REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L JUDICIAL REVIEW NO. 38 OF 2012

IN THE MATTER OF AN APPLICATION BY SOUTH NYANZA SUGAR COMPANY LIMITED FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC………………………………………….…….….……APPLICANT

VERSUS

PRINCIPAL MAGISTRATE'S COURT, RONGO……..1ST RESPONDENT

DISTRICT LAND REGISTRAR, MIGORI…….………..2ND RESPONDENT

AND

NICHOLAS OGUNA OGOLA………………………….INTERESTED PARTY

EXPARTE

SOUTH NYANZA SUGAR COMPANY LIMITED

JUDGMENT

1. **Background**:

The exparte applicant, **South Nyanza Sugar Company Limited** (hereinafter referred to only as **"the applicant"**) was at all material times the registered proprietor of leasehold interest in all that parcel of land known as **LR. No. 16339** situated North of Migori Township in Migori District measuring 2997.70 hectares or thereabouts (hereinafter referred to as **"the applicant's property"** where the context so admits). The applicant's property was leased to the applicant by the government of Kenya for a period of 99 years with effect from 1st January, 1998 at a revisable annual rent of Ksh. 3,333,000.00. The land comprised in the applicant's property was acquired compulsorily by the Government of the Republic of Kenya for the applicant in the year 1976 from several land owners in Kamasoga and Waundha sub-locations of the then Rongo Division in the former South Nyanza District. One of the parcels of land that was compulsorily acquired and that formed part of the applicant's property was the parcel of land known as **LR No**. **South Sakwa/Waundha/338 (**hereinafter referred to as "**the suit property**") then owned by one, Wellington Alphayo Kodhe Arwa (deceased) (hereinafter referred to only as "**Arwa"**). The applicant's property was acquired compulsorily for the applicant to be used for planting sugar cane. The applicant has planted sugarcane in the applicant's property which is inclusive of the suit property over the

years. The interested party is the legal representative of one, Alois Obura Onyango (hereinafter referred to as "**Obura**") who is alleged to have been the lawful owner of the suit property. On 25th February, 2008, the interested party brought a complaint against Arwa at Migori District Land Disputes Tribunal (hereinafter referred to as "**the tribunal**"). The interested party's complaint against Arwa was that Arwa had acquired and was registered as the proprietor of the suit property illegally as the property belonged to Obura. By the time this complaint was lodged, Arwa was already deceased and the suit property had long been acquired by the Government, consolidated with other parcels of land and leased to the applicant who was in occupation of the same. The tribunal assumed jurisdiction over the complaint heard the interested party and his witnesses and made its decision on the matter on 4th August, 2008. In its decision aforesaid, the tribunal declared the interested party as the owner if the suit property and directed the executive officer of the court to execute any document that may be necessary to perfect the said declaration in the event that whoever is supposed to execute the same failed to do so. The said order by the tribunal was filed before the 1st respondent under section 7 of the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) for adoption as a judgment of the court. The said decision was adopted by the 1st respondent as a judgment of the court on 18th September, 2008. On or about 15th May, 2009, the interested party applied to the 1st respondent for an order that the 2nd respondent be compelled to register the suit property in the name of the interested party. The said application came up for hearing before the 1st respondent on 25th June, 2009, when the application was allowed and the 2nd respondent ordered to transfer the suit property to the interested party. The order that was made by the 1st respondent on this day seems to have been extracted twice by the interested party. The first order was extracted on 25th June, 2009 and the second one on the same terms was extracted on 11th January, 2011. This order by the 1st respondent to the 2nd respondent to transfer the suit property to the interested party is one of the orders sought to be quashed herein by the applicant. Following the issuance of the said order on 25th June, 2009, the applicant filed an application before the 1st respondent on 17th November, 2009 to be joined in the proceedings that had been instituted before the 1st respondent and in which the said order of 25th June, 2009 was granted namely, **Senior Resident Magistrate's Court at Rongo, Misc. Appl. No. 20 of 2008** (hereinafter referred to as "**the Rongo case**"). At the same time (on 27th November, 2009), the applicant filed a civil suit before the High Court against the interested party, namely, **Kisii High Court Civil Case No. 258 of 2009, South Nyanza Sugar Company Ltd. vs. Nicholas Oguna Ogola**(hereinafter referred to as "**the high court case**"). In the high court case, the applicant sought among other reliefs, declarations that the suit property was compulsorily acquired by the government from Arwa and now forms part of the applicant's property and that all the proceedings that were undertaken before the tribunal and the 1st respondent with respect to the suit property were null and void and all the orders that were issued by the tribunal and the 1st respondent in the said proceedings were illegal null and void and ought to be set aside. The interested party filed his defence to the high court case on 12th February, 2010. The high court case is still pending hearing and determination. In the meantime, the applicant was joined in the Rongo case as a respondent on 21st January, 2010. It seems that after filing the high court case, the applicant did not take any immediate action to set aside or vary the orders that had been issued by the 1st respondent in the Rongo case even after being joined in that case as a respondent. On 3rd April, 2012, the interested party filed another application in the Rongo case seeking an order that the 1st respondent do issue a mandatory injunction compelling the 2nd respondent to transfer the suit property to the interested party. This application was heard by the 1st respondent on 11th April, 2012 and granted as prayed. The order of mandatory injunction issued by the 1st respondent was extracted on the same day. This is the second order that the applicant is seeking to quash in these proceedings. This order was made while the applicant was a party to the Rongo case. It is not clear however from the record whether the applicant was served with the application by the interested party. Following this order, the 2nd respondent proceeded to register the interested party as the proprietor of the suit property on 11th April, 2012. After being registered as the proprietor of the suit property as aforesaid, the interested party filed yet another application in the Rongo case on 4th June, 2012 in which he sought an order from the 1st respondent that M/s Odongo Investments Auctioneers do fence off the suit property and evict the agents of Arwa therefrom. This application was heard by the 1st respondent on 4th June, 2012 and granted as prayed. This order was made while the

