REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENOUS JUDICIAL CIVIL APPLICATION NO. 333 OF 2011

IN THE MATTEROF: APPLICATION BY AMOTA NYASAE NYANG'ERA FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGSINT THE PUBLIC SERVICE COMMISSION OF KENYA.

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP. 26, SECTIONS 8& 9 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF: SERVICE COMMISSION ACT, CAP 185, LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLES 2, 47, 165 AND 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: DECISION MADE BY THE PUBLIC SERVICE COMMISION OFKENYA RESCINDING THE PROMOTION OF THE APPLCIANT TO THE POSITION OF DIRECTO, PERFORMANCE AND EFFICIENCY AUDIT

BETWEEN

AMOTA NYASAE NYANG'ERA …….APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION OF KENYA…...1ST RESPONDENT

THE HON. ATTORNEY GENERAL…….....2ND RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF ROADS ……....3RD RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 1st March, 2012, the *ex parte* applicant herein, **Amota Nyasae Nyangera** seeks the following orders:

1. **That an order of CERTIORARI be granted to quash the decision of the 1st Respondent rescinding the promotion of the applicant to the position of Director, performance and Efficiency Audit (Job Group S)**
2. **That an order of PROHIBITION be granted prohibiting the Respondents by themselves, their servants, agents, any officers acting on their behalf and or direction from taking any steps to enforce the decision rescinding the applicant's promotion to the position of Director, performance and Efficiency Audit (Job Group S)**
3. **That an order of MANDAMUS be granted to compel the 1st Respondent to reverse its decision to rescind the applicant's promotion**
4. **That the process of enforcing rescission of the applicant's promotion set in motion by the 1st Respondent be and is hereby stayed.**
5. **That any process set in motion by the respondents by themselves, their agents, any officer acting on their behalf and or direction to interfere with, hinder and or obstruct the applicant's rights and privileges as Director, performance and Efficiency Audit including salaries. Allowances and benefits be and is hereby stayed.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement of Facts and a Verifying Affidavit filed on 21st December 2011 by the applicant. The said verifying affidavit is however only made up of 5 very economical paragraphs. However there was another affidavit sworn by the same applicant on 1st March 2012 which was entitled 'supporting affidavit".
3. According to the applicant, he joined the Civil Service on 30th April, 1993 as Senior Principal Lecturer at the Kenya Institute of Administration and is currently serving in the Ministry of Roads as a Deputy Director/Human Resource Development. On 7th March, 2007 he was promoted to the position of director Performance and Efficiency Audit vide the Public Service Commission's letter reference 300/163/1/1 dated 7th March, 2007 addressed to the Permanent Secretary, Public service Reform and Development Secretariat. Subsequently, the Permanent Secretary, Public Service Reform and Development Secretariat appointed him to the position of Director performance and Efficiency audit vide her letter reference OP/PS & DS/14/1/1/(74) dated 26th March, 2007. However, on 28th March, 2007 the Public Service Commission (hereinafter referred to as the Commission)rescinded the applicant's said promotion on the sole and singular ground that the applicant had 'pending disciplinary proceedings' to be instituted by his then authorized officer vide their letter reference. 300/163 dated 28th March, 2007. According to him, his said Authorized Officer, in response to the Commission's rescission letter reference 300/163 dated 28th March, 2007, wrote to the Commission vide his letter reference 75025627(10) dated 2nd May, 2007 absolving the applicant of any 'pending disciplinary proceedings' and further, urging the Commission to reconsider and reverse its decision. Pursuant to that letter, the Permanent Secretary, Public Service Reform & Development Secretariat wrote to the Commission requesting to be allowed to retain the applicant as Director, Performance and Efficiency Audit since he had no 'pending disciplinary proceedings' vide her letter reference OP/PSR &D/7/1/1 (42) dated 11th may, 2007. The Commission nevertheless, without any justifiable cause and or reason whatsoever, rejected both the applicant's authorized Officer's recommendation to reconsider and reverse its decision and the Permanent Secretary, Public Service Reform & Development Secretariat's request to retain him vide the commission's letter reference. 300/163 dated 6th June, 2007. On 20th May, 2008 the applicant lodged a complaint with the Public Complaints Standing Committee who,

