



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 1441 OF 2003**

**IN THE MATTER OF: AN APPLICATION BY BROOKE BOND KENYA LIMITED AND CARGILL KENYA LIMITED FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS CERTIORARI AND PROHIBITION**

**-AND-**

**IN THE MATTER OF: THE REGISTERED LANDS ACT, CAP. 300 LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF: BROOKE BOND KENYA LIMITED AND CARGILL KENYA LIMITED**

**-BETWEEN-**

**BROOKE BOND KENYA LIMITED.....1<sup>ST</sup> APPLICANT**

**CARGILL KENYA LIMITED.....2<sup>ND</sup> APPLICANT**

**-AND-**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, MOMBASA LAND**

**REGISTRATION DISTRICT.....2<sup>ND</sup> RESPONDENT**

**BAHARI (T) COMPANY LIMITED.....INTERESTED PARTY**

**JUDGEMENT**

**I. CAUTIONS & RESTRICTIONS IMPROPERLY LODGED TO IMPEDE TRANSFER OF PROPERTIES: APPLICATION, PRAYERS, DEPOSITIONS**

The applicants came before me by Chamber Summons dated 20<sup>th</sup> November, 2003 which I heard *ex parte* on 21<sup>st</sup> November, 2003 and made a ruling by which I gave leave for the filing of a motion for judicial review orders. They thereafter, by their Notice of Motion dated 24<sup>th</sup> November, 2003 and filed on 25<sup>th</sup> November, 2003, citing as its basis s.8(2) of the Law Reform Act (Cap. 26, Laws of Kenya), ss.131, 132, 133, 136 and 137 of the Registered Lands Act (Cap. 300, Laws of Kenya), and Order LIII, rules 1 and 3 of the Civil Procedure Rules, moved the Court seeking orders of *certiorari*, *mandamus* and *prohibition* in

the particulars set out herebelow:

(i) that, an order of *certiorari* do issue removing into Court and quashing the decision of the Chief Land Registrar made by way of the letter dated 9<sup>th</sup> October, 2003 purportedly setting aside the rulings delivered herein on 8<sup>th</sup> April, 2003 and 31<sup>st</sup> July, 2003 by **Mr. Kenneth Kariuki Githii** and **Ms. Mary Kai**, respectively, in relation to the removal/retention of the cautions lodged on those parcels of land known as Mombasa/Block1/350, Mombasa/Block 1/449 and Mombasa/Block 1/215 by Bahari (T) Company Limited and further ordering that the issue of the removal/retention of the cautions aforesaid be heard afresh;

(ii) that, an order of *mandamus* do issue compelling the Lands Registrar, Mombasa and the Chief Land Registrar to remove the restrictions entered on 6<sup>th</sup> August, 2003 on the registers of those parcels of land known as Mombasa/Block 1/350, Mombasa/Block 1/449 and Mombasa/Block 1/215, respectively;

(iii) that, an order of *mandamus* do issue compelling the Lands Registrar, Mombasa and the Chief Land Registrar to effect immediate and due registration of the transfer of lease in favour of Cargill Kenya Limited in respect of those parcels of land known as Mombasa/Block 1/350 and Mombasa/Block 1/215 respectively;

(iv) that, an order of *prohibition* do issue stopping or prohibiting the Lands Registrar, Mombasa and the Chief Land Registrar from effecting registration of any other document adverse to the interests of Cargill Kenya Limited in those parcels of land known as Mombasa/Block 1/350, Mombasa/Block 1/449 and Mombasa/Block 1/215, respectively, pending the due registration of the transfer of lease thereof in favour of Cargill Kenya Limited;

(v) that, an order of *prohibition* do issue stopping or prohibiting the Chief Land Registrar from appointing another Lands Registrar or any other person whomsoever to hear afresh the issue of removal/retention of the cautions lodged on the registers of the respective properties by Bahari (T) Company Limited;

(vi) that, in the event that this Court finds that the cautions lodged by Bahari (T) Company Limited on 14<sup>th</sup> October, 2002 in respect of those parcels of land known as Mombasa/Block 1/350, Mombasa/Block 1/449 and Mombasa/Block 1/215, respectively, have not been vacated, an order do issue vacating the said cautions;

(vii) that, the costs of this application be provided for.

### ***Grounds in Support of the Application***

The applicants state that the administrative authorities in charge of land-registration matters have misapplied the discretion entrusted to them, and the High Court has jurisdiction to supervise and oversee the conduct of such bodies where they exercise a judicial discretion. It is asserted that the Chief Land Registrar lacked jurisdiction under the Registered Land Act (Cap.300) to set aside rulings made by two District Land Registrars – the ruling by one **Kenneth Kariuki Githii** on 8<sup>th</sup> April, 2003; and the ruling made on 31<sup>st</sup> July, 2003 by one **Mary Kai** – both in relation to the removal/retention of cautions lodged on the three properties in question by the interested party. It is stated too that the Chief Land Registrar had no jurisdiction to order that the issue of removal/retention of the cautions aforesaid, be heard afresh. The actions taken in the circumstances, by the Chief Land Registrar, it is asserted, were in excess of jurisdiction.

It is further asserted that the restrictions which the Chief Land Registrar and/or the District Land Registrar, Mombasa placed on the titles to the disputed properties, were irregular as no notices thereof were given to the parties hereto, and no hearings were conducted in relation to the matter. These failings, it was stated, amount to a procedural impropriety and the same have denied the applicants their right to be

heard.

The applicants state that the Chief Land Registrar had acted outside the law, and in excess of his powers in purporting to nullify the rulings delivered on 8<sup>th</sup> April, 2003 and 31<sup>st</sup> July, 2003 by two District Land Registrars, and in ordering a fresh hearing as to whether the cautions in question should be removed or not. The applicants state that the Chief Land Registrar, unless prohibited by this Court, intends to institute and continue with a fresh hearing of the issue as to the retention/removal of the said cautions, in disregard of the applicable procedure and in excess of his jurisdiction.

The applicants state that it is the statutory duty of the Registrar of Lands to effect and/or facilitate due registration of documents presented at the Lands Registry and which comply with the provisions of the Registered Land Act (Cap.300), and so it is within the powers of this Court to compel the respondents to perform that which is their duty.

The applicants state that since no appeal on this matter has been made to the Chief Land Registrar, it follows that the administrative machinery under the Registered Land Act (Cap.300) has been exhausted, and only the High Court now can decide the relevant question.

It is asserted that the actions of the Chief Land Registrar and the Lands Registrar, Mombasa have exposed the applicants to financial loss.

These grounds emerge from detailed pleadings contained in the statutory statement filed by virtue of Order LIII, rule 1(2) of the Civil Procedure Rules, on 21<sup>st</sup> November, 2003 and being part of these proceedings at the leave stage. The said pleadings were accompanied by the 56-paragraph verifying affidavit of **Manoj Chopra**, the Commercial Director of Brooke Bond Kenya Limited, the 1<sup>st</sup> applicant herein. The deponent has given the evidentiary basis to support the instant motion for a review, on grounds of excess of powers and jurisdiction, by the Chief Land Registrar (1<sup>st</sup> respondent) and the District Land Registrar Mombasa (2<sup>nd</sup> respondent) in their dealings with titles for, and transactions relating to the three parcels of land located in Mombasa.

**Manoj Chopra** deposes that Brooke Bond Kenya Limited is the registered proprietor as lessee of properties known as Mombasa/Block 1/350, Mombasa/Block 1/449 and Mombasa/Block 1/215; and in 2002 this company (referred to hereinafter as Brooke Bond) had entered into negotiations with Bahari Trading Company Limited (referred to hereinafter as Bahari), the interested party, on a “subject-to-contract” basis. Advocates for Bahari, M/s. Kapila Anjarwalla & Khanna then wrote to M/s. Hamilton Harrison & Mathews, the advocates for Brooke Bond, on a “subject-to-contract” basis (16<sup>th</sup> August, 2002) stating the consideration for the sale of the three parcels of land at Kshs.70,500,000/=, and raising several issues which were yet to be agreed upon, with regard to the proposed sale; and such yet-to-be-agreed issues included: (i) amount of deposit to be paid; (ii) when such deposit was to be paid; (iii) whether or not purchase-and-completion would be linked to special financing facility; (iv) the terms and conditions of warehousing and shipment of Brooke Bond’s tea. Bahari’s advocates also indicated that they were preparing a draft sale agreement to be approved by Brooke Bond’s advocates.

So, Bahari had made a price-offer, Kshs.70,500,000/=; Bahari had identified outstanding issues for resolution as between them and Brooke Bond; and Bahari had, subject to those specific considerations, stated that their advocates were in the course of preparing the draft contract, to be dispatched to Brooke Bond’s advocates for approval – of course, before the same may be executed so as to constitute a sacrosanct, concluded contract instrument.

Three days later (on 19<sup>th</sup> August, 2002), it is deposed, Brooke Bond’s lawyers wrote back to Bahari; they expressed the 1<sup>st</sup> applicant’s agreement to the proposed consideration, in the sum of Kshs.70,500,000/=; they responded on the several yet-to-be-agreed issues raised in Bahari’s letter of offer of 16<sup>th</sup> August, 2002; and they concluded by supposing there was now full agreement, and “they were looking forward to receiving the draft Agreement for Sale for their approval.”

Bahari acted on Brooke Bond's letter of 19<sup>th</sup> August, 2002, by Bahari's e-mail of 20<sup>th</sup> August, 2002 which still incorporated the phrase "subject to contract"; and by this dispatch Bahari forwarded to Brooke Bond's advocates "the draft Agreement for review and comments"; but Bahari's advocates reserved their right to make amendments to the said draft Agreement once they had received instructions from their client, and upon perusing the leases and certificates of leases and undertaking searches at the Mombasa Land Registry.

Three days later (on 23<sup>rd</sup> August, 2003) Brooke Bond's advocates sent a facsimile message to Bahari's advocates. The content of this message was: "that Brooke Bond had considered the terms in the draft Agreement for Sale and found them to be unacceptable." This was followed by letter dated 2<sup>nd</sup> September, 2002 marked "subject to contract," by Brooke Bond's advocates forwarding the draft Agreement to Bahari's advocates; and Bahari's advocates were being requested to make their comments on the draft as it now stood.

The process of seeking consensus, which is represented by the several communications aforementioned, was taken on to a higher stage, when a broad-based meeting was held on 4<sup>th</sup> September, 2002 bringing together the management representatives of both Bahari and Brooke Bond, and their respective advocates; and this meeting was then followed on 6<sup>th</sup> September, 2002 with an e-mail from Bahari's advocates to Brooke Bond's advocates, still marked "subject to contract," "setting out the matters that had been discussed at the meeting"; Brooke Bond was being requested for a response on specific issues which appear to have arisen at the meeting. The outcome was a further exchange of correspondence, still marked "subject to contract", between the advocates for Bahari and for Brooke Bond, and dated 10<sup>th</sup> September, 2002. And on 11<sup>th</sup> September, 2002 Brooke Bond's advocates, still "subject to contract", forwarded to Bahari's advocates a further draft of the proposed Agreement for Sale. Upon receipt of that dispatch, Bahari's advocates made certain amendments to the draft agreement, and sent it back, under cover of their e-mail of 13<sup>th</sup> September, 2002 still citing the phrase "subject to contract", to Brooke Bond's advocates. Brooke Bond's advocates responded by their fax communication dated 17<sup>th</sup> September, 2002 marked "subject to contract", specifying certain amendments by Bahari's advocates which were not acceptable to them; they made their own further amendments, forwarding the same to Bahari's advocates. Bahari's advocates acknowledged the same by a faxed letter of 17<sup>th</sup> September, 2002 marked "subject to contract," stating "that the Agreement for Sale would only be engrossed and executed *after the terms thereof had been entirely agreed between the parties.*" Two days later (on 19<sup>th</sup> September, 2002) Brooke Bond's advocates made a fax dispatch to Bahari's advocates requesting them "to confirm whether the Agreement could be finalised on the terms discussed." The matter thereafter went for a discussion before the parties; and subsequently Brooke Bond's advocates, by fax marked "subject to contract" and dated 20<sup>th</sup> September, 2002 forwarded to Bahari's advocates a further draft Agreement for Sale; and they also set out their understanding of the issues that had been discussed between the parties. On that same day (20<sup>th</sup> September, 2002) Bahari's advocates sent to Brooke Bond's advocates a "subject-to-contract" fax giving their comments regarding the amendments to the draft Agreement for Sale which had been made by Brooke Bond's advocates.

Four days later (on 24<sup>th</sup> September, 2002) Brooke Bond's advocates sent a "subject-to-contract" fax to Bahari's advocates indicating those aspects of the draft Agreement for Sale on which they had now received definite instructions from their clients. Bahari's advocates responded immediately (24<sup>th</sup> September, 2002) with a "subject-to-contract" fax, raising issues with regard to the draft Agreement for Sale. On the following day (25<sup>th</sup> September, 2002), Brooke Bond's advocates, by a "subject-to-contract" fax, responded to the issues raised by Bahari's advocates; and soon thereafter, on 26<sup>th</sup> September, 2002 they went further to forward a letter, still marked "subject to contract" and accompanied with the engrossed Agreement for Sale, to Bahari's advocates.

Exactly one week later (on 2<sup>nd</sup> October, 2002), Bahari's advocates conditionally forwarded to Brooke Bond's advocates the Agreement for Sale executed by Bahari, together with a cheque for Kshs.3,525,000/=. In Bahari's covering letter of 2<sup>nd</sup> October, 2002 it was stated that "the partially

executed Agreement for Sale was being forwarded *subject to* Brooke Bond's advocates confirming which of the documents listed in Bahari's advocates' letter of 20<sup>th</sup> September, 2002 would be provided to them." Brooke Bond's advocates, upon receipt of the communication from Bahari's advocates of 2<sup>nd</sup> October, 2002, referred the matter to their clients for further instructions, and the instructions received were that "Brooke Bond was unable to provide the documents sought by Bahari." Brooke Bond became convinced, at this stage, that "Bahari was not interested in completing the sale in light of the condition Bahari purported to impose on Brooke Bond in their advocates' letter of 2<sup>nd</sup> October, 2002." Two weeks later (on 15<sup>th</sup> October, 2002) Brooke Bond's advocates sent a letter to Bahari's advocates, stating that "Brooke Bond was not in a position to comply with the condition that had been imposed in Bahari's advocates' letter of 2<sup>nd</sup> October, 2002 and that consequently Brooke Bond would not proceed with the transaction;" and under cover of the said letter, Brooke Bond's advocates returned the partly-executed Agreement for Sale and the un-banked cheque for Kshs.3,525,000/=. By their letter of 16<sup>th</sup> October, 2002 Bahari's advocates *acknowledged receipt* of the returned partially-executed Agreement for Sale and the unbanked cheque.

**Manoj Chopra** depones that the negotiations for the sale of the three suit properties to Bahari had been conducted throughout on a "subject-to-contract" basis and it was clear to both parties that the parties would only become bound after all the terms of the Agreement for Sale had been agreed upon, and the Agreement for Sale executed by both parties. But Bahari and Brooke Bond had failed to *reach agreement* on the terms and conditions for the sale and purchase of the properties, and consequently no Agreement for Sale was executed between Bahari and Brooke Bond.

Following the failure of agreement between the parties, Brooke Bond entered into an Agreement for Sale dated 17<sup>th</sup> October, 2002 with Cargill Kenya Limited (hereinafter referred to as Cargill), 2<sup>nd</sup> appellant – in which Brooke Bond agreed to sell and Cargill agreed to purchase the three suit properties for a consideration of Kshs.71,000,000/=. Cargill proceeded, pursuant to the Agreement for Sale made with Brooke Bond, to pay up the full price of Kshs.71,000,000/=. Following which Brooke Bond's advocates duly released the completion documents, including the titles and the transfers of leases in respect of the suit properties to M/s. Salim Dhanji & Co. Advocates who were then acting for Cargill, to enable them to finalise the transfer of the properties to their client's name.