applicant was already a party to the Rongo case. It is however not clear from the record whether the application was served upon the applicant. The 1st respondent's order made on 4th June, 2012 was extracted on 5th June, 2012. This is the 3rd order by the 1st respondent which is sought to be quashed herein by the applicant. On 11th June, 2012, the applicant filed an application in the Rongo case seeking an order from the 1st respondent to set aside the orders that had been made by the 1st respondent on 11th January, 2011 that compelled the 2nd respondent to register the interested party as the proprietor of the suit property, the order made by the 1st respondent on 11th April, 2012 that compelled the 2nd respondent through mandatory injunction to register the interested party as the proprietor of the suit property, the cancellation of the entries in the register of the suit property that indicated the name of the interested party as the proprietor of the suit property and the one that indicated that the interested party had been issued with a title deed. The applicant also sought an order for the nullification of the registration of the name of the interested party as the proprietor of the suit property and the restoration of the name of the Government of Kenya as the proprietor of the same. Seven (7) days after filing the said application before the 1st respondent, the applicant commenced these proceedings for judicial review seeking to quash the same orders that it had asked the 1st respondent to set aside in the Rongo case. While these proceedings were pending, the applicant proceeded with his application aforesaid in the Rongo case and by a ruling delivered on 17th July, 2012, the 1st respondent set aside the order that it had made on 11th April, 2012 that had compelled the 2nd respondent by a mandatory injunction to register the interested party as the proprietor of the suit property and pursuant to which he was so registered. The 1st respondent also set aside all consequential orders that arose from the said order of 11th April, 2012 which I believe includes the order made on 4th June, 2012 that authorized Odongo Investments Auctioneers to fence off the suit property and evict therefrom the agents of Arwa.

2. **The application;**

The applicant's judicial review application herein was brought by way of Notice of Motion dated 26th June, 2012. The same was brought pursuant to leave that was granted to the applicant on 19th June, 2012. In the application, the applicant sought the following reliefs;

a. **An order of certiorari to quash the decision and/or order of mandatory injunction made by the 1st respondent on 11th April, 2012 that compelled the 2nd respondent to transfer the suit property to the interested party;**
b. **An order of certiorari to quash the decision and/or order made by the 1st respondent on 5th June, 2012 which directed Odongo Investments Auctioneers to fence off the suit property and evict the agents of Arwa therefrom;**
c. **An order of prohibition to prohibit the 1st respondent from enforcing the said orders made on 11th April,**

d. **An order of certiorari to quash the decision of the 2nd respondent to cancel the registration of the Government of Kenya as the proprietor of the suit property and to register the same in the name of the interested party;**
e. **An order quashing the decision of the 2nd respondent to issue a title deed for the suit property to the interested party;**
f. **An order of mandamus directed to the 2nd respondent to rectify the register of the suit property by cancelling the registration of the interested party as the proprietor of the suit property, to recall and cancel the title deed issued to the interested party and to restore the name of the Government of Kenya as the proprietor of the suit property**.

3. **The grounds on which the application was brought**;

The application was supported by the statement of facts and the verifying affidavit sworn by Gabriel Ouma Otiende on 14th June, 2012 that had accompanied the application for leave. The application was

brought on several grounds. The applicant contended that the orders made by the 1st respondent on 11th April, 2012 and 5th June, 2012 could only be issued in a substantive suit by the interested party against an existing respondent. The applicant contended that since Arwa who was the respondent in the said proceedings was deceased as of the date when the said proceedings were instituted and the said orders made and was also not the registered proprietor of the suit property, there are errors apparent on the face of the said proceedings that necessitates the intervention of this court through the orders sought herein. The applicant contended that; the said orders were made against a deceased person and as such the same are null and void and that the order of mandatory injunction was issued against officers of the government contrary to the provisions of the Government Proceedings Act, Cap. 40 Laws of Kenya without the government having been made a party to the proceedings and without a substantive suit. The applicant contended that the orders made by the 1st respondent on 11th January, 2011 and 5th June, 2012 were in the circumstances made without jurisdiction. The applicant contended further that the said orders were made ex parte without notice to the applicant who is now the proprietor and occupant of the suit property. The same were therefore issued in breach of the rules of natural justice. The applicant contended further that the suit property was valued in the year 2008 at Ksh. 1, 240,000.00. In the circumstances, a dispute over the proprietorship thereof exceeded the pecuniary jurisdiction of the 1st respondent. It was also contended by the applicant that under the Registration of Titles Act, Cap. 280, Laws of Kenya (now repealed) under which the applicant's property was registered, the 1st respondent had no jurisdiction to entertain any claim or proceedings concerning a property registered thereunder. The applicant contended further that the applications that gave rise to the orders made on 11th April, 2012 and 5th June, 2012 were filed by the interested party while the high court case was pending hearing and determination. The said applications therefore concerned matters that were *sub judice* and as such bad in law. The applicant contended further that since it had occupied the suit property for the last 35 years, it had acquired title over the same by adverse possession and as such the order made by the 1st respondent on 11th April, 2012 took away the applicant's rights over the suit property without following the due process and as such violated the applicant's constitutional rights. The applicant contended that the proceedings leading to the orders complained of were fraught with errors and mistakes which this court has jurisdiction to correct in exercise of this court's supervisory power over subordinate courts. The applicant contended that the registration of the interested party as the proprietor of the suit property and the issuance to him of the title deed for the said property were procured through illegal and fraudulent acts and as such the court has the power to rectify the register of the suit property by making an order for the cancellation of the entries in the register of the suit property pursuant to which the interested was registered as owner of the suit property and issued with a title deed.

4. **The grounds on which the application was opposed;**

The application was not opposed by the respondents. The interested party however filed a replying affidavit in opposition to the application. In his replying affidavit sworn on 1st November, 2012, the interested party stated that the suit property was registered into his name following the adoption by the 1st respondent of the tribunal's order on 18th September, 2008. The interested party contended that after the adoption of the tribunal's order aforesaid and the registration of the interested party as the proprietor of the suit property, the applicant decided to institute the high court case against the interested party instead of commencing judicial review proceedings to challenge the said order and/or decision of the tribunal. The interested party contended that the orders sought by the applicant have been overtaken by events as the orders sought to be quashed by the applicant have already been set aside by the 1st respondent. The interested party contended further that the issues raised in the application herein are of varied nature such that the same can only be determined in a normal civil suit. The interested party contended further that the registration of the interested party as the proprietor of the suit property was effected pursuant to the adoption of the tribunal's order on 18th September, 2008 which order cannot be challenged herein in any event since these proceedings were instituted after the expiry of 6 months from the date when the said order was issued. The interested party contended further that the issues raised in this application are *sub judice* as they are the same issues which have been raised by the applicant in the high court case which was filed prior to this application and which case is still pending hearing and determination. The interested party contended further that the order of mandamus is not available to the applicant as it has not

been shown that the 2nd respondent has declined to carry out a duty which is within its power to carry out. On the allegation that Arwa is deceased, the interested party contended that the applicant did not avail any evidence in proof of such death.