in turn, wrote letter reference PCSC/HR/2008/006/NA dated 27th August, 2008 followed by a reminder reference PCSC/HR/2008/006/NA dated 17th July, 2008 to the commission stating that the Commission's action appeared to be to maladministration and injustice against the applicant to which the Commission's response vide its letter reference PSC.SEC.93/69 dated 14th August, 2008 was that it upheld its decision rescinding the applicant's appointment. Vide their letter reference PCSC/PSC/016/3/08/2 dated 8th August, 2008 the Public Complaints Standing Committee wrote to the Permanent Secretary, Ministry of state for public service seeking his intervention to resolve the matter to no avail. The Minister of Planning, National Development & vision 2030 did write to his counterpart in the Ministry of State for Public Service and the response is contained in letter reference MSPA 30/3A (43) dated 28th January, 2009 addressed to the Permanent Secretary, Planning, national Development & Vision 2030. According to the applicant, the chairman, Public Complaints Standing Committee did write to the Commission seeking an appointment to discuss the complaint but the Commission did not buy the idea.

4. It is the applicant's case that contrary to the rules of Natural justice he has to date, neither been summoned by the Commission nor afforded any opportunity whatsoever to give his side of the story prior to the Commission's unilateral decision rescinding his deserved promotion, thus condemning him unheard. Further, since the Commission's unilateral decision in the year 2007, no formal communication has been addressed to him to enable him appeal against the said decision, thus ignoring and or keeping him in the dark.
5. Following his recent posting to the Ministry of roads, the applicant wrote to the Public Service Commission through his current Permanent Secretary appealing against the decision to rescind his promotion vide his letter dated 9th September, 2011 and on 28th October, 2011 his current permanent Secretary wrote to him conveying the Commission's rejection of his appeal vide his letter reference 1975025627/9 dated 28th October, 2011.
6. In the applicant's view, the alleged pending 'disciplinary proceedings' were a creation of the commission to deny his my right to promotion as enshrined in the Service Commission Act and the Constitution and that by reason of the above actions, the decision to rescind his promotion is unconstitutional and therefore a nullity and should be quashed and the Public Service Commission prohibited from enforcing its unilateral decision and the Commission compelled to reverse its decision to rescind his promotion hence it is in the interest of justice that the orders sought be granted.

RESPONDENTS' CASE

7. In opposition to the Motion the Respondents filed a replying affidavit sworn by **Bernadette Mwihaki Nzioki**, the 1st Respondent's Secretary on 11th April 2012.
8. According to the deponent, the applicant herein was on 7th March, 2007 promoted to the position of Director Performance and Efficiency audit vide the Commission's letter of the same date addressed to the permanent secretary, Public Service reform and Development secretariat. The said promotion was rescinded by the Commission on 28th march, 2007 after the Commission reviewed the Applicants personal file and realized he had a pending disciplinary case. In making the rescission decision, it is deposed that the commission acted within its jurisdiction as provided for vide Regulation 21 of the Public Service commission Regulations, 2005 in view of the seriousness of the disciplinary allegations against the officer. It is deposed that the appeals made by the applicant's Permanent Secretaries, Ministry of Planning, the Ministry of State for Public Service and the Ministry of roads where handled as per the Regulations and Commission exercised its mandate and rejected the appeals as ungrounded and especially that as authorized officers they had not disclosed all the material facts at the initial stage to enable the Commission arrive at the correct decision.
9. According to the deponent, the provisions of section 106(12) of the Constitution Applicable at the time the Commission was an Independent Commission and in exercise of its functions under the constitution not subject to the direction or control of any other person or authority and that under Article 249 (2) of the Constitution the Commission is independent and not subject to direction or control by any person or authority in the exercise of its powers and functions.
10. It is further contended that the Notice of Motion Application as drawn is defective and ought to be

dismissed for the reasons that (a) the application is statutory time barred as it is brought six years way after the six month period provided for an application for an order of certiorari; (b) the application is wrongly instituted as per the principle in Farmers Bus Service and Others versus Transport Licensing appeal tribunal (1959) E. A. 779; (c) that an order of prohibition looks into the future and not available where a decision has already been made as in this case; (d) that the prayer of Mandamus is not available as the applicant has not demonstrated or cited statutory duty imposed on the Commission that the Commission has failed or refused to exercise to his detriment; (e) the court cannot issue any of the prerogative orders where the applicant has not cited any breach of the rules of natural justice, ultra vires action or breach of a statutory provision; and (f) that the Notice of Motion herewith was filed and served outside the 10 days given by the honourable court in its order of 24th February, 2012.

11. The deponent therefore urges the court to find that the application is a mere after thought and the applicant has not come to the court with clean hands as he has not disclosed the fact that the disciplinary processes against him that led to the rescission decision has never been concluded hence the court should consider and find that the applicant cannot be appointed or promoted to a non-existent vacancy.

12. There was a further replying affidavit sworn by **Alice Atieno Otwala** on 15th March 2013 in which she deposed that on 26th September, 2012 the Public Service Commission reviewed its earlier decision which has rescinded the appointment of the applicant to the position of Director Performance and Efficiency Audit (Job Group S) and that that the decision was conveyed to the Permanent Secretary in the office of the Prime Minister. On 31st October, 2012, the Permanent Secretary responded and advised that one position of Director, Performance and Efficiency audit has since been abolished. Therefore, it is deposed that in view of the communication received from the Permanent Secretary office of the Prime Minister, the commission on 6th February, 2012 again reviewed its decision of 26th September, 2012 and decided that the applicant should still retain job group S but will remain in the Ministry he is currently serving. According to her, in the public service different institutions play different roles and whereas the Commission is responsible for appointments, promotions and exercise of disciplinary control at the material time the Ministry of State for Public Service was responsible for establishment and abolition of offices an determining the headship grades for different ministries depending on the size of the ministry. It is therefore averred that for a person to be appointed to a position that position must exist in the Public Service but the position to which the applicant is seeking to be reinstated to no longer exists. Likewise under the Constitution of Kenya, 2012 office of the Prime Minister where the department was domiciled does not exist. Although the applicant may have lost the title 'Director' monetary wise he has been compensated because the Commission's decision is to the effect that the effective date of promotion is 7.3.2007 meaning he will be paid the salary difference from that date up to now.

DETERMINATIONS

13. I have considered the application, the affidavits both in support of and in opposition to the application. As already noted hereinabove, the verifying affidavit is very on the material relied upon. The Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000** restated the law which position has been affirmed in several decisions thereafter that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon.

13. The applicant, however, swore a supporting affidavit. The procedure guiding judicial review applications does not, however, have room for supporting affidavits. This position was restated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** where **Nyamu, J** (as he then was) was of the view which view I associate myself with that:

"There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."

14. However under Article 159(2)(d) that is a procedural goof which is curable and does not in my view render the application fatally defective.
15. The next issue that has been taken up is that the application is not properly intituled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
16. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

17. It is clear that the present application in so far as the applicant is indicated as **Amota Nyasae Nyangera** is not properly intituled. However in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

18. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.
19. The next issue is whether the Notice of Motion was filed within time. On 24th February 2012, **Hon. Mr. Justice Korir** granted leave to the applicant and directed that the Notice of Motion be filed and served within ten days from the date of the grant thereof. The Notice of Motion herein was filed on 5th March 2012. In computation of time Cap 2 of the Laws of Kenya provides that the day of the occurrence of the event is to be excluded from the reckoning of time while the last day is to be included. Therefore excluding 24th February 2012, my calculation is that the Motion was

filed within the 10 days as directed by the Court hence that objection must fail.

20. It is further contended that these proceedings were brought after the sic moths provided for instituting judicial review applications. The decision which the applicant seeks to be quashed was the decision rescinding his promotion. That decision according to the applicant was made on 28th March 2007. The present application was however not filed until 11th December 2011 which was outside the 6 months limitation provided. That being the position, it follows that these proceedings were commenced outside the limitation provided under section 9 of the Law Reform Act and that would render the application incompetent. In **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**, **Pall, J** (as he then was) held:

"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."

21. 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.

22. 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** in which the said Court the expressed itself *inter alia* as follows:

"Attention needs to be given to the situation that would arise if Parliament fails timeously to cure the under-inclusiveness of the common law and the Marriage Act. Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be

no better off in practice. What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words "or spouse" after the words "or husband", as the Equality Project proposes. Reading-in of the words "or spouse" has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word. Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the Court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC has indicated, there are a great range of issues that call for legislative attention. The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief. In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples."

23. As was recognised by this Court in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR:**

    "The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises… We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights."

24. That, however, is a matter for another day.
25. Suffice to say that the application is incompetent for being barred by the limitation provided under section 9 aforesaid and hence the orders for certiorari cannot be granted.
26. The applicant, however, seeks orders for prohibition and mandamus. 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."

27. 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.
28. 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.

ORDER

29. Having arrived at the foregoing decision, it is my view that to determine the merits of the application would be prejudicial if the applicant chose to take and succeed in the steps alluded to

by myself in paragraph 22 hereinabove.

30. In the result the Notice of Motion dated 1st March 2012 is incompetent and is struck out but with no order as to costs taking into consideration the averments contained in the affidavits sworn in response to the Motion.

G V ODUNGA

JUDGE

Dated at Nairobi this 6th day of June 2013

JUDGE

Delivered in the presence of: