



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL SUIT NUMBER 413 OF 2007

**IN THE MATTER OF AN APPLICATION BY ELIUD CHEPTOO, MICHAEL CHERONO,
JOHN CHERUTICH, MATTHEW CHELIMO, SAMUEL CHEPKUTO CHEPCHIENG',
SMAUEL BETT AND**

**DAVID CHELIMO FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS
REPUBLIC.....APP
LICANT**

VERSUS

- 1. THE CHIEF LAND REGISTRAR.....1ST
RESPONDENT**
- 2. THE COMMISSIONER OF LANDS.....2ND
RESPONDENT**
- 3. COUNTY COUNCIL OF BARINGO.....3RD
RESPONDENT**

AND

- 1. ATTORNEY GENERAL.....1ST
INTERESTED PARTY**

2. HON. MINISTER FOR EDUCATION.....2ND
INTERESTED PARTY
3. THE KENYA REVENUE AUTHORITY.....3RD
INTERESTED PARTY
4. REGISTERED TRUSTEES OF THE CATHOLIC DIOCESE OF NAKURU.4TH
INTERESTED PARTY
5. THE KENYA ANTI-CORRUPTION COMMISSION.5TH
INTERESTED PARTY

Ex-parte: Eliud Cheptoo, Michael Cheron, John Cherutich, Matthew Chelimo, Samuel Chepkuto Chepchieng' Samuel Bett and David Chelimo

J U D G M E N T

Before me is a Notice of Motion dated 30th June, 2008, filed by O P Ngoge and Associates Advocates for the ex parte applicants **Eliud Cheptoo, Michael Cheron, John Cherutich, Matthew Chelimo, Samuel Chepkuto Chepchieng' Samuel Bett and David Chelimo**. The application was filed under Order 53 Rule 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya).

The application was filed against three respondents, and five interested parties. The respondents are the **Chief Land Registrar** (1st Respondent), **the Commissioner of Lands** (2nd Respondent), and **The County Council of Baringo** (3rd Respondent). The interested parties joined in the proceedings are the **Attorney General** (1st interested party), **Hon. Minister for Education** (2nd interested party), the **Kenya Revenue Authority** (3rd interested party), **Registered Trustees of the Catholic Diocese of Nakuru** (4th interested party), and the **Kenya Anti-Corruption Commission** (5th interested party).

The prayers sought are as follows: -

1. *That orders of Mandamus be issued compelling the 1st and 2nd respondents herein to cancel the transfer instruments and all entries, transactions and dealings made in the register fraudulently and contrary to the law by the Respondent whose diabolical effects was to transfer land parcel No. Baringo/Kapchepkor/725 to the registered trustees of the Catholic Diocese of Nakuru thereby defeating the charitable purposes for which the ex-parte applicants donated the suit land.*
2. *That further or in the alternative the honourable court be pleased to issue orders of certiorari to remove to this hounourable court for the purpose of quashing all entries, transactions and fraudulent dealings made in the register by the respondents whose diabolical effects was to transfer land parcel No. Baringo/Kapchepkor/725 to the registered trustees of the catholic Diocese of Nakuru thereby*

defeating the charitable purposes for which the ex-parte applicants donated the suit land.

3. That, further or in the alternative the honourable court be pleased to grant orders of mandamus to issue directed at the Kenya Anti-corruption Commission to investigate and name individuals involved in the fraud and to recommend to the Attorney General that they be prosecuted forthwith.

4. That the costs of the application be provided for.

The application is grounded on the statement filed with Chamber Summons for leave. The statement has the grounds for the reliefs sought. The grounds are as follows.

(a) That it is a mandatory public and statutory duty of the respondents to fight the ever persistent ghost of fraud, corruption and irregular dealings in the land registry and to follow the law.

(b) That the transfer was tainted with corruption and fraud and the mandatory consent from the Land Control Board was never sought or obtained.

(c) That the purposes for which the applicants donated their land has been defeated and the applicant's land has been taken away from them by fraud.

(d) That the transactions are a nullity and no stamp duty was ever paid to Kenya Revenue Authority yet Catholic Diocese of Nakuru is running a private business on the suit land in the name of St. Peters Girls Secondary School.

(e) That it is a mandatory duty of the Kenya Anti-Corruption commission (the 5th interested party) hereto to investigate and recommend for prosecution persons involved in corruption or fraud in the fraudulent transaction of suit land in this matter.

