



**Republic v Kisumu County Land Registrar & another; .Otieno & 29
others (Exparte) (Judicial Review Application E001 & E005 of 2023
(Consolidated)) [2024] KEELC 6577 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E001 & E005 OF 2023 (CONSOLIDATED)
SO OKONG'O, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE KISUMU COUNTY LAND REGISTRAR 1ST RESPONDENT

THE KISUMU COUNTY LAND SURVEYOR 2ND RESPONDENT

AND

GEORGE GN OTIENO EXPARTE

DAVID MACHIO LUKIRI EXPARTE

WILLIAM MAYI EXPARTE

AUMA OBUORO EXPARTE

DOMINICK O OKELLO EXPARTE

PULIN J MORJARIA EXPARTE

WESLEY OSCAR NYAKUNGU EXPARTE

LORNAH KERUBI ANURI EXPARTE

MILLICENT A ATIENO EXPARTE

PIUS OTIENO OKERO EXPARTE

RICHARD L MASIME OGOLA EXPARTE

BONVENTURE ODHIAMBO OMOLLO EXPARTE

AMIR MAUJI ARJAN EXPARTE

DAVID ONGERI EXPARTE



FRED OMONDI DACHA	EXPARTE
FERDINAND OUMA	EXPARTE
DOUGLAS OTIENO OMONDI	EXPARTE
MICHAEL OGOLA	EXPARTE
JAMES MASWACHE	EXPARTE
SPALA OHANGA	EXPARTE
RICHARD KUBONDO MAINA	EXPARTE
CHRISPINE OTIENO ODIMA	EXPARTE
CAROLINE JOY AYOMA ONYANGO	EXPARTE
DANIEL OKELLO	EXPARTE
CRISPHINE JUMA OGONGO	EXPARTE
MAINA MATARA MALACK	EXPARTE
EVALINE APONDI OTIENO	EXPARTE
NATHANIEL OTORO OTIENO	EXPARTE
JOSHUA OTIENO	EXPARTE
NEREAH AWINO OCHIENG	EXPARTE

JUDGMENT

Brief Facts

1. Pursuant to the leave granted on 23rd January 2023, the 1st to 20th Ex parte Applicants, George G.N.otieno, David Machio Lukiri, William Mayi, Auma Obuoro, Dominick O. Okello, Pulin J. Morjaria, Wesley Oscar Nyakungu, Lornah Kerubi Anuri, Millicent A. Atieno, Pius Otieno Okero, Richard L. Masime Ogola, Bonventure Odhiambo Omollo, Amir Mauji Arjan, David Ongeru, Fred Omondi Dacha, Ferdinand Ouma, Douglas Otieno Omondi, Michael Ogola, James Maswache, Spala Ohanga (hereinafter referred to only as “the Applicants”) brought a Notice of Motion application dated 7th February 2023 seeking the following orders;
 1. An order of mandamus compelling the 1st Respondent to reinstate and maintain in the land registry records the applicant’s titles for land parcel Title Nos. Kisumu/Kogony/5102, 6055, 5704, 5705, 5123, 5850, 5934, 7276, 6183, 6056, 5142, 5186, 5870, 5915, 5845, 5846, 7492, 6023, 5139, 5143, 5144, 5565 and 5118, and to permit the applicants unhindered access and dealing with the said parcels of land at the lands office.
 2. An order of mandamus compelling the 2nd Respondent to reinstate and maintain in the Registry Index Map Sheet No. 18 Kogony Registration Area, Kisumu County the applicants’ parcels of land registered as Title Nos. Kisumu/Kogony/5102, 6055, 5704, 5705, 5123, 5850, 5934, 7276, 6183, 6056, 5142, 5186, 5870, 5915, 5845, 5846, 7492, 6023, 5139, 5143, 5144, 5565 and 5118 reflected and appearing therein.
 3. An order of prohibition to restrain the Respondents from striking off, removing, and/or cancelling the applicants’ parcels of land registered as Title Nos. Kisumu/Kogony/5102, 6055,



5704, 5705, 5123, 5850, 5934, 7276, 6183, 6056, 5142, 5186, 5870, 5915, 5845, 5846, 7492, 6023, 5139, 5143, 5144, 5565 and 5118 (hereinafter together registered as “the suit properties” and individually as “Plot Nos. 5102, 6055, 5704, 5705, 5123, 5850, 5934, 7276, 6183, 6056, 5142, 5186, 5870, 5915, 5845, 5846, 7492, 6023, 5139, 5143, 5144, 5565 and 5118” respectively) from the land registry records and the Registry Index Map Sheet No. 18 Kogony Registration Area, Kisumu County.