The deponent avers from information received from Brooke Bond's former advocates, M/s. Hamilton Harrison & Mathews Advocates that after the negotiations between Bahari and Brooke Bond broke down due to *lack of agreement*, Bahari applied to register cautions against the suit properties, and the same were registered on 14<sup>th</sup> October, 2002. About one month later, on 12<sup>th</sup> November, 2002 Brooke Bond's advocates sent a letter to the Mombasa District Land Registrar protesting the lodgement of the cautions by Bahari. The said Land Registrar responded, by his letter of 20<sup>th</sup> November, 2002 advising Brooke Bond's advocates to make a formal application seeking the removal of the cautions; and Brooke Bond's advocates acted by their letter of 29<sup>th</sup> November, 2002 formally applying for the removal of the cautions. Some two months later, on 4<sup>th</sup> February, 2003 the Mombasa District Land Registrar gave written notice to Bahari's advocates of his intention to remove the cautions registered against the suit properties – unless a written objection was received from them. The Land Registrar, on 18<sup>th</sup> February, 2003 wrote a letter to Bahari's advocates requesting them to provide written submissions as to the cause for their client's objections to the removal of the cautions. And Bahari's advocates, by their letter dated 3<sup>rd</sup> March, 2003 filed their submissions, which in turn, led to a reply by Brooke Bond's advocates dated 19<sup>th</sup> March, 2003.

The deponent believes to be true the information he has received from Brooke Bond's advocates, that the new District Land Registrar at Mombasa, **Ms. Mary N. Kai** who took over from **Mr. Kenneth Kariuki Githii** on 2<sup>nd</sup> April, 2003 delivered her ruling on the issue of cautions lodged against titles to the three suit properties on 31<sup>st</sup> July, 2003; and she ordered that the said cautions be vacated and removed from the register, upon payment of the requisite registration fees; and then, on 5<sup>th</sup> August, 2003 Bahari's advocates brought before the said Land Registrar the "fact" that already, earlier on, before her ruling of 31<sup>st</sup> July, 2003 her predecessor, **Mr. Kenneth Kariuki Githii** who had been posted to Nakuru on 2<sup>nd</sup> April, 2003

had made his own ruling on the same cautions on 8<sup>th</sup> April, 2003 – and that **Mr. Githii's** ruling carried orders for the *retention* of the said cautions. But the new District Land Registrar, Mombasa on 1<sup>st</sup> September, 2003 wrote a letter to Bahari's advocates confirming that her ruling on the said cautions dated 31<sup>st</sup> July, 2003 still stood, as her office was not aware that there existed a ruling by **Mr. Kenneth Kariuki Githii** made on 8<sup>th</sup> April, 2003 by which date he was a Land Registrar in Nakuru District. The deponent believes to be true the information received from Brooke Bond's advocates, that **Ms. Mary Kai's** letter of 1<sup>st</sup> September, 2003 which confirmed the validity of her own ruling of 31<sup>st</sup> July, 2003 was not copied to them and they only obtained a copy of the same from the Mombasa Land Registry on 3<sup>rd</sup> November, 2003.

The deponent avers that the confusion in the design of rulings on the impugned cautions, at the Mombasa Land Registry, was compounded by the *intervention* of the Chief Land Registrar at Head Office in Nairobi, **Mr. C.W. Ngatia**. This senior officer wrote a letter dated 10<sup>th</sup> September, 2003 by which he ordered **Ms. Mary N. Kai** the Mombasa District Land Registrar, to "provide him with a brief on the matter of the cautions"; and the same letter also "ordered that *any transactions involving the properties be held in abeyance.*" The deponent avers, from information received from Brooke Bond's advocates, that **Mr. Ngatia's** letter of 10<sup>th</sup> September, 2003 was *not copied to them* – and that they only obtained a copy from the Mombasa Land Registry on 3<sup>rd</sup> November, 2003.

On 19<sup>th</sup> September, 2003 **Ms. Mary Kai**, the Mombasa District Land Registrar furnished a brief to the Chief Land Registrar as ordered by him on 10<sup>th</sup> September, 2003. After seeing the said brief, **Mr. C.W. Ngatia** wrote a letter on 9<sup>th</sup> October, 2003 ordering that "the matter of the removal/retention of the cautions be *heard afresh by another Land Registrar*"; and he appointed a **Mrs. Rosemary Ng'ong'a** to hear the matter. The deponent believes information from Brooke Bond's advocates, that the matter was to be heard by the said **Mrs. Rosemary Ng'ong'a** on 3<sup>rd</sup> November, 2003 at 10.00 a.m. in Mombasa; and so the said advocates travelled to Mombasa for the hearing, but no hearing took place as **Mrs. Rosemary Ng'ong'a** did not avail herself at the venue of the proceedings; and since then, no fresh date has been made for a hearing of the matter.

On 13<sup>th</sup> November, 2003 Brooke Bond's advocates wrote a letter of complaint to the Chief Land Registrar, "regarding the manner in which the matter of the cautions was being handled." To this letter of complaint, to-date the Chief Land Registrar has made *no response*.

Over and above the cautions lodged against titles for the suit properties by Bahari, the deponent believes to be true the information he has received from Brooke Bond's former advocates, *Restrictions* had been entered in the register of properties, against the titles for the three suit properties, on 6<sup>th</sup> August, 2003 – *more than two months to 15<sup>th</sup> October, 2002* when Brooke Bond came to learn that Bahari did not seriously intend to purchase the three suit properties. These restrictions had the effect of "prohibiting any dealings with the properties until further orders."

**Manoj Chopra** deposes that Brooke Bond had not known, even as they negotiated for the sale of their properties to Bahari, that the Registrar's office would not permit the sale-and-purchase transaction then being negotiated; in his words: "The applicants were at no time issued with notices or heard before the said Restrictions were placed on the registers of the properties as is required by law. Accordingly, the Land Registrar, Mombasa and/or the Chief Land Registrar failed to follow the ...laid-down procedure."

**Ivan Fernandes**, the Managing Director of Cargill (2<sup>nd</sup> applicant) swore a verifying affidavit on 20<sup>th</sup> November, 2003 in which he deposes that Cargill and Brooke Bond had executed an agreement for sale on 17<sup>th</sup> October, 2002 under which the vendor was to sell and the purchaser to purchase three properties registered as Mombasa/Block 1/350; Mombasa/Block 1/215; and Mombasa/Block 1/449 at the purchase price of Kshs.71 million which Cargill did pay in full. Brooke Bond's advocates, M/s. Hamilton Harrison & Mathews Advocates, had then released the completion documents to M/s. Salim Dhanji & Co. Advocates who were acting for Cargill. On 31<sup>st</sup> July, 2003 M/s. Njoroge Regeru & Co. Advocates had

obtained certificates of search for the suit properties, and these showed that all the three properties were free from encumbrances and restrictions of whatever nature. On 6<sup>th</sup> August, 2003 the transfers of lease for the three properties were duly stamped with the amounts of the requisite stamp duty duly paid. However, in the case of L.R. No. Mombasa/Block 1/449, a special condition is applicable as the property is undeveloped, and this necessitates further clearance procedures.

It is deponed that by a ruling of the District Land Registrar delivered on 31<sup>st</sup> July, 2003 cautions hitherto registered against the subject properties by Bahari were *vacated* and ordered to be *removed from the register*. On 11<sup>th</sup> August, 2003 M/s. Njoroge Regeru & Co. Advocates lodged the transfers of lease in respect of the three properties.

The deponent came to learn from Cargill's advocates that by their letter of 5<sup>th</sup> August, 2003 M/s. Kapila Anjarwalla & Khanna Advocates for Bahari brought it to the attention of the District Land Registrar, Mombasa that before her ruling of 31<sup>st</sup> July, 2003 removing Bahari's caution against the titles to the suit properties, a *different ruling* had been made by her predecessor as Registrar, on 8<sup>th</sup> April, 2003 on the removal/retention of the said cautions. The deponent records the advice of Cargill's advocates, which he believes to be true, that "the ruling delivered herein on 8<sup>th</sup> April, 2003 by **Mr. Kenneth Kariuki Githii** was delivered without any jurisdiction whatsoever as...the said **Mr. Githii** had by 2<sup>nd</sup> April, 2003 been transferred to the Nakuru Land Registry."

The deponent avers that the Chief Land Registrar, **Mr. C.W. Ngatia** by his letter of 10<sup>th</sup> September, 2003 ordered that all transactions on the subject properties be *held in abeyance*, and that later, on 9<sup>th</sup> October, 2003 he ordered that the question whether or not the cautions lodged against the subject titles be removed, be a matter for a re-hearing before a *different Land Registrar*, and for this purpose he appointed a **Mrs. Rosemary Ng'ong'a** as the Land Registrar to hear the question, though this Registrar did not turn up to hear the matter on the appointed date. By their letter dated 14<sup>th</sup> October, 2003 Cargill's advocates notified all parties herein of Cargill's interest in the matter herein. To-date, the deponent deposed, Cargill has not heard from the Chief Land Registrar, and so the *cautions still remain* lodged against the subject land-titles.

The deponent avers that Cargill's advocates, upon perusal of the registers of the subject properties on 3<sup>rd</sup> November, 2003, had come to learn that on 6<sup>th</sup> August, 2003 Restrictions had been entered against the relevant titles, prohibiting any dealings with the properties until further order. The deponent believes to be true the information received from Cargill's advocates that "Cargill and/or Brooke Bond were at no time issued with notices or heard before the said Restrictions were placed on the registers of the properties as is requisite."

**Ivan Fernandes** deponed that "in view of the refusal and/or failure by the Lands Registrar, Mombasa to effect due registration of the transfers of lease in respect of the [subject] properties, it is a matter of great concern to Cargill that for as long as the transfers remain unregistered Cargill's proprietary interest in the properties is greatly prejudiced." Such non-registration, it is further deponed, "means that third parties would not have any notice of [Cargill's interests], thereby compromising Cargill's rights and interests very substantially."

## **II. CONTRACT BINDS BROOKE BOND TO TRANSFER PROPERTIES TO US, THEY WRONGFULLY TRANSFER TO CARGILL, THEREFORE REGISTRARS ARE RIGHT TO FREEZE THEIR CONVEYANCE: INTERESTED PARTY'S**

### **DEPOSITIONS IN REPLY**

**Mehmood Jagani**, the Managing Director of Bahari (interested party) swore an affidavit on 6<sup>th</sup> December, 2003 in which he avers that he is duly authorised to make his depositions, and is fully conversant with the facts of this matter and has read and understood the application papers as well as the affidavits sworn by **Manoj Chopra** and by **Ivan Fernandes**.

The deponent depones that after negotiations conducted over several months, Brooke Bond and Bahari had “entered into an Agreement for Sale...for the purchase by [Bahari] of Brooke Bond’s leasehold properties known as Mombasa/Block 1/350, Mombasa/Block 1/215 and Mombasa/Block 1/449 ... at a consideration of Kshs.70,500,000/00 on terms and conditions set out in.... correspondence and oral agreement reached at ...meetings.” When was agreement reached? The deponent avers:

“THAT pursuant to the terms and conditions of the Agreement for Sale ...the Interested Party through its Advocates forwarded to Brooke Bond’s Advocates a cheque for Kshs.3,525,000/00 being 5% of the purchase price as a deposit together with a formal Agreement for Sale which contained all the essential terms of the Agreement reached duly executed by the Interested Party for execution by Brooke Bond.”

It is deposed that Brooke Bond was in breach of the Agreement for Sale when it “returned to the Interested Party the cheque for Kshs.3,525,000/= being 5% deposit paid and the formal Agreement for Sale unexecuted and refused to proceed with the transfer of the properties to the Interested Party.” The deponent expressed his belief in the truthfulness of advice received from Bahari’s advocates “that there is a valid contract between Brooke Bond and the Interested Party for the sale of the properties which contract is enforceable in law by an action for specific performance.”

The deponent avers that Bahari had indeed, caused cautions to be registered against the titles for the subject properties – with a view to protecting “its interest in the properties.” He avers that Brooke Bond, through its advocates, had objected to the cautions and that “after hearing both parties through written submissions, the District Land Registrar, **Kenneth Kariuki Githii** by a ruling dated 8<sup>th</sup> April, 2003 dismissed the application for the removal of the cautions.” Of the ruling made on the same cautions by the serving District Land Registrar, Mombasa, **Mary N. Kai**, the deponent avers:

“THAT on 31<sup>st</sup> July, 2003 after a period of about four (4) months, a new District Land Registrar, **Mary N. Kai** who had taken over from **Mr. Githii** who had been transferred to Nakuru purported to deliver yet another ‘ruling’ by which she allowed the removal of the cautions over the properties and proceeded to so remove them.”

The deponent avers that on 31<sup>st</sup> July, 2003 the said cautions were removed – and on that day a certificate of search issued to Brooke Bond showed that there were no encumbrances on the titles to the properties. It is deposed that notice of the removal of the cautions on 31<sup>st</sup> July, 2003 did not reach Bahari until 4<sup>th</sup> August, 2003. It is averred that upon knowing of the lifting of the cautions, Bahari lodged complaints – with (i) **Ms. Mary Kai** (the District Land Registrar in office); (ii) the Chief Land Registrar; and consequently the Chief Land Registrar ordered “a *fresh hearing* before *another District Land Registrar*.” A hearing date, 3<sup>rd</sup> November, 2003 was then fixed, but the appointed District Land Registrar, **Mrs. Rosemary Ng’ong’a**, did not turn up.

The deponent, on the basis of advice received from Bahari’s advocates, attaches a significance to the abortive hearing by Land Registrar, **Rosemary Ng’ong’a**; he deposes:

“THAT I have been advised by the Interested Party’s advocate...that Brooke Bond and Cargill having received the 1<sup>st</sup> respondent’s decision and having complied with it by agreeing to attend a fresh hearing, did waive all rights to challenge the decision.”

The deponent avers that the Chief Land Registrar took some further action; on 20<sup>th</sup> November, 2003 he appointed the Kajiado District Land Registrar, one **D.M. Mulili**, to re-hear and determine the issue of the retention or removal of the impugned cautions herein; and the said **Mr. Mulili** then fixed a new hearing date for the matter – 5<sup>th</sup> December, 2003. It is averred that **Mr. Mulili** did not proceed with his scheduled hearing, for “Brooke Bond’s advocate wrote to the 1<sup>st</sup> respondent and **Mr. Mulili** notifying them that this Honourable Court had stayed further proceedings in the matter.”

The deponent avers that he believes to be true the advice of Bahari’s advocate, “that the Restriction on the

properties was placed by the *District Land Registrar and not the Chief Land Registrar;*” and he offers justification for the said Restrictions attributing his averments in this regard to belief of the truth of advice from Bahari’s advocate:

“...the [District] Land Registrar had a statutory right to put a Restriction on the titles of the properties pending the resolution of the dispute over the Cautions since the Cautions had already been removed and nothing was left in place to *maintain the status quo.*”

The deponent endeavours further still to justify the said *Restrictions*:

“...*Brooke Bond had already been heard on the issue of the Cautions and as such it was not necessary for another hearing to be conducted on the issue as to whether or not a Restriction should be put on the titles pending a fresh hearing of the Caution dispute.*”

The deponent’s affidavit is unusual in that, rather than make depositions of *fact* based on his own first-hand knowledge, he has mainly articulated and expressed *arguments* of counsel seeking to canvass *legal points* in favour of Bahari, the interested party. He avers, for instance:

“THAT I have been advised by the Interested Party’s Advocate...which [advice] I verily believe, that Cargill are...*not innocent purchasers* and as such are fully responsible for the uncomfortable situation they have found themselves in and should not be allowed to use the law to aid their culpable act of inducing breach of contract.”

I have to state at this stage that *Mehmood Jagani’s* replying affidavit gives only little help to the Court in arriving at the authoritative *factual position* which is the only basis for a judicial disposal of the gravamina herein. Indeed, in the measure in which *Jagani’s* affidavit assumes counsel’s submission-role before the Court, it may be typified as abusive of process, in its overall tenor and effect. This affidavit goes well beyond its proper evidentiary remit, and speaks to factual matters which would be much better known to *other parties* – especially the 1<sup>st</sup> and the 2<sup>nd</sup> respondent.

### **III. IS IT PROPER TO HEAR THESE PROCEEDINGS AT THE HIGH COURT IN NAIROBI? INTERESTED PARTY APPLIES FOR TRANSFER TO HIGH COURT IN MOMBASA**

On 8<sup>th</sup> December, 2003 the interested party (Bahari) filed a Notice of Motion under certificate of urgency:

“THAT this Honourable Court be pleased to exercise its discretion and order that this application be transferred to the High Court of Kenya at Mombasa for hearing and final determination.”

This application was canvassed before me on 10<sup>th</sup> December, 2003 when the applicants (in the main proceedings) were represented by *Mr. Regeru* and *Mr. Oriri*, the respondents by *Mr. Muiruri*, and the interested party (Bahari) by *Mr. Okong’o* and *Mr. Devani*. All counsel made their submissions appropriately and I reserved the ruling, which I later delivered on 22<sup>nd</sup> December, 2003. In that ruling, I had set out the prayers, the depositions, the grounds of opposition, the argumentations of counsel, and the several authorities invoked during the submissions. I may set out here the relevant paragraphs in the said ruling which climaxed in my determination that these proceedings be heard and concluded at the High Court in Nairobi.

**“The governing provision of the law regarding the jurisdiction of the High Court in matters heard at first instance is section 60 of the Constitution. All counsel involved in this matter have correctly recognised that, in first-instance matters, the High Court has unlimited jurisdiction in the area of civil law and that of criminal law. As is quite clearly stated by the learned Judges in the several authorities cited, the High Court is one and only one institution, except that, purely for in-house management purposes, several stations have been established throughout the country. It follows that [none] of these stations has [any] exclusive jurisdictional remit qua station, and there is only one remit covering all the High**

Court Judges. Each one of them is empowered to hear any case or matter whatsoever, regardless of the part of the country it comes from and regardless of the particular station where a Judge is sitting. It thus follows that the Judges attached to the central station in Nairobi are empowered to hear cases from all places in the country, the Mombasa and coastal areas included. This would dispose of the submissions of counsel for the interested party (Bahari), but [I] will consider one or two additional issues raised.

“It is clear from the authority of *Riddlesbarger & Another v. Robson & Others [1958] E.A. 375 (C.A.)* that section 15 of the Civil Procedure Act (Cap 21, Laws of Kenya) gives no legal basis for transferring the present suit from the Nairobi Court to the Mombasa Court; for that Section regulates the jurisdiction of the lower Courts and not the High Court. The definition of the local limits of Court jurisdiction in Section 15 is concerned with lower Courts only; and hence this is not a basis for granting the prayer of the interested party for case-transfer to Mombasa.

“It is clear too that there is no agreement between the applicants and the interested party on factual issues (such as) would make a practical case for transferring the (proceedings) from Nairobi to Mombasa. There is no agreement about the magnitude of interests whether of the parties or their advocates, that have their focus on Nairobi or Mombasa. And there is no agreement about the *locus* of the critical decision-making processes that are the subject of suit – whether these took place in Nairobi or Mombasa. There is no need for this Court, at this stage, to determine these factual matters, as there is already a recognised legal principle to resolve the matter in such situations of disagreement. I would adopt the passage set out at page 5 of the ruling by the Honourable *Mr. Justice Ringera* in *Mumias Agricultural Transporters Limited v. Channan Agricultural Contractors (Kenya) Ltd*, HCCC No. 786 of 1996 .....

“The present matter is of a kindred type since, as in the *Mumias* case, there will be no opportunity for taking evidence on the questions of fact in contention. Applying this principle, that preliminary objections are not to be allowed where there is no agreement on facts ....., I decline to accept grounds 4, 5 and 7 in the grounds of objection. But I determine the Notice of Motion filed by the interested party on 8<sup>th</sup> December, 2003 on the basis of the legal submissions made. The upshot in the legal submissions, founded on the relevant legal documents and case law, is that there is no valid basis for transferring Miscellaneous Civil Application No. 1441 of 2003 from the High Court at Nairobi to the High Court at Mombasa.”

#### **IV. I HALTED APPLICANT’S TRANSFER OF ITS PRIVATE PROPERTIES SO AS TO “SAFEGUARD THE INTERESTS OF PERSONS CLAIMING RIGHTS”: DEPOSITIONS OF THE CHIEF LAND REGISTRAR**

Only much later, on 19<sup>th</sup> February, 2004 did the Chief Land Registrar (1<sup>st</sup> respondent) file his replying affidavit. How does he account for the conflicting decisions in the discharge of official Land Registry functions, in respect of the transfer of the three properties which are duly registered in the name of Brooke Bond (1<sup>st</sup> applicant), namely L.R. No. Mombasa/Block 1/350; L.R. No. Mombasa/Block 1/449; and L.R. No. Mombasa/Block 1/215?

**Mr. C.W. Ngatia**, the Registrar of Lands, deposes that he had received a complaint from the interested party’s (Bahari) advocates, “to the effect that [there were] *two contradictory rulings* emanating from the offices of the Land Registrar, Mombasa and touching on retention and/or removal of cautions in respect of Land Parcel Numbers Mombasa/Block 1/215; 350 and 449;” that upon receiving the said complaint, the deponent, on 10<sup>th</sup> September, 2003 called for a brief “with a view to [addressing] the complaint and in discharge of my supervisory functions under the Registered Land Act (Cap. 300 Laws of Kenya);” that he received the same on 19<sup>th</sup> September, 2003 and then *gave consideration to the conflicting rulings* by two different District Land Registrars; in his own words:

“THAT upon consideration of the subject rulings and with due regard to the interests of all the parties involved, I directed that the matter of retention and removal of the cautions be *heard afresh by an independent Land Registrar* and accordingly appointed a Senior Land Registrar to preside over the hearing.”

The deponent affirms that he was acting “in exercise of my statutory functions under the Registered Land Act”; and he depones: “I am charged with the responsibility of safeguarding the interests of person(s) claiming a right(s) or other entitlement over land.” He avers that his decision to appoint “an independent arbitrator” was *bona fide* “intended to accord all *parties a fair and just opportunity for being heard*, in keeping with rules of natural justice.” He deposes that his *status quo* letter of 9<sup>th</sup> October, 2003 was “not [intended] to nullify the contradictory rulings [by two District Land Registrars] but merely *places in abeyance the said rulings* for purposes of fresh hearing.”

**Mr. Ngatia’s** affidavit carries an element which runs in synchrony with the averment of **Mehmood Jagani**, in his depositions in reply to the instant application:

“THAT the applicants herein through M/s. Njoroge Regeru & Co. Advocates acknowledged and *accepted the appointment of an independent arbitrator and availed themselves for the fresh hearing.*”

So, on that account, the deponent further avers: “I verily believe that I acted within the precincts [sic] of the law... whilst [being] properly seized of the jurisdiction to proceed [as I did].” Of his said *status quo* letter (of 9<sup>th</sup> October, 2003) the deponent deposes:

“THAT the letter...authored by myself was regular [and was] made in the ordinary course of discharging my responsibility as the Chief Land Registrar with supervisory powers over the District Land Registry.”

The deponent avers that he had intended to proceed with his arrangements regarding the registration of the conveyances of the three Mombasa properties, by appointing a new District Land Registrar to determine the registry status of those properties, were it not for the orders of this Court which stayed all such administrative activities touching on private ownership of land and the rights of a land-owner to alienate the same.

## **V. THE CASE FOR JUDICIAL REVIEW: SUBMISSIONS FOR THE APPLICANTS**

### **1. Background to these Judicial Review Proceedings**

Hearing of the main application began on 30<sup>th</sup> March, 2004 when learned counsel **Mr. Regeru** appeared for the applicants, **Mr. Muiruri** for the respondents, and **Mr. Okong’o** for the interested party.

**Mr. Regeru** informed the Court that during the pendency of these judicial review proceedings which relate to perceived impropriety on the part of the Chief Land Registrar (1<sup>st</sup> respondent) and the Mombasa District Land Registrar (2<sup>nd</sup> respondent), and in relation to the applicants’ rights to effect a conveyance of the subject properties, the interested party, Bahari (T) Company Limited, has moved to *file suit* at the Mombasa High Court, against the applicants herein (***Bahari (T) Company Limited v. Brooke Bond Kenya Limited & Cargill Kenya Limited***, Mombasa HCCC No. 303 of 2003); and that in that suit the interested party (Bahari) is claiming *contractual* specific performance against Brooke Bond which has executed a contract to transfer its three Mombasa properties to Cargill Kenya Limited (2<sup>nd</sup> applicant herein). It is to be noted that Bahari’s Mombasa suit *in contract* was filed on 8<sup>th</sup> December, 2003, the very same day Bahari filed its Notice of Motion in this Court seeking to *transfer* the instant judicial review proceedings to the Mombasa High Court. The learned Judge in Mombasa, **Mwera, J** surely appreciated the uncanny nexus between Bahari’s *private law claim* in contract, over the very same properties in respect of which the applicants were claiming *administrative irregularities*, and seeking the High Court’s intervention through the *public law* mandate of judicial review. Upon an application filed by

the applicants herein, **Mwera, J** ordered a *stay* of the Mombasa High Court proceedings until the instant proceedings are concluded.

## **2. Further Background: Affidavits of Two District Land Registrars who made different Decisions at different Times on the Titles to the Subject Properties**

Learned counsel **Mr. Regeru** noted from the affidavit evidence that **Mr. Kenneth Kariuki Githii** who had been Mombasa District Land Registrar, had been transferred to the Nakuru District Land Registry on *2<sup>nd</sup> April, 2003* and **Ms. Mary Kai** had taken over at the Mombasa District Land Registry; and that, as at the time she made her ruling *removing cautions* lodged on the subject properties, on *31<sup>st</sup> July, 2003* the relevant file had *no ruling in it*; and so it was a surprise when Bahari's advocates later came up with a ruling of *8<sup>th</sup> April, 2003* by **Githii** (who by that time was in service at the Nakuru Land Registry), which ordered the *retention* of those very same cautions. Such an incomprehensible state of affairs led to an order which I made on *30<sup>th</sup> February, 2004*:

**“Mr. Muiruri, counsel representing the Attorney-General's office, shall ensure that an affidavit is sworn by Mr. K. Githii of the Lands Office, Nakuru; this is to be filed and served by 20<sup>th</sup> April, 2004.”**

The order made also allowed *replies*, if need be.

The orders thus made led to the filing of *two new affidavits*, and the admission of both became a contested question. One affidavit was by **Kenneth Kariuki Githii**, the Land Registrar said to have made a land-registry ruling for the *Mombasa* station, whereas he already was serving at the *Nakuru* land registry; and the other was by **Mary Kai**, the serving Mombasa District Land Registrar, who also made a ruling on the same property titles in respect of which **Kenneth Kariuki Githii's** ruling related.

The immediate problem raised was that, whereas **Kenneth Kariuki Githii's** affidavit was in aid of the 1<sup>st</sup> respondent's case, that of **Mary Kai** had been sourced by counsel for the *applicants* – and so it might be seen as an affidavit which did not carry the authority of the Chief Registrar of Lands, or of the Attorney-General; and indeed on this account learned counsel for the interested party, **Mr. Nowrojee** applied for it to be struck out, and his position was supported by learned counsel **Mr. Muiruri** representing the Attorney-General.

On 18<sup>th</sup> October, 2004 the interested party filed its Notice of Objection dated 16<sup>th</sup> October, 2004 the content of which was a full-scale challenge to the admissibility of **Mary Kai's** affidavit. I heard the submissions of all counsel, on the matter, and gave a considered ruling on 21<sup>st</sup> January, 2005. Several paragraphs in this ruling may be set out, as **Mary Kai's** orders are at the centre of the instant proceedings:

**“An important aspect of the submissions made for the Interested Party is that in regular conduct of administration, Mary Kai as the Mombasa District Land Registrar, should have shown the official capacity and the proper authorisation by virtue of which she was proffering evidence not through the office of the Attorney-General, but through counsel on record for the applicants. I would, with respect, agree with this submission, especially as it underlines a significant dimension of *good administration* which is the direct concern of all judicial review proceedings.**

**“Learned counsel for the applicants, Mr. Njoroge Regeru set store by two elements as justifying Mary Kai's supplementary affidavit: (a) Court's orders as the origin of the affidavit; and (b) the need to obtain truthful information from the most knowledgeable witness on the relevant matter. As regards the first of these, a careful perusal of the Court record has shown that while orders had been made creating a liberty for parties to respond to Kenneth Kariuki Githii's affidavit, there had been no mention of Mary Kai, as a person who should make depositions. The effect is that the selection of deponents following the filing of Githii's affidavit, was left to the parties and to the professional advice of their**

counsel on record. Learned counsel, *Mr. Nowrojee* submitted that the selection of *Mary Kai* as a deponent in these circumstances was improper, as it led to serious conflicts of interest which could only compromise the process of resolution of the issues in dispute. I think it is clear that this perception was a valid one and is to be upheld.

“Learned counsel *Mr. Regeeru* also justified *Mary Kai’s* affidavit on the basis that it would lead to the truth, in important matters of fact relevant to the main proceedings. That may be so, but I think this would be at a price too high, in terms of the established mode of play of the trial process in the common law tradition. It has been recognised that the motions of that process will invariably lead to the substantial truth, and will be good enough for ensuring that justice is done.

“It is the case, of course, that truth is the crucial value that leads the Court to a just determination of matters in dispute. But different paths to the truth do exist. One of them is cross-examination of a deponent on his depositions: and the applicant could very well have resorted to this method.

“Therefore, I must hold, and render as a direction on a question of law, that ?

*‘It is not tenable in legal practice that a public officer named as a joint-respondent alongside her superiors, can independently make and file depositions through the applicant’s counsel on record, save in such special circumstances as may have been considered by the Court and a different, specific order made.’*

**As exceptions to the general rule do not apply, on the facts before me, I must order that the affidavit of *Mary Kai* sworn on 23<sup>rd</sup> July, 2004 and filed on 26<sup>th</sup> July, 2004 be struck out; and the costs in this regard shall be borne by the applicants in any event.”**

Subsequently (on 21<sup>st</sup> January, 2005) it was learned counsel *Mr. Regeeru’s* turn to object to the supplementary affidavit of District Land Registrar *Kenneth Kariuki Githii*. His first objection was that since *Mary Kai’s* affidavit had been struck out, his clients would now have no way of meeting *Mr. Githii’s* depositions. He was seeking leave to file a substitute affidavit, while other counsel raised objections. I made orders granting the applicants leave to file a new affidavit in place of the one sworn by *Mary Kai* on 23<sup>rd</sup> July, 2004.

What evidence is carried in *Kenneth Kariuki Githii’s* affidavit of 20<sup>th</sup> April, 2004? He avers that he used to be the Mombasa District Land Registrar up to “about April 2004” when he was transferred to the Nakuru District Land Registry. How could he make a ruling for the Mombasa District Land Registry when he was now in service at the Nakuru District Land Registry? He avers:

“3. That by the time of [my] transfer I had some cases or hearings pertaining to land matters.

“4. That one of the cases was a caution hearing pertaining to title numbers Mombasa/Block 1/215; 350; 449.

“5. That I had by a letter dated 18<sup>th</sup> February, 2003 requested the cautioners’ advocates to provide written submission [in relation to their] grounds of objection to [the] removal of the [cautions].

“6. That I had also received written submissions from the complainants.

“7. Upon receipt of the submission I was to make a determination.

“8. That by the time of my transfer from Mombasa to Nakuru I had not completed the typing of my findings and I therefore carried the file to Nakuru to be typed there.

“9. That I returned the file and ruling to Mombasa after the typing and the same was to be sent to the parties as required by my [successor].

“10. That I am made to understand that another ruling was made by my predecessor and the cautions were removed which would amount to a re-hearing.

.....

“14. That I duly considered all the facts presented before me by both parties and made an assessment of the findings that informed my ruling.

“15. That I acted properly [and bona fide] within the powers conferred upon me [by] statute and [delegated] by the Chief Land Registrar.”

The applicants later (11<sup>th</sup> February, 2005) filed a substitute affidavit sworn by **Antoinette Atieno Absaloms**, the company secretary of Brooke Bond (1<sup>st</sup> applicant). This affidavit responds to **Kenneth Kariuki Githii's** depositions of 20<sup>th</sup> April, 2004 and reaffirms the content of **Manoj Chopra's** affidavit regarding the status of the cautions registered against the titles for the three properties in question. The deponent believes to be true the advice of counsel for the applicants, that **Kenneth Kariuki Githii** having been transferred to the Nakuru Land Registry on 2<sup>nd</sup> April, 2003 and having been replaced in Mombasa by **Mary Kai**, could not while serving in Nakuru, purport to carry out functions of the office of the Mombasa District Land Registrar; and since the said **Mr. Githii** as at 8<sup>th</sup> April, 2003 was holding the position of Nakuru District Land Registrar, he could not on that named day, have been holding the position of Mombasa District Land Registrar and could have made no valid ruling on the cautions registered at the Mombasa District Land Registry; and he “lacked any capacity to exercise any of the duties or functions of the Land Registrar, Mombasa Land Registration District.” And, in any event, it was deponed, “**Mr. Githii's** letter dated 8<sup>th</sup> April, 2003 in which he purported to act as the Mombasa District Land Registrar was not received by Brooke Bond at all and it was not until 5<sup>th</sup> August, 2003 that Brooke Bond's attention was drawn thereto by the *advocates for the interested party.*”

The deponent deposed, from a letter written by the Mombasa District Land Registrar who took over from **Mr. Githii** on 2<sup>nd</sup> April, 2003, **Mary Kai**, on 19<sup>th</sup> September, 2003 and addressed to the 1<sup>st</sup> respondent together with her ruling on the cautions delivered on 31<sup>st</sup> July, 2003, that **Ms. Kai** was able to write her said ruling “because *the relevant files, including the written submissions of the parties' respective advocates, had been left at the Mombasa District Land Registry by Mr. Githii upon his transfer to Nakuru...*” **Mary Kai**, it is deponed, “duly forwarded her ruling to both Brooke Bond's advocates, then Hamilton Harrison & Mathews, and the Interested Party's advocates, Kapila Anjarwalla & Khanna. It is deponed that **Mary Kai**, in her ruling, duly removed the cautions registered at the behest of the interested party, and so “the issue of a re-hearing to determine whether the said cautions should be removed should not have arisen at all.”

### **3. Was there a Legal Basis for the Cautions Lodged by the Interested Party, and retained by the Land Registry Officials, in respect of the three subject Properties?**

Learned counsel **Mr. Regevu** submitted that since all negotiations between Brooke Bond and Bahari had been *subject to contract*, and there was no time when a *definite offer was made and accepted on its terms*, it followed that *no agreement* was reached, that satisfied the requirements of s.3(3) of the Law of Contract Act (Cap. 23). The said s.3(3) of the Act thus provides:

“No suit shall be brought upon a contract for the disposition of an interest in land unless –

a. the contract upon which the suit is founded –

i. is in writing;

**ii. is signed by all the parties thereto; and**

**b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”**

It is my understanding of this point that, it is urged, *no completed contract came to exist* between Brooke Bond and Bahari; and therefore there is no *civil law foundation* on the basis of which the interested party could invoke the application of *public land-regulation instruments* to restrain on-going disposal arrangements for the three properties in question. Learned counsel submitted that the 2<sup>nd</sup> applicant (Cargill) has a cast-iron interest in the properties in question, and its legal claim thereto rests upon *executed contract* and *full payment of the agreed purchase price*. Counsel cited s.135 of the Registered Land Act (Cap.300) as the governing law on *propriety of cautions* lodged by persons in the Land Registry, against particular titles. That provision thus reads:

**“Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has thereby sustained damage, to pay compensation to such person.”**

Although the foregoing provision, most directly, is a framework for *private law* redress, I think it quite clearly expresses also the *policy of the law*, which is a *public norm to be observed by State officials* in charge of the regulation of the property-law regime. Of this I take judicial notice, and would state here that the public land officer, such as a Registrar of Land, is under a *public legal duty* not to sustain a frivolous encumbrance against the property title of a specific person or organization. This principle is to continue lighting up my perception of the issues emerging in the instant proceedings.

Learned counsel made submissions on the question of *locus standi*, and especially in relation to the 2<sup>nd</sup> applicant who has an *executed contract*, and has *paid* the entire agreed consideration, in respect of the purchase and transfer to them by the 1<sup>st</sup> appellant, of the three subject properties.

Of *standing* in judicial review, **Sir William Wade**, the distinguished authority in *administrative law*, in his classic work *Administrative Law*, 8<sup>th</sup> ed. (by **Sir William Wade** and **Christopher Forsyth**) thus writes (p.667):

**“It has always been an important limitation on the availability of remedies that they are awarded only to litigants who have sufficient locus standi, or standing. The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies. No one else will have the necessary standing before the Court.**

**“In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals.”**

Learned counsel stated the well-known purpose of the judicial review remedies of *certiorari* and *prohibition* on the basis of **Sir William Wade’s** writing (*op.cit.*, p. 672);

**“Prerogative remedies are granted at the suit of the Crown, as the titles of the cases show; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully [emphases added].”**

**Professor Wade** notes that anybody can apply for judicial review ? **“a member of the public who has been inconvenienced, or a particular party or person who has a particular grievance of his own.”** And counsel urged that in the instant proceedings the applicants have a major contractual interest which has

been damnified by the actions of the *public* land-regulating authorities. On the basis of a concluded contract, the 2<sup>nd</sup> appellant did pay the full purchase price and, consequently, the conveyance instrument was drawn and duly stamped, only to run up against a denial of registration in the name of the purchaser. For the cautions, the *respondents* lodged them and kept them in place in the name of the interested party (Bahari); for the restrictions, the *public land regulation officers*, of their own accord, entered these to impede the registration of property-transfer by Brooke Bond to Cargill. The applicants can show a *contract* as the legal basis of their contentions; and they can show that they have *duly paid stamp duty* – which was received and kept by the very same officers who then entered cautions and restrictions to stop the completion of the disposal process for the three properties by their owner, Brooke Bond. Counsel urged that the applicants’ mutual transactions had a *legal validity founded on contract*, and the *rights* immanent in such contract had been compromised by the decisions and acts of the respondents herein – a scenario much like that which occurred in earlier judicial review proceedings, in the *Commissioner of Lands v. Hotel Kunste*, C.A. No. 234 of 1995. On that occasion the Court of Appeal thus held:

**“The appellant (the Commissioner of Lands) was exercising his statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. the exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision .... It is, therefore, our view and we so hold, that the appellant should have consulted the Hotel along with the other parties before he decided to allot the plot to the interested party ... [It] does not lie in the appellant’s or anybody else’s mouth to argue, as counsel for the interested party sought to do, that in the absence of registration the interest Kunste Hotel seeks to protect was non-existent .... (emphases added).”**

*Mr. Regeru* submitted that the interested party’s stand in the instant matter was in contradiction to the decision in the *Kunste Hotel* case; as Bahari was, in effect, saying: “Your transfer has not been registered, and therefore you should not be heard; you have no *locus standi*.”

Learned counsel took up the suggestions in the depositions made for the respondents and for the interested party – that the applicants should wholly submit themselves to the workings of the Chief Land Registrar’s Office, and trust that some good day, that Registrar will accord the issue of cautions on the subject properties a fair hearing, and then determine at his own discretion whether or not the cautions are to be removed. Counsel contested such a position, by citing this Court’s (*Hancox J*) decision in *Re Kisima Farm Ltd* (1978) KLR 36. It was in that case a judicial review application by *Kisima Farm Ltd*, for leave to issue an order of prohibition against the Commissioner of Lands from continuing the holding an inquiry into claims for compensation by persons interested in certain portions of land in Timau. The learned Judge held that:

**“The existence of a right of appeal from the decision of the Commissioner of Lands does not preclude the grant of an order of prohibition.”**

The Court went further in that case to *stay* such proceedings as were already in progress *before the Commissioner*; in the words of the learned Judge (at p. 39):

**“From what I have said ..., it seems to me that grounds exist in this case for the granting of leave for an order of prohibition, and for a direction that such grant shall operate as a stay of the proceedings now pending before the Commissioner of Lands until the Court shall decide the matter.”**

When *Mr. Regeru* began to address the point whether there had at all been a contract for the sale of the subject properties, between the 1<sup>st</sup> applicant (Brooke Bond) and the interested party (Bahari), learned counsel *Mr. Nowrojee* objected; in his words: “That is the subject of a suit in Mombasa;” “Judicial review is not about the merits of a contract”; “The question is *sub judice* in Mombasa.”

Such a contest raises a relevant point; is it the case that matters *contractual* are entirely excluded from the

building of a proper case in the public law remedy of judicial review? I very much hope learned counsel **Mr. Nowrojee** was by no means suggesting that private law rights, such as those founded on contract, are to be shut out of submissions in aid of prayers for judicial review.

The proper foundations to judicial review prayers are well exemplified in **Sir William Wade's** work *Administrative Law*, 8<sup>th</sup> ed. which I cited earlier (at P. 667):

***“The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies.”***

Where do such rights come from? At the very first level, such rights will have a foundation in *private law* as it is known at common law; then more rights are guaranteed by laws of a public nature, including the Constitution; and there may also be broader public interests that establish a basis for prayers for judicial review. It has to be made clear, in these circumstances, that an individual whose private-law rights, such as contractual rights, are at stake due to the *mode of exercise of discretion by a public official* acting by virtue of statute, has rights of recourse to the High Court for judicial review, where the discretion is exercised churlishly, irregularly, abusively or illegally.

**Mr. Regeeru** considered the provisions of the Registered Land Act (Cap.300) which regulate the lodgement and subsequent treatment of cautions; ss.132 and 133 of that Act provide:-

***“132. (1) The Registrar shall give notice in writing of a caution to the proprietor whose land, lease or charge is affected by it.***

***(2) So long as a caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the Court.***

***“133. (1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.”***

Once the cautions in issue were lodged, the Mombasa District Land Registrar at the time, **Kenneth Kariuki Githii**, sought submissions as required by law; but he was then transferred to the Nakuru Land Registry and replaced by **Mary Kai**, at a time when he had made *no ruling* on the three cautions. **Mr. Githii** in his affidavit avers that he later, while in Nakuru, wrote the said ruling-on-cautions, on 8<sup>th</sup> April, 2003 and remitted it to Mombasa, even though there is conflicting evidence, that **Ms. Mary Kai** found the relevant files at the Land Registry in Mombasa, and without any ruling on the cautions, so that it fell upon *her* to consider the matter and to make a ruling on 31<sup>st</sup> July, 2003. I have anxiously considered **Kenneth Kariuki Githii's** depositions for veracity; and between his averments and those made for the applicants, notably those of **Antoinette Atieno Absaloms**, it appears to me *untrue* for **Mr. Githii** to say he had with him in Nakuru the Mombasa District Land Registry file for a ruling, when that same file, in fact, was held at Mombasa with all the proceedings which **Mr. Githii** himself had recorded – the proceedings which alone, were the basis upon which **Mary Kai** the Mombasa District Land Registrar wrote her ruling on 31<sup>st</sup> July, 2003. There apparently, was no registered ruling by **Mr. Githii** against the title document. That **Mr. Githii** has chosen not to depose truthfully on this matter, is still more evident from the fact that his claimed ruling delivered on 8<sup>th</sup> April, 2003 while in Nakuru, was only availed to counsel for the *interested party*; quite unlike **Mary Kai's** ruling of 31<sup>st</sup> July 2003 which was – as ought in law and in regular administrative practice, to have been the case – duly served upon counsel for all the parties. I must conclude as a *fact*, at this point, that **Mr. Kenneth Kariuki Githii** the Nakuru District Land Registrar told a lie, in respect of which I would expect the Attorney-General's office, in its proper management of the criminal process, to initiate action to secure redress, within the Courts of law.

Learned counsel **Mr. Regeeru** submitted, and I would say, quite properly, that **Mr. Kenneth Kariuki Githii's** ruling dated 8<sup>th</sup> April 2003 on the cautions in question, “is a nullity in law, and binds no one.”

**Mr. Regeeru** submitted that **Mr. Githii** had already been transferred to the Nakuru District Land Registry

at the time he purported to write a ruling regarding the subject cautions lodged at the Mombasa District Land Registry. **Mr. Githii** was not at that time a District Land Registrar for Mombasa, for purposes of the administration of the Registered Land Act (Cap 300) (ss. 5-9). Counsel urged that it is the Registrar as appointed and designated under the Act who is empowered to carry out the functions of that office; and that in respect of land registration matters pertaining to a particular district, the relevant functions fall for discharge by the responsible Registrar – and that is the Land Registrar responsible for the particular district.

**Mr. Regeeru** submitted that since the Mombasa District Land Registrar, **Mary Kai** had, by virtue of her ruling of 31<sup>st</sup> July, 2003 removed the cautions lodged against the three subject properties by the interested party, it was not open to the 1<sup>st</sup> respondent to order a *re-hearing*; “the issue had been determined and the necessary action taken,” so that no further action was open to the 1<sup>st</sup> respondent unless a timeous appeal, in the prescribed form, had been laid before him.

Therefore, the applicants were seeking orders of *certiorari* to quash the 1<sup>st</sup> respondent’s orders of 9<sup>th</sup> October, 2003 purportedly setting aside the rulings relating to the cautions registered against the subject parcels of land.

Learned counsel submitted that the appeals procedure in respect of the decision of a Land Registrar was set out in detail in sections 131 – 135 of the Registered Land Act (Cap 300). A party dissatisfied with a Land Registrar’s decision is required to lodge a complaint with the Chief Land Registrar within a period of 90 days; and counsel urged that the period from the purported ruling of **Mr. Githii** on 8<sup>th</sup> April, 2003 to **Ms. Mary Kai’s** ruling on 31<sup>st</sup> July, 2003 to 9<sup>th</sup> October 2003 when the Chief Land Registrar ordered that the transactions relating to the subject properties be held in abeyance did not comply with the period of time for complaint prescribed by law; and moreover, *no appeal* had been lodged in respect of which the Chief Land Registrar’s orders could have been made. The Chief Land Registrar at that time, counsel urged, was not seized of the matter; he could not order a re-hearing when the matter was not properly before him – and hence his orders were unlawful. When **Ms. Mary Kai** delivered her ruling on 31<sup>st</sup> July 2003, she *executed a valid instrument* which she duly signed; and on that basis she *removed the three subject cautions, and duly signed*. So in this state of affairs, how, learned counsel asked, could the Chief Land Registrar order a re-hearing of a matter already heard and determined? This matter, counsel submitted, was now *res judicata* and no longer fell within the decision-making competence of the Chief Land Registrar, save in the context of a formal appeal by an aggrieved party.

**Mr. Regeeru** urged that it was beyond the powers of the Chief Land Registrar to take away the District Land Registrar’s jurisdiction which had already been duly exercised, and to install the so-called “independent district Land Registrar” to re-hear a matter that was, in accordance with the relevant Land Registry jurisdiction, as created by the Registered Land Act (Cap. 300), now *res judicata*. A valid appeal could only have been made to the Chief Land Registrar *himself*, and provided it was in compliance with the statutory time-limit. By section 150(1) of the Registered Land Act (Cap. 300), anyone dissatisfied with a Land Registrar’s decision is to appeal to the Chief Land Registrar within 30 days; and any appeal from the Chief Land Registrar (s.150(2)) would have to go to the High Court.

Learned counsel submitted that it was not, in regular management of Land Registry administration, possible for the Chief Land Registrar to take any decision which would *preserve two contradictory rulings* on the register; for contradictions would make nonsense of the register, yet the register “must be a self-contained record of interests, consistent, clear, and authoritative.” It was thus not permissible, counsel submitted, for the Chief Land Registrar to issue orders preserving a *status quo* of contradictions in the register. Counsel submitted that the proper maintenance of the register was only consistent with a *removal of the cautions* as ordered by the District Land Registrar, **Ms. Mary Kai**; in which case the party aggrieved who had the right of appeal within **30 days**, was the interested party (Bahari). But Bahari lodged no appeal against the Registrar’s decision; and the Registrar’s decision had been founded on the ascertainment from correspondence, that “*no formal contract was concluded between the parties*”. All the correspondence between Brooke Bond and Bahari, **Ms. Mary Kai** had found out, was “*subject to contract*”, but there was *no executed contract* as such. On this point, **Mr. Regeeru** cited a passage from **Sir**

*Robert Megarry's The Law of Real Property*, 5<sup>th</sup> ed, which would validate the position taken by the Land Registrar (Chap. 12, pp 568 – 569):-

**“If an offer is accepted not finally but conditionally, for example with the common formula ‘subject to contract’ or ‘subject to the preparation and approval of formal contract’ or ‘subject to suitable arrangements being arranged between your solicitors and mine’, the effect is that until the necessary contract or arrangements have been made, there is no contract and *either party can withdraw*. This follows the ordinary rule that a contract to make a further contract on terms unspecified is no binding contract at all. If such a reservation is made, therefore, *both parties have complete freedom of action*; and if one of them has paid a deposit, he can demand its return at any time. ‘Subject to contract’ is therefore commonly inserted in letters from solicitors and agents conducting negotiations for purchasers as a protection *against legal liability in the preliminary stages*. Meanwhile, the vendor remains at liberty to withdraw or to raise the price (the abuse known as gazumping), but this is the inevitable counterpart of the protection which the purchaser needs while making inquiries, arranging finance, etc.”**

Learned counsel urged that the principle above-stated well illuminates the respective legal rights of Brooke Bond and Bahari in the instant matter, and that the Land Registrar **Mary Kai** was, on that basis entirely right in law, in her ruling which led to the *removal of the cautions* lodged by Bahari against the three subject properties.

Counsel prayed for an order of *mandamus* directed to the Chief Registrar of Lands, compelling him to remove the cautions lodged against the titles for the first applicant’s three properties by the interested party.

Once the Land Registrar **May Kai** removed the impugned cautions on 31<sup>st</sup> July, 2003 complaints were raised by some of the parties herein; and this led to an *unusual act* by the same Registrar – she introduced her own kind of encumbrance and registered the same against Brooke Bond’s three titles, and thus impeding Brooke Bond’s rights of disposal of its properties – the same being registered on 6<sup>th</sup> August, 2003. These Restrictions, **Mr. Regeru** submitted, ‘were improperly and unlawfully imposed.’ Such Restrictions are provided for in ss.136 – 138 of the Registered Land Act (Cap.300), for the purpose of preventing “any fraud or improper dealing or for any other sufficient cause” (s.136(1)). However, the relevant provision requires ‘inquiries to be made and notices to be served’ upon those concerned. Learned counsel noted from the evidence that ‘no notice was given to either party, as required by law’, and it was not until *November 2003* – some four months later – that Brooke Bond found out that its disposal rights over its properties had been encumbered by the Registrar’s Restrictions; and the applicant immediately lodged its complaints.

Learned counsel remarked the admission of the Chief Land Registrar, that *irregularities* had marred the mode of treatment of titles to the applicant’s three properties at the Mombasa District Land Registry. This admission is contained in **Mr. Ngatia’s** letter to all the advocates involved in this matter, dated 20<sup>th</sup> November, 2003 and attached to **Manoj Chopra’s** supplementary affidavit sworn on 6<sup>th</sup> January 2004. The Chief Land Registrar’s own words may be set out here:

*“Further confusion became apparent after information was received that the cautions in issue had already been removed by the current Mombasa District Land Registrar and replaced with a Restriction which information was not available by the time this office ordered for the fresh hearing on removal/retention of the cautions.”*

The Chief Lands Registrar goes on to write (*ibid*):

*“However, the removal of the cautions and replacement of the same with Restrictions was substantially unprocedural and [outright] irregular and this office is unable to sustain the same. In addition and in view of the fact that there are two unprocedural and contradictory rulings and*

*in fairness to all parties, the order by this office that the matter be heard afresh still stands unless otherwise directed by [a] competent Court of law.”*

Learned counsel urged: ‘Had the [Chief Land Registrar] known that the cautions were already removed, then no [re-hearing] would have been recalled’; and he went on to submit that the tenor and effect of the 1<sup>st</sup> respondent’s letter is that “he is now *attacking his own Restrictions*”; and so, even he himself acknowledges the impropriety of these Restrictions – and hence they merit being quashed by an order of *certiorari*.

Learned counsel prayed for an order of *mandamus* – to direct the Land Registrar to effect registration of the three subject properties in favour of the intended transferee, the 2<sup>nd</sup> applicant (Cargill). He urged that if the Court takes the position that the cautions are already *validly removed*, and quashes the Registrar’s Restrictions, then the right and the logical course is to issue an order of *mandamus*, to ensure registration in Cargill’s name of the transfer documents which, indeed, have already been stamped and duly paid for in the offices of the selfsame respondents.

The applicants were also seeking orders of *prohibition* to restrain the respondents from registering any instruments against titles to the subject properties, adverse to the applicants; and to restrain the Chief Land Registrar from purporting to appoint any other ‘independent’ Land Registrar to conduct a re-hearing. Learned counsel submitted that there was no provision in the Registered Land Act (Cap.300) for the kind of re-hearing the Chief Land Registrar has called.

Learned counsel prayed for costs as against the respondents and/or the interested party.

**VI. CHIEF LAND REGISTRAR HAS WIDE DISCRETION; HE HASN’T REFUSED TO ENTERTAIN COMPLAINTS; HE ACTED IN GOOD FAITH; APPLICANTS SUBMITTED THEMSELVES TO HIS JURISDICTION – THEREFORE THERE’S NO CASE FOR JUDICIAL REVIEW ORDERS:**

#### **SUBMISSIONS FOR RESPONDENTS**

Learned counsel for the respondents, **Mr. Muiruri** of the Attorney General’s office, embarked upon his submissions on 9<sup>th</sup> May, 2005 and rested his clients’ case mainly on the affidavit of the Chief Land Registrar, **Charles Wambugu Ngatia** dated 19<sup>th</sup> February 2004 and on the questionable affidavit of Nakuru District Land Registrar, **Kenneth Kariuki Githii** dated 20<sup>th</sup> April 2004. Counsel noted that the gravamen leading to the instant proceedings was precipitated mainly by the Chief Land Registrar’s letter dated 9<sup>th</sup> October, 2003 by which he was, in effect, countermanding the differing orders of two District Land Registrars (that of **Kenneth Kariuki Githii** purporting to be dated 8<sup>th</sup> April, 2003 and that of **Mary Kai** dated 31<sup>st</sup> July 2003) regarding the interested party’s cautions lodged at the Mombasa District Land Registry in respect of the 1<sup>st</sup> applicants three properties which were to be transferred to the 2<sup>nd</sup> applicant.

Learned counsel states the content of the Chief Land Registrar’s depositions, that it was the advocates for the *interested party* (Bahari) who had raised a complaint about the existence of two contradictory rulings by different District Land Registrars, in respect of the titles for the three properties. It is in the circumstances to be taken as an established fact, that only the *interested party* and its advocates had over a period of close to half a year, believed that the Nakuru District Land Registrar had made a ruling on the Mombasa District Land register which stood in the interested party’s favour and against the claims of the owner of the properties in question. Could these circumstances have put the Chief Land Registrar (1<sup>st</sup> respondent) on *inquiry*? That ought to have been so, in my judgment; but the Chief Land Registrar, rather than ask the pertinent question and exercise his discretion responsibly as duty and legal process demanded, sustained an anarchic situation in the Lands-Office record in Mombasa by upholding the *status quo*, and by purporting to appoint a *third* District Land Registrar, as an “independent Registrar” to resolve the stalemate at the Mombasa District Land Registry. In this way the Chief Land Registrar, in his own perception, was exercising “his supervisory power.”

**Mr. Muiruri** submitted that the Chief Land Registrar, by virtue of s.7 of the Registered Land Act (Cap.300), was responsible for administering the many land registries all over the country and that, where he authorised a Land Registrar or Assistant Land Registrar to exercise powers vested in himself, he, the Chief Land Registrar, “still retained his powers and he may exercise and perform all such powers and duties notwithstanding such authorisation.”

**Mr. Muiruri** urged that s. 7 of the Registered Land Act was to be read together with the long title to the Act, and the upshot was that the Chief Land Registrar had the liberty to *overlook* the two rulings attributed to the two District Land Registrars in respect of the three Mombasa properties, and to appoint still another District Land Registrar, as an “independent Land Registrar” to make *another ruling* on the dispute at the Mombasa District Land Registry.

Section 7 of the Registered Land Act (Cap.300) provides:

***“(1) There shall be appointed a Chief Land Registrar, who shall be responsible for administering the land registries in accordance with this Act.***

.....

***“(4) The Chief Land Registrar may in writing authorise a Land Registrar or Assistant Land Registrar to exercise or perform all or any of the powers or duties conferred on the Chief Land Registrar by this Act or by any rules made thereunder, and may at any time revoke or vary any such authorisation;***

***Provided that no such authorisation shall be deemed to divest the Chief Land Registrar of any of his powers or duties and he may, if he thinks fit, exercise and perform all his powers or duties notwithstanding any such authorisation.”***

Learned counsel anchored himself on the foregoing provisions of the statute law, as he contended that even though the Chief Land Registrar had delegated his powers to the Mombasa District Land Registrar, he, the Chief Land Registrar, was not thereby divested of the powers “to exercise or perform all powers and duties specified in the Act”; and he, the Chief Land Registrar, still “had a statutory duty to ensure that the full intent of the Act is complied with.”

Counsel contended that the Chief Land Registrar’s decision had been taken *bona fide*, to “accord all the parties an opportunity for a fair hearing.” He urged that “since the rulings of the two District Land Registrars were in mutual contradiction, the Chief Land Registrar had properly come in as an impartial party.” Learned counsel did not, however, address himself to the question *how* the two contradictory rulings came in the first place to be made; how **Mr. Kenneth Kariuki Githii** who was serving at the Nakuru District Land Registry came to be making a ruling for the Mombasa District Land Registry; how it came about that only the interested party had information regarding **Mr. Githii’s** ruling; what were the governing issues of *legal rights* serving as the basis of **Mr. Githii’s** decision; and the *legal foundation* upon which **Mary Kai**, the Mombasa District Land Registrar’s ruling rested. Had those points been addressed, then fundamental points regarding *legal rights* would have been accorded first priority as they deserved to be, ahead of the mainly *administrative* question as to whether one or two or more occasions for a hearing of the parties, should be availed by the Land Registrars. Learned counsel submitted: “faced with those facts [i.e. the two rulings by different land Registrars], the Chief Land Registrar had the duty to ensure that each of these parties was heard, and a decision on the merits made.” Counsel urged that it did not, at that stage, behove the Chief Land Registrar to inquire whether there had been any act of collusion or influence weighing on the respective District Land Registrars as they made their rulings. Why would it not behove the Chief Land Registrar to ask such basic questions? Learned counsel did not say; but he urged that “it was fair that he [the Chief Land Registrar] exercises his power under the Act, institutes an inquiry, [gives] a decision that fairly settles the dispute.” But could such a possible decision be one that ran counter to recognised rules of law – such as the *law of real property*, or the *law of contractual obligations*? Learned counsel did not address this point.

The foregoing fundamental point is overlooked by learned counsel when he disputes the prayer for an order of *certiorari*, on the basis that the Chief Land Registrar “did not act in excess of jurisdiction”. **Mr. Muiruri** proceeded to contend: “As per the [Registered Land] Act, [the Chief Land Registrar] acted within his mandate in appointing an independent Land Registrar to undertaken the inquiry.”

Learned counsel further considers the Chief Land Registrar’s appointment of ‘an independent District Land Registrar’ to resolve the dispute, to have been entirely proper because the applicants’ advocates, as demonstrated by their letter of 14<sup>th</sup> October, 2003, had raised no objection. I would not agree, however, that this is a valid argument; for there can be no acquiescence by the applicants in an assumption of administrative jurisdiction by a lands administrator, such as the Chief Land Registrar, where a fundamental principle of law (such as that which governs proprietary rights, or contractual obligations) has been misunderstood or misapplied. I think this point ought to have been addressed by learned counsel since, as I hold, the established principles that govern parties’ legal rights, lie at the very threshold of any jurisdiction to exercise an administrative power; the exercise of an administrative power occupies a *secondary level* to the status of a right established by and recognised under the law. I would hold, therefore, that there is no foundation to the contentions of learned counsel which he thus eloquently expressed: “*The applicants.... willingly accepted and submitted themselves to the process initiated by the Chief Land Registrar. ... How can the applicants now turn round and seek to quash that same letter which they accepted in totality. They take steps, in reliance on that letter, and submit themselves to the authority of the Registrar. They have [excluded themselves from the process of judicial review]. They would be estopped by reason of waiver; they cannot challenge a decision they had themselves accepted.*”

**Mr. Muiruri** contested the prayer in the application that the Chief Land Registrar’s letter of 9<sup>th</sup> October, 2003 be quashed. That letter was addressed to M/s. Kapila Anjarwalla & Khanna Advocates (for the interested party) and M/s. Hamilton Harrison & Mathews Advocates (then, for the applicants) and was copied to **Ms. Rosemary Ng’ong’a**, Senior Land Registrar, Nairobi District; **Ms. Mary Kai**, District Land Registrar, Mombasa District; **Mr. K.K. Githii**, District Land Registrar, Nakuru District, and to M/s. Njoroge Regeru & Co. Advocates. The letter reads in part as follows:-

*“Kindly refer to [earlier] correspondence on the above subject [RE: CAUTIONS OVER LAND PARCEL Nos. MOMBASA/BLOCK 1/215, 350 AND 449 – BAHARI (T) COMPANY LIMITED AND (BROOKE) BOND KENYA LIMITED] and the two contradictory rulings by two different Land Registrars on the removal/retention of the cautions registered on the titles in favour of Bahari (T) Company Limited.*

*“Firstly and in view of serious defects in the manner in which the two rulings were arrived at, and secondly in consideration of their contradictory nature, I am through the supervisory powers conferred [upon] this office by the provisions of the Registered Land Act (Cap.300), hereby ordering that the matter be heard afresh by an independent Land Registrar. This in effect sets aside the two contradictory rulings to the extent that they will not be of any evidential value in the fresh hearing.”*

Although by the said letter of 9<sup>th</sup> October 2003 the Chief Land Registrar (1<sup>st</sup> respondent) had taken the crucial administrative decisions which lie at the core of the applicants’ gravamen, so that all later decisions of the 1<sup>st</sup> respondent are only modality-elaborations, learned counsel **Mr. Muiruri** maintained that the said decision of the Chief Land Registrar was *no longer in force*, having been substituted by a subsequent administrative letter of 20<sup>th</sup> November 2003. Of the subsequent letter, I have already excerpted portions, and made necessary comments; and to me it is quit clear, and with much respect to learned counsel, that the prayer for orders of *certiorari* cannot properly be contested on the basis that the Chief Land Registrar’s orders of 9<sup>th</sup> October 2003 had *ceased to exist*.

Learned counsel cited the Uganda High Court decision in **Masaka District Growers Co-operative Union V. Mumpiwakoma Growers Co-operative Society Ltd & 4 Others** [1968] E.A. 258 to support his contention that the applicants herein had conducted themselves in such a manner, that they did not deserve the award of a discretionary remedy such as they were seeking. **Sheridan, J** in that case cited

with approval certain relevant English authorities, and thus remarked (pp 261-262):

**“Prohibition lies only for excess or absence of jurisdiction. It does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... It is a discretionary remedy and the Court may decline to interpose, by reason of the conduct of the party. Counsel relies on *Farquharson V. Morgan* [1894] IQB 552 as authority for the proposition that acquiescence in the exercise of jurisdiction by the inferior court is no bar to the issue of prohibition, but in that case there was a total absence of jurisdiction apparent on the face of the proceedings, which is not the case here.**

**“On the other hand, in *Mouflet V. Washburn* (1886), 54 L.T. 16) *Sir James Hannen*, following *Erle, J* in *Jones V. James* ((850), I.L.M. & P. 65) decided that the defendant, by once appearing before the county court judge, had waived the right of examining into the process by which he had been summoned to appear, and that a subsequent application by such defendant for a writ of prohibition to prevent the judge of the county court from proceeding in such suit must be refused. A court may also decline to interpose if there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction.”**

All this is in aid of the contention that when the Chief Land Registrar presumed to stay two rulings by different Land Registrars and to designate an ‘independent’ Land Registrar to do a re-hearing, the applicants did not at the beginning protest – and so they should be taken to have validated the course taken by the Chief Land Registrar, and so on this account this Court ought not to interpose its judgment, determining questions of legality and questions of regular and lawful administration (which is the basis of the Court’s jurisdiction in judicial review).

**Mr. Muiruri** submitted that the order of prohibition could not avail the applicants in their prayer that the respondents be ordered not to register any interests in respect of the subject lands adverse to the 2<sup>nd</sup> applicant, and that the 1<sup>st</sup> respondent be stopped from appointing an “Independent Land Registrar” to re-hear the matter. In aid of this point, the Court of Appeal decision in ***Kenya National Examinations Council v. Republic, ex parte Geoffrey Gathenji Njoroge & Others***, Civil Appeal No. 266 of 1996 was cited. Counsel was invoking the following passage in that decision:

**”That is why it is said prohibition looks to the future so that if a tribunal were to announce that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.”**

Learned counsel contended that at this moment, all action in the matter had been *stayed*; the Mombasa District Land Registrar had placed *Restrictions* on the three subject properties – and therefore there could be no registration of the titles; and the applicants had not “shown that the respondents intend to register an interest.”

**Mr. Muiruri** urged that the Court could not prohibit the appointment of a new District Land Registrar to conduct a re-hearing, because the 1<sup>st</sup> respondent by his letter of 20<sup>th</sup> October 2003 had already appointed a replacement for one **Ms. Rosemary Ng’ong’a** who previously had been named as an “independent” District Land Registrar to re-hear the issue of the subject cautions lodged by the interested party. Counsel submitted, on the basis of the above-cited ***Kenya National Examinations Council*** case, that “once the appointment of an alternative Land Registrar was made, an order of prohibition is not available to [prohibit] the same.”

Learned counsel next contested the prayer in the application, which sought mandamus to compel the removal of the *Restrictions* lodged against titles for the three subject properties. He urged that the

placement of the three Restrictions by the Mombasa District Land Registrar had been done by virtue of ss.136 – 138 of the Registered Land Act (Cap.300) – to prevent *fraud* or *improper dealings* with the subject lands. Counsel urged: “It confers a discretionary power on the Registrar, intended to prevent fraud or improper dealings, or for any other sufficient cause”. And where was the *evidence* of such improper dealings, fraud, etc? **Mr. Muiruri** urged: “there are parties disputing the existence of cautions on the registers; there are parties who want to register transfers...” So, learned counsel submitted, it was quite proper for the Mombasa District Land Registrar to register the restrictions in question, and in any case the applicants must have known they had rights under s. 138 (1) to *apply for such restrictions to be removed*. I have found this submission disturbing, as it would justify a placement of cautions otherwise than conscientiously in discharge of duty, merely supposing that anyone who is aggrieved has the opportunity to apply for their removal. I would take judicial notice that the management of property-registration records by State organs is a delicate function that touches on parties’ fundamental *constitutional rights*, and cannot be conducted frivolously, churlishly, or in the mode of an individual’s hobby; and this principle must guide this Court in appraising the *status of the Restrictions* in question which were registered against the 1<sup>st</sup> applicant’s property rights, in this case.

**Mr. Muiruri** contested the applicant’s prayer for orders of *mandamus*; he urged: “The applicant must demonstrate that there has been a *demand*, an *unequivocal demand*, that a specific public duty lies within the mandate of the authority concerned and it should be performed.” No such duty, counsel urged, has as yet fallen upon the respondents; because while s.138 of the Registered Land Act provides that the Registrar may upon application order the removal of a Restriction, “the applicants have not shown that they have made such an application.” Counsel submitted that an order of *mandamus* ought not to be granted because the Registrar of Lands *had not been asked* to remove the Restriction and he had refused so to do.

On the applicants’ prayer that the Land Registrar be compelled by order of *mandamus* to transfer the subject properties to the name of the 2<sup>nd</sup> applicant, **Mr. Muiruri** urged that the Registrar’s non-transfer of those properties had some kind of *justification* under the Registered Land Act (Cap.300); and he then made recourse to the long title of that statute – an Act to make further and better provisions for the regulation of title to land ? and he invoked the general powers of the Registrar (s.8 of the Act): “The Registrar may exercise the following powers in addition to any other powers conferred on him...” And counsel in particular, noted that the Registrar may refuse to proceed with any registration, etc. Learned counsel urged that the Registrar had rightly refused to transfer the 1<sup>st</sup> applicant’s three properties in Mombasa to the 2<sup>nd</sup> applicant, because: “on the register there are *cautions that have not been lifted*; and there are *Restrictions* placed on the land registers and they have not been removed; the 2<sup>nd</sup> respondent cannot proceed to register a transfer or any other interest on the land parcels before the removal of those limitations; it is not right to ask the 2<sup>nd</sup> respondent to do so, she would be contravening the Act.” **Mr. Muiruri** contended that the appellants could not seek immediate registration of the transfer of the three subject properties in the name of the 2<sup>nd</sup> applicant; his reasoning was: “It is the case that in a judicial review matter, the Court is not being asked to go into the merits of the case... The Court cannot order the manner in which [the Registrar’s] discretion is going to be exercised ? save that it must be exercised in accordance with the law.”

## **VII. CONTRACT IS NO BUSINESS OF JUDICIAL REVIEW; REGISTERED LAND ACT (CAP. 300) IS SELF-CONTAINED, PRECLUDES JUDICIAL REVIEW; APPLICATION BEARS NO RELATION TO PUBLIC LAW: SUBMISSIONS FOR THE INTERESTED PARTY**

Learned counsel **Mr. Nowrojee** submitted that the instant application was for refusing; in his words: “They haven’t come within the ambit of the law relating to judicial review; their application has wrongly invoked the Court’s powers and jurisdiction; even on the facts, they haven’t qualified for the grant of the orders.” On what legal account may the applicants’ case be so peremptorily turned down? Learned counsel invokes a decision of the Court of Appeal in aid, **Commissioner of Lands v. Kunste Hotel Ltd** [1995 – 1998] 1 E.A.1. And counsel’s crisp point in this regard is that the applicants’ entire gravamen is a *civil cause* which does not qualify as a *judicial review* matter. It is an intriguing submission, and to perceive it well, I have to set out here the relevant passage in the **Kunste Hotel** decision of **Akiwumi**,

**Pall, JJA and Bosire Ag. JA** (as he then was) (1995 – 1998) 1 E.A. 1, at pp. 5 – 6:

“By virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act of 1938 of the United Kingdom, which is applicable in this country by reason of section 8(2) of the Law Reform Act (Cap.26), prerogative writs were changed to be known as ‘Orders’, except for the writ of *habeas corpus*. So section 8(1) [of the Law Reform Act]...denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising *civil or criminal jurisdiction*. What that then means is that notwithstanding the wording of section 13A [of the Government Proceedings Act (Cap.40)]...which talks of *proceedings*, in exercising the power to issue or not to issue an order of certiorari the Court is neither exercising civil nor criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of section 136(1) of the Government Lands Act [Cap.280], and also, section 13A of the Government Proceedings Act, which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that section 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term ‘suit’ in section 2 of the Civil Procedure Act is envisaged...

“Having come to the above conclusion the way is now paved for considering the remaining grounds of appeal which, in effect, attack each of the findings and holdings of the superior Court...But it must be remembered 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 the individual is given fair treatment by the authority to which he has been subjected... [emphases added].”

Mr. Nowrojee submitted that “Judicial Review cannot assist the applicant who seeks to deal with private rights in a judicial review application.” He submitted further that the proper remedies that may be obtained within the ambit of the Registered Land Act (Cap.300), had no relationship to the scheme of judicial review; and that within the framework of the Registered Land Act, “The applicant cannot canvass...the merits of the decision being challenged.”

In my understanding, learned counsel’s contention is, firstly, that the applicants’ cause is private and civil – and so does not fall within the redress scheme of judicial review; and secondly, that any redress such as may be claimed by the applicants, must only be sought within the ambit of the Chief Land Registrar’s *discretion* as provided for under the Registered Land Act (Cap.300).

Learned counsel cited the Court of Appeal decision in *Municipal Council of Mombasa v. Republic*, Civil Appeal No. 24 of 2001 in aid of his argument; and the passage he relied on is the following:

*“The relief which has been sought in the application.., as far as we can discern from the statement accompanying the application for leave, is an order of certiorari to remove into the superior Court, for purposes of being quashed, the decision of the Municipal Council of Mombasa dated December 3, 1999, together with its notice dated December 23, 1999 both of which are alleged to have unlawfully terminated the agreement of February, 1998.*

*“We are respectfully compelled to point out that the procedure of judicial review has no application, whatsoever, to disputes arising out of contractual relationships. Those relationships are all the time governed by the law of contract which offers the remedies of specific performance and damages, general or specific for redress of any violation of those contractual obligations. There is never an occasion when a dispute arising out of these obligations may be redressed by means of the special orders of mandamus, certiorari or prohibition.”*

Mr. Nowrojee submitted that *contract* was the concept running through the applicants’ statutory statement as well as the affidavit evidence tendered in support of the judicial review motion; he urged that throughout the pleadings, emphasis had been laid on the fact that the negotiations between the applicants and the interested party, for the sale to the interested party of the subject properties, were “subject to contract” ? and that the real issue in the proceedings was a *contractual* one, between the *applicants* and

the *interested party*; and therefore, it was urged, this was not a meet subject for a judicial review application. *Mr. Nowrojee* submitted that the applicants' repeated reference to *contract* in their factual averments, gave the supporting statutory statement the appearance of an extended *plaint* – a veritable signal that no true judicial review matter had been brought before the Court. Counsel urged that “no element of *public law*” had featured in the applicants' 23 grounds in support of the application – and hence no basis had been laid for the Court's exercise of its judicial review jurisdiction.

While relying on general principles stated in case law, and in particular in *Commissioner of Land v. Kunste Hotel Ltd* [1995 – 1998] 1 E.A. 1 and in *Municipal Council of Mombasa v. Republic*, Civil Appeal No. 24 of 2001 to associate the instant application with *contract* and *private law*, as contrasted with *judicial review* and *public law*, *Mr. Nowrojee* may have, in my view, glossed over the *nature of legal rights and expectations* which, clearly, would accord a party *locus standi* to question the legality and the propriety of actions taken by a *public officer* such as a Registrar of Lands. It is also not clear how learned counsel would justify the possible existence of *unlimited discretion* on the part of the Chief Land Registrar, by excluding the play of the Court's judicial review jurisdiction in those situations in which Land Registrars have acted by virtue of the Registered Act (Cap.300). I consider it to be the law that the judicial review jurisdiction is a well-recognised aspect of judicialism and constitutionalism which is not in any way qualified by ordinary statutes that make provisions for administrative powers – and the Registered Land Act (Cap.300) falls in this category of ordinary statutes. That statute establishes *public land- registry offices*, but does not in any way derogate from the well-established oversight jurisdiction of the High Court, exercised by way of *judicial review*. The nub of this judicial-review principle may be found in the old English case, *Rex v. Shoreditch Assessment Committee, ex parte Morgan* [1910] 2 K.B. 859 (at p.880 – *Farwell, L.J.*):

“*Subjection in this respect to the High Court is a necessary and inseparable incident for all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure – such a tribunal would be autocratic, not limited – and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact.*”

The foregoing principle of the subjection of tribunals or public bodies pronouncing on issues touching on private or public rights, to the review jurisdiction of the High Court, is now well established, and absolutely beyond question: see *Sir William Wade and Dr. C. Forsyth, Administrative Law*, 8<sup>th</sup> ed. (Oxford: Oxford U.P., 2000), pp. 707 – 708; *Anisminic Ltd. V. Foreign Compensation Commission & Another* [1969] 2 A.C. 147. With much respect therefore, I consider it not right that learned counsel should portray the contractual foundation of a land-transfer agreement as excusing the Land Registry officials from performing their *public duties* in such a manner as to comply with the dictates of lawful administration, as this concept is understood in judicial review principles.

I would in this context, hold that the two decisions of the Court of Appeal relied on by counsel, the *Kunste Hotel* case and the *Municipal Council of Mombasa* case have been invoked out of context. It follows, as I believe, that the contract-suit proceedings which the interested party has filed in Mombasa recently, in *Bahari (T) Company Limited v. Brooke Bond Kenya Limited & Cargill Kenya Limited*, Mombasa HCCC No. 303 of 2003, proves nothing as regards the juridical merits of the instant application, and, indeed, provides no ideal or correct framework for the resolution of any grievances which may have led the interested party to lodge the cautions which are the reason for this judicial review application.

*Mr. Nowrojee* relied on a decision of this Court (*Ringera, J* – as he then was), *Jotham Mulati Welamondi v. The Chairman, Electoral Commission of Kenya* [2002] 1 KLR 486 as a basis for the proposition that the Registered Land Act (Cap.300) was a *complete code* on land matters, so that in a matter such as the instant one, the applicants had no right to seek judicial review, and they must only look to the exercise of *discretion* by the Chief Land Registrar. I do not, with respect, perceive that to be the law, given the purpose of judicial review as I have already discussed. The instant matter, I think, is not in exactly the

same category as *Welamondi*, where there had been an ordinary civil procedure issue in the shape of conditions attendant on a representative suit. Indeed, in *Welamondi* the learned Judge expressly stated the character of judicial review in its inherent, extended scope (p.495):

*“...I reject the submission of counsel for the respondent that the Court cannot by way of judicial review intervene where the public body is exercising a discretionary power. In my judgement, the Court would be perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice.”*

*Mr. Nowrojee* further advanced the thesis that the instant matter fell squarely under the Chief Land Registrar’s discretion, as provided for under the Registered Land Act (Cap.300), and well outside the process of judicial review, by citing an election matter decided by the Court of Appeal, *The Speaker of the National Assembly v. The Hon. James Njenga Karume*, Civil Application No. Nai 92 of 1992. The Speaker had made a declaration which led to a petition, *Election Petition No. 2 of 1992*, brought by virtue of s.20(1) (b) of the *Parliamentary and Presidential Elections Act* (Cap.7), challenging the said declaration. Even as the same petition remained pending, the respondent filed *Miscellaneous Cause No. 388 of 1992*, a judicial review application under Order LIII, rule 1 of the Civil Procedure Rules; he was seeking leave to apply for an order of *certiorari* to remove into the High Court and quash the Speaker’s declaration. After the orders sought were granted by *Shields, J* the Speaker filed a notice of appeal, and lodged an application in the Court of Appeal. The Court of Appeal (*Kwach, Cockar, Muli, JJA*) held – and this is the aspect *Mr. Nowrojee* has invoked in the instant matter –

*“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order LIII of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”*

It is evident that learned counsel is here attempting to draw a *parallel* between the regime of the Registered Land Act (Cap. 300) – in relation to the exercise of administrative discretion by the Chief Land Registrar – and that of the National Assembly and Presidential Elections Act (Cap.7) – in relation to declarations made by the Speaker of the National Assembly. To my mind, such an analogy cannot quite so readily be drawn – firstly because the indication by the Court of Appeal that it wasn’t a meet case for judicial review, bore the rider that their Lordships were not “expressing a concluded view”; and secondly, because, whereas the National Assembly and Presidential Elections Act (Cap.7) certainly has a detailed regime for the *judicial* determination of grievances, through *petitions*, the Registered Land Act (Cap. 300) is designed like any ordinary statute which entrusts public officials with discretions to be exercised judicially, and clearly subject to the judicial review jurisdiction of the High Court. It is, in these circumstances, not possible for me to be persuaded that the Registered Land Act (Cap.300) has any special, *self-contained* design which would preclude this Court’s supervisory jurisdiction over the mode of exercise of discretion by the Land Registry officials in relation to individuals’ property titles; and hence I would hold the *Njenga Karume* decision to be of no application in the instant matter. I would not also see the relevance of *E v. E* [1970] E.A. 604 (*Chanan Singh, J*) which also has been cited by *Mr. Nowrojee* especially for its statement that (p.606): *“This seems to mean that although the Court of Appeal may not set aside a correct decision taken by the High Court on a wrong form of application the High Court should reject an application made in a form which is as different from the correct form as an ordinary summons is from an originating summons.”*

## **VIII IT’S JUDICIAL REVIEW, NOT CONTRACT; THERE’S VIOLATION OF STATUTORY PROCESS; REGISTRARS’ ACTIONS LACK JURISDICTION, AND VIOLATE NATURAL JUSTICE; HENCE CASE FOR PREROGATIVE ORDERS: APPLICANTS’ SUBMISSIONS IN REPLY**

### **(1) 1<sup>st</sup> Respondent’s Decisions Ultra Vires and without Jurisdiction, Should be Quashed**

Learned counsel *Mr. Regeru* contested the attribution of a wide range of powers to the Chief Land Registrar as attempted by *Mr. Muiruri* of the State Law Office who represented the respondents. *Mr. Regeru* urged that s.8 of the Registered Land Act (Cap.300) which refers to the general powers of the Chief Land Registrar, made no reference to “supervisory powers” as powers entrusted to that lands officer. Counsel urged that the 1<sup>st</sup> respondent, as a public officer exercising statutory authority, is required to act within the law and cannot act by virtue of an undefined range of powers described as “supervisory powers”.

*Mr. Regeru* submitted that the Chief Land Registrar had resorted to “supervisory powers” in a manner that exceeded the terms of the governing statute; he indeed could have acted within the framework of an appeal preferred to him, as s.150(1) of the Registered Land Act stipulates:

*“If a person is dissatisfied by the refusal of the Deputy Chief Land Registrar, Land Registrar or Assistant Land Registrar to effect or cancel any registration, he may, within thirty days of the refusal, appeal in the prescribed form to the Chief Land Registrar, and the Chief Land Registrar may direct that the registration be effected or cancelled as the case may require, or uphold the refusal.”*

Counsel submitted that since the three cautions in question had been removed on the basis of a ruling by the Mombasa District Land Registrar on 31<sup>st</sup> July, 2003 the interested party (Bahari) was the *aggrieved party* and should have lodged an *appeal* as contemplated in s.150(1) of the Registered Land Act (Cap.300), but no such appeal has ever been lodged.

Counsel submitted that there had been no legal basis upon which the Chief Land Registrar took his decision to maintain an anarchic *status quo* in the Mombasa Land Registry records, and with regard to the three subject properties, while purporting to appoint an “independent Land Registrar” to conduct a re-hearing of the matter; and that there could not have been a valid election to be made by him as between the alleged ruling in relation to the subject properties, made by the Nakuru District Land Registrar on 8<sup>th</sup> April, 2003 and the ruling on the same matter, made by the Mombasa District Land Registrar on 31<sup>st</sup> July, 2003. Whereas the Mombasa District Land Registrar’s ruling was properly made, on the basis of *records* held in the Mombasa District Land Registry, by virtue of powers conferred by s.133(4) of the Registered Land Act (Cap.300) and was duly *registered* for notice to all, in the Mombasa Land Registry records, the alleged ruling by the Nakuru District Land Registrar, of 8<sup>th</sup> April, 2003 was *unregistered, unknown*, and would appear to have been formulated from records other than those lying at the Mombasa District Land Registry. On those foundations which emerge from the *evidence* and the documentation in the motion herein, *Mr. Regeru* urged that there was no element of legality, on the basis of which the Chief Land Registrar (1<sup>st</sup> respondent) took his decisions which are now being contested by way of the judicial review process. The Chief Land Registrar’s process of decision-making is being challenged as tainted with illegality, impropriety and maladministration, the very considerations upon which the judicial review jurisdiction rests. In the words of learned counsel: “Quite simply therefore, there was no legal basis upon which the 1<sup>st</sup> respondent could have made the decision that he did. He simply had no power, authority or jurisdiction to set both rulings aside, to order that Restrictions be put on the respective registers and to direct that the matter be heard before another Registrar. There was already in place a valid ruling... Furthermore, as required by the [Registered Land Act], the ruling by ...the 2<sup>nd</sup> respondent had been duly registered against the registers to each of the properties, resulting in the removal of the respective cautions. The 1<sup>st</sup> respondent had no power to unilaterally disregard this ruling. He therefore acted...*ultra vires* in making his direction. There was no legal anchor upon which the 1<sup>st</sup> respondent’s decision-making process was or could...have been grounded.”

Learned counsel contested the notion that, in relation to the subject properties, the Mombasa District Land Registrar was only playing an auxiliary role which the Chief Land Registrar could at any time and at his own pleasure, lawfully countermand – all by dint of the general intent of the Registered Land Act (Cap.300) as expressed in its *long title*.

Counsel submitted – correctly on the facts, with respect – that all prior dealings on the three subject

property titles had been conducted not by the 1<sup>st</sup> respondent, but by the 2<sup>nd</sup> respondent; and from this fact it follows, counsel urged, quite correctly in my view, “that as the 2<sup>nd</sup> respondent was making the entries, doing what the 1<sup>st</sup> respondent would ordinarily have done, she must have been empowered by the 1<sup>st</sup> respondent to do so as provided under section 7(4) of the [Registered Land Act]. She was drawing on powers vested in her by virtue of sections 131 – 135 of the [Act], at the time when she made the ruling and ordered the removal of the cautions on the three properties.” Learned counsel urged that the ruling and the consequential measures taken by the Mombasa District Land Registrar (2<sup>nd</sup> respondent) on 31<sup>st</sup> July, 2003 carried the full Land-Registry authority which dictated that any challenge to them would have to be by way of *appeal* as provided under s.150(1) of the Registered Land Act. But no appeal had been lodged in *Form R.L. 23* as set out in the Third Schedule to the Act, and within the *time limited* for that purpose.

*Mr. Regeru* submitted, and correctly on the facts, with respect, that the question of the removal of the cautions in issue herein had *already been the subject of a hearing*, and that the said hearing had led to the properly-conducted ruling by the Mombasa District Land Registrar, made on 31<sup>st</sup> July, 2003. Thereafter it was not open to the 1<sup>st</sup> respondent to make *informal* arrangements regarding the Land-Registry status of the three subject properties, and there could only have been an *appeal* brought by the aggrieved party. In these circumstances, counsel urged, and quite persuasively, I think, there was no room, in law, for a *repeat hearing* of the kind the 1<sup>st</sup> respondent has been endeavouring to put in place. *Mr. Regeru* submitted that there is no provision in the Registered Land Act (Cap.300) for a repeat hearing. Counsel submitted that the 1<sup>st</sup> respondent had acted *ultra vires* and without jurisdiction when he ordered the setting aside of the rulings by two District Land Registrars, when he ordered the placement of Restrictions on the subject properties, and when he directed a re-hearing before an “independent Land Registrar”; and so the applicants prayed for orders of *certiorari* to quash those decisions made by the Chief Land Registrar.

***(2) How does Duty fall upon an Inferior Tribunal? Does it arise by and of itself, or must Complainant first show he had demanded proper discharge of that Duty?***

Learned State Counsel *Mr. Muiruri* had sought to fault the application herein by contending that no obligation cognizable for the purpose of judicial review, could possibly fall upon the 1<sup>st</sup> respondent, unless, first, the applicants had *notified him of his proper role, and called upon him* to do the right thing. For this proposition, in respect of which no known legal basis had been invoked, learned counsel *Mr. Regeru* now submitted that the contention was “wholly wrong, both in substance and in law.” In *Mr. Regeru’s* words: “it is untenable to contend that a public official must be requested and/or reminded to perform his duty, as required of him and as laid down in statute. By virtue of his office, the 1<sup>st</sup> respondent ought to perform all his duties in the manner prescribed in the statute, without awaiting some request or prodding from the public before he acts as he is required to do.” It was not, therefore, a condition to application for *mandamus*, that the applicants should have urged the Chief Land Registrar to adhere to the course of conduct required by law.

I would agree, on this point, with the position taken by counsel for the applicants; for the law which governs the Chief Land Registrar in lodging or lifting encumbrances in the land titles-register, is always there and beckoning, so that compliance by a public officer such as the Land Registrar is *already* ordained; and it does not lie in the mouth of the Land Registrar to aver: “You did not prod me, so I didn’t have to do it.”

*Mr. Regeru*, further, and relying on the affidavit evidence, stated that, as for the impugned Restrictions lodged against titles to the three properties, the applicants had not been given notice, and so they had no opportunity to complain and to urge the Registrar to do the right thing. The said Restrictions had been registered on 6<sup>th</sup> August, 2003 by the 2<sup>nd</sup> respondent (on the instructions of the 1<sup>st</sup> respondent); the applicants only came to know of them on 3<sup>rd</sup> November, 2003. The two Registrars, counsel urged, were in breach of s.137 of the Registered Land Act (Cap. 300) when they lodged the Restrictions; because that section stipulates that “the Registrar shall *give notice in writing* of a Restriction to the proprietor affected

thereby.” As a result, counsel urged, the applicants “were...denied an opportunity to be heard before the Restrictions were registered.”

Further, when the applicants’ advocates came to know of the existence of the said Restrictions, they *did* make demands upon the 1<sup>st</sup> respondent (by their letters dated 6<sup>th</sup> November, 2003 and 13<sup>th</sup> November, 2003). The 1<sup>st</sup> respondent even acknowledged that the impugned Restrictions were “*substantially unprocedural and [outright] irregular*” – and yet, nonetheless, he took no action to vary the *status quo* represented by those Restrictions.

Learned counsel submitted that the procedure adopted by the respondents in registering the Restrictions was contrary to law – and consequently, these Restrictions were void *ab initio*. In that event, counsel urged, the instant application for orders of *mandamus* is apposite – to *compel* the 1<sup>st</sup> and 2<sup>nd</sup> respondents to *remove* the said Restrictions entered against the three properties.

### ***(3) Of Contractual Matters and Judicial Review***

*Mr. Regeu* did not contest the statement of principle in the case relied on by learned counsel for the interested party ? *Municipal Council of Mombasa v. Republic* C.A. No. 24 of 2001 – that the remedy of judicial review seeks not to resolve *contractual disputes*. Learned counsel urged: “The applicants do not dispute this at all. It should be noted, however, that the applicants do not in any way seek the Court’s intervention to *determine the contractual disputes* that could be in existence between the applicants and the interested party. To the contrary, this [matter] falls squarely in the realm of *public law* as the applicants seek judicial review of certain decisions made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their capacities as *public officers* and in purported exercise of powers and authority vested in them by law.” Counsel further submits: “Any reference to the contractual dispute which exists between the applicants and the interested party was made so as to lay a good background and to give the Court an opportunity to understand all facts pertaining to this application. By making reference to the said contractual relationship.., the applicants were in no way asking the Court to resolve this contractual dispute.”

Learned counsel submitted that the two public officers (1<sup>st</sup> and 2<sup>nd</sup> respondents) had constituted themselves into an impediment to the registration of the transfers of leases which was the right of the applicants, and such impediment had been created through breaches of the law. Counsel urged: “It is *not* even the interested party who was standing in the way. It was the *two respondents* who were pleading Restrictions, which Restrictions they had imposed unlawfully without following due process.”

### ***(4) Captioning Application Docket with references to Laws not required for the purpose of Judicial Review***

At the leave stage, prior to the substantive motion for judicial review, the applicants’ Chamber Summons filed on 21<sup>st</sup> November 2003 had born the following caption:

“(Under Section 8(2) of the Law Reform Act, Cap 26 Laws of Kenya, Sections 131, 132, 133, 136, 137 of the Registered Land Act, Cap. 300 Laws of Kenya, Order LIII Rule I of the Civil Procedure Rules and all other enabling provisions of the law)”

The same captioning accompanied the substantive judicial review motion, filed on 25<sup>th</sup> November 2003.

Although notwithstanding the captioning of the two applications the instant matter, in its entirety, has been canvassed as a judicial review matter, learned counsel **Mr. Nowrojee** had urged that the application had not been formulated as a proper judicial review matter, and should on this account be dismissed. His argument greatly relied on the decision of this Court (**Ringera J.**, as he then was) in **Welamondi v. The Chairman, Electoral Commission of Kenya** [2002] IKLR 486; and the nub of his contention was this : “Judicial review proceedings under Order LIII of the Civil Procedure Rules are a special procedure” (at p. 487).

No doubt, s.8(2) of the Law Reform Act (Cap 26) and Order LIII of the Civil Procedure Rules – the vital legal bases for the judicial review jurisdiction – had been cited; and the application has been addressed by the parties as a *judicial review* matter; so, should the application now be disqualified, owing to the surplus provisions of law which the applicants also cited in their captioning?

**Mr. Regeru** submitted that “the mere reference to certain sections of the [Registered Land Act] in both the *ex parte* Chamber Summons and in the Notice of Motion cannot be fatal to [these proceedings]”; because in both, “the applicants have in fact cited and invoked the provisions of not only Order LIII Rules 1 and 3 of the Civil Procedure Rules which govern Judicial Review but also section 8(2) of the Law reform Act which is the substantive statutory grounding for Judicial Review. This is to be contrasted with the situation in .... ***Welamondi V. Chairman of the Electoral Commission of Kenya*** in which the applicants had invoked certain sections of the Constitution ... in proceedings instituted ostensibly as Judicial Review Proceedings”. The applicants herein, **Mr. Regeru** noted, “do not claim any reliefs other than those grounded under Order LIII of the Civil Procedure Rules.” Counsel urged that no reliefs were being sought “under the provisions of the [Registered Land Act], and to that extent the sections referred to in the headings of the Chamber Summons and the Notice of Motion may be construed as surplusage that does not go to the substance of the application.” In the ***Welamondi*** case, by contrast, counsel submitted, the applicants “had not only cited the aforesaid sections of the Constitution, but they had also sought substantive relief thereunder.”

**Mr. Regeru** urged that the application’s reference to certain sections of the Registered Land Act (Cap.300) cannot affect the competence of these proceedings in judicial review: “The reference to the ... sections of the Registered Land Act would be an inconsequential procedural issue which in the circumstances cannot override the substance of the suit”; and he further submitted – and this, in my view and with respect, is entirely unanswerable – that: “It is a trite proposition of the law that procedural issues, particularly in instances where *no prejudice is caused to the opposing party*, as is the case in this matter, cannot supersede issues relating to substantial justice.”

**(5) Registered Land Act ss. 136 and 154: Does it permit the registration of the Restrictions without a hearing?**

No, learned counsel submits; because of the language of s.136 (1) of the Act which stipulates:

“For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, *after directing such inquiries to be made and notices to be served* and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

The clear meaning of the foregoing provision, counsel urged, quite persuasively, with respect, is that an *absolute obligation* is imposed on the Registrar “to make the requisite inquiries and to serve notices on the parties interested in the matter.” So, it was submitted, s.136(1) of the Registered Land Act prescribes the *process* to be followed in the imposition of a Restriction against a land title – and the concern here is not the *merits* of the decision arrived at by the Registrar.

To the same effect, learned counsel urged, are the provisions of s. 154 of the Registered Land Act (Cap. 300). It thus stipulates:

“.....where by this Act a thing is to be or may be done after giving a person the opportunity to be heard, that person shall be deemed to have been given such an opportunity ... if he has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which he will, if he attends before the Registrar, be heard.”

In view of the express terms of ss.136(1) and 154 of the Act, it is to be deduced, counsel urged, that the Mombasa District Land Registrar when she imposed the impugned Restrictions on the 1<sup>st</sup> appellant’s

property titles, failed to comply with lawful process, by not serving the required *notice* on the applicants – and in particular on the 1<sup>st</sup> applicant – to enable them to put up their case. Such an opportunity to be heard, counsel submitted, was a crucial ingredient of *natural justice*, without which the District Land Registrar could not have lawfully proceeded when she registered her Restrictions.

Such an error on the part of the 2<sup>nd</sup> respondent was all the graver, counsel urged, in view of s.137 (1) of the Registered Land Act which provides that “the Registrar shall give notice in writing of a restriction to the proprietor affected thereby”. Counsel urged that, just as the phrase “as he thinks fit”, as incorporated in s.136 (1) of the Act – which empowers the Land Registrar – does not allow the Registrar to act *unreasonably*, or in *bad faith*, “so does it not allow such Registrar to disregard elementary doctrines of fair procedure.” Parliament has not by the Registered land Act (Cap. 300) authorised the exercise of powers in breach of *natural justice*, and so, counsel submitted, “the respondents cannot claim the backing of statute, to justify their failure to observe the rules of natural justice by failing to give the applicants an opportunity to be heard.” Hence the Court’s order of *mandamus* is sought to compel the respondents to remove instruments which they have made *ultra vires*, and in contravention of the laws of natural justice.

#### **(6) Appropriateness of Orders of Prohibition.**

Counsel for both the respondents and the interested party had contended that the order of prohibition is inappropriate and inapplicable to the gravamina in the instant proceedings. *Mr. Muiruri* for the respondents had sought to rely on a passage from *Halsbury’s laws of England*, 4<sup>th</sup> ed. (Vol. 1), para. 128:

“*The order of prohibition is an order issuing out of the High Court of Justice and directed to an ecclesiastical or inferior temporal court ... which forbids the court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land.*”

Such a statement of the law, *Mr. Regeru* urged, goes indeed to support the applicant’s position in these proceedings, for the respondents, who were acting in a quasi-judicial capacity, had exceeded their jurisdiction and acted in contravention of the express provisions of the Registered Land Act (Cap. 300); and even the 1<sup>st</sup> respondent had recognised in his letter (of 20<sup>th</sup> November 2003 annexed to the interested party’s affidavit (*Mehmood Jagani’s*) of 6<sup>th</sup> December 2003) that only a competent Court of law could forbid the making of the orders purportedly made by the 1<sup>st</sup> respondent.

Both counsel for the respondents and the interested party, on the application of the law relating to orders of *prohibition*, had sought to rely on the case, *Kenya National Examination Council v. Geoffrey Gathenji Njoroge*, Civil Appeal No. 266 of 1966, in which it was held that an order of prohibition has no effect against a *decision that is already taken*. *Mr. Regeru* submitted that such was not the case in the present instance; because the applicants are here seeking an order of prohibition as against *future acts* of the 1<sup>st</sup> respondent; *prohibition* is being sought as a *consequential order*, in the event that the Court *quashes* the decisions being challenged.

#### **(7) Do the Applicants have a more suitable Recourse elsewhere?**

Learned counsel, *Mr. Nowrojee* had sought to rely on the case, *Speaker of the National Assembly v. The Hon. Mr. James Njenga Karume*, Civil Appeal No. Nai. 92 of 1992, to demonstrate the point that the Registered Land Act (Cap.300) was a *complete code*, and he who sought to rely upon it, would *forfeit* the process of judicial review as a recourse.

*Mr. Regeru* sought to distinguish that authority; on the basis that the applicants’ grievances herein could only be redressed by way of judicial review. By contrast, in the said *Njenga Karume* case, “a clear remedy existed in the relevant statute, namely *The National Assembly and Presidential Elections Act* (Cap 7). Counsel urged that “there are no provisions under the Registered Land Act or any other statute, save for Order LIII of the Civil Procedure Act, that [prescribe] the manner in which the applicants can obtain relief against the high-handed actions of the respondents.”

## IX FINAL ANALYSIS, AND ORDERS

### 1. *Preliminary Remarks*

In this long-running hearing which began with the *ex parte* application for leave on 21<sup>st</sup> November, 2003 and was only completed on 15<sup>th</sup> December, 2006 complex issues both substantive and technical, were raised. The main technical question was whether proper citations had been made, so as to qualify the motions as a judicial review matter for the exercise of the High Court's jurisdiction pertaining thereto. There is no need to return to the contending positions in that regard, which I have already considered fully, save to state that I have found nothing on that score upon which the outcome of this application should turn. The entire motion has been canvassed as a judicial review matter; and the application, in any case, cites the pertinent law in its caption which is the juridical basis for the exercise of the Court's jurisdiction.

### 2. *The Vital Facts giving rise to the Gravamen*

It was not disputed that three properties in Mombasa, namely L.R. No. Mombasa/Block 1/350, LR No. Mombasa/Block 1/215, and L.R. No. Mombasa/Block 1/449 belong to and are registered in the name of the 1<sup>st</sup> applicant, Brooke Bond. Brooke Bond had taken the decision to sell off these three properties; and pursuant to this decision it had been negotiating with a potential purchaser, namely Bahari (the interested party), always "subject to contract". In these prolonged negotiations, it was consistently Bahari who called for amendments to the draft agreement for sale; and when, ultimately, Brooke Bond's advocates placed before Bahari's advocates, on 26<sup>th</sup> September, 2002 what appeared in every respect like the final draft which the vendor could agree to and which ought to be regarded as a firm offer, Bahari took one week before *conditionally* forwarding to Brooke Bond's advocates the agreement for sale which Bahari had executed. Bahari's forwarding letter of 2<sup>nd</sup> October 2002 stated that the partially executed agreement was being forwarded *subject to* Brooke Bond's advocates confirming which of the documents listed in Bahari's advocates' letter of 20<sup>th</sup> September 2002 would be provided to them. When this *condition* was referred to Brooke Bond by its advocates, the *client felt unable to comply with the condition* which Bahari's advocates had stipulated; and Brooke Bond felt it *could not go on with the negotiation* and transactions which were in any case, still clearly marked "*subject to contract*". So Brooke Bond abandoned all hopes of a possible sale of the three Mombasa properties to Bahari. On 15<sup>th</sup> October 2002 Brooke Bond's advocates sent a letter to Bahari's advocates to this effect: "Brooke Bond was not in a position to comply with the condition that had been imposed in Bahari's advocates' letter of 2<sup>nd</sup> October 2002 and that consequently Brooke Bond would not proceed with the transaction"; and Brooke Bond's advocates returned the partly-executed agreement for sale together with the unbanked deposit cheque to Bahari's advocates; and Bahari's advocates duly acknowledged receipt of the same. Brooke Bond then moved fast to sell off its three properties to Cargill (2<sup>nd</sup> applicant), and Cargill performed its part of the contract by paying the entire purchase price, in the sum of Kshs.71,000,000/= to Brooke Bond, leaving the vendor now bearing only the conveyancing burden. The contract between Brooke Bond and Cargill was dutifully performed, and the transfer document prepared and duly stamped, with stamp duty all paid, at the Land Registry in Mombasa.

The private, contractual obligations between vendor and purchaser being complete and to their mutual satisfaction, it was the role of the Mombasa District Land Registrar, duly assigned his functions by the Chief Land Registrar (1<sup>st</sup> respondent), that now remained outstanding. It is the mode of discharge of that *public function* of registering the conveyance of Brooke Bond's land to Cargill, the purchaser, that has led to the instant judicial review application.

In the context of the foregoing facts, is it a valid argument coming from Bahari (the interested party) that the gravamen belongs to *contract* and therefore private law, and not to public law and not to judicial review?

### 3. *Contract, or Judicial Review?*

The pertinent issues on this question have already been considered in this judgment and, I think, my opinion in the matter has already taken a fairly clear direction.

Was there any contractual claim in these proceedings as between the *applicants* and the *interested party*? Certainly not. Therefore, I would not agree with the submission made by learned counsel for the interested party, *Mr. Nowrojee*, that these proceedings may be a private-contract claim abusively brought under the cover of judicial review.

Clearly, the applicants have at this stage made no claim against the interested party; their focus has been the *public* land-administration officials, in the shape of the Chief Land Registrar and the Mombasa District Land Registrar; they have, quite legitimately, sought a review of apparent duplicity of actions, and non-compliance with the terms of the Registered Land Act (Cap.300), on the part of the Chief Land Registrar; and they have sought appropriate *quashing*, *mandatory* and *prohibitory* orders against those officials who deliberately impede the registration of a property-sale transfer in favour of Cargill (2<sup>nd</sup> applicant). I hold, in these circumstances, that the application is a *proper* judicial review application in every sense.

#### ***4. Did the Respondents depart from fair decision – making as required by the Registered Land Act?***

This question is to be answered in relation to two sets of encumbrances which the respondents have maintained, in respect of the transfer by the 1<sup>st</sup> appellant of its three properties to the 2<sup>nd</sup> appellant; the *cautions* registered by *Kenneth Kariuki Githii* who was then the District Land Registrar, Mombasa, on 14<sup>th</sup> October, 2002; and the *Restrictions* unilaterally registered by *Mary Kai*, Mombasa District Land Registrar since 6<sup>th</sup> August, 2003 at the behest of the Chief Land Registrar (1<sup>st</sup> respondent).

The story of the cautions is intriguing. On what basis was the interested party able to get the respondents to register cautions that stopped the registration of the subject lands in the name of the 2<sup>nd</sup> applicant? This is entirely unclear, as, from the facts adduced before this Court, the 1<sup>st</sup> applicant did indeed have all *the rights of a proprietor-and-vendor*, of discontinuing unsatisfactory land-sale *negotiations* and selling its properties to whomsoever it preferred ? subject to any private-law *contract* claims as might be pursued in that regard. On this basis, the decision by the-then Mombasa District Land Registrar, *Kenneth Kariuki Githii* to entertain the interested party's request to lodge the impugned cautions, was clearly lacking in justification. If *Mr. Githii* took a Land-Registry decision which violated the 1<sup>st</sup> applicant's property rights, this would be an abusive distortion of the law, which this Court cannot allow him to do, in purported exercise of a *statutory discretion*. Administrative discretion, as it may be provided for in statute law, must be judiciously exercised, where it touches on *rights established by, and recognised in law*. I hold the 1<sup>st</sup> applicant's rights to enjoy and to dispose its property to be a *fundamental right*, both under s.75 of the Constitution, and at common law; and *Mr. Kenneth Kariuki Githii* was in serious error when he purported to take away that right, in purported exercise of an administrative discretion. From this reasoning, it follows that the hearing which *Mr. Githii* then accorded the parties and in respect of which he recorded his proceedings, was a farcical process and a pretended compliance with the hearing procedure as laid down under the Registered Land Act (Cap. 300).

From credible evidence brought before this Court, *Kenneth Kariuki Githii*, after his hearing of the parties, and recording of the proceedings, left the file of proceedings at the Mombasa Land Registry when he was assigned Land-Registry duties at the Nakuru District Land Registry on 2<sup>nd</sup> April 2003.

I have been unable to believe the veracity of *Kenneth Kariuki Githii's* affidavit of 20<sup>th</sup> April, 2004 which avers that the deponent had carried the relevant Mombasa District Land Registry file with him to Nakuru, and that this enabled him to write a ruling on 8<sup>th</sup> April, 2003 ordering that the *interested party's* three cautions be *retained*. If he ever made such a ruling, it was kept secret, and was only known to the interested party – which already suggests an impropriety in the proper management of the Lands Office, a fact which would qualify such a ruling for *quashing* orders, in a proper case. But *Mr. Githii's* averment

cannot possibly be true. If he ever made such a ruling, it was not *registered* against the three property titles at the Mombasa District Land Registry. And there is further credible evidence that *Mr. Githii* did not, contrary to his allegation, have in Nakuru the Mombasa Land-Registry file, and its recorded proceedings; for these were always at the Mombasa District Land Registry where the incumbent Land Registrar, *Ms. Mary Kai* accessed them and made a proper, *duly registered and notified ruling*, on 31<sup>st</sup> July 2003.

If the Chief Land Registrar addressed these details with a presence of mind, as required by law, then he could not possibly have entertained the claim that there was a valid ruling regarding the Mombasa properties, written by the Nakuru District Land Registrar on 8<sup>th</sup> April, 2003 as was represented by the interested party's advocates.

Not only must I declare the alleged ruling by *Kenneth Kariuki Githii*, the Nakuru District Land Registrar, and with regard to the three subject properties in Mombasa, null and void, but I must, ultimately make orders to the effect that the Office of the Attorney-General shall investigate the overwhelming likelihood of *perjury*, contrary in particular to section 11 of the Oaths and Statutory Declarations Act (Cap 15, Laws of Kenya), in the making of the said affidavit of *Kenneth Kariuki Githii* dated 20<sup>th</sup> April 2004.

It follows that the 1<sup>st</sup> respondent had no decision to make on the basis that two rulings existed, in relation to the three subject properties. For the Chief Land Registrar to have proceeded as if, in addition to the regular ruling of the Mombasa District Land Registrar, of 31<sup>st</sup> July, 2003 there was another one of 8<sup>th</sup> April, 2003, was a serious misdirection and departure from dutiful and *bona fide* administration such as was required under the Registered Land Act (Cap.300). The Chief Land Registrar lacked the jurisdiction to decide the question of the cautions registered against the three Mombasa properties on the basis that a certain ruling on the matter had been made on 8<sup>th</sup> April, 2003. His decision based on the hypothesis that there was such a ruling, I would hold, was *ultra vires* and void. Only one valid Land-Registry ruling, which was duly notified and published – the one of 31<sup>st</sup> July, 2003 – existed, and this ruling had been made by virtue of powers properly delegated to the Mombasa District Land Registrar, by virtue of the provisions of the Registered Land Act (Cap. 300). Since that ruling favoured the *applicants*, the Chief Land Registrar could only have acted on the basis of an *appeal by the interested party*; but as there was no such appeal, I hold that the Chief Land Registrar acted entirely without jurisdiction, when he made orders maintaining the confused *status quo* interposed on the Mombasa Lands Office records, and with regard to the subject properties; *and* when he, entirely without authority, ordered a re-hearing of a matter that had already been disposed of by the Mombasa District Land Registrar, by her ruling of 31<sup>st</sup> July, 2003. The 1<sup>st</sup> respondent lacked a basis in law for appointing “an independent District Land Registrar” to re-hear the question.

***(5) What was the Legal Basis for the Restrictions entered by the Mombasa District Land Registrar, on 6<sup>th</sup> August 2003?***

I have already held the orders made by the 1<sup>st</sup> respondent in respect of the three subject properties to have been *ultra vires* and void. Yet, when those orders were made, as it emerges from the evidence, the 1<sup>st</sup> respondent directed the Mombasa District Land Registrar to enter unnotified Restrictions, thus, now maintaining an enhanced level of encumbrances against the completion of the 1<sup>st</sup> applicant's transfer of its three properties to the 2<sup>nd</sup> applicant. First, the imposition of the Restrictions as an outflow of void cautions, now *tainted* these Restrictions themselves with invalidity. And secondly, the unannounced manner of entering these Restrictions ran directly counter to the provisions of Sections 136 and 154 of the Registered Land Act (Cap. 300). It follows that the lodgement of these Restrictions was contrary to law, whether done by the Mombasa District Land Registrar on her own, or at the command of the Chief Land Registrar. If it was done by the Mombasa District Land Registrar on her own, it clearly *contradicted* the lawful decision which she had taken only so recently, in removing the caveats which had been registered against the 1<sup>st</sup> appellant's title to the three subject properties. A contradiction of such a nature cannot, in the very nature of things, be explained other than on the hypothesis of *arbitrariness* – which is contrary to law, and invariably harmful to the rights of individuals. This unexplained contradiction is to be construed,

in this case, as a signal of *ultra vires* acts. The applicants have stated without being contradicted, that the said Restrictions were entered without observance of the *principles of natural justice*, as they were not accorded a hearing as required by law.

### **(6) Orders**

In the light of the foregoing analysis of evidence and submissions, I will make several orders as follows:

(a) *That an order of certiorari be and is hereby issued to remove into Court and quash the decision of the 1<sup>st</sup> respondent made by way of a letter dated 9<sup>th</sup> October, 2003 purporting to set aside two previous rulings and directing a re-hearing on the issue of cautions lodged against titles to the subject properties.*

(b) *That an order of mandamus be and is hereby issued compelling the Chief Land Registrar and the Mombasa District Land Registrar to remove the Restrictions entered on 6<sup>th</sup> August, 2003 against the titles to the three subject properties, known as L.R. No. Mombasa/Block 1/350, LR No. Mombasa/Block 1/449, and LR No. Mombasa/Block 1/215 respectively.*

(c) *That an order of mandamus be and is hereby issued compelling the Chief Land Registrar and the Mombasa District Land Registrar to effect immediate and due registration of the transfers of lease in favour of Cargill Kenya Limited (2<sup>nd</sup> applicant) in respect of those parcels of land known as L.R. No. Mombasa/Block 1/350, LR No. Mombasa/Block 1/215 and L.R. No. Mombasa/Block 1/449, respectively.*

(d) *That an order of prohibition be and is hereby issued stopping the Chief Land Registrar and the Mombasa District Land Registrar from effecting registration of any other document adverse to the interests of Cargill Kenya Limited (2<sup>nd</sup> applicant) in the parcels of land known as L.R. No. Mombasa/Block 1/215, L.R. No. Mombasa/Block 1/350 and L.R. No. Mombasa/Block 1/449 respectively, pending the due registration of the transfers of lease thereof in favour of the 2<sup>nd</sup> applicant.*

(e) *That an order of prohibition be and is herein issued stopping the Chief Land Registrar from appointing another Land Registrar or any other person whatsoever to hear afresh the issue of removal/retention of the cautions lodged on the registers of the three subject properties by Bahari (T) Company Limited (the interested party).*

(f) *That an order be and is hereby made that the Office of Attorney-General shall commence investigations that may lead to prosecution for perjury, and especially in relation to section 11 of the Oaths and Statutory Declarations Act (Cap 15, Laws of Kenya), with regard to the swearing of the affidavit by Kenneth Kariuki Githii dated 20<sup>th</sup> April, 2004; and the Deputy Registrar, by proper protocol, shall cause this order to be conveyed.*

(g) *That an order be and is hereby made mulcting the respondents and the interested party, jointly and severally, in the costs of these proceedings to the applicants.*

(h) *That an order be and is hereby made that if any application or matter shall arise following the delivery of this judgment, the same shall be heard and determined within the Constitutional and Judicial Review Division of the High Court.*

**DATED and DELIVERED at Nairobi this 19<sup>th</sup> day of January, 2007.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Mwangi**

**For the applicants: Mr. Regeru, instructed by M/S Njoroge Regeru & Co. Advocates**

**For the respondents: Mr. Muiruri, instructed by the hon. The Attorney General**

**For the interested party: Mr. Nowrojee, instructed by M/S Kapila Anjarwalla & Khanna**