



Republic v Director of Criminal Investigations & another; Nairobi House Limited (Exparte); Koinange & another (Interested Parties) (Environment and Land Judicial Review Case E013 of 2020) [2022] KEELC 15138 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E013 OF 2020**

OA ANGOTE, J

NOVEMBER 24, 2022

**IN THE MATTER OF AN APPLICATION BY NAIROBI
HOUSE LIMITED FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE PROTECTION OF THE RIGHT TO
PROPERTY AS ENSHRINED UNDER ARTICLE 40 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF DCI CRIMINAL CASE NO
121/746/2005: TITLE I.R 31722 FOR L.R NO 6863/75-
NAIROBI HOUSE LIMITED AND TITLE NO IR 94498 FOR
L.R NO 209/7577-LENNAH CATHERINE KOINANGE**

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING 2ND RESPONDENT**

AND

NAIROBI HOUSE LIMITED EXPARTE



AND

LENNAH CATHERINE KOINANGE INTERESTED PARTY

DIAMOND TRUST BANK INTERESTED PARTY

JUDGMENT

Background

1. Vide the Notice of Motion dated February 2, 2021, the Ex-Parte Applicant (Applicant) seeks the following orders ;
 - i. An order of Certiorari to remove to the High Court and quash the investigations, findings and recommendations of the 1st Respondent as contained in its letter of July 20, 2020 in respect of DCI Criminal Case No 121/746/2005: Title IR 31722 for LR No 6863/75 Nairobi House Limited and Title IR 94498 for LR No 209/7577- Lennah Catherine Koinange.
 - ii. An order of prohibition to issue to prohibit the 2nd Respondent and any person acting under their behest or direction from enforcing the recommendations of the 1st Respondent as contained in its' letter of July 20, 2020 in respect of DCI Criminal Case No 121/746/2005: Title IR 31722 for LR No 6863/75 Nairobi House Limited and Title IR 94498 for LR No 209/7577- Lennah Catherine Koinange.
 - iii. Any other and/or further relief that this Honourable Court may deem just and expedient to grant in the circumstances.
 - iv. Costs of this Application be awarded to the Ex-Parte Applicant
2. The application is based on the grounds set out on the face of the Motion and supported by the Affidavit of Javed Iqbal Abdulrahman, the Director of the Applicant. In the Supporting Affidavit, Mr Abdulrahman deponed that he fully adopts and relies on the Statutory Statement and Verifying Affidavit both dated December 9, 2020.
3. It was his deposition in the aforesaid Verifying Affidavit that the 1st Respondent vide its letter of July 20, 2020 made a recommendation that the 2nd Respondent invokes Section 79 (1) and (2) of the [Land Registration Act, 2012](#) and expunge fraudulent transactions in regard to Title IR 31772 for LR No 6863/75 issued to the Applicant and that the 1st Respondents' decision to investigate and make the said recommendations is illegal and in any event sub judice as the legality of the Title IR 31772 for LR 6863/75 and Title IR 94498 for LR 209/7577 are the subject of Nairobi ELC 434 of 2017-Nairobi House Limited vs Lennah Catherine Koinange which is currently on-going.
4. It was deponed by the ex parte applicant's Director that the 2nd Interested Party requested the 1st Respondent to withdraw its letter of July 20, 2020 which request elicited no response; that a demand letter by the Applicant equally seeking the withdrawal of the recommendation went unanswered and that the legality of Titles 31722 for LR No 6863/75 and Title IR 94498 have been the subject of various law suits.
5. According to the applicant, the suits involving the suit property include Nairobi HCCC No 1184 of 2005, HCCC Misc Civil Application No 1492 of 2005(OS), Nairobi HCCC No 1532 of 2005, Nairobi HCCC No 1531 of 2005-Nairobi House Limited vs The Commissioner of Lands & The Attorney General, Nairobi HCC Misc Civil Application No 298 of 2007-JR Nairobi House Limited



vs OCS Muthangari Police Station & The Attorney General, and Nairobi HCCC No 1094 of 2005- Nairobi House Limited vs Lennah Catherine Koinange, Trenton(K) Limited & Jewel Investments Limited.

6. It was deponed that Inspector Daniel Kirorei on November 1, 2005 swore an Affidavit on behalf of the 1st Respondent confirming that he carried out investigations on the Applicants' title and found it to be legitimate and as such there is no basis for the new investigations; that the Respondents are obligated to carry out their functions in the interests of justice and that where they are granted discretion, it should be judiciously exercised.
7. The 1st Respondent, through its investigating officer, Chief Inspector Geoffrey W Kinyua, filed a Replying Affidavit in which where he deponed that he is the Chief Investigating Officer with conduct over the matter; that he has carried out thorough and conclusive investigations leading to the recommendations in the letter of July 20, 2020, advising the 2nd Respondent to invoke Section 79(1) and (2) of the Land Registration Act, 2012 and expunge the fraudulent registration of Title No 31772 for LR No 6863/75 and that Section 35 of the National Police Act provides for the function of the Directorate which includes inter-alia undertaking investigations on crimes.
8. It is the 1st Respondent's case that the decision to re-investigate the matter was informed by a letter of complaint ref: NCC/CA/GA/AC/10/2015 dated May 20, 2015 from the Office of the Governor, Nairobi County to the Director of Public Prosecutions copied to Directorate of Criminal Investigations and that the investigations revealed that Nairobi House Limited illegally acquired Title No 31722 using an obsolete Deed Plan No 91751 which was a transfer and surrender Deed Plan surrendered to create a sub-division and Kabaserian road among other public utilities.
9. It was deponed that Deed Plan No 91751 was subjected to forensic examination which revealed it to be a photocopy with an original seal; that the Applicants' title was equally subjected to forensic examination and was found to be forged and that the actual and correct Deed Plan for the subject plot is Deed Plan No 91752 that was subsequently issued in respect of Title No IR 157842 belonging to the 1st Interested Party.
10. The 1st Respondent, through its investigating officer, Chief Inspector Geoffrey W Kinyua, further deponed that according to the Director of Surveys, Land Reference Number 6863/75 under Deed Plan No 91751 measuring 3.146 Hectares ceased to exist the moment Deed Plan 91752 was introduced and LR No 209/7577 created which is the actual position on the ground and that it is misleading to state that the title was subjected to any investigation by the 1st Respondent.
11. In response to the application, the 1st Interested Party filed a Replying Affidavit on June 8, 2021 wherein she deponed that the present proceedings are incompetent, their institution not having been authorized by a resolution of the Ex-parte Applicant Company and that she is the *bona-fide* owner of LR 209/7577, IR 94498(now 157842) with Deed Plan No 91752.
12. It was deponed that the suit property originates from the surrender of part of LR No 6863 (IR 2832) owned by Catholic Holy Ghost Fathers to the Government which thereafter lodged a caveat on the surrendered LR No 6863 75GL with Deed Plan 91751 marked for transfer and surrender comprising of 3.146 Ha for provision of access roads, Kabasarian Avenue and Kabasarian gardens which are public properties managed by the Nairobi City County.
13. The Interested Party deponed that the remaining portion of 1.964 Ha was allocated to her late father Hon Mbiyu Koinange as compensation for land he had donated to the Government for the construction of Government offices and a Police Station in Banana Hills, Kiambu and that her late father took possession of the property, fenced it off and constructed temporary housing for his staff.



14. It was deponed that at the time of his demise, her father had not obtained a grant for the property leading her to apply for allocation of the suit property which was done on September 10, 1991 and a letter of allotment duly issued; and that she subsequently obtained a Certificate of Title issued under the Registration of Titles Act and that in 2005, she applied for and was granted approval to construct a perimeter wall by the Nairobi City Council.
15. According to the Interested Party, on May 7, 2013, having received due approvals, she sub-divided her property LR No 209/7577 and Deed Plan No 91752 into 3 portions being LR 209/21308-310 and received titles in respect thereof and that as a consequence of the sub-division, Grant IR No 94498 ceased to exist.
16. According to Ms Koinange, sometime in 2005, persons entered upon the suit property alleging that it was LR 209/6863/75; that several suits have been filed touching on the suit property; that there has been no single determination on the validity of LR 6863/75(IR 31722) and that having failed to take over the suit property, the Applicant colluded with officers from the CID & Ministry of lands and engineered allegations of fraud against her leading to the institution of a criminal suit against her in Kibera Criminal Case No 121/746/2005.
17. Ms Koinange further deponed that the Applicant is guilty of material non-disclosure having failed to inform the Court that the investigations leading to the letter of July 20, 2020 have been the subject of the proceedings before the Kiambu Magistrates Court and the Judicial Review Court; that the decision now sought to be quashed was sanctioned by the Judicial Review Court and that the Applicant is attempting to review the decision of a court of competent jurisdiction.

Submissions

18. The Ex-parte Applicant, through its counsel, submitted that the 1st Respondent's letter of July 20, 2022 recommending that the 2nd Respondent invokes Section 79(1) and (2) of the [Land Registration Act, 2012](#) and expunge fraudulent transactions with respect to Title IR 31772 for LR No 6863/75 is illegal and motivated by extraneous purposes and that is in any event sub judice as the legality of the aforesaid title is the subject of ELC 434 of 2017-Nairobi House Limited vs Lennah Catherine Koinange.
19. It was submitted that the 1st Respondent has no business running parallel investigations. Counsel cited the case of [Commissioner of Police & The Director of Criminal Investigation Department & another vs Kenya Commercial Bank Ltd & 4 Others](#) [2013] eKLR where the Court stated that the criminal justice processes should not be used as a pawn in civil disputes.
20. It was submitted by the applicant's advocate that the decision to investigate the applicant's title was based on a letter of complaint by the Office of the Governor of Nairobi County and the same cannot be said to fall under Section 35 (h) of the [National Police Service Act](#) which mandates the 1st Respondent to act on instructions of the Director of Public Prosecutions and that as no directions were issued by the Director of Public Prosecutions, the 1st Respondent's actions constitute an illegality.
21. Reliance in this respect was placed on the case of [County Government of Nyeri & Anor vs John Wachiuri t/a Githakwa Graceland & Wandumbi Bar & 50 Others](#)[2016]eKLR and [Republic vs Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives\(Interested Party\) Tanners Association of Kenya\(suing through its Chairman Robert Njoka Ex-parte Applicant](#)[2019]eKLR.
22. Counsel submitted that the decision of the 1st Respondent runs contrary to formal and procedural rules which were expressed by the Court in [Republic vs University of Nairobi Ex-parte Lazarus Wakoli](#)



- Kunani & 2 Others*[2017]eKLR and that the 1st Respondent's actions further violates the Applicant's right to a fair hearing as enshrined in Article 50(1) of the *Constitution* as the Applicant was never granted an opportunity to be heard with respect to its title.
23. Counsel submitted that the legality of the titles IR 31722 for LR 6863/75 and title IR 94498/ for LR 209/7577 have been the subject of several suits which have been determined in the Applicants' favour and as affirmed in the case of HCC 1492 of 2005-Lennah Catherine Koinange vs The Attorney General Director of CID & Nairobi House Limited, investigations were carried out which affirmed the validity of the Applicants' title.
 24. According to counsel, the timing of the conclusion of the investigations and the report in 2018 was intended to aid the 1st Interested Party in her civil case ELC 434 of 2017. Counsel cited the case of *Republic vs Attorney General & 9 Others Ex-parte Cyrus Shakhhalga Jirongo*[2017]eKLR which relied on the case of *Vincent Kibiego Saina vs The Attorney General* HC Misc Appl 839 and 1088/99 where the Court stated that the purpose of a criminal investigation is not to aid individuals in advancing their civil cases.
 25. The 1st Interested Party's advocate submitted that this court has no jurisdiction to entertain the matter as the application seeks to review the decision of a court of concurrent jurisdiction; that in JR 320 of 2015-Nairobi House Limited vs Chief Magistrates Court, the court found that the Directorate of Criminal Investigations was well within its mandate to investigate the Applicants title and that it is apparent from the foregoing that rather than appealing the decision, the Applicant is seeking a review from this court which remedy does not lie.
 26. It was submitted that this suit violates the doctrine of res judicata as expressed in Section 7 of the *Civil Procedure Act* as it seeks to re-litigate the matters in JR 320 of 2015-Nairobi House Limited vs Chief Magistrates Court, Kiambu Law Courts & 2 Others.
 27. It was submitted by the Interested Party that Judicial Review is concerned with the process and not the merits of the decision and that where an authority considers extraneous factors in making a decision, it may be said to be acting unreasonably and in bad faith and that the Applicant has not met the threshold for the grant of the orders sought and the same should be dismissed.

Analysis & Determination

28. Having considered the Application, Affidavits in support and against and the submissions thereto, the issues that arise for determination are;
 - i. Whether the Court has jurisdiction to entertain the Application?
 - ii. Whether the Ex-Parte Applicant has met the grounds or threshold for granting of Judicial Review Order of Certiorari and Prohibition.
29. The 1st Interested Party submitted that this Court has no jurisdiction to entertain the present proceedings. It is her assertion that the present matter offends the principles of sub-judice and res judicata and is an attempt by the Applicant to review the decision of a court of concurrent jurisdiction which remedy does not lie and that the application is akin to forum shopping and constitutes an abuse of Court process.



30. It is trite that jurisdiction is everything and where the Court is faced with a question as to its jurisdiction, it is obligated to determine it first. This was expressed by the Court of Appeal in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others* [2013] eKLR which stated thus;

“So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”

31. The principle of sub judice is provided for in Section 6 of the *Civil Procedure Act* in the following terms:

“(6) No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

32. The Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020]eKLR discussed the concept thus;

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.

33. The principle of res judicata is encompassed in Section 7 of the *Civil Procedure Act* which provides as follows:

“(7) No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



34. The Court of Appeal in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others* [2017] eKLR set out the parameters of res judicata thus;
- “For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit. b) That former suit was between the same parties or parties under whom they or any of them claim. c) Those parties were litigating under the same title. d) The issue was heard and finally determined in the former suit. e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
35. It is apparent from the foregoing that the underlying objective of Section 6 of the *Civil Procedure Rules* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. Section 7 of the Act requires that there should be an end to litigation and to that, end bars re-litigation of suits where the matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in the former suit.
36. Further, the former suit must have been between the same parties or parties claiming under them; the parties must have litigated under the same title in the former suit; the court which decided the former suit must have been competent to try the subsequent suit; and the matter in issue must have been heard and finally decided in the former suit.
37. The Court has considered the pleadings in ELC 434 of 2017. The same is between the Applicant and the 1st Interested Party as the Plaintiff and the Defendant respectively and the dispute revolves around the ownership of LR 6863/75(IR No 31772) which they both lay claim to.
38. In the present proceedings, there are other parties apart from the Applicant and 1st Interested Party and the application primarily seeks to impugn the investigations and findings of the Directorate of Criminal Investigations which culminated into a recommendation that the Applicants’ title be expunged and affirmed the legality of the 1st Interested Party’s title.
39. It is apparent that notwithstanding the fact that the suit properties are the subject of both suits, the nature of the proceedings and reliefs sought therein are vastly different. The current application cannot be said to be sub judice ELC 434 of 2017.
40. The next consideration is whether this application is res judicata JR 320 of 2015-Nairobi House Limited vs Chief Magistrates Court, Kiambu Law Courts & 2 Others. The common parties in both suits are the Applicant, the 1st Respondent herein as the 2nd Respondent in JR 320 of 2015 and the 2nd Interested Party herein who was an Interested Party in JR 320 of 2015. The 1st Interested Party herein was not a party in JR 320 of 2015.
41. In JR 320 of 2015, the Applicant sought to quash the orders issued in Kiambu Magistrates Court directing Diamond Trust Bank to release the Title LR 6863/75 IR 31772 to the Directorate of Criminal Investigations to have them conduct forensic investigations and to quash and prohibit the Directorate of Criminal Investigations from carrying out any investigations in respect of title. In its determination, the Court declined to stop the investigations and made a finding that investigation



- of the title was within the mandate of the Police and there was no evidence that the same was being undertaken improperly.
42. The present application seeks to quash the investigations, findings and recommendations of the 1st Respondent as contained in its letter of July 20, 2020, which findings provided that the Applicant's Title IR 31722 for LR No 6863/75 was a forgery and recommended that the 2nd Respondent invokes Section 79(1) and (2) of the [Land Registration Act, 2012](#) and expunge it from his records. The letter also affirmed the validity of LR No 209/7577.
 43. In JR 320 of 2015, the Applicant sought to prevent any investigations into its title, arguing that the Magistrates Courts' decision to allow such investigation was not justifiable and was made in bad faith because it was the Applicant who was the complainant in the Criminal case. In declining to grant the orders, the Court found that the 1st Respondent herein is well mandated to carry out investigations and that there was no evidence that the intended investigations constitute an abuse of court.
 44. It is clear from the above narration that these two matters are distinguishable. JR 320 of 2015 dealt with the pre-investigation stage whereas in the present circumstances, investigations have already been undertaken and findings issued. This court is of the view that even though the court in JR 320 of 2015 declined to halt the investigations, the Applicant is well within its rights to question the propriety of the investigations and to this end, the application is not res judicata JR 320 of 2015 and does not constitute an attempt to review the decision of the court in JR 320 of 2015.
 45. As to the assertion that the application constitutes an abuse of Court process, the same is founded on the premise that the application offends the principles of sub judice, res judicata and constitutes forum shopping. Having found that the two principles have not been infringed, it follows that there is no basis upon which the court can make a finding that the application is an abuse of court process.
 46. The 1st Interested Party deponed that the Applicant has failed to disclose that the investigations, the subject of these proceedings, have been the subject in ELC 434 of 2017 and JR 320 of 2015. Having regard to the application, it is clear that while ELC 434 of 2017 has been alluded to, JR 320 of 2015 was not disclosed. The law on this issue is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage, the court will set aside the ex parte orders so obtained.
 47. What constitutes relevant material is a matter of fact. JR 320 of 2015 was concerned with the quashing of the Magistrates decision allowing investigations on the acquisition of the Applicant's title to commence while in the present case, the investigations having been completed and recommendations given by the 1st Respondent.
 48. It is trite that Judicial Review proceedings relate to specific actions and each action can precipitate its own proceedings. In the circumstances, the Court does not agree that this non-disclosure was material to warrant dismissal of the suit.
 49. At the outset, it must be appreciated that Judicial Review is concerned with the decision making process and not with the merit of the decision. This was expressed by the Supreme Court in [Judges and Magistrates Vetting Board vs Centre for Human Rights and Democracy](#) [2014] eKLR where it was stated that:

“(161) when Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and



individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.”

50. Similarly, the Court of Appeal in *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) vs Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR, stated thus;

“The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect;

That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters.”

51. The parameters of judicial review were set out by the Court of Appeal in the case of *Republic vs Kenya National Examinations Council ex parte Gatbenji & Others* Civil Appeal No 266 of 1996 where the court stated as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that JR 3 of 2021 page 57 | 82 tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in



the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed JR 3 of 2021 page 58 | 82 i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

52. As mentioned earlier in this judgment, the applicant has sought orders of Certiorari and Prohibition . The learned authors of H W Wade and C F Forsyth, *Administrative Law*, 10th Edition, the have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

“The quashing order and prohibiting order are complementing remedies, based upon common law principles....A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultra vires. A quashing order looks to the past, a prohibiting order to the future.”

53. The gist of the Applicant’s case is that the investigations leading to the recommendations in the 1st Respondent’s letter of July 20, 2020 recommending that the 2nd Respondent invokes Section 79(1) and (2) of the *Land Registration Act, 2012* and expunge fraudulent transactions in regard to Title IR 31772 for LR No 6863/75 issued to the Applicant and validating the 1st Interested Party’s Title LR No 209/7577 were illegal and prejudicial to the Applicant.
54. The legality of the Title IR 31772 for LR 6863/75 and Title IR 94498 for LR 209/7577 are the subject of Nairobi ELC 434 of 2017-Nairobi House Limited vs Lennah Catherine Koinange which is currently on-going.
55. Section 35 of the *National Police Service Act* lays out the functions of the Directorate of Criminal Investigations. The 1st Respondent is legally obligated, once they witness or are informed of a crime, to investigate the offence and are not limited to only investigating matters on the direction of the Director of Public Prosecutions as the Applicant alleges. In *Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR the Court held as follows:

“In our view, it would be within the mandate of an investigative body to receive complaints and to investigate them. Such bodies or entities cannot be faulted for acting on the complaints as in so doing, they would be acting within their constitutional and statutory duty. It was stated in Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR, that by undertaking investigations an investigating entity does not violate any constitutional rights, and that violation of rights may only occur in the manner in which the investigative mandate is executed. In that event, the Petitioner would be under an obligation to demonstrate that his or her rights have been violated by the manner of investigation and attendant processes.”



56. The Applicant's contention of illegality under this head must fail. As to the contention that the investigations are sub judice due to the existence of ELC 434 of 2017, this cannot lie. Sub judice applies to court processes. In any event, the existence of civil proceedings is not in itself a bar to criminal investigations. Section 193A of the *Criminal Procedure Code* on this issue provides:
- “Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
57. The above notwithstanding, the Court agrees with the assertion by the Court in *Commissioner of Police & The Director of Criminal Investigation Department & another vs Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR cited by the Applicant that criminal justice should not be used as a pawn in civil disputes.
58. According to the Applicant, the investigations by the 1st Interested Party violated his rights to a fair hearing because he was not granted an opportunity to be heard; that there was no basis for re-investigations as investigations had already been carried out affirming the propriety of his title and that the timing of the conclusion of the investigations being a year after the institution of the ELC 434 of 2017 makes it apparent that its purpose was to aid the 1st Interested Party in that case.
59. In response, the 1st Respondent states that the legitimacy of the Applicant's title was never fully investigated and that the re-investigation was prompted by the complaint from the Nairobi City County.
60. Section 52(4) of the *NPS Act* requires a police officer to record any statement made to him by a person he has summoned, whether that person is a suspect for the commission of the crime or not. Before recording the person's statement, the officer is required to warn that person of the fact that the statement he is recording may be used against him. The statement should be in writing and signed by the person.
61. In view of the Applicant's assertions that he was denied an opportunity to be heard, it behooved the 1st Respondent to prove that the Applicant was granted an opportunity to be heard in this respect. There is no evidence that the Applicant was summoned if at all and this failure to adhere to rules of natural justice points to procedural impropriety.
62. Secondly, the court has considered the Affidavits of Daniel Kororei as well as the Affidavit by Geoffrey Kinyua. Both are investigators from the Directorate of Criminal Investigations and have conducted investigations on the suit titles. Vide his Replying Affidavit, Inspector Geoffrey Kinyua states the re-investigation was prompted by the complaint from the office of the Governor of Nairobi County and that there was need to conclusively investigate the issue.
63. It should be noted that contrary to this position, the impugned letter in itself states that the investigation is pursuant to the complaint made in 2005. Nonetheless, it appears absurd that the same office, albeit at different times, could reach different conclusions on the two titles. No explanation has been given for this drastic shift and the 1st Respondent's decision to this extent is irrational and violated the Applicant's Petitioner's right to fair administrative action.
64. It is not in dispute that the Applicant and the 1st Interested Party are involved in litigation over the ownership of the same parcel of land. In determining whether or not to commence or pursue criminal prosecution, the 1st Respondent must consider the interests of the public and consider whether the



prosecution will enhance public confidence or whether the case can be easily resolved by civil process without putting an individual's liberty at risk. This was the position in *Republic vs Attorney General & another Ex-Parte Kipng'eno Arap Ng'eny* [2001] eKLR.

65. In conclusion, the court is persuaded that the investigations that culminated in the recommendations set out in the letter of July 20, 2020 were vitiated by irrationality and procedural impropriety. To this end, the court finds that the Applicant has made out a case for the grant of Judicial Review orders sought and the Court proceeds to grant the following orders;
- a. An order of Certiorari is hereby issued removing to this court and quashing the investigations, findings and recommendations of the 1st Respondent as contained in its letter of July 20, 2020 in respect of DCI Criminal Case No 121/746/2005: Title IR 31722 for LR No 6863/75 Nairobi House Limited and Title IR 94498 for LR No 209/7577- Lennah Catherine Koinange.
 - b. An order of prohibition does hereby issue prohibiting the 2nd Respondent and any person acting under their behest or direction from enforcing the recommendations of the 1st Respondent as contained in its' letter of July 20, 2020 in respect of DCI Criminal Case No 121/746/2005: Title IR 31722 for LR No 6863/75 Nairobi House Limited and Title IR 94498 for LR No 209/7577- Lennah Catherine Koinange.
 - c. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Nyacholi for Ex-parte Applicant

Mr. Kisinga for 2nd Interested Party

Mr. Kivindyo for Ouma for 1st Interested Party

Court Assistant - June