4. The costs of the application.
2. The 21st to 30th Applicants, Richard Kubondo Maina, Chrispine Otieno Odima, Caroline Joy Ayoma Onyango, Daniel Okello, Crisphine Juma Ogongo, Maina Matara Malack, Evaline Apondi Otieno, Nathaniel Otoro Otieno, Joshua Otieno And Nereah Awino Ochieng were added to the application on 25th September 2023 after the filing of the said Notice of Motion application dated 7th February 2023. Although the application was not amended, the 21st to 30th Applicants’ claim which was similar to that of the 1st to 20th Applicants concerned land title Nos. Kisumu/Kogony/6619, 6191, 5893, 6913, 6912, 7277, 6245 and 5136. The Applicants’ application was supported by a Statutory Statement dated 18th January 2023, a verifying affidavit sworn by George G.N.Otieno on 18th January 2023 that accompanied the application for leave, and a statement dated 7th February 2023 and a supporting affidavit sworn by George G.N. Otieno on 7th February 2023 that accompanied the application. The application was also supported by a further affidavit sworn by George G.N. Otieno on 10th June 2023.
3. The Applicants averred that they were the registered proprietors of the suit properties. The Applicants averred that the suit properties were contained in Registry Index Map (RIM) Sheet No.18, Kogony Registration Section. The Applicants averred that they acquired the suit properties through purchase. The Applicants averred that they undertook due diligence before they purchased the suit properties. The Applicants averred that they obtained all the necessary consents and paid the requisite fees before the suit properties were registered in their names and titles in respect thereof issued to them.
4. The Applicants averred that a number of them had developed and occupied their parcels of land while others had not yet done so. The Applicants averred that in 2020, some of them attempted to enter into transactions involving some of the suit properties but were unable to do so in that the 1st Respondent had stopped any dealing with the suit properties. The Applicants averred that the 1st Respondent did not give any reason for this action that had a negative effect on them as the proprietors of the suit properties. The Applicants averred that the 1st Respondent also denied them access to information kept by the 1st Respondent on the registration status of the said properties. The Applicants averred that as a result of the 1st Respondent’s act of freezing all transactions involving the suit properties, the Applicants were unable to obtain certificates of official search. The Applicants averred that they were therefore unable to obtain development approvals for properties from the County Government of Kisumu. The Applicants averred that they engaged the 1st Respondent, the National Land Commission, and the County Government of Kisumu among others in correspondence to resolve the dispute but nothing positive came out of the same.

The Applicants averred that the 2nd Respondent proceeded to remove or erase the suit properties from the Registry Index Map(RIM) Sheet No.18, Kogony Registration Section. The Applicants averred that due to the actions that had been taken by the Respondents against them, they engaged a private surveyor to survey the suit properties so that they could be able to understand the issues surrounding the situation that they had found themselves. The Applicants averred that a report that was prepared by the said surveyor revealed massive irregularities in the manner in which the Respondents had dealt with the suit properties. The Applicants averred that their requests to have audience with the Respondents to discuss the said irregularities were ignored. The Applicants averred that the actions



that the Respondents had taken concerning the suit properties were against the rules of natural justice in that the Respondents condemned them unheard. The Applicants averred that the Respondents also acted ultra vires their powers in that they violated the sanctity of title protected under Sections 24 and 25 of the *Land Registration Act* 2012. The Applicants averred that the Respondents' actions violated the provisions of Article 47 of *the Constitution* on fair administrative action. The Applicants averred that although they had titles to the suit properties, they were unable to deal with the same. The Applicants averred that it was in the interest of justice for the orders sought to be granted.

5. The Applicants' application was opposed by the Respondents through a replying affidavit sworn by Joseph Nanzala, the Regional Surveyor, Nyanza on 21st April 2023. The Respondents averred that the office of the Director of Surveys, Kisumu Regional Survey Office discovered that land parcels, Kisumu/Kogony/5102, 6055, 5704, 5705, 5123, 5850, 5934, 7276, 6183, 6056, 5142, 5842, 5870, 5915, 5845, 5846, 7492, 6023, 5123, 51435144, 5565 and 5118 (hereinafter referred to as "the disputed parcels") indicated to be on Kisumu Kogony Registration Section Registry Index Map (RIM) Sheet No. 18, 87th Edition were included in the said Kogony Registration Section RIM fraudulently. The Respondents averred that according to the 1st Edition of Kisumu Kogony Registration Section Registry Index Map (RIM) Sheet No. 18, the parcel of land that gave rise to the disputed parcels was Kisumu/Kogony/2409 (hereinafter referred to only as "the original parcel"). The Respondents averred that the original parcel measured 1.90 hectares. The Respondents averred that the subdivision of the original parcel and its resultant plots mysteriously increased the area of the original parcel from 1.90 hectares to 38.02 hectares. The Respondents averred that the disputed parcels that resulted from the original parcel which measured 1.90 hectares had a total area in excess of 38 hectares. The Respondents averred that the expansion of the land which measured 1.90 hectares upon subdivision to 38.02 hectares was not supported by any explanation. The Respondents averred that the measurement of the disputed parcels should in total not exceed 1.90 hectares which was the area of the original parcel from which they were created.
6. The Respondents averred further that geographically, all the disputed parcels which were subdivisions of the original parcel had to fall within the boundaries of the original parcel. The Respondents averred that the disputed parcels were neither within the boundaries of the original parcel nor the boundaries of Kisumu Kogony Registration Section. The Respondents averred that the disputed parcels had no relationship with Kisumu Kogony Registration Section and as such the same were invalid. The Respondents averred that the extra area that was used to create the disputed parcels, was acquired from the land that was set aside for the expansion of Kisumu Municipality through Gazette Notice No. 3400 of 19th November 1976 in respect of which leasehold interests had been created by the Commissioner of Lands which had now been overlapped by the disputed parcels. The Respondents averred that the suit properties and the disputed properties had overlapped on the said land that was set aside for the expansion of Kisumu Municipality through Gazