



**Registered Trustees Redeemed Gospel Church v National Land Commission & another;  
Umoja Residents Association sued through Its officials P.S Kinyanjui (Chairman), Arkipo  
Onyango (Secretary) & another (Interested Parties) (Judicial Review Miscellaneous  
Application 54 of 2019) [2022] KEELC 3029 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3029 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 54 OF 2019**

**JO MBOYA, J  
JUNE 16, 2022**

**BETWEEN**

**REGISTERED TRUSTEES REDEEMED GOSPEL CHURCH ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**UMOJA RESIDENTS ASSOCIATION SUED THROUGH ITS  
OFFICIALS P.S KINYANJUI (CHAIRMAN), ARKIPO ONYANGO  
(SECRETARY) ..... INTERESTED PARTY**

**NAIROBI CITY COUNTY ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction:**

1. Vide Notice of Motion Application dated the 20<sup>th</sup> November 2019, the Applicant herein seeks the following Reliefs:
  - a. That an Order of Prohibition directs that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their officers and any other authority acting under their instructions from implementing their decisions dated the 12<sup>th</sup> February 2016 and the subsequent letter dated the 14<sup>th</sup> March 2016 as regards the Applicants title known as Nairobi/Block 107/384 and in any other manner interfering with the smooth and peaceful occupation by the Applicants on the property known as Nairobi/Block 107/384.



- b. That an Order of Certiorari to remove into this court honourable court and quash the 1<sup>st</sup> Respondents decision made on the 12<sup>th</sup> February 2016 and the subsequent letter dated the 14<sup>th</sup> March 2016, threatening to revoke the Applicants title known as Nairobi/Block 107/384.
  - c. The Honourable court be at liberty to make such further and any orders as it deems fit to grant for the ends of justice to be met.
  - d. Costs of the Application be provided for.
2. The subject Application, which essentially seeks Judicial Review orders is indicated to be premised on the Statement of Facts dated the 31<sup>st</sup> October 2019 and the affidavit of one, Pastor John Bankosky Gitonga sworn on the 31<sup>st</sup> October 2019.
  3. Nevertheless, it is imperative to point out at the onset that the affidavit alluded to and which is sworn on the 31<sup>st</sup> October 2019 was one that was made in Support of the Chamber Summons Application dated the 31<sup>st</sup> October 2019 and not in Verification of the Statement of Facts.
  4. Be that as it may, upon the filing of the substantive Notice of Motion, the 1<sup>st</sup> Respondent duly entered appearance and thereafter filed a Grounds of opposition to the said Application.
  5. On the other hand, the 2<sup>nd</sup> Respondent entered appearance and filed a Notice of Preliminary objection dated the 24<sup>th</sup> February 2020.
  6. Besides, the 1<sup>st</sup> Interested Party entered appearance and filed a Replying affidavit in respect of which same opposed the Application by the applicant.
  7. On her part, the 2<sup>nd</sup> Interested Party filed a Notice of appointment on the 4<sup>th</sup> February 2020, but does not appear to have filed any Pleadings and/or further Documents.

### **Depositions by the Parties:**

#### **Applicant's Case:**

8. Vide the Supporting Affidavit sworn on the 31<sup>st</sup> October 2019, one Reverend John Bankosky Gitonga, (hereinafter referred to as the deponent) has averred that the Applicant herein applied for and was allocated the property known as L.R No. Nairobi/Block 107/384, Umoja 2, within the city of Nairobi.
9. Further, it has been averred that upon the allocation of the suit property, the Applicant herein duly complied with the terms of the Letter of allotment, culminating into the issuance of a Lease Instrument in favor of the Applicant.
10. On the other hand, the deponent has further averred that the Applicant proceeded to and duly executed the Lease instrument, which was thereafter duly registered and thus leading to the issuance of a Certificate of Lease in favor of the Applicant. For clarity, the deponent indicated that the certificate of lease was issued on the 7<sup>th</sup> July 2011.
11. Other than the foregoing, the deponent has averred that the Applicant entered upon and took possession of the suit property.
12. Nevertheless, the deponent has also averred that while in the course of utilizing the suit property, which lawfully belonged to and was registered in her name, Members of the 1<sup>st</sup> Interested Party interfered with her Rights over and in respect of the suit property.



13. It has been averred further that owing to the activities by and/or on behalf of the members of the 1<sup>st</sup> Interested Party, the Applicant was constrained to and filed civil proceedings vide Nairobi ELC No. 432 of 2012.
14. On the other hand, the deponent has averred that other than the substantive suit, the Applicant also filed an Application seeking conservatory orders, calculated to bar and/or prohibit the 1<sup>st</sup> Interested Party or her Members from interfering with the suit property.
15. At any rate, the deponent has further averred that after the lodgment of the Application, the Court proceeded to and granted the orders of Temporary injunction.
16. Be that as it may, the deponent has averred that despite the existence of the Civil suit and the orders of Temporary injunction, Members of the 1<sup>st</sup> Interested Party herein proceeded to and lodged a complaint with the 2<sup>nd</sup> Respondent herein seeking to Quash the Applicant's title to the suit property.
17. It has further been averred that after the lodgment of the Complaint with the 2<sup>nd</sup> Respondent herein, same duly entertained the complaint and thereafter rendered a decision vide letter dated the 12<sup>th</sup> February 2016, revoking the Applicant's title to the suit property.
18. Further, the deponent has averred that the decision by the 2<sup>nd</sup> Respondent, namely, the decision vide letter dated the 12<sup>th</sup> February 2016 and which was communicated vide letter dated the 14<sup>th</sup> March 2016, were made and/or generated without notice to and/or involvement of the Applicant.
19. In the premises, the deponent has averred that the proceedings before and the decision of the 1<sup>st</sup> Respondent herein, whereby same revoked the Applicant's title to the suit property, were unlawful and illegal.
20. Owing to the foregoing, the deponent has therefore averred and/or contended that the decision by the 1<sup>st</sup> Respondent herein, revoking the Applicant's title to the suit property, was therefore issued in contravention and violation of the Applicant's Fundamental rights.
21. Based on the foregoing, the deponent has therefore implored the Court to interrogate the proceedings before the 1<sup>st</sup> Respondent and thereafter to quash the impugned decision, whose effect was to nullify the Applicant's title.
22. On the other hand, the deponent on behalf of the Applicant, has sought for appropriate orders of Certiorari and Prohibition.

**Response by the 1<sup>st</sup> Respondent :**

23. The 1<sup>st</sup> Respondent herein, duly entered appearance and thereafter filed Grounds of opposition. However, same did not file any Replying affidavit.

**Response by the 2<sup>nd</sup> Respondent:**

24. On her part, the 2<sup>nd</sup> Respondent duly entered appearance and thereafter filed a Notice of Preliminary objection dated the 24<sup>th</sup> February 2020.
25. Nevertheless, the Notice of Preliminary objection was canvassed and disposed of vide Ruling of the court rendered on the 23<sup>rd</sup> March 2021, whereupon same was Dismissed.



