute.

20. With respect to the prayer for prohibition, the said remedy can only prevent the making of a contemplated decision. Here the decision has already been taken and there is nothing left to be enforced. Accordingly, prohibition would not be efficacious in the circumstances.
21. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."

22. Whereas the applicants contend that the registration of the restriction was not brought within their attention, the court cannot simply ignore the provisions of section 9(3) of the Law Reform Act with respect to the time bar for making applications seeking to quash the impugned decisions.

15. In my view it is high time the provisions of Section 9 of the Law Reform Act were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to "read in" a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for extension of time.

23. The Court is however, of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17.**
24. In **Roodal vs. State of Trinidad and Tobago [2004] UKPC 78,** the majority in the Privy Council cited with approval the South African case of **State vs. Manamela [2000] (3) SA 1** in which it was held:

"Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential".

25. It is therefore my view and I hereby hold that the Court has no powers in the circumstances of this case to grant an order of certiorari to quash the Respondent's decision of registering restrictions in relation to title Numbers Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304 on the 28th of August, 2010. Without quashing the said decision the Court, based on the decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others** (supra) likewise cannot grant an order of mandamus to compel the Respondent to remove the restrictions registered on the 26th of August, 2010 in relation to parcels

Numbers Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304. On the same vein, the Court cannot grant an order of prohibition to prohibit the Respondent from restricting or in any manner or encumbering the titles registered as Nairobi/Block 92/299, Nairobi/Block 92/300, Nairobi/Block 92/301, Nairobi/Block 92/302, Nairobi/Block92/302, Nairobi/Block 92/303, and Nairobi/Block 92/304 in the future as the said parcel comprise private not public land. Applying the same reasoning the prayer seeking cancellation of the restrictions cannot similarly be granted as to do so would amount to quashing the decision of the Respondent through the back door.

ORDER

26. In the result, the Notice of Motion dated 28th May 2012 fails and the same is dismissed but with no order as to costs.

Dated at Nairobi this 12th day of June 2013

G V ODUNGA

JUDGE

Delivered in the presence of Ms Koki Mbulu for the applicant