5. **The submissions made by the parties;**

On 29th January, 2013, the parties agreed by consent to argue the application by way of written submissions. The applicant filed its submissions on 27th March, 2013 while the interested party filed his submissions on 13th February, 2013. The respondents did not file any submissions. In its 68 page submissions, the applicant reiterated the grounds on which this application has been brought which I have highlighted herein above. The applicant's submissions touched on the proceedings before the tribunal and the Rongo case which gave rise to this application and the high court case. The applicant submitted that this application is not concerned with the tribunal's case or the order made by the 1st respondent in the Rongo case on 18th September, 2008 that adopted the decision of the tribunal as a Judgment of the court. This is because, the applicant was not a party to the tribunal's case and that more than six (6) moths had lapsed from the date of the tribunal's said decision and the 1st respondent's order dated 18th September, 2008 aforesaid as at the time these proceedings were being instituted. The applicant submitted that it has challenged the tribunal's decision and the 1st respondent's order of 18th September, 2008 aforesaid in the high court case. The applicant submitted that the 1st respondent had no jurisdiction to issue the orders of mandatory injunction dated 11th April, 2012 as the orders were issued against Government Officers contrary to the law. The applicant submitted further that when the said order was given, the Environment and Land Court Act, 2011 had already commenced and as such only the Environment and Land Court could have entertained the interested party's application pursuant to which the said order was given. In the circumstance, the applicant submitted that the order of 11th April, 2012 was made without jurisdiction and as such prayer (a) in the Notice of Motion application dated 26th June, 2012 should be granted. The applicant submitted further that the 1st respondent did not have the jurisdiction to make the order dated 5th June, 2012 by which Odongo Investments Auctioneers were granted permission to evict the agents of Arwa from the suit property and fence off the same. The applicant submitted that such orders could only be granted in a substantive suit and that only the High Court or the Environment and Land Court could grant such orders. The applicant submitted further that the order was made without notice to the applicant and that it was against Arwa who was deceased as at the time the said order was made a fact which from the evidence on record was within the knowledge of the interested party. The applicant submitted that it was an act of abuse of the process of the court for the interested party to sue and obtain orders against a deceased person and that such abuse of process is amenable to review by this court. The applicant submitted further that the interested party knew all along of the applicant's interest in the suit property but chose not to join them in the proceedings in which the order of 5th June, 2012 or the previous orders were made. This order of 5th June, 2012 was therefore made in beach of the rules of natural justice and as such, the same have to be quashed in accordance with prayer (b) in the Notice of Motion application. The applicant submitted further that the 1st respondent was only supposed to read and adopt the decision of the tribunal and as such the 1st respondent had no jurisdiction to entertain the various applications that were made before it by the interested party. The applicant submitted that its prayer for an order of prohibition against the 1st respondent is therefore well merited.

6. The applicant submitted further that since the decision of the 2nd respondent to cancel the registration of the Government of Kenya as the proprietor of the suit property and to register the interested party as the proprietor of the said property was made pursuant to the order made by the 1st respondent on 11th April, 2012 which is sought to be quashed, the said decision of the 2nd respondent must likewise be quashed. The same submission was made in relation to the decision by the 2nd respondent to issue the interested party with a title deed for the suit property.

7. On the application that it had made before the 1st respondent to set aside the orders complained of herein, the applicant submitted that once the 1st respondent had made the orders complained of

herein, the 1st respondent became *functus officio* and could not set aside or reverse the said orders. The applicant submitted that only this court could correct the wrongs that were committed by the 1st respondent as the 1st respondent ceased to have jurisdiction over land disputes once this court came into being. In the alternative, the applicant submitted that the said application for setting aside that was made before the 1st respondent could not bar it from bringing this application for judicial review. Further, the applicant submitted that the orders that were sought before the 1st respondent are not the same as the orders sought herein. The applicant submitted that the present application is directed at the procedure that was adopted by the 1st respondent while issuing the orders complained of while the application before the 1st respondent was directed at the merit of the said orders.

