**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC JUDICIAL REVIEW NO. 72 OF 2018**

**(FORMERLY HC. MISC. CIVIL APPLICATION NO. 554 OF 2017)**

**REPUBLIC...............................................................................APPLICANT**

**=VERSUS=**

**NATIONAL LAND COMMISSION...........................1ST RESPONDENT**

**CHIEF REGISTRAR OF TITLES.............................2ND RESPONDENT**

**THE DIRECTOR OF SURVEY..................................3RD RESPONDENT**

**AND**

**SADHANI LIMITED.......................................1ST INTERESTED PARTY**

**KEIBUKWO INVESTMENT LTD...............2ND INTERESTED PARTY**

**EX-PARTE**

**SAYANI INVESTMENT LIMITED**

**JUDGMENT**

Background:

At all material times, the ex-parte applicant, Sayani Investments Ltd. (hereinafter referred to only as “the applicant”) was the registered proprietor of all those parcels of land known as L.R No. 209/923, L.R No. 209/924 and L.R No. 209/925 (hereinafter referred to together as “the suit properties”). The applicant acquired L.R No. 209/923, L. R No. 209/924 and L.R No. 209/925 on 9th April, 1965, 1st April, 1968 and 31st July, 1957 respectively. The suit properties were leasehold from the Government of Kenya for a term of 99 years with effect from 1st January, 1911. The terms of the leases for the suit properties were to expire on 1st January, 2010.

The applicant applied to the Commissioner of Lands for extension of the said leases. By separate letters dated 4th December, 2007, the Commissioner of Lands informed the applicant that its application for extension of leases in respect of L.R No. 209/923 and L.R No. 209/925 had been approved. By a letter dated 12th September, 2008, the Commissioner of Lands notified the applicant that the applicant had been granted lease extension for 50 years with effect from 1/12/2007 in respect of the suit properties. In the said letter, the Commissioner of Lands asked the applicant to furnish his office with a new deed plan for the proposed extension of the terms of the leases for the suit properties and amalgamation of the same.

The applicant’s application for extension of the leases for the suit properties was approved by the Director of Physical Planning through a letter dated 13th August, 2007 and by the City Council of Nairobi through separate letters dated 30th June, 2011. The process of extension of the leases for the suit properties and consolidation of the same stalled in 2011. The applicant’s founding director who had initiated the process died on 12th March, 2010 and the applicant was unable to establish why there was a delay in the issuance of new grants for the extended leases. The Land Registry files for the suit properties in which the applications for extension of the leases were being processed disappeared and could not be traced. While pursuing the extension of the said leases, the applicant came to learn that the issuance of the new grants for the extended leases was being derailed by some unknown persons who were making attempts to acquire the suit properties.

On 31st March, 2014, the applicant learnt from the Director of Surveys that the suit properties had been amalgamated into L.R No.

209/20737 ("amalgamated parcel") under Deed Plan No. 356256 ("the disputed deed plan"). The applicant had not instructed any surveyor to amalgamate the suit properties and produce the disputed deed plan. The applicant learnt that the said deed plan was issued to a stranger, one, Catherine Njeri Maranga. The applicant asked the Director of Surveys to investigate the circumstances under which the disputed deed plan was issued. The Director of Surveys in a letter dated 24th July, 2014 assured the applicant that the matter was being investigated. While the matter was pending investigation, the applicant learnt that the 1st and 2nd respondents were planning to issue to unknown persons a title over the suit properties on the strength of the said disputed deed plan.

This prompted the applicant to file an application for judicial review namely, HC. JR No. 313 of 2014 ("JR No. 313 of 2014") seeking among others; an order of Certiorari to quash the disputed deed plan, an order of mandamus to compel the 1st and 2nd respondents to issue grants to the applicant in respect of the suit properties for a term of 99 years and an order of prohibition to stop the 1st and 2nd respondents from issuing grants in respect of the suit properties or L.R No. 209/20737 (amalgamated parcel) to any other person or persons other than the applicant.

While granting leave to the applicant in JR No. 313 of 2014 to apply for the said orders of judicial review on 15th August, 2014, the court ordered that:

> **"……the order granting leave do operate as stay of issuance of Grants in respect of L.R No. 209/923, 209/924 and 209/925 the suit properties or a Grant in respect of L.R Number 209/20737 to any other person or persons other than the exparte applicant or dealing with the suit properties in any manner that will deprive the ex parte applicant proprietary rights and interest in the suit properties until the hearing and determination of the substantive application."**

The said order was served upon among others, the National Land Commission and the Chief Land Registrar, the 1st and 2nd respondents herein on 14th August, 2014 and 15th August, 2014 respectively.

JR No. 313 of 2014 was heard and a judgment delivered on 21st September, 2016 by Aburili J. From the decree extracted from the said judgment on 22nd November, 2016, the court quashed the disputed deed plan and prohibited the 1st and 2nd respondents herein from issuing grants in respect of L.R No. 209/20737 (amalgamated parcel) to any other person or persons other than the applicant. The court also issued an order of mandamus compelling the 1st and 2nd respondents herein to consider issuing grants to the applicant in respect of the suit properties for a term of 50 years with effect from 1st December, 2007 as per the approval for renewal granted in 2007.

While JR No. 313 of 2014 was pending, the 1st respondent confirmed the earlier approval by the Commissioner of Lands to extend the applicant's leases in respect of the suit properties and proceeded to issue the applicant with letters of allotment for the renewed leases on 16th August, 2016. The applicant accepted the allotments and made payment of the charges that were set out in the said letters of allotment on 23rd September, 2016. The applicant thereafter instructed a surveyor, Harunani & Associates to prepare deed plans for extension of the leases for the suit properties and amalgamation thereof.

On 5th October, 2016 after the judgment of the court in J.R No. 313 of 2014 aforesaid, the 2nd respondent herein issued to the interested parties jointly a certificate of title (amalgamated title) in respect of L.R No. 209/20737 (amalgamated parcel) on the basis of the disputed deed plan that had been quashed by the court and contrary to the order of the court prohibiting the respondents herein from issuing a grant in respect to the amalgamated parcel to any other person apart from the applicant. The said certificate of title was issued to the interested parties on the basis of the following; an application for allocation of the suit properties that was made by the interested parties to the Commissioner of Lands on 14th August, 2012, a survey that was carried out by Opiyo & Associates in July, 2013 that gave rise to the disputed deed plan, a letter of allotment issued to the interested parties on 4th August, 2013, payments made on 5th September, 2016 for the allotment and a lease issued on 23rd September, 2016 and registered on 5th October, 2016. The applicant was not aware of this development and continued to pursue the issuance of grants for the extended leases pursuant to the said judgment that was made on 21st September, 2016 in J.R No. 313 of 2014.