The application is also grounded on the verifying affidavit sworn by Eliud Cheptoo, one of the ex-parte applicants on 20th April, 2007, also filed with a Chamber Summons for leave. It was deponed in the said affidavit, inter alia, that the residents of Kaptere donated portions of their land which was consolidated together and named Baringo/Kapchepkor/725. It was on this land that Kaptere Public Primary School was built. Thereafter, the residents requested the Ministry of Lands to reserve the parcel of land for Kaptere Secondary School which was to be a public charitable trust school, which the Ministry of Lands accepted. It was deponed that the residents vested the said land in Baringo County Council to manage it as trustee. It was deponed further that, by allowing Baringo County Council to transfer the said land to the Catholic Diocese of Nakuru, the Registrar of Lands and Commissioner of Lands defeated the purpose for which the parcel of land was meant to serve. It was deponed that there was fraud because the diocese was exercising private ownership rights contrary to the objectives of donating the land. It was contended that Stamp Duty was not paid to transfer the said land and that the Land Control Board Consent was not sought before the transfer of this agricultural land. It was also deponed that the land was grabbed corruptly and that as a consequence there was a suit filed as Nakuru as HCCC No. 24/2005.

The applicants through their counsel also filed written submission son 11th may 2009. It was contended in the said submissions, inter alia, that the Attorney General was on record in this matter on behalf of the Government, the Chief Land Registrar, the Minister for Education and the Commissioner of Land who has failed to file a replying affidavit to controvert the contents of the verifying affidavit. Therefore, both the Attorney General and the Government should be deemed as having admitted all the facts and therefore, the orders sought against them s hould be granted. It was submitted that the Baringo County Counsel violated its obligations as a trustee by transferring public land donated by a Public Charitable

Trust to a private institution the Registered Trustee for the Catholic Diocese of Nakuru which land, was not registered under the Registered Land Act, Cap 300 Laws of Kenya. It was contended that the transaction was fraudulent and contrary to the Constitution of the Republic of Kenya. It was further contended that the consent of the Commissioner of Land Control Board was not sought for this land which was located within an agricultural zone. In addition, the consent of Ministry of Education who was managing Kaptere Primary School was not obtained. The consent of the Attorney General as Chief Legal Government Advisor was not obtained for the transfer. Stamp Duty was also not paid which amounts to fraud and corruption against the people of Kenya.

On the grounds of opposition filed by the Attorney General dated 10th November 2008, it was contended that the application was not statute barred under section 8 of the Law Reform Act (Cap 26 Laws of Kenya) because a prayer for mandamus is not limited by time. Secondly, the six months limitation period for application for certiorari only applies to formal orders. Reliance was placed on a number of cases. The first case relied on was High Court Miscellaneous application No. 1279 of 2004 – In the Matter of Commission of Inquiry Into Golden-burg Affair, where the High Court held that nullities were not covered by the 6 months limitation period for certiorari proceedings. Reliance was also placed on the case of **Govindji Papatla Versus Nasser [1960] EA 160** wherein the court held that where there was a nullity, procedure was not important since the court has inherent jurisdiction to set aside its own order. On the issue raised by the Attorney General that there exist other proceedings, it was submitted that indeed there is **Nakuru High Court Civil Case No. 24 of 2005 and Nakuru High Court Civil Case No. 20 of 2004**. However, Counsel contended that those are civil cases and could not affect the present case, as Judicial Review is neither Civil nor Criminal. Therefore, there can be no doctrine of res-judicata applicable. Reliance was placed on **Civil Appeal No. 265 of 1997, David Mugo T/a Manyatta Auctioneers versus Republic** wherein the court held that the existence of alternative avenue was not a bar to Judicial Review Proceedings. The case of **Justus Nyangaya & Others Nairobi High Court Miscellaneous Civil Case No. 1133 of 2002** was also relied on. In that case it was held that Section 3A of the Civil Procedure Rules was applicant in Judicial Review to uphold, protect and fulfill the Judicial Functions of Administering Justice.

Reliance was also placed on **Civil Appeal No. 266 of 1996 Kenya National Examinations Council Versus Republic** wherein the Court of Appeal held that orders of certiorari would issue where the decision already made was made without or in excess of jurisdiction, or where rules of natural justice were not complied with. The Court of Appeal also stated that mandamus compels performance of a public duty and therefore, this court had jurisdiction to grant the orders sought in the present case against Kenya Anti-Corruption Commission contrary to the contents of their affidavit sworn on 17th February, 2009. It was contended that, though the Commission stated that it was carrying out investigations, it had refused to recommend prosecution of the Registrar of Lands, The headmaster of Kaptere Primary School, the Councilors and Town Clerk of the County Council of Baringo, and the Minister for Local Government and his Permanent Secretary. It was contended that the Kenya Anti-Corruption Commission had failed to carry out its statutory duties to investigate the Registrar of Lands and Kenya Revenue Authority for allowing the transfer of this public utility land to pass to a private owner without payment or Stamp Duty. In addition, the Commission had failed to charge the registered trustees of Catholic Diocese of Nakuru. Counsel also argued that though the Commission was listed in the proceedings as an interested party, orders of mandamus could still issue as the Commission was served with the application.

On the replying affidavit of the 3rd respondent, it was argued that they were blowing hot and cold at the same time. Counsel contended that the sponsorship of the primary school and proposed private school since 1972 was undisputed. What was in controversy was the transfer of public utility land without the consent of the President through the Commissioner of Lands and the Cabinet, and without the consent and legal advice of the Attorney General and the Minister for Education. Counsel contended that the transfer contravened the mandatory provisions of Sections 114, 115, 116, 117, 118, 119 and 120 of the Constitution. This was because the original purpose for which the parcel of land was donated to the public had been converted into a private enterprise thus defeating the purpose of the trust to the detriment of the public. There were no powers or jurisdiction to alienate the said parcel of land without complying with the Constitution and without paying Stamp Duty.

With regard the 3rd interested party's replying affidavit, it was contended that it was disrespectful to the people of Kenya for the Deputy Commissioner of Domestic Taxes to allege that he was not in a position to give a conclusive response to the allegation on Stamp Duty which was paid in 2003. That was an indication of the culture of impunity and therefore prerogative orders were justified. Counsel lastly, stated that he was not able to respond to the supplementary affidavit filed belatedly on 5th May of 2009 without leave of the court. The court was urged to allow the application.

The application was opposed. The Attorney General for the 1st and 2nd respondents and for the 1st and 2nd interested parties filed grounds of opposition on 11th November, 2008. The grounds are nine (9). They are as follows: -

- 1. The application is premised on grounds (as set out in the statement of facts) that cannot support the granting of Judicial Review Orders as envisaged by the provisions of section 8 of the Law Reform Act.**
- 2. The application is premised on facts (as set out in the statement of facts) yet a statement has no evidential value.**
- 3. The application is based primarily on allegations of fraud which is a civil claim that this honourable court is expressly bared by statute from determining. See section 8 of the Law Reform Act.**
- 4. As regards the applicants prayer for orders of certiorari the same are statute barred.**
- 5. The applicant has not made any claim against either of the respondent.**
- 6. The respondents have not made any decision that is capable of being quashed.**
- 7. The applicants have not complied with the mandatory provisions of Order 53 rule 7 of the Civil Procedure Rules.**
- 8. The applicant admits having similar suits in regard to the same subject matter Nakuru HCCC No. 24 of 2005 and Nakuru HCCC No. 120 of 2004. This is clearly an abuse of the court process.**
- 9. The application is misconceived, incompetent and bad in law.**

The Attorney General also filed written submissions on 8th May 2009.

It is contended therein that Order 53 rule 2 of the Civil Procedure Rules provided for a 6 months limitation period where one was seeking orders of certiorari. It took the applicants more than four years before filing the application. Therefore, the Notice of Motion herein was statutory time barred.

It was contended also that this Notice of Motion which contained allegations of fraud and corruption should have been pursued through a normal civil suit where cross-examination of witnesses would take place. Judicial Review proceedings do not deal with merits but with the process of decision making. The applicants had not also shown which statutory duties the respondents had breached.

It was the contention of counsel that under section 144(3) of the Local Government Act, (Cap 265) if any land belonging to a Local Authority was appropriated, approval of the Minister had to be obtained. That was why in this present matter, after the council approved the transfer, they obtained the Minister's approval on 20th December, 2002. This was in line with the correct legal procedure provided by the statute. The land having been registered in the name of the 3rd respondent, and reserved for the

construction of secondary school, the said 3rd respondent (Local Authority) legally transferred the same to the 4th interested party who had developed a secondary school on the land.

The third respondent, through their counsel Ms Chebii & Company advocates, filed a replying affidavit sworn by Nicholas Kalela the County Clerk on 20th February, 2009. It was deponed in the said affidavit, inter alia, that the land was registered in the name of the County Council to hold in trust for the community in accordance with the Trust Land Act (Cap 288 of the Laws of Kenya) and particularly reserved for Kaptere Secondary School and not Kaptere Primary School as alleged by the applicants. That sometime on 27th December, 1990 the headmaster of Kaptere School wrote to the County Council requesting the transfer of the plot to the Catholic Diocese of Nakuru and Kaptele Secondary School which was approved by the Council in January, 1991 at which meeting the area councilor the late Joel Kutut was present. That in April, 1991 the Council wrote to the Headmaster communicating the Council's approval. That the sponsor of the Primary School and the proposed secondary school had been the Catholic Diocese of Nakuru since 1972. That it was the Kaptere Primary School Board and the community who had been pushing for the transfer of title from the County Council. That in August 2002, the Council forwarded to the Government the transfer documents in respect of the land and in December, 2002 the Ministry of Local government wrote to the 4th interested party informing them that title documents were being processed. That the 4th interested party wrote back to the Ministry and confirmed that the project to be undertaken was a community project. That the subject plot was Trust Land exclusively reserved for construction of a secondary school and that the trustee (Local Authority) however, allowed the local community to construct a primary school under the patronage and sponsorship of the 4th interested party. That it was the local community which requested that the suit land ought to be subdivided into a primary and secondary school. That it was not true that the transfer was tainted with fraud and that it was not true that the land was governed by the Land Control Act. It was deponed that the County Council was exempted from seeking consent of Land Control Board. It was further deponed that the Ministry of Education was aware of the transaction and actively supported it.

The 3rd respondent through their advocates also filed written submissions on 12th May, 2009. It was contended that the applicants had not sought any orders against the 3rd respondent, therefore it was surprising that they were included in the proceedings. It was contended that the 3rd respondent had never committed any acts of fraud in this matter. In addition, the 3rd respondent was exempted from seeking consent of the Land Control Board to transfer the parcel of land to the 4th interested party. Further, it was contended that the applicants did not donate any land, but that it was the community which donated the land for the construction of a girl's secondary school which had been put up by the 4th interested party. It was contended that the applicants had already addressed issues of fraud in Nakuru HCCC No. 24 of 2005. That the applicants' application was statute barred. That no authority was given by the residents of Kaptere authorizing the applicants to bring this suit. That the applicants had actually acted in bad faith in failing to disclose the existence of Nakuru HCCC No. 24 of 2005. Therefore, the application was vexatious and an abuse of the court's process. It was contended that the applicants were driven by religious inclination to bring these proceedings.

The 3rd interested party filed a replying affidavit sworn by WILFRED ONGUBO on 9th April 2009. It was deponed, inter alia, that the deponent was a Deputy Commissioner – Domestic Taxes Department. That the Finance Act 1999 appointed the 3rd interested party to be the collector of Stamp Duty with effect from that year. That, however, there were some initial logistic issues which called for deliberations and that the 3rd interested party therefore commenced collecting Stamp Duty from 1st January, 2005. That the 3rd interested party was therefore, unable to confirm or deny whether Stamp Duty was paid during the transfer of the land in 2003. That the 3rd interested party wrote to the 2nd respondent in March 2009 to give details relating to payment of Stamp Duty for the said plot. Therefore, the 3rd

interested party was not able to give the requested information on collection of Stamp Duty.

The 3rd interested party through their counsel, Joyce Mwangi also filed short written submissions on 22nd June, 2009. It was reiterated in those submissions that prior to January, 2005 the 3rd interested party was not collecting Stamp Duty. It was at that time the responsibility of the 2nd respondent to collect Stamp Duty. Therefore, the 3rd interested party was not in a position to confirm or deny whether Stamp Duty was paid in 2003.

The 4th interested party filed a replying affidavit sworn by Fr. Bernard Ngaruiya on 14th October, 2008. It was deponed, inter alia, that there was a suit filed as HCCC No. 24 of 2005 at Nakuru before these proceedings were filed. In that suit, an application by way of Chamber Summons was filed under Certificate of Urgency. It was dismissed.

It was deponed that the applicant had, from that time failed, refused or neglected to set down the suit for hearing and had chosen to file these separate proceedings in order to summarily lock out other stakeholders, including the 4th interested party, from being heard through witnesses. It was also deponed that the residents of Kaptere were supportive of the status of ownership of the land by the 4th interested party. It was deponed that the land was not Agricultural Land requiring consent of Land Control Board. It was deponed that the value of the land with entire development could exceed forty million shillings. It was deponed that it was preferable that HCCC NO. 24 of 2005 Nakuru be heard through viva voce evidence. It was further deponed that another suit Nakuru HCCC 120 of 2004 was filed by the applicants against the 4th interested party and was struck out and the applicants had not yet paid part of the costs. The 4th interested party also filed a further affidavit sworn by the same deponent on 2nd April 2009, which was filed on 5th May 2009. This affidavit appears not to have been filed with the leave of the court. I will ignore it.

The 4th interested party, through their counsel Rudy Orege, filed written submissions on 5th May 2009. It was contended that the applicants had filed HCCC No. 120 of 2004 which was struck out with costs of Justice Kimaru on 9th July 2004. They later filed HCCC No. 24 of 2005 which was still pending in court without a hearing date. They have now come to this court to file these proceedings while other proceedings on the same subject were pending. It was contended that this was impunity and an abuse of court process. That in Nakuru HCCC No. 24 of 2005 a total of 283 interested parties had been enjoined. It was counsel's contention that the applicants herein were gambling by coming to this court, which should be discouraged by court. It was the contention of the counsel that their position was supported by members of the community, parents and teachers of Kaptere Primary School and had blessings of the Ministry of Education. It was the contention that the land was not subject to the consent of Land Control Board. In any event, the St. Peters Girl's Secondary – Kaptere had already been functional since 2005. It was emphasized that the applicants had not demonstrated that they donated the land or that they would suffer prejudiced, by the land allocation. Counsel argued that the application was filed outside the limitation period of certiorari which is 6 months.

The 5th interested party filed an affidavit sworn by G. K. Ruto a Senior Attorney on 16th February 2009. It was deponed, inter alia, that the applicants had not shown that the 5th interested party had failed to investigate the matter. It was deponed that applicants had also failed to tender evidence to show that 5th interested party has failed to discharge its statutory duty. It was deponed that in fact the 5th interested party was investigating the matter after having received some complaints. It was deponent further that since the 5th interested party was carrying out investigations, there was no merit in the prayer for mandamus directed at it. In any event, the applicants wrongly asked for prayers against the 5th interested party without joining them as a respondent. It was also deponed that the application with regard to the 5th

interested party was incompetent, misconceived, misguided, defective and an abuse of court process.

The 5th interested party does not appear to have filed written submissions.

At the hearing Mr. Ngoge appeared for the applicants, Mr. Cherugony appeared for the 1st and 2nd respondents and the 1st and 2nd interested parties. Mr. Ontweka appeared for the 3rd interested party, Mr Orege for the 4th interested party and Mr. Rinkanya for the 5th interested party. All the advocates of the parties addressed the court in support of their clients' position.

I have considered the application, the documents filed, the submissions both written and oral, the authorities cited, and the law. A number of issues arise from this application. I will now proceed to deal with the issues that I consider are relevant.

1. Is the Application Statute Barred?

It has been argued that since the applicants have come to court seeking orders of certiorari, the application is statute barred since the leave to file the application was sought more than six (6) months after the occurrence of the act or acts complained of.

Under Order 53 rule 2 of the Civil procedure Rules, there is a limitation period for applying for certiorari Orders in certain situations. The said rule states: -

“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction, or other proceedings for the purpose of being quashed, unless the application for leave is made not later than 6 months after the date of proceedings or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired.”

In my view, the above limitation applies only to formal orders from judicial or quasi judicial proceedings. The limitation does not apply where the decision sought to be quashed by certiorari is from a person or an institution that was not exercising judicial or quasi judicial authority. In our present case, the decision or decisions or actions sought to be quashed through certiorari were not judicial actions. Therefore, the above limitation period of 6 months does not apply. I dismiss the objection.

2. Is the Application Defective Due to the Contents of the Statement

It has been argued by the Attorney General that the statement herein is defective because it contains facts. Indeed, one of the items included in the statement herein was an item on facts. Indeed, in Judicial Review proceedings, the facts are to be contained in the verifying affidavit. In our present case there is a verifying affidavit which contains the facts relied upon. The statement, other than containing what are described as facts, also contains all that is required to be contained therein under order 53 Rule 1(2) of the Civil Procedure Rules.

It contains the description of the applicant, the reliefs sought and the grounds on which the reliefs are sought. In view of those circumstances, I am of the view that the complaint about the statement containing facts is a superficial complaint. If that is a defect, then it is a curable defect. It prejudices none of the parties. Those facts can be ignored, and the application will still stand, because the verifying affidavit contains the facts relied upon. I dismiss this objection.

3. Are these Judicial Review Proceedings Sustainable?

Indeed, it is not contested that there is pending High Court Civil Case No. 24 of 2005 at Nakuru. That case seems to involve much more people than the ones who have come to this court. The ex-parte applicants are parties therein. The applicants in bringing these proceedings did mention under Paragraph 12 of the verifying affidavit that the case in Nakuru existed. They did not however, give more details on the status of that case. They also mentioned in the statement the existence of that case. Through they did not give details of the state of that case, they did disclose its existence. In my view, therefore, they cannot be penalized for not disclosing the existence of that case.

That having been said these proceedings are Judicial Review proceedings. As was held by the Court of Appeal case of **COMMISSIONER OF LANDS VS KUNSTE HOTEL LTD CA No. 234 of 1995**, Judicial Review is concerned with the process and not the merits of a case. This means that any proceedings that invite the Judicial Review court to make decisions on merit of a case cannot be sustainable because decisions on merits are outside the Judicial Review jurisdiction of this court.

In my view, the issues raised herein are not straight forwards issues that can be dealt with through Judicial Review proceedings. There is an allegation that the land was donated by the applicants. It is contested. Evidence has to be given to prove that donation. That cannot be decided through Judicial Review. There is an allegation that the land was to be used for only a public school. That also has to be proved through evidence. There are allegations that Stamp Duty was not paid. That also needs to be proved through evidence.

In addition to the above from the list of plaintiff's the case No. HCCC No. 24 of 2005 Nakuru, who are 311, together with 256 people who also joined as interested parties, it is clear that oral evidence has to be tendered. This is not a matter that can be handled through affidavit evidence. It is clear to any casual eye that the matter is a highly contested matter on facts and evidence which cannot be dealt with through Judicial Review because in Judicial Review proceedings the court is not able to determine who is saying the truth, and who is entitled to this or that. Ultimately, this matter has to be determined on merits. There is no other choice.

The parties who went to the High court in Nakuru, included the applicants herein, were well advised that those were the appropriate proceedings to resolve their disputes. They should have pursued the case in Nakuru rather than come to this court through this Judicial Review proceedings. Having filed that case in High Court at Nakuru and since the same is still pending, I hold that these present proceedings were misadvised. The applicants should have sought to expedite the hearing and disposal of the case in Nakuru rather than filing these parallel proceedings on the same subject matter of dispute.

I note that in Nakuru, the defendants are only two. That is the County Council of Baringo (1st defendant) and The Registered Trustees of Catholic Diocese of Nakuru (2nd defendant). However, in these proceedings, the respondents are three, while five institutions were joined as interested parties. The coming into the picture of different parties herein, itself shows that this is a matter that should be determined substantial oral evidence and cross-examination.

I am aware that Judicial Review proceedings can be filed irrespective of whether there are other alternative reliefs available. However, that leeway should not be used to bring to the Judicial Review court matters whose determination depends on consideration of evidence on merit. I find and hold that this matter of necessity has to be determined through substantive oral evidence, and determination of same will have to consider the merits of the claims of the parties. It is not a matter for the Judicial Review Court, which is limited to consideration of the process. I will dismiss the application. I find and hold that these Judicial Review proceedings are not sustainable.

Since the Nakuru Case was filed before these proceedings were filed, and since that case was and is still pending, I will grant costs of these proceedings to both the respondents and the interested parties herein.

For the foregoing reasons, I dismiss the Notice of Motion herein. I order that the ex-parte applicants will pay the costs of the other parties.

Dated and delivered at Nairobi this 14th day of March 2011.

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GEORGE DULU

JUDGE

In the presence

Mr. Ngoge for ex-parte applicants

Ms Lavuna holding brief for Mr. Ontweka for 3rd interested party.

Mr. Oyiemba holding brief for Mr. Orege for 4th interested party.

Mr. Rikanya for 5th interested party.

Catherine Muendo – court clerk