8. On the high court case, the applicant submitted that it has only sought declaratory reliefs and an injunction in that case and as such the issue of *sub judice* cannot therefore be invoked to defeat this application. The applicant submitted further that the 1st and 2nd respondents herein are not parties to the high court case which is merely challenging the proceedings that were undertaken by the interested party before the tribunal. The applicant submitted that only judicial review orders can undo the wrongs that had been committed herein.
9. The applicant submitted further that the registration of the interested party as the proprietor of the suit property is illegal null and void and this court has jurisdiction under the provisions of Section 80 (1) and (2) of the Land Registration Act, No. 3 of 2012 to order the 2nd respondent to rectify the register of the suit property which jurisdiction the 1st respondent does not possess. The applicant submitted that the order made by the 1st respondent on 17th July, 2012 that set aside its earlier order made on 11th April, 2012 was belated as it could not undo the registration of the interested party as the proprietor of the suit property that was done on 11th April, 2012. The applicant submitted that the suit property is currently registered in the name of the interested party and that the said registration cannot be altered by the order that was issued by the 1st respondent on 17th July, 2012. The applicant cited the case of, **Kenya African Union vs. Kibaki & 6 others [2005] 2 KLR 437** in support of part of its foregoing submissions.

10. In his submissions in reply, the interested party submitted that leave to institute the present application was obtained irregularly as the applicant had not filed an affidavit in support of the application for leave as required by the provisions of Order 53 rule 1 (2) of the Civil Procedure Rules. The interested party submitted further that this application offends the provisions of Section 6 of the Civil Procedure Act, Cap. 21 Laws of Kenya in that when this application was filed, there was in existence between the parties the high court case that was pending hearing and determination and which concerned the same issues raised herein. The interested party submitted further that the applicant filed this application after it had filed another application in the Rongo case seeking the setting aside of the orders sought to be quashed herein which application was allowed on 17th July, 2012. In the circumstances, the interested party submitted that the orders made on 11th April, 2012, 19th April, 2012 and 5th June, 2012 sought to be quashed herein are no longer in existence and as such are not capable of being quashed. The interested party submitted further that the applicant's application is misconceived and bad in law to the extent that it is seeking to quash the order made by the 1st respondent on 11th January, 2011 after the expiry of six (6) months from the date when it was made and without leave having been granted for that purpose. The interested party submitted that the applicant's application has no merit and should be dismissed with costs to the interested party.

11. **Consideration of the application, the opposition thereto and the parties respective submissions**;

I have considered the applicant's application, the statement of facts, the verifying affidavit filed in support thereof and the applicant's advocate's written submissions. I have also considered the affidavit in reply filed by the interested party in opposition to the application and his advocate's written submissions. The

issues that present themselves for determination in this application are as follows;

i. **Whether the application is incompetent;**
ii. **Whether the applicant is entitled to the reliefs sought.**

Issue No.1:

12. The interested party has objected to the applicant's application on several technical grounds that touch on the competency of the application. The first objection that was raised by the interested party against the application was that leave to institute the application was obtained irregularly as the application for such leave was not accompanied by a supporting affidavit. In support of this objection, the interested party cited the provisions of Order 53 rule 1 (2) of the Civil Procedure Rules. On this objection, I am in agreement with the submission by the applicant that the objection is not well taken. What is expected of an applicant for leave to institute judicial review proceedings under Order 53 rule 1 (2) of the Civil Procedure Rules is to lodge with the application, a statement of facts and a verifying affidavit. There is no requirement under that rule for a "supporting affidavit" to be filed with the application. The applicant's application for leave was accompanied with a statement of facts and a verifying affidavit sworn by Gabriel Ouma Otiende on 14th June, 2012 in accordance with the requirement of the said rules. It is my finding therefore that the application herein is not incompetent for want of a supporting affidavit as such affidavit was not necessary. The other objection raised by the interested party was that the issues raised in the present application are *sub judice* since the same issues have been raised by the applicant in the high court case. The interested party contended therefore that the application herein offends the provisions of section 6 of the Civil Procedure Rules. Again, I am not in agreement with this line of submission. As was held in the case of, **Commissioner of Lands vs. Kunste Hotel Ltd., [1995-1998] 1 E.A. 1(CAK)** that was cited by the applicant, in matters of judicial review, the court exercises special jurisdiction which is neither civil nor criminal. A judicial review application is therefore not on a par with a normal civil suit originated by way of a plaint. Furthermore, in judicial review proceedings, the court is only concerned with the legality of the process through which a decision complained of was made but not the merit or otherwise of such a decision. A merit of a decision can only be investigated in a normal civil suit. In the said case of, **Commissioner of Lands vs. Kunste Hotel** (supra), it was held further that;