### **Response by the 1<sup>st</sup> Interested Party:**

26. The 1<sup>st</sup> Interested Party herein entered appearance and thereafter filed a Replying Affidavit sworn by one P. S. Kinyanjui and in respect of which same averred that the suit property herein was duly reserved for purposes of the construction of a Community Social Center meant for the use of the Residents of Umoja 2 Estate.
27. It has further been averred that to the extent that what comprises of the suit property was reserved for the construction of a community social center for the residents of Umoja 2 Estate, same therefore could not be alienated and or allocated to the Applicant or any other Third Party.
28. Besides, the deponent has averred that the issue of the allocation and or alienation of the suit property in favor of the Applicant herein was the subject of deliberations before the Ndungu Land Commission, which commission found and held that the alienation of the Suit property in favor of the Applicant was illegal.
29. On the other hand, the deponent has further averred that even though the applicant herein proceeded to and filed civil proceedings vide ELC No. 432 of 2012 and thereafter procured temporary orders of injunction, the said orders were thereafter vacated and or discharged by the Court.
30. At any rate, the deponent has further averred that the suit that was filed by the Applicant herein, namely, ELC No. 432 of 2012 was thereafter heard and determined vide judgment rendered on the 18<sup>th</sup> May 2020, whereupon the Applicant's claim to and in respect of the suit property was Dismissed.
31. Further, the deponent has averred that other than the dismissal of the Applicant's case, the counter claim that have been filed by the 1<sup>st</sup> Interested Party was allowed and the suit property was reverted to the 2<sup>nd</sup> Interested Party, albeit to hold on trust for the 1<sup>st</sup> Interested Party herein.
32. In the premises, the deponent has averred that following the delivery of the Judgment vide ELC No. 432 of 2012, the Applicant herein has no rights and/or interests whatsoever over and in respect of the suit property. Consequently, there is no basis upon which the Orders sought can issue and/ or be granted.
33. Based on the foregoing, the deponent on behalf of the 1<sup>st</sup> Interested Party has therefore sought to have the subject Application be dismissed.

### **Respons by the 2<sup>nd</sup> Interested Party:**

34. The 2<sup>nd</sup> Interested Party duly filed a Notice of Appointment on the 4<sup>th</sup> February 2020, but however same did not file any pleadings and/or affidavit to the substantive application.

### **Submissions by the Parties:**

35. The subject matter came up for mention on the 6<sup>th</sup> December 2021, when directions were issued, relating to the manner of disposal of the substantive Application. For clarity, it was ordered and/ or directed that the substantive Application be canvased and/or disposed of by way of written submissions.
36. Pursuant to the directions in terms of the preceding paragraph, it was incumbent upon the Parties herein to file and exchange written submissions within set timelines. However, the submissions in respect of the subject matter were never filed within the set timelines.



37. Be that as it may, the Applicant herein ultimately filed her written submissions on the 21<sup>st</sup> March 2022, whereas the 1<sup>st</sup> Respondent filed her written submissions on the 9<sup>th</sup> May 2022.
38. Other than the Applicant and the 1<sup>st</sup> Respondent, the other Party that filed written submissions is the 1<sup>st</sup> Interested Party whose submissions were filed on the 13<sup>th</sup> May 2022. For the avoidance of doubt, the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Interested Party did not file any written submissions.
39. Briefly, the Applicant herein has submitted that the 1<sup>st</sup> Interested Party commenced a process of interfering with her rights and/or interests over and in respect of the suit property. Consequently, same was obliged to and indeed filed civil proceedings vide Milimani ELC 432 of 2012.
40. Besides, the Applicant has further submitted that upon the filing of the said proceedings, same persuaded the court and thereby procured and obtained orders of temporary injunction to avert the offensive activities by and/or on behalf of the 1<sup>st</sup> Interested Party herein.
41. Nevertheless, the Applicant has also submitted that despite the existence of the civil suit and the orders of temporary injunction granted by this court, the 1<sup>st</sup> Interested Party herein proceeded to and lodged a Complaint with the 1<sup>st</sup> Respondent pertaining to the allocation and ownership of the suit property.
42. On the other hand, the Applicant has further submitted that upon the lodgment of the complaint by 1<sup>st</sup> Interested Party, the 1<sup>st</sup> Respondent herein proceeded to and dealt with the Complaint, culminating into the delivery of a decision dated 12<sup>th</sup> February 2016 and which was communicated vide letter dated 14<sup>th</sup> March 2016.
43. Further, the Applicant has submitted that the decision by the 1<sup>st</sup> Respondent rendered on the 12<sup>th</sup> February 2016 and which proceeded to revoke the Applicant's title, was made without notice to and/or involvement of the Applicant.
44. In the premises, the Applicant has submitted that the decision of the 1<sup>st</sup> Respondent, which ordered the revocation of the Applicant's title, was therefore arrived at and/or reached in contravention of the rules of Natural Justice.
45. Besides, the Applicant has further submitted that the 1<sup>st</sup> Respondent was not seized of the requisite jurisdiction to deal with and/or render a determination revoking the Applicant's Title.
46. Finally, the Applicant has submitted that it was also not appropriate for the 1<sup>st</sup> Interested Party, to lodge and/or mount a Complaint before the 1<sup>st</sup> Respondent when there was already a pending suit before the Environment and Land court, awaiting hearing and determination.
47. In the premises, the Applicant has thus contended that the lodgment of the complaint and the determination thereof by the 1<sup>st</sup> Respondent, was thus illegal, unlawful and amounted to Contempt of the court.
48. Based on the foregoing, the Applicant has invited the Court to grant the Reliefs sought at the foot of the substantive Application dated the 20<sup>th</sup> November 2019.
49. On her part, the 1<sup>st</sup> Respondent has contended that the subject Application by and/or on behalf of the Applicant was mounted in contravention of the provisions of Section 9 (2) of the Law Reform Act, Chapter 26 Laws of Kenya as read together with Order 53 Rule 2 of the Civil Procedure Rules, 2010.
50. In this regard, the 1<sup>st</sup> Respondent has therefore contended that to the extent that the impugned decision was made on the 12<sup>th</sup> February 2016, it was not appropriate for the substantive proceedings herein to be commenced in the year 2019.



51. Secondly, the 1<sup>st</sup> Respondent has also submitted that the decision made on the 12<sup>th</sup> February 2016 and communicated vide letter dated 14<sup>th</sup> March 2016, is not capable of being quashed, either in the manner sought by the Applicant or at all.
52. In support of the foregoing submission, the 1<sup>st</sup> Respondent has relied in the case of *Republic v City Council of Nairobi & Another Ex-parte Sbital Bandari* (2015)eKLR.
53. Finally, the 1<sup>st</sup> Respondent has also submitted that the entire application by the Applicant amount to an abuse of the Due process of the court and in this regard same ought to be dismissed.
54. On her part, the 1<sup>st</sup> Interested Party has re-visited the issue of timeline within which to apply for and/or obtain leave to commence judicial review proceedings in the nature of Certiorari. For clarity, the 1<sup>st</sup> Interested Party has contended that the impugned decision having been made on the 12<sup>th</sup> February 2016, it was not open for the Applicant herein to approach the court and obtain Leave on the 4<sup>th</sup> November 2019.
55. In the circumstances, the 1<sup>st</sup> Interested Party has thus submitted that the Leave that was granted in favor of the Applicant herein, for purposes of commencing the Judicial review seeking orders of Certiorari, was therefore a nullity ab initio.
56. Secondly, the 1<sup>st</sup> Interested Party has also submitted that the issue pertaining to ownership of the suit property, has since been dealt with and/or addressed vide ELC No. 432 of 2012, wherein the Applicant's claim to the suit property was dismissed.
57. Based on the foregoing, the 1<sup>st</sup> Interested Party has submitted that the Applicant's title to the suit property having been canceled and/or revoked vide ELC No. 432 of 2012, the Applicant herein has no legitimate Interests and/ or Rights over the suit property to warrant the continuation of the subject proceedings.
58. In the premises, the 1<sup>st</sup> Interested Party has contended that the continuation of the subject proceedings therefore amounts to and or constitute an abuse of the Due process of the court.
59. Finally, the 1<sup>st</sup> Interested Party also submitted that the 1<sup>st</sup> Respondent herein was duly seized of the requisite jurisdiction to receive the Complaint and also to entertain same, with a view to arriving at a resolution and/or decision.
60. In the premises, the 1<sup>st</sup> Interested Party has therefore contended that the entire Application by the Applicant and by extension the suit are misconceived and legally untenable.

**Issues for Determination:**

61. Having reviewed the substantive Application dated the 20<sup>th</sup> November 2019, the Statement of Facts dated the 31<sup>st</sup> October 2019, the Responses by the Respondents and the Replying by the 1<sup>st</sup> Interested Party ,as well as the written submissions filed on behalf of the Parties, the following issues do arise and are germane for determination;
  - I. Whether the Subject Application seeking Judicial Review order is competent and legally tenable.
  - II. Whether the Applicant has any legal and/or legitimate right to and in respect of the Suit property to warrant the issuance of the order sought.
  - III. Whether the continuation of and further proceedings in respect of the subject Application amounts to an abuse of the Court Process.



## Analysis and Determination

### Issue Number 1

#### Whether the Subject Application seeking Judicial Review order is Competent and Legally tenable.

62. The subject Application seeks Judicial Review orders in the nature of Certiorari and Prohibition. To the extent that the subject application is seeking for the issuance of the prerogative order/writs of Judicial review, it is common ground that the subject application ought to and should be commenced in the name of the Republic as the Applicant.
63. In any event, it is common ground that the prerogative order of judicial review can only be procured in the name of the Republic and not in the name of an individual citizen and/or subject.
64. In the premises, though the Application for leave to commence judicial review proceedings is ordinarily sought by and in the name of the subject, immediately the Leave to commence judicial review proceedings is granted, the substantive application must ipso jure, be filed and/or commenced in the names of the Republic.
65. Simply put, it is the Republic that is the Applicant and the subject, whose rights and/or interests has been violated, breached and/or otherwise threatened with violation, becomes the Ex-parte Applicant.
66. However, in respect of the subject matter, the subject, in whose favor leave was sought and granted has filed the Application in own name as the Applicant. For clarity, the Republic who ought to be the Applicant has not even be impleaded and/or made a party.
67. Suffice it to note that Judicial review proceedings are neither civil nor criminal, but same are sui juris proceedings and thus same have Special procedure regulating not only their institution, but also prosecution.
68. Consequently, it is imperative to note that every subject that is keen to commence and/or originates Judicial review proceedings must strictly comply with and/or adhere to the laid down procedure and not otherwise.
69. It is also appropriate to mention here and now that failure to comply with and adhere with the strict rules governing the Judicial Review Proceedings, does not amount to Procedural technicality, but same goes to the root of the proceedings and thereby invalidates the entire suit.
70. I must point out, that the foregoing observations are not new and or novel. For clarity, the need for strict compliance with the rules under pinning Judicial Review proceedings, were spoken to and underlined vide the decision in the case of *Farmers Bus Service and others v The Transport Licensing Appeal Tribunal* (1959) E.A. 779, where the court held as hereunder;  
  
'the East African Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled. On Kenya's assumption of Republican status on 12<sup>th</sup> December 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of Certiorari, Mandamus or Prohibition now issue in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue.'



71. Other than the foregoing decision, which circumscribed the manner in which Judicial Review proceedings are to be filed, it is also worthy to take cognizance of the decision in the case of *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 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”.

72. Recently, the position of the law as espoused in the preceding decision was re-visited vide the decision in the case of *Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002* [2002] 1 KLR 486, where Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for Mandamus is: -

“Republic.....applicant

v

The Electoral Commission of Kenya.....Respondent.

Ex Parte

Jotham Mulati Welamondi”

73. Based on the foregoing, I find and hold that the Notice of Motion application dated the 20<sup>th</sup> November 2019, filed by and in the Name of the Subject as the Applicant, is fatally incompetent and legally untenable.

74. Other than the foregoing muddle, which negates the subject application, there is yet another legal issue that invalidates the entire application.

75. It is common ground, that before Leave can be sought for and or be granted, the Subject/Applicant is called upon to file a Statement of Facts and same must be verified by a Verifying affidavit. Ordinarily, the documents and/or annexures if any are to be attached to the affidavit of Verification of facts.

76. On the other hand, the Statement of Facts is statutorily required to contain inter-alia, the Reliefs that the subject would be seeking in the substantive Application.

77. For the avoidance of doubt, the reliefs contained in the Statement of Facts, provide the fulcrum and or anchorage to the reliefs which would be contained and/or reflected in the substantive Notice of motion.

78. At any rate, it is worthy to note that if the Statement of Facts does not allude to and/or contain the substantive Reliefs, then the Notice of Motion Application cannot contain and/or reflect a new Relief, at variance with what was contained or reflected in the Statement of Facts.



79. In respect of the foregoing observation, it is imperative to take note of the provisions of Order 53 Rule 1 (1 & 2), which provides as hereunder;
1. Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1.]
    - (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
    - (2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
      - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
      - (b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.
80. However, in respect of the subject matter, the Statement of Facts which was filed by the Applicant contains and/or state the reliefs to be sought as Leave to apply for orders of Certiorari and Prohibition and not otherwise.
81. At any rate, it must be recalled that the issue of Leave to seek for the judicial review orders in the nature of certiorari and prohibition, were dealt with and disposed of vide the orders of the Court issued on the 4<sup>th</sup> November 2019.
82. In the premises, once the leave to apply for judicial review in the nature of certiorari and prohibition were granted in terms of the preceding paragraph, the entire of the Application on behalf of the Applicant was subsumed and/or otherwise concluded.
83. To my mind, having not sought for the substantive orders for judicial review in the Statement of Facts, which is the operative pleadings insofar as as Judicial review is concerned, the Applicant cannot now be seen to seek substantive orders in the Notice of Motion Application herein.
84. Simply put, the Reliefs which have been sought vide the Notice of Motion Application dated the 20<sup>th</sup> November 2019 and which are at variance with Statement of Facts, are devoid of any legal foundation and are thus incapable of being granted.
85. To buttress the foregoing statement of the law, it is imperative to take cognizance of the holding in the case of Commissioner General, Kenya Revenue Authority through *Republic v Silvano Onema Owaki t/a Marenga Filling Station* [2001] eKLR, where the court held as hereunder;

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII . This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

“The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see *R. v. Wandsworth JJ., ex p. Read* [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought,



and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."

86. Finally, it is also important to observe that despite the peremptory requirement that the Statement of Facts must be verified by a verifying affidavit, no such verifying affidavit was filed and/or lodged by the Applicant herein.
87. In the premises, though a Statement of Facts was duly filed, same was not verified in the manner required by the law.
88. Consequently, I beg to point out that in the absence of the affidavit in verification of the Statement of Facts, the substantive Notice of Motion Application, which is ordinarily anchored on the statement of facts and the affidavit in verification thereof, was/is devoid of factual foundation.
89. In the premises, the substantive Application was therefore stillborne.

## **Issue Number 2**

### **Whether the Applicant has any legal and/or legitimate right to and in respect of the Suit property to warrant the issuance of the order sought.**

90. It is common ground that prior to and/or before the commencement of the subject proceedings, the Applicant herein had filed and/or lodged civil proceedings vide ELC 432 of 2012, wherein the Applicant was the Plaintiff, whereas the Interested Parties herein were impleaded as the Defendants.
91. It is also important to note that in the said proceedings, the applicant herein had sought Declaratory reliefs, inter alia, declaration that the Applicant is the lawful and legitimate proprietor of the suit property.
92. Though the Applicant herein has failed to disclose the obtaining status and/or outcome of the civil proceedings that same had filed, it is incontestable that the said suit was indeed heard and dismissed vide Judgement rendered on the 18<sup>th</sup> May 2020.
93. On the other hand, it is also imperative to observe that the court while dealing with ELC No. 432 of 2012, decreed that the Applicant's title be cancelled and/or be revoked and that the suit property, be registered in the name of the 2<sup>nd</sup> Interested Party, albeit to hold on Trust for the 1<sup>st</sup> Interested Party.
94. I must also point out, that despite the delivery of the said Judgement, no appeal was ever filed and/or lodged.
95. Nevertheless, if any appeal was ever filed and/or lodged against the said decision, none was brought to the attention of this court and hence the assumption in terms of the preceding paragraph holds sway.
96. To the extent that the Applicant's title to the suit property has since been revoked and/or cancelled, the question that now begs an answer is whether the Applicant herein has any legitimate claim, right and/or interest in the suit property to warrant protection vide an order of Prohibition.
97. To my mind, the Applicant's title having been revoked and/or cancelled by a Court of Competent jurisdiction vide Judgement rendered on the 18<sup>th</sup> May 2020, the Applicant herein therefore has no Locus standi to further and/or propagate the subject proceedings.
98. In my humble view, without the Applicant being the registered owner of the suit property, the Judicial Review order of Prohibition would be issued in vanity and or futility.
99. Suffice it to state, that court orders do not issue in vanity and/or futility.



100. To fortify the foregoing observation, I adopt and endorse the holding in the case of *Jocinta Wanjiru Raphael vs William Nangulu, Divisional Criminal Investigation Officer Makadara and 2 others* (2014) eKLR, where the Court was of the view that

“It must always, be remembered that Judicial Review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another..... the Court does not issue orders in vain even when it had jurisdiction to issue the prayed orders.....

since the Court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been a delay and where the public body has done all that it can be expected to do to fulfill its duty..... where it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance,”

101. In view of the fact that the Applicant’s title to the suit property has since been nullified and revoked vide Judgment rendered in ELC No. 432 of 2012, it is my finding and holding the Applicant herein cannot accrue any precipitate orders in respect of the suit property or at all.

### **Issue Number 3**

#### **Whether the continuation of and further proceedings in respect of the subject Application amounts to an abuse of the Due process of the Court.**

102. The civil proceedings vide ELC No. 432 of 2012, were heard and determined vide judgment rendered on the 18<sup>th</sup> May 2020. For clarity, the Judgment under reference was delivered in the presence of Mr. Oonge, learned counsel for the Plaintiffs (read Applicant herein).
103. Despite the fact that the Applicant herein and his counsel were privy to and or aware of the outcome of the said proceedings, same still invited the court to proceed with and render a Judgment in respect of the subject matter.
104. Nevertheless, the central issue for determination herein is whether or not the Applicant is the legitimate owner of the suit property and if so, whether same ought to attract protection of the court by issuance of inter-alia, orders of Judicial Review in the nature of Prohibition.
105. However, the issue of ownership of the suit property having been duly resolved and/or determined elsewhere, it was incumbent upon the Applicant and his counsel to make disclosures to the court.
106. Be that as it may, the Applicant and his counsel withheld the critical information and perhaps thought that such concealment would enable same to procure and obtain a favorable decision.
107. To my mind, the Applicant herein indulged in a process, namely, concealment of material information and such concealment, has enabled the Applicant to continue abusing the Due process of the court.
108. Hopefully, such conduct shall not be witnessed any further, but nevertheless it is a conduct that must attract appropriate sanction and/or reprimand.



109. In respect of the observation pertaining the abuse of the Due process of the court, it is worthy to take cognizance of the holding in the case of *Muchanga Investments Ltdv Safaris Unlimited(Africa) Ltd& 2 others* [2009] eKLR, where the court held as hereunder;

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- (d) (sic meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

110. Clearly, the prosecution and continuation of the subject Judicial Review proceedings by the Applicant even though same was privy to and/or aware of the Judgment in ELC No. 432 of 2012, reflects pure and unbridled abuse of the Due process of the court.

**Final disposition:**

111. Having addressed and resolved the issues that were outlined herein before, it must have become obvious that the Judicial Review proceedings herein are not only misconceived, but are legally untenable.

112. Consequently and in the premises, the substantive Notice of Motion Application dated 20<sup>th</sup> November 2019 be and is hereby dismissed with costs to the Respondents and Interested Parties.

113. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2022.**

**OGUTTU MBOYA,**

**JUDGE**

In the Presence of;

Kevin Court Assistant

Mr. Oonge for the Applicant.

Ms Masinde for the 1<sup>ST</sup> Respondent.

N/A for the 2<sup>ND</sup> Respondent.

N/A for the Interested Parties.