At all material times, there was and still is a commercial building on the suit properties known as Caxton House. The interested parties took no immediate action after obtaining the said certificate of title in respect of the amalgamated parcel on 5th October, 2016 which made them not only the owner of the amalgamated parcel but also the Caxton House standing thereon which comprises of several shops and offices. On 21st August, 2017 after about 10 months from the date the interested parties obtained the certificate of title aforesaid, the interested parties wrote to one of the applicant's tenants in Caxton House, Equity Bank Ltd. informing them that they were the registered owners of the amalgamated parcel and Caxton House. In the said letter, the interested parties informed Equity Bank of their intention to start collecting rent from them and requested for a meeting to deliberate on the terms of a new lease. It was at this point that the applicant leant of the existence of the interested parties and what they had been engaged in behind the scenes.

The application before the court:

After being notified of the interested parties' ownership claim over the amalgamated parcel, the applicant instituted these proceedings on 6th September, 2017. Following the grant of leave on 7th September, 2017, the applicant brought the present application by way of Notice of Motion dated 19th September, 2017 seeking the following reliefs;

1. An order of certiorari to remove into the High court for purposes of being quashed and quashing Certificate Title No I.R 180647 being a consolidation/amalgamation of all the properties known L.R Nos. 209/923, 209/924 and 209/925 (the suit properties) into L.R No. 209/20737(amalgamated title) issued by the National Land Commission and the Land Registrar to Sadhani Limited and Keibukwo Investments Limited on 5th October, 2016.

2. An order of mandamus to compel the National Land Commission and the Land Registrar to rectify the land register by cancelling, expunging and removing from the land register any entry or registration of the Certificate of Title No I.R 180647 in respect of L.R No. 209/20737(Original Number 209/923-925) issued to Sadhani Limited and Keibukwo Investment Limited on 5th October, 2016.

3. A conservatory order restraining Sadhani Limited and Keibukwo Investment Limited whether by themselves, their employees, servants, agents and/or assigns or any other person whatsoever acting on their behalf and/or under their mandate and/or instructions from demanding rents from the applicant's tenants, alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever, whether claiming under the Certificate of Title No. I.R 180647 in respect of L.R No 209/20737 or otherwise, interfering with the properties known as L.R No 209/923, 209/924 and 209/925(the suit properties) and the premises or building erected thereon commonly known as Caxton House or the occupants, tenants and or licensees.

4. Cost of the judicial review proceedings.

5. Any other or further consequential orders and/ or directions that may be necessary.

The application was brought on the grounds set out on the face thereof and on the verifying affidavit sworn by Karim Jetha on 5th September, 2017, the Statutory Statement of the same date, supplementary verifying affidavit of Karim Jetha sworn on 21st November, 2019 and a further affidavit of Karim Jetha sworn on 4th December, 2019. I have covered much of the grounds upon which the application was brought in what I have set out above in the background. I do not intend to repeat the same here. In summary, the applicant averred that: It had at all material times been in possession of the suit properties. The suit properties were leased to several tenants. The terms of the leases for the suit properties expired on 1st January, 2010. In 2007, it applied for the extension of the leases. Its application for the renewal of the leases in respect of the suit properties was derailed by unknown persons who intended to acquire the suit properties fraudulently. It learnt that the suit properties had been amalgamated under Deed Plan No. 356256(the disputed deed plan) without its knowledge and the 1st and 2nd respondents were in the process of issuing a fresh grant for the suit properties to other persons on the basis of the said deed plan.

This is what prompted the filing of JR.No. 313 of 2014 in which it obtained an order on 13th August, 2014 staying the issuance of grants in respect of the suit properties by the 1st and 2nd respondents to any person other than the applicant. By a letter dated 26th August, 2014 the Director of Surveys confirmed that the disputed deed plan was fraudulently procured and that it had cancelled the same. Despite the issuance of the said order by the court on 13th August, 2014 and the approval that it had obtained from the Commissioner of Lands for extension of its leases, there were individuals who were still fraudulently trying to deny it its rights over the suit properties. On 21st and 26th May, 2015, it placed a caveat emptor in the Daily Nation and Standard newspapers respectively notifying the public of its interest in the suit properties.

The 1st and 2nd respondents herein did not respond to J.R No. 313 of 2014. In a judgment delivered on 21st September, 2016 in J.R No. 313 of 2014, the court issued an order of certiorari quashing the disputed deed plan and an order of prohibition restraining the 1st and 2nd respondents herein from issuing a grant in respect of the suit properties to any other person. Before that, the 1st respondent had in a letter dated 18th January, 2016 upheld the earlier approval of extension of its leases in respect of the suit properties. On 16th August, 2016, the 1st respondent issued it with letters of allotment for the suit properties to facilitate issuance of new grants. It fully complied with the terms of the said letters of allotment and it was in the final stage of obtaining the deed plans for the suit properties when the interested parties herein sent a letter to Equity Bank on 21st August, 2017 purporting to be the registered owner of the suit properties. Unknown to it, on 5th August, 2016, the respondents herein purported to issue the interested parties with a Certificate of Title No. I.R 180647(amalgamated title) following amalgamation of the suit properties into L.R No. 209/20737(amalgamated parcel). The said amalgamated title was issued notwithstanding the final court orders made on 21st September, 2016 quashing the disputed deed plan on the basis of which it was issued and prohibiting the respondents from issuing a grant to any other person in respect of the suit properties. Furthermore, the said disputed deed plan had also been cancelled by the 3rd respondent on 26th August, 2014 on the ground that the same had been issued fraudulently.

The applicant averred that the amalgamated title held by the interested parties in respect of the amalgamated parcel was null and void being a product of fraud and blatant abuse and violation of the provisions of the Land Act, 2012 and Land Registration Act, 2012 on renewal of leases. The applicant averred that the same was also issued in blatant disobedience of court orders. The applicant averred that it sent a letter dated 23rd August, 2017 to the interested parties asking them to desist from disturbing it on the suit properties and in a letter dated 29th August, 2017 in reply, the interested parties indicated that they were asserting their claims over the suit properties. The applicant averred that the court had power to quash the title held by the interested parties that was fraudulently issued by the 1st and 2nd respondents on 5th October, 2016 and order the 1st and 2nd respondents to rectify the register of the suit properties by removing any entry or registration relating to the said title.

While the present application was pending, the interested parties filed an application dated 27th July, 2017 in J.R No. 313 of 2014 seeking; a stay of execution of the judgment that was made therein on 21st September, 2016 in favour of the applicant quashing the disputed deed plan and prohibiting the 1st and 2nd respondents from issuing a grant in respect of the suit properties to any other person apart from the applicants; the setting aside of the said judgment; and an order that rent derived from the suit properties be paid into a joint interest earning account in the names of the advocates for the parties. The application was brought on the grounds that although the interested parties were affected by the said judgment, they were not given a hearing before the same was made.

In a ruling delivered in J.R No. 313 of 2014 on 27th September, 2018, the court set aside the said judgment of 21st September, 2016 and joined the interested parties in that application as interested parties. The court however declined to stay execution of the said judgment on the ground that the application was brought one year after the judgment and decree of the court in the matter and that the judgment had already been implemented to some extent which implementation had given rise to other proceedings that were pending before this court. The court also declined to nullify the actions that had been taken by the respondents in that application in execution of the said judgment. Finally, the court declined to order that rent be deposited in a joint interest earning account in the names of the advocates for the parties. The court

ordered that the status quo on rent collection be maintained pending the hearing and determination of that application. Following the setting aside of the said judgment of 21st September, 2016, J.R No. 313 of 2014 is pending hearing before this court.

Again, while the present application was pending, the interested parties and their directors were charged before the Nairobi Chief Magistrate's Court in Criminal Case No. 819 of 2019 in relation to the manner in which the interested parties acquired title to the suit properties. In relation to the said criminal case, several people including Peter Kahuho a retired land registrar who is said to have signed the letter of allotment of the suit properties in favour of the interested parties and Patrick Opiyo Odero of Opiyo & Associates who is said to have carried out a survey that gave rise to the disputed deed plan recorded statements with the police. The said criminal case is pending hearing.

While the present application was pending, the 2nd respondent following its independent investigations proceeded to cancel the interested parties lease dated 23rd September, 2016 and certificate of title No. I.R 180647(amalgamated title) in respect of L.R No. 209/20737(amalgamated parcel) sometimes in 2017 on the ground that the same were acquired irregularly. The interested parties have challenged the said cancellation of their lease and title in Constitutional Petition No. 29 of 2018 which is also pending hearing before this court. Following the cancellation of the interested parties said lease and title, the applicant was issued with certificates of title in respect of the suit properties on 1st October, 2019. The applicant annexed copies of the said certificates of title to the supplementary affidavit sworn by Karim Jetha on 21st November, 2019.

Response to the application:

The application by the applicant was responded to by the 1st and 2nd respondents and the interested parties. The 1st respondent filed a replying affidavit sworn by Zacharia Ndege, the 1st respondent's Chief Land Administration Officer. In his affidavit, Zacharia Ndege reiterated the contents of the affidavit and further affidavit that he had sworn on 13th October, 2017 and 1st November, 2017 in J.R No. 313 of 2014. He stated that the 1st respondent was not involved and was not consulted in the issuance of the title in respect of the suit properties in favour of the interested parties. He stated that following a complaint from the applicant that there was a delay in the processing of its application for extension of lease, it carried out investigations that revealed that there was a deed plan that had been prepared on misrepresentation of facts which deed plan was subsequently declared null and void by the Director of Surveys, the 3rd respondent herein. He stated further that the 1st respondent following further investigation made a decision that the applicant was the rightful party in whose favour the leases in respect of the suit properties should be extended under section 13 of the Land Act, 2012. He stated that the 1st respondent was not privy to the process through which the suit properties were allocated to the interested parties and a title issued to them. He stated that the 1st respondent was the body mandated to manage public land and as such any actions affecting rights or interests in public land made without its sanction is null and void.

The 2nd respondent filed a replying affidavit sworn by Charles Kipkurui Ng'etich on 6th March, 2018. In the affidavit, Charles Kipkurui Ng'etich, a Principal Land Registration Officer at Ardhi House stated that the 2nd respondent received a complaint from the applicant in respect of the lease dated 5th October, 2016 and certificate of title registered as No. I.R 180647 in respect of L.R No. 209/20737. He stated that the 2nd respondent investigated the matter and established that title No. I.R 180647 in respect of L.R No. 209/20737 was irregularly issued in that the interested parties manipulated the correspondence file in the land office and obtained registration of L.R No. 209/20737 in their favour by false pretence. He stated that the 2nd respondent wrote to the interested parties to surrender the original certificate of title No. I.R 180647 pursuant to sections 14 and 79 of the Land Registration Act, 2012.

He stated that the 2nd respondent was served with a court order issued in J.R No. 313 of 2014 through which the disputed deed plan on the strength of which the certificate of title No. I.R 180647 was processed was cancelled. He stated that he personally cancelled the certificate of title No. I.R 180647 for L.R No 209/20737 and notified the applicant's advocates accordingly.

The interested parties filed replying affidavits sworn by David Some Barno, John Mwangi Mwaniki and Peter Gathii Reuben on 26th November, 2019. In his affidavit, David Some Barno, the Managing Director of the 1st interested party stated that the interested parties were the joint proprietors of L.R No. 209/20737(the amalgamated parcel). He stated that the cancellation of the interested parties title to the said property that was carried out by the 2nd respondent pursuant to the orders that were issued on 21st September, 2016 in J.R No. 313 of 2014 was overturned by the orders that were issued in the same matter on 27th September, 2018. He stated that the orders of the court made on 27th September, 2018 in J.R 313 No. 313 of 2014 reinstated the disputed deed plan No. 356256 that had been quashed. He stated that the reinstatement of that deed plan reinstated the interested parties' title to the amalgamated parcel as well. He narrated at length the process through which the interested parties acquired the amalgamated parcel. He stated that; the interested parties through some sources learnt that the leases for the suit properties had expired, they made a written application to the Commissioner of Lands to be allocated the suit properties and for amalgamation of the same, their application was approved, the suit properties were surveyed by Patrick Opiyo Adero who produced the disputed Deed Plan No. 356256, they were subsequently issued with a letter of allotment on 4th October, 2014, after they accepted the allotment and made payment of the requisite fees, they were issued with a lease in respect of the a amalgamated parcel for a period of 99 years with effect from 1st October, 2013. They were thereafter issued with a certificate of title in respect of the property. He stated that the process through which they acquired the amalgamated parcel was above board, legal and in strict compliance with the law and practice attendant to such processes. He stated that no fraud was involved in the acquisition of the property and that Article 40(6) of the Constitution was inapplicable. He stated that the interested parties' right to the amalgamated parcel was indefeasible and was protected under Articles 40 and 260 of the Constitution.

He stated that when the interested parties applied to be allocated the suit properties, the applicant's lease had expired and had not been extended. He stated that the applicant's application for extension of the leases in respect of the suit properties was approved conditionally and that the applicant failed to fulfil the conditions for extension of the said leases before expiry. He stated that following that failure, the suit properties became available for alienation after reverting to the government. He stated that as a result of the failure by the applicant to pursue the extension of the leases for the suit properties before the expiry thereof, the applicant lost its right of pre-emption over the suit properties.

He stated further that the applicant's application was premised on a judgment and decree issued in J.R No. 313 of 2014 that was set aside. He stated that the application was unsustainable in the circumstances. He stated further that the directors and shareholders of the applicant were not Kenyan citizens and as such the applicant was not entitled to a lease renewal. He urged the court to dismiss the applicant's application in the interest of justice.

In his affidavit sworn on 26th November, 2019, Peter Gathii Reuben, the Managing Director of the 2nd interested party adopted the contents of the affidavit by David Some Barno which he confirmed as accurate. John Mwangi Mwaniki who filed an affidavit in support of the interested parties' case was a retired land surveyor. He stated that while working at the Survey of Kenya in Nairobi as an Approval Officer, he approved the survey work that was done by Mr. Patrick Opiyo who undertook re-survey of L.R No. 209/924 and developed the amalgamation plan for merging the suit properties. He stated that the survey records Comps. No 64085, FR No. 546/146 and Deed Plan No. 356256 for LR No 209/20737 were cancelled wrongfully by the Director of Surveys. He stated that the said records were cancelled on the basis that the survey work had been undertaken by Mr. J.D Obel when in actual fact it was undertaken by Mr. Patrick Opiyo. He stated that since this was a re-grant that was being undertaken following the expiry of the lease, it was normal for the deed plan to predate the letter of allotment.

The applicant filed a further affidavit on 5th December, 2019 in which it responded to the issues raised in the affidavits by the directors of the interested parties and John Mwangi Mwaniki.

The submissions.

The applicant's application was heard by way of written submissions. The applicant filed its submissions on 5th December, 2019. The 2nd and 3rd respondents filed their submissions on 14th July, 2020 while the 1st respondent filed its submissions on 29th July, 2020.

The applicant's submissions.

The applicant submitted that the prayer for an order of certiorari was merited on several grounds. The applicant submitted that the court has power under section 80 of the Land Registration Act, 2012 to rectify the land register where registration is obtained by fraud or mistake. The applicant submitted that the title sought to be quashed was not lawfully issued since the Deed Plan No. 356256(the disputed deed plan) on which it was premised was non-existent as at the time the title was issued on 5th October, 2016. The applicant submitted that the disputed deed plan had been cancelled by the Director of Surveys on 26th August, 2014. The applicant submitted further that as at the time the title for the amalgamated parcel was issued, the judgment made in J.R No. 313 of 2014 on 21st September, 2016 was in force. The applicant submitted that the said judgment was not set aside until 27th September, 2018. The applicant submitted that that judgment prohibited the issuance of the said title.

The applicant submitted further that allocation of public land can only be undertaken by the 1st respondent pursuant to section 12 of the Land Act, 2012 and that in the process of allocation, the 1st respondent has to comply with the provisions of section 14 of the said Act. The applicant submitted that the purported allotment of the suit properties to the interested parties did not comply with these provisions of the law. The applicant submitted further that the disputed deed plan on the basis of which the title for the amalgamated parcel was issued was not only obtained fraudulently but the same was also issued irregularly and illegally in that the same was issued before the issuance of a letter of allotment. The applicant submitted further that the title for the amalgamated parcel was issued pursuant to a fraudulent letter of allotment. The applicant submitted that Mr. P.K Kahuho a land registrar who is alleged to have signed the letter of allotment dated 4th October, 2013 denied ever signing the same in a statement that he recorded in Criminal Case No. 819 of 2019. The applicant submitted further that the said letter of allotment could not be issued to the interested parties in respect of the suit properties because the suit properties were not unalienated government land but private land owned by the applicant.

The applicant submitted further that confirmation to the applicant of the extension of the leases in respect of the suit properties extended the applicant's proprietary rights over the properties and created a legitimate expectation in the applicant that the leases would be issued. In support of this submission, the applicant relied on the cases of Serah Mweru *v* Commissioner of Lands & 2 others [2014] eKLR, and Karume Investments Limited *v* Kenya Shell Limited & The Commissioner of Land Nairobi Civil Appeal No. 201 of 2008. In the latter case, it was held that since Kenya Shell Ltd. had a letter extending its lease, denying it extension of the lease and allocating the property to Karume Investments Ltd. after expectation was created was unfair treatment. The applicant submitted further that since the certificate of title for the amalgamated parcel issued in favour of the interested parties was a product of fraud, the same was null and void. The applicant submitted that the decision by the 2nd respondent to issue the impugned certificate of title on the basis of an illegal and fraudulent deed plan that had been cancelled and quashed by the court amounted to illegality, irrationality and procedural impropriety. The applicant submitted that the court had no alternative in the matter but to nullify the illegal document. The applicant submitted that the law only protects a title obtained regularly and not otherwise. The applicant submitted that in light of the above, the only deserving remedy is an order of certiorari.

On whether an order of mandamus should be issued to compel the respondents to rectify the register of the amalgamated parcel, the applicant submitted that an order of mandamus is normally issued to compel a person to do that which he has by acts of commission or omission neglected to do. The applicant submitted that it was clear that the impugned certificate of title was issued on the basis of a fraudulent deed plan and that the 2nd respondent had jurisdiction under section 80 of the Land Registration Act, 2012 to rectify the register by cancelling the said title. In support of this submission, the applicant relied on the case of Moses Okatch Owuor & another *v* Attorney General & another [2017] eKLR.) The applicant submitted that although the 2nd respondent had indicated that it had cancelled the impugned certificate of title, the original thereof is still with the interested parties and the register is yet to be rectified to expunge the title from the record. The applicant submitted that if an order of mandamus was not issued for the rectification of the register, the interested parties will continue to hood wink innocent members of the public that they were the owners of the suit properties.

On the issue of costs, the applicant submitted that pursuant to section 27 of the Civil Procedure Act, cost is a discretion of the court and the general rule is that costs follow the event. The applicant submitted that it had demonstrated that the impugned certificate of title was obtained fraudulently and that it had been made to incur cost to challenge the same that it should not have incurred. The applicant submitted that it was entitled to the costs of the application.

1st respondent's submissions.

The 1st respondent in its submissions dated 17th July, 2020 reiterated that it was not privy to the process through which the suit properties were allocated to the interested parties and the lease and certificate of title No. I.R 180647(amalgamated title) in respect of L.R 209/20737(amalgamated parcel) issued to them on 5th October, 2016. The 1st respondent submitted that it took over the responsibility of land management from the defunct office of the Commissioner of Lands. The 1st respondent referred to the Supreme Court Advisory Opinion in Reference No. 2 of 2014 in which its role was clarified.

The 1st respondent submitted that when the interested parties allege to have lodged an application to be allocated the suit properties on 16th August, 2012 and were subsequently allocated the same through a letter of allotment dated 4th October, 2013, the office of the Commissioner of Lands had ceased to exist and its role taken over by the 1st respondent. The 1st respondent submitted that the purported letter of allotment issued to the interested parties by the Commissioner of Lands whose role had been taken by a properly constituted office of the 1st respondent was null and void. The 1st respondent cited Article 62(1) of the Constitution and Section 13 of the Land Act, 2012 and submitted further that the only circumstance under which an immediate owner of land may be deprived of its pre-emptive right over the land is when the land is required by either government for public purposes.

The 1st respondent submitted further that the procedure that was followed by the 1st respondent in issuing letters of allotment to the applicant in respect of the suit properties was lawful and not ultra vires as claimed by the interested parties. The 1st respondent submitted that it properly exercised its mandate under section 13 of the Land Act, 2012 in accordance with the Supreme Court Advisory Opinion in Reference No. 2 of 2014(supra). The 1st respondent submitted that having received approvals for extension of its leases over the suit properties in 2007, the applicant had an enforceable reasonable legitimate expectation that it would be granted extension of the said leases. The 1st respondent submitted that it would have been unfair to deny the applicant extension of the said leases. In support of this submission, the 1st respondent cited Diana Kethi Kilonzo & another *v* the Independent Electoral and Boundaries Commission & 2 others [2013] eKLR in which the court held that a legitimate expectation creates an estoppel against a public body so that the person benefiting from the circumstances giving rise to the expectation would continue to benefit. The 1st respondent also cited Communication Commission of Kenya *v* Royal Media Service & 5 others, Supreme Court of Kenya Petition No. 14A & 14C of [2014] eKLR where the court set out the test for legitimate expectation.

The 1st respondent reiterated that the letter of allotment that was issued to the interested parties by the office of the Commissioner of Lands that had ceased to exist was void. The 1st respondent admitted that upon the expiry of the leases that had been granted to the applicant by effluxion of time, the suit properties reverted to the government. The 1st respondent contended however that the allocation of the suit properties could only be valid if it was done by the right body with proper mandate and jurisdiction which was not the case with regard to the purported allocation of the suit properties to the interested parties. The 1st respondent submitted that the right to protection of property under Article 40 of the Constitution is not absolute and does not extend to property that is found to have been acquired irregularly.

Finally, the 1st respondent submitted that the applicant had established valid grounds for grant of the orders sought in its application and urged the court to allow the application in the interest of justice.

The Attorney General's submissions.

In his submissions dated 14th July, 2020 filed on behalf of the 2nd and the 3rd respondents, the Attorney General (A.G) submitted that the certificate of title No. I.R 180647(amalgamated title) in respect of L.R No. 209/20737(amalgamated parcel) had already been cancelled by the 2nd respondent after investigations conducted by the 2nd respondent revealed that the same was issued irregularly. The A.G supported the grant of the orders sought by the applicant arguing that the court had already made a definitive finding that the deed plan on the basis of which the impugned title was issued was acquired fraudulently. The A.G submitted further that the dispute between the applicant and the interested parties was over the ownership of the suit properties and as such the determination thereof requires viva voce evidence. The A.G submitted that ownership of land could not be determined on the affidavit evidence that the parties had placed before the court. In support of this submission, the A.G cited the cases of Republic *v* County Government of Tana River & 2 others [2018] eKLR and Republic *v* Commissioner of Police Ex parte Nicholas Gituhu Karira [2004] eKLR. The A.G submitted further that judicial review is not an appropriate forum for determining land rights. In support of this submission, the A.G cited Sanghani Investment Limited *v* The Officer in Charge Nairobi Remand & Allocation Prison [2007] eKLR and Republic *v* Public Procurement Administrative Review Board & another Ex-parte Copy Cat Limited [2017] eKLR.

The A.G submitted further that judicial review is a discretionary remedy and even where grounds exist for the grant of the order, the court may refuse to grant the same where for instance, the remedy is not the most efficacious in the circumstances. The A.G submitted that the court does not issue orders in vain even where it has jurisdiction to issue the orders sought. In support of this submission, the A.G cited, Halsbury Laws of England 4th Edn. vol. 1(1) para. 12 page 270, Republic *v* Judicial Service Commission ex parte Pareno [2004]1KLR 203, and Sanghani Investment Limited *v* The Officer in Charge Nairobi Remand & Allocation Prison(supra).

The Interested parties' submission.

The interested parties filed their submissions dated 27th July, 2020 in which they framed and submitted on a number of issues. The interested parties submitted that the jurisdiction of the court under section 80 (1) and (2) of the Land Registration Act, 2012 could not be invoked by

way of judicial review. The interested parties submitted that a title deed can only be cancelled under section 80 of the Land Registration Act, 2012 after a trial by the Court on merit. The interested party cited a number of authorities some of which I have already referred to earlier on the proposition that judicial review is not an appropriate procedure for the determination of disputes over land ownership.

The interested parties submitted further that the applicant had no legal standing to institute the present application. The interested parties submitted that there were two companies with the name Sayani Investments Limited with different directors both claiming ownership of the suit properties. The interested parties submitted that the issue as to which of the two companies owned the suit properties was yet to be resolved. The interested parties contended that in the circumstances, the court could not grant the reliefs sought by the applicant. The interested parties submitted further that most of the directors of the applicant were deceased and that there was no valid board of directors of the applicant that could have transacted any lawful business of the applicant since 2011. The interested party submitted that this rendered this application before the court invalid.

The interested parties submitted further that the applicant had no pre-emptive or proprietary rights over the suit properties as at the time the same were allocated to the interested parties. The interested parties submitted that the pre-emptive rights only existed prior to the expiry of the leases in favour of the applicant. The interested parties submitted that the leases in respect of the suit properties in favour of the applicant expired before the applicant accepted and fulfilled the conditions upon which the government had agreed to extend the said leases. The interested parties submitted that upon expiry of the said leases, the suit properties reverted to the government and were available for alienation. The interested parties averred that the issue of extension or renewal of the said leases in favour of the applicants could not arise in the circumstances and that the applicant could only apply for allocation. The interested parties submitted that legitimate expectation for renewal of a lease to a previous lease holder lasts for the period of the lease and that once the lease expires, it cannot be extended or renewed. The interested party relied on several authorities in support of this submission among them, Suleiman Murunga *v* Nilestar Holdings Limited & another [2014] eKLR and Goan Institute Nakuru (Suing by its Trustees) & 3 others *v* Said Abdalla Zubedi [2007] eKLR. The interested parties submitted further that the applicant could not claim pre-emptive rights under section 13 of the Land Act, 2012 since its leases expired in 2010 before the Land Act, 2012 was enacted.

The interested parties submitted further that the suit properties were allocated to them lawfully under the old legal regime. The interested parties submitted that although the provisions of the Land Act, 2012 came into operation on 2nd May, 2012, sections section 12 and 14 thereof dealing with renewal of leases and allocation of land could not be operationalized until regulations were promulgated pursuant to sections 10, 12(11) and 160 of the Land Act, 2012. The interested parties submitted that it was not until 2017 that The Land (Allocation of Public Land) Regulations were made. The interested parties submitted that between 2nd May, 2012 and 2017 when the said regulations were made, allocation of public land was done by the Commissioner of Lands in accordance with the practice under the Government Land Act, Chapter 280 Laws of Kenya (now repealed). The interested parties submitted that in the circumstances, the suit properties were lawfully allocated to them by the Commissioner of Lands.

The interested parties submitted that they acquired the impugned title lawfully. The interested parties submitted that they complied with all the requirements before the issuance of the letter of allotment and that after the letter of allotment was issued to them, they complied with the conditions therein before they were issued with a lease and a certificate of title. They submitted that the process through which they acquired title over the suit properties was in full compliance with law.

The interested parties submitted further that since the suit properties had been amalgamated and allocated to them as L.R No. 209/20737(the amalgamated parcel), the same were not available for allocation by the 1st respondent to the applicant in 2015. The interested parties submitted that the court order that was made in J.R No. 313 of 2014 cancelling the Deed Plan No. 356256 was set aside by the same court thereby restoring the amalgamated parcel. In support of this submission, the interested parties relied on Benja Properties Ltd *v* H. H. Dr. Syedna Mohammed Burhannudin Sahed & Others C.A. NAI 79 of 2000. The interested parties submitted that in any event, in its decision to renew/extend the applicant's leases over the suit properties, the 1st respondent failed to observe the rules of natural justice in that although the said properties had already been allocated to the interested parties, they were not given a hearing before the decision that was going to affect their interest was made. The interested parties submitted that any decision made in breach of the rules of natural justice is void. They submitted that similarly, the 1st respondent's decision to renew the applicant's leases was illegal, null and void which illegality also affected the letters of allotment issued to the applicant by the 1st respondent.

The interested parties submitted that the applicant had engaged in fraudulent activities in relation to the suit properties. The interested parties reiterated that the applicant had presented to the Director of Surveys forged letters of allotment that were disowned by the 1st respondent. The interested parties submitted that such conduct that was out rightly criminal disentitled the applicant to the discretionary reliefs sought.

The interested parties submitted further that they had been victimised as a result of the allocation of the suit properties to them. The interested parties submitted that they had suffered persecution in the hands of the applicant. The interested parties submitted that in an effort to put pressure on them to relinquish their lawful interest over the suit properties, the applicant had filed a criminal complaint against them that led to the institution of a criminal case against their directors in Nairobi Criminal Case No. 819 of 2019, Republic *v* David Some Barno & others, for alleged forgery of the letter of allotment in dispute in these proceedings. The interested parties submitted that their complaint regarding the applicant's acts of fraud mentioned earlier elicited no action. The interested parties urged the court to dismiss the applicant's judicial review application.

Supplementary submissions by the applicant.

The applicant filed supplementary submissions dated 5th August, 2020 in response to the interested parties' submissions. In the submissions, the applicant reiterated its earlier submissions and added that most of the issues raised in the submissions by the interested parties were extraneous to the application before the court and some were the subject of other proceedings by the interested parties pending before the court.

Issues for determination.

The main issues that I need to determine in the present application are two, namely; whether sufficient grounds have been placed before the court to warrant the grant of the orders of judicial review sought by the applicant and, whether the orders should be granted. I have considered the application together with the affidavits filed in support thereof. I have also considered the various affidavits filed by the respondents and the interested parties in response to the application. Finally, I have considered the written submissions filed by the advocates for the parties and the various authorities cited in support thereof. The following is my view on the matter. Section 13(7)(b) of the Environment and Land Court Act, 2011 gives this court power to grant prerogative orders. The nature and purpose of judicial review orders are now settled. Judicial review is now both a statutory and a common law remedy. Section 4 of the Fair Administrative Action Act, 2015(the Act) provides as follows:

> **4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**
>
> **(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> > **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
> >
> > **(b) an opportunity to be heard and to make representations in that regard;**
> >
> > **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
> >
> > **(d) a statement of reasons pursuant to section 6;**
> >
> > **(e) notice of the right to legal representation, where applicable;**
> >
> > **(f) notice of the right to cross-examine or where applicable;**
> >
> > **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
>
> **(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> > **(a) attend proceedings, in person or in the company of an expert of his choice;**
> >
> > **(b) be heard;**
> >
> > **(c) cross-examine persons who give adverse evidence against him; and**
> >
> > **(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."**

Section 7 of the Act provides as follows:

> **7. (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-**
>
> > **(a) a court in accordance with section 8; or**
> >
> > **(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.**
>
> **(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-**
>
> > **(a) the person who made the decision-**
> >
> > > **(i) was not authorized to do so by the empowering provision;**
> > >
> > > **(ii) acted in excess of jurisdiction or power conferred under any written law;**
> > >
> > > **(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**
> > >
> > > **(iv) was biased or may reasonably be suspected of bias; or**
> > >
> > > **(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;**

**(f) the administrator failed to take into account relevant considerations;**

**(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**

**(h) the administrative action or decision was made in bad faith;**

**(i) the administrative action or decision is not rationally connected to-**

**i. the purpose for which it was taken;**

**ii. the purpose of the empowering provision;**

**iii. the information before the administrator; or**

**iv. the reasons given for it by the administrator;**

**(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**

**(k) the administrative action or decision is unreasonable;**

**(l) the administrative action or decision is not proportionate to the interests or rights affected;**

**(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**

**(n) the administrative action or decision is unfair; or**

**(o) the administrative action or decision is taken or made in abuse of power."**

Section 11 of the Act provides as follows:

**11(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-**

**(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**

**(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**

**(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**

**(d) prohibiting the administrator from acting in particular manner;**

**(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**

**(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**

**(g) prohibiting the administrator from acting in a particular manner;**

**(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**

**(i) granting a temporary interdict or other temporary relief; or**

**(j) for the award of costs or other pecuniary compensation in appropriate cases.**

**(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-**

**(a) directing the taking of the decision;**

**(b) declaring the rights of the parties in relation to the taking of the decision;**

**(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or**

**(d) as to costs and other monetary compensation."**

Section 12 of the Act provides that:

**This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.**

In OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) *v* Public Procurement Administrative Review Board Kenya & 2 others NRB CA 28 of 2016 (2017) eKLR, the Court of Appeal stated as follows:

**"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".**

As mentioned earlier in this judgment, the applicant has sought orders of Certiorari and Mandamus. In Halsbury's Laws of England, 4th Edition, page 150 at paragraph 147, the authors have stated as follows regarding the nature of certiorari as a remedy:

**"It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury".**

In Halsbury's Laws of England, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

**"The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation 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 defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative 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 made 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 leave discretion as to the mode of performing the duty in the hand 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."**

In Kenya National Examination Council *v* Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court explained the principle pronounced in the foregoing passage from Halsbury's Laws of England as follows:

**"They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of persons has failed to perform the duties to the detriment of a party who has a legal right to expect the duty to be performed."**

In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows at page 250;

**“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”**

It is on the foregoing principles that the applicant’s application falls for consideration. The facts giving rise to the application before the court are to a large extent not disputed. It is not in dispute that the applicant was at all material times the registered proprietor of the suit properties. It is also not in dispute that the applicant’s leasehold interests in the suit properties expired by effluxion of time in 2010. It is not disputed that before the expiry of the said leases, the applicant applied to the Commissioner of Lands for extension of the said leases and that the application for extension was approved by the Commissioner of Lands in 2007. It is also not disputed that the process of renewing the applicant’s leases had not been completed as at the time the leases expired in 2010. The reason why the applicant’s leases in respect of the suit properties were not renewed before their expiry is contentious. The applicant has contended that the land registry files in which the lease renewal applications were being pursued disappeared and could not be traced while the interested parties have contended that the said files were readily available at the land registry and that the said leases were not renewed because of the applicant’s indolence and failure to comply with the renewal conditions.

It is also not disputed that even after the said leases expired, the applicant remained in occupation of the suit properties and that it continued pursuing the renewal of the said leases. It is also not disputed that in 2012 or thereabouts, the interested parties developed interest in the suit properties and applied to the Commissioner of Lands to be allocated the same and that the suit properties were amalgamated and allocated to the interested parties on 4$^{th}$ October, 2013. The amalgamation of the suit properties was carried out by a surveyor by the name Patrick Opiyo in the firm of Opiyo and Associates on the instructions of one, Catherine Maranga to whom the disputed Deed Plan No. 356256 was released on 23$^{rd}$ August, 2013. According to the statement that was recorded by Patrick Opiyo with the Police on 2$^{nd}$ October, 2014 for the purposes of a criminal case that has been preferred against the directors of the interested parties, Patrick Opiyo stated that when he was instructed by Catherine Maranga to carry out survey on one of the suit properties; L.R No. 209/924 and subsequently to have the same amalgamated with the other two parcels comprised in the suit properties namely, L.R No. 209/923 and L.R No. 209/925, the said Catherine Maranga gave him a letter Ref. 2341/47 dated 12$^{th}$ September, 2008 as his authority to do the work. The statement is at page 67 of the further affidavit of Karim Jetha filed on 5$^{th}$ December, 2019 while the letter Ref: 2341/47 dated 12$^{th}$ September, 2008 is at page 47 of the affidavit of David Some Barno filed on 27$^{th}$ November, 2019. The letter is certified by Patrick Opiyo as a true copy of the original.

It is apparent on the face of that letter that it was addressed to the applicant and not the interested parties which means that it was the applicant who was called upon to provide the Commissioner of Lands with a deed plan for the purposes of amalgamation of the suit properties. The letter was written on 12$^{th}$ September, 2008. As at that time, the interested parties were not in the picture as they had not applied to be allocated the suit properties. In fact, the leases for the suit properties had not expired and as such they could not have applied for the said properties to be allocated to them. The circumstances under which Catherine Maranga who appears to have been acting as an agent of the interested parties got or obtained the said letter and used the same to survey the suit properties and amalgamate the same into L.R No. 20737 under Deed Plan No. 356256 is a mystery. A part from this letter dated 12$^{th}$ September, 2008 that was addressed to the applicant, there is no other letter by the Commissioner of Lands authorising the survey and amalgamation of the suit properties. It is apparent from the foregoing that the disputed Deed Plan No. 356256 was produced on the strength of a letter addressed to the applicant but without the applicant’s authority since the applicant did not instruct Patrick Opiyo to survey any of the suit properties or to amalgamate the same. There is no doubt that the process that had been initiated by the applicant for the renewal of its leases in respect of the suit properties was high jacked midstream.

It is also not disputed that the suit properties were surveyed and amalgamated for the purposes of allocation to the interested parties before the same was allocated to them. The interested parties have tried to justify this anomaly by claiming that this was not a new grant but a re-grant. This argument would only make sense if the interested parties were the previous owners of the suit properties and were only having their leases in respect thereof renewed. That was not the case herein. The suit properties were owned by the applicants and if the same were to be allocated to the interested parties, it would have been a new grant and the normal procedure had to be followed. How could the interested parties survey and amalgamate land that had not been allocated to them and which they never owned? There is no doubt that the survey and amalgamation of the suit properties were carried out on the basis that it was for the purposes of extending the term of the applicant’s leases over the suit properties and amalgamation of the said properties. That is what the letter dated 12$^{th}$ September, 2008 which Patrick Opiyo used as authority to survey and amalgamate the suit properties states on the face of it. There is no explanation as to how a survey that was carried out for the purposes of extending the leases for the suit properties in favour of the applicant and amalgamating the same ended up being used for the purposes of allocating the suit properties to the interested parties and issuing them with a new grant in respect of the said properties.

I have said enough to show that the process through which the interested parties were allocated the suit properties to say the least was unprocedural. Although the parties submitted at length and invited the court to determine the ownership of the suit properties, I am of the view that it is not within the province of this court to determine that issue in these proceedings. I have noted however that the land registrar who is alleged to have signed the letter of allotment in favour of the interested parties has denied having done so and has declared the letter a forgery. The interested parties have played down this serious issue in their submissions in which they seem to suggest that it does not matter whether the letter of allotment was not signed by the land registrar who is indicated to have signed the same and that what matters is that the Commissioner of Lands had the intention of allocating the suit properties to them. I am of the view that it would be unsafe for the court to determine such a highly contentious issue on affidavit evidence.

What is before this court for determination is the legality or propriety of the process through which the title in respect of the suit properties was issued to the interested parties by the 2$^{nd}$ respondent. It is not disputed that while pursuing the renewal of the leases for the suit properties, the applicant learnt of the survey and amalgamation of the suit properties that was undertaken without its permission or knowledge by Patrick Opiyo aforesaid on the instructions of Catherine Maranga whose interest in the suit properties remains a mystery. Out of apprehension that the suit properties were likely to be allocated to third parties, the applicant filed J.R No. 313 of 2014 seeking the quashing of the Deed Plan No. 356256 that had been prepared by the said Patrick Opiyo, an order of mandamus compelling the 1$^{st}$ and 2$^{nd}$ respondents herein to issue it with a grant in respect of the suit properties and an order of prohibition to prohibit the 1$^{st}$ and 2$^{nd}$ respondents

herein from issuing grants in respect of the suit properties or L.R No. 209/20737 to any other person or persons other than the applicant.

It is not disputed that when the court granted leave to the applicant to apply for the said orders of judicial review in J.R No. 313 of 2014 on 13th August, 2014, the court at the same time granted a stay which prohibited the 1st and 2nd respondents herein from issuing grants in respect of the suit properties or the amalgamated parcel, L.R No. 209/20737 to any other person other than the applicant pending the hearing and determination of the judicial review application. It is not disputed that the judicial review application in J.R No. 313 of 2014 was determined on 21st September, 2016 and that in its final orders, the court once again prohibited the 1st and 2nd respondents from issuing grants in respect of the suit properties or the amalgamated parcel, L.R No. 209/20737 to any other person other than the applicant.

It is common ground that the interested parties were issued with a lease in respect of the amalgamated parcel on 23rd September, 2016 and that they were issued with a certificate of title subsequently on 5th October, 2016 upon registration of the said lease. It is not disputed that the said lease and certificate of title were issued by the 2nd respondent and that the two documents were issued in flagrant disobedience of the stay order that was made by the court on 13th August, 2014 and the final orders made by the court on 21st September, 2016. In Clarke and Others *v* Chadburn & Others [1985] 1 All E.R. (PC) 211, it was held as follows:

> **"An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others…..I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done … but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them … even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it."**

That decision was adopted with approval in Kenya Tea Growers Association *v.* Francis Atwoli and 5 others [2012] eKLR. An act done in disobedience of a court order is invalid and an invalid act is void for all intents and purposes. In the case of Macfoy *v* United Africa Co. Ltd. (1961) 3 All E.R 1169**,** Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

> **"if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"**.

It follows from the forgoing that the lease and certificate of title dated 23rd September, 2016 and 5th October, 2016 respectively were illegal, null and void. I am aware that the final judgment that was made in J.R No. 313 of 2014 on 21st September, 2016 was subsequently set aside on 27th September, 2018 on application by the interested parties on the ground that they were not heard before the said judgment that affected their interest was made. It is common ground that J.R No. 313 of 2014 is still pending hearing following the order setting aside the judgment of 21st September, 2016. The ruling of 27th September, 2018 that set aside the judgment of 21st September, 2016 did not however discharge the orders of 13th August, 2014 neither did it cure the disobedience of the orders that were made on 21st September, 2016 before they were set aside. The setting aside of the judgment of 21st September, 2016 did not therefore legalise the lease and certificate of title that were issued to the interested parties before the setting aside of the said judgment in disobedience of the judgment and the orders of stay that had been made earlier which are still in existence.

It is also my finding that in issuing the said certificate of title, the 2nd respondent violated the applicant's legitimate expectation and also acted irrationally. It is not disputed that as at the time when the 2nd respondent issued the interested parties with the impugned certificate of title, the applicant was in possession of the suit properties and had received a confirmation that its leases in respect of the suit properties would be renewed. Neither the 1st nor the 2nd respondent had revoked the approvals for the renewal of the applicant's leases over the suit properties as at the time the 2nd respondent purported to offer the suit properties to the interested parties. In the circumstances, the applicant which was in possession of the suit properties on the basis of the said approval had legitimate expectation that its leases would be renewed. The 2nd respondent was under an obligation to fulfil that expectation. I have also noted from the material on record that the 2nd respondent had been informed as early as 26th August, 2014 by the Director of Surveys that there were irregularities in the manner in which the survey that produced the disputed deed plan No. 356256 was carried out. In the replying affidavit sworn by Charles Kipkurui Ngetich in response to the present application, he stated that the 2nd respondent also carried out investigations that revealed that the interested parties acquired the amalgamated parcel and title irregularly by false pretences. I am of the view that with the information that was in the possession of the 2nd respondent as at 5th October, 2016 as concerns the irregularities surrounding the preparation of the disputed deed plan and allocation of the amalgamated parcel to the interested parties some of which I have highlighted earlier, the 2nd respondent acted irrationally in issuing the interested parties with the impugned certificate of title.

There is no dispute that an illegal, null and void decision is amenable to judicial review. The same applies to decisions made irrationally and in breach of legitimate expectation. See the decisions in Republic *v* Kenya Revenue Authority, Ex-parte Yaya Towers Limited [2008] eKLR and Karume Investments Limited *v* Kenya Shell Limited & The Commissioner of Lands(supra) that were cited by the applicant in its submissions. An illegal decision cannot be said to be rational or procedurally fair. A public body or a person in public office does not have jurisdiction to make illegal decisions. From the evidence on record, the applicant had brought to the attention of the 1st and 2nd respondents prior to the filing of the present application the fact that the impugned certificate of title was issued illegally in violation of a court order and that the deed plan on the basis of which it was issued was prepared irregularly. The 2nd respondent has contended that it had already

cancelled the said certificate of title in favour of the interested parties. I have noted that despite this claim by the 2nd respondent, the interested parties have placed before the court what they claim to be an official search issued by the 2nd respondent on 13th June, 2019 showing that they are still registered as the proprietors of the amalgamated parcel, L.R No. 209/20737. This court has jurisdiction under section 80 of the Land Act, 2012 to compel the 2nd respondent to rectify a land register. The court also has power under section 13(7)(b) of the Environment and Land Court Act, 2011 to issue an order of mandamus compelling the 1st and 2nd respondents to cancel all the records relating L.R No. 209/20737 from the register.

Due to the foregoing, I am satisfied that the applicant has made out a case for grant of the orders of certiorari and mandamus sought in the application dated 19th September, 2017. In addition to the said orders of judicial review, the applicant had also sought a conservatory order. The applicant's application was brought under Order 53 of the Civil Procedure Rules. I am of the view that for applications brought solely under Order 53 of the Civil Procedure Rules, a conservatory order can only be granted in the form of a stay pending the hearing of the application for judicial review. The applicant was granted the orders of stay on 7th September, 2017 when it obtained leave pending the hearing and determination of the judicial review application. For the foregoing reasons, permanent conservatory orders sought by the applicant in its judicial review application are not available to it.

In conclusion, I find merit in the Notice of Motion application dated 19th September, 2017. The application is allowed on the following terms;

1. An order of certiorari is hereby issued removing into this court and quashing Certificate of Title No. I.R 180647 in respect of L.R No. 209/20737(original number 209/923-925) that came about following the consolidation/amalgamation of all those parcels of land known L.R Nos. 209/923, 209/924 and 209/925 issued by the 1st and 2nd respondents to the interested parties on 5th October, 2016.

2. An order of mandamus is hereby issued compelling the 1st and 2nd respondents to rectify the land register relating to Title No. I.R 18064 in respect of L.R No. 209/20737(Original Number 209/923-925) issued to the interested parties on 5th October, 2016 by cancelling, expunging and removing from the register all entries or registration entered therein as relates to the interested parties' ownership of L.R No. 209/20737(Original Number 209/923-925).

3. The applicant shall have the costs of the suit to be paid by the interested parties.

**Delivered and Dated at Nairobi this 4th Day of February,2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Muthui for the Applicant

N/A for the 1st Respondent

Mr. Kamau for the 2nd and 3rd Respondents

Mr. Bwire for the Interested Parties

Ms. C. Nyokabi-Court Assistant