> "**Judicial review is 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 an individual is given a fair treatment by an authority to which he has been subjected."**

It follows from the foregoing that the fact that the applicant had filed a civil suit in the high court in which it sought private law remedies against the interested party cannot bar the applicant from proceeding with this application even if the facts giving rise to the high court case and this application are the same. Whereas the reliefs sought in the high court case are of a private law nature the orders of certiorari, mandamus and prohibition sought herein are public law remedies. The reliefs sought in the high court case are also not the same as the reliefs sought herein. I can't see therefore how the issues raised in this application for determination cannot be said to be *sub judice*. I would wish to add that the existence of an alternative remedy is not a bar to an application for judicial review. The filing of the high court case could not therefore bar the applicant from instituting this application.

13. The last technical objection that was urged by the interested party was that the application herein has been overtaken by events since the orders sought to be quashed herein were set aside by the 1st respondent on 17th July, 2012. The applicant has sought orders of certiorari to quash the orders of the 1st respondent made on 11th April, 2012 and 5th June, 2012. The applicant has also sought an order of certiorari to quash the decisions of the 2nd respondent made on 11th April, 2012 and 19th April, 2012. In addition to the said orders of certiorari, the applicant has also sought orders of prohibition and mandamus against the respondents herein. I have looked at the applicant's

application dated 7th June, 21012 that was made before the 1st respondent in which the applicant sought among others, orders to set aside the orders challenged herein. I have also looked at the ruling by the 1st respondent dated 17th July, 2012 which forms the basis of the interested party's present objection. From my understanding of the 1st respondent's ruling, the 1st respondent did set aside the order it had made on 11th April, 2012. The 1st respondent also set aside other orders by the 1st respondent that were made consequent to the said order of 11th April, 2012. The only order that in my view falls in this category is the 1st respondent's order that was made on 5th June, 2012. It follows from the foregoing that the orders of the 1st respondent made on 11th April, 2012 and 5th June, 2012 stand set aside as of the date hereof. The 1st respondent did not however grant the other prayers that the applicant had sought and which were aimed at reversing the registration by the 2nd respondent of the interested party as the proprietor of the suit property and the issuance to him of a title deed for the said property which are also sought to be quashed in this application. The question that now begs for an answer is whether the fact that the orders dated 11th April, 2012 and 5th June, 2012 have already been set aside makes the present application incompetent or bad in law? As submitted by the applicant the said orders were made by the 1st respondent after this application had already been filed. The application herein cannot therefore be rendered incompetent, bad in law or an abuse of the process of the court on account of the state of facts or circumstances that were not in existence as of the date when it was instituted. In my view the issue of the competency or otherwise of this application on account of the setting aside of the said orders does not a rise because as I have stated above, this application is not concerned only with the said orders made on 11th April, 2012 and 5th June, 2012. The issue that a rises is whether this court can quash orders that have already been set aside. In this regard focus would only be on the orders of the 1st respondent made on 11th April, 2012 and 5th June, 2012. I intend to deal with this issue later when I would be considering the issue as to whether or not the applicant is entitled to the reliefs sought herein. From the totality of the foregoing, it is my finding that the application herein is competent. All the technical objections that were raised by the interested party against the application herein that touched on its competency have no merit and are hereby overruled.

Issue No. II;

14. As I have stated herein above, the applicant herein has sought; orders of certiorari to quash the decisions of the 1st respondent made on 11th April, 2012 and 5th June, 2012 , an order of prohibition to prohibit the 1st respondent from enforcing the said orders made on 11th April, 2012 and 5th June, 2012, an order of certiorari to quash the decisions of the 2nd respondent made on 11th April, 2012 and 19th April, 2012 and an order of mandamus to compel the 2nd respondent to rectify the register of the suit property by the cancellation of the registration of the interested party as the proprietor of the suit property and the restoration of the name of the Government of Kenya as the proprietor of the same. These reliefs have been sought on the grounds that I have highlighted above which ranges from want of jurisdiction, breach of rules of natural justice to illegality. Certiorari, Prohibition and Mandamus are public law remedies which are available to persons whose legally recognized interests have been infringed by public bodies or officers exercising statutory powers. In, **Halsbury's Laws of England, 4th Edition** at paragraph 46, the authors have stated as follows;

> **"the courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognized interests. Powers must not be exceeded or abused".**

In the case of, **Council for Civil Service Unions –vs- Minister for Civil Service [1985] A.C. 374 at 401D,** lord Diplock had this to say on the purview of judicial review;

> **"Judicial Review has I think developed to a state today when……one can conveniently classify under three heads the grounds upon which**

administrative

> **action are subject to control by judicial review. The first ground I would call "illegality". The second "irrationality" and the third "procedural impropriety"……….By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it…."**

H.W.R Wade & C.F.Forsyth in their book, Administrative Law, 10th Edition have said this on the remedies of Certiorari and Prohibition at page 509,

> **"the quashing order and prohibiting order are complementary remedies, based upon common principles……….A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultra vires. A quashing order looks to the past, a prohibiting order to the future."**

The court of Appeal also had an occasion in the case of, **Kenya**

National Examination council –vs- Republic, Exparte Geoffrey Gathenji Njoroge & 9 others [1997] e KLR to set out the scope and efficacy of the remedies of certiorari, mandamus and prohibition. In that case the court described the remedies of prohibition and certiorari as follows;

> **"…….prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land………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…."**

15.In the same judgment, the court of appeal while discussing the remedy of Mandamus cited with approval a passage in Halsbury's Laws of England, 4th edition, Volume 1 page 111 paragraph 89,

where the authors have stated as follows;

> "**The order of mandamus is of 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 and no specific legal remedy for enforcing that right; and it may issue in cases where although there is alternative remedy, yet that mode or redress is less convenient, beneficial and effectual"**

I am satisfied on the material before me that the orders and decisions complained of herein are liable to review by this court. The proceedings that gave rise to the orders made by the 1st respondent on 11th April, 2012 and 5th June, 2012 were fraught with irregularities, illegalities, abuse of the court process, want of jurisdiction, breaches of rules of natural justice and violation of constitutional rights. The said orders were obtained knowingly against a deceased person. It elementary law that a suit cannot be maintained against a deceased person and that any order issued against a deceased person is a nullity. I have no doubt on the material presented before the court that Arwa who was the respondent in the Rongo case was deceased as at the time when the said proceedings were instituted. The proceedings in the Rongo case that were presided over by the 1st respondent were therefore null and void together with the orders

made therein on 11th April, 2012 and 5th June, 2012 by the 1st respondent. The said orders were therefore not capable of being executed. It is also worth noting that the orders aforesaid were made after the applicant had been made a party to the Rongo case and both the interested party and the 1st respondent were aware that the same would affect the interest of the applicant in the suit property. The applicant was however not served with the applications pursuant to which the said orders were made. The said orders were in the circumstances made in breach of the rules of natural justice. I am also of the view that the 1st respondent had no jurisdiction to issue orders of mandatory injunction in an interlocutory application without a substantive suit for such relief. Furthermore, the said orders of mandatory injunction were directed at public officers in their official capacity contrary to the provisions of the Government Proceedings Act, Cap. 40 Laws of Kenya and Order 29 rule 2 (2) (d) of the Civil Procedure Rules. I also doubt whether the 1st respondent had jurisdiction to make the order dated 5th June, 2012. The order of the tribunal that was adopted by the 1st respondent was declaratory in nature. It declared the interested party to be the owner of the suit property and directed the executive officer of the 1st respondent to execute any document that may be required to transfer the suit property to the interested party. That was the scope of the tribunal's decision and the decree of the 1st respondent that was issued following the adoption of the same. The tribunal did not give the interested party vacant possession of the suit property. It is difficult to infer such order either in the tribunal's decision or the 1st respondent's decree aforesaid. The 1st respondent's order to Odongo Investments Auctioneers to evict the unnamed agents of Arwa from the suit property and to fence off the same was therefore made in vacuum and as such was illegal. Due to the foregoing the orders of certiorari sought against the 1st respondent's decisions made on 11th April, 2012 and 5th June, 2012 are merited. The applicant has also sought an order to prohibit the 1st respondent from executing the said orders. As I have already found above, the said orders were illegal, null and void. The 1st respondent has no jurisdiction to enforce an order which is null and void. The order of prohibition sought by the applicant is also well merited. The 2nd respondent's decision to register the interested party as the proprietor of the suit property and to issue him with a title deed was made pursuant to an illegal, null and void order by the 1st respondent. The 2nd respondent's decisions made on 11th April, 2012 and 19th April, 2012 were therefore tainted with illegality. This court has power to quash decisions which are illegal. The orders of certiorari sought against the decisions of the 2nd respondent made on 11th April, 2012 and 19th June, 2012 is therefore well founded.

16. From my findings above, it is clear that the applicant's Notice of Motion application dated 26th June, 2012 has merit. What remains to be considered is whether in the circumstances of this case, the orders sought should be granted. Orders of Certiorari, Prohibition and Mandamus are discretionary. They are not granted as a matter of right. It follows that even in cases where sufficient reasons have been advanced that justify the grant of the said orders, the same can be declined if circumstances do exist that militate against the granting of the orders. It is conceded that the 1st respondent's orders made on 11th April, 2012 and 5th June, 2012 were set aside by the 1st respondent on 17th July, 2012. The said orders are therefore not in existence. The same cannot therefore be brought before this court for the purposes of being quashed. I am in agreement with the submission of the interested party's advocates that the two orders are in the circumstances not capable of being quashed by this court. Since the said orders were set aside by the 1st respondent on 17th July, 2012, there is nothing left for the 1st respondent to execute. The order of prohibition sought to restrain the 1st respondent from executing the said orders likewise has been overtaken by events and cannot be granted by this court. This leaves the orders of certiorari and mandamus sought against the 2nd respondent. As I have stated above the decision of the 2nd respondent to register the interested party as proprietor of the suit property and to issue him with a title deed was made pursuant to annul and void order from the 1st respondent and as such the decision was tainted with illegality. An illegal decision is subject to review by this court. The orders of certiorari sought against the 2nd respondent are therefore available to the applicant. I have already held above that the registration of the interested party as the proprietor of the suit property was illegal the same having been effected by the 2nd respondent following an illegal order. The 2nd respondent having committed an illegality although pursuant to an order of the 1st respondent has

a duty to correct the illegality. An order of mandamus is therefore appropriate in the circumstances to compel the 2nd respondent to restore the status quo that prevailed prior to the illegal registration of the interested party as theproprietor of the suit property. Since the illegality was committed by the 1st respondent pursuant to an illegal court order, an order of mandamus would serve to correct the said illegality. As stated above, the purpose of an order of mandamus is to remedy the defects of justice and the order will normally issue to ensure that justice is done. Such an order no doubt is appropriate in the circumstances.

17. **Conclusion;**

In conclusion, the applicant's Notice of Motion application dated 26th June, 2012 succeeds in part. Prayers, (a), (b) and (c) are disallowed. Prayers (d) and (e) of the application are allowed as prayed. Prayer (f) is allowed to the extent that the 2nd respondent is directed to cancel entry Nos. 7 and 8 in the register of the suit property. Since the application has succeeded in part, each party shall bear its own costs.

Dated, signed and delivered at Kisii this 22nd day of November 2013.

S. OKONG'O,

JUDGE.

<u>In the presence of:-</u>

…………………………………………………………….for the Applicant

…………………………………………..……………….for the Respondents

………………………..…………………………for the Interested Party

……………………………………………………..…………..Court Clerk

S. OKONG'O,

JUDGE.

E&L.JR.NO. 38 OF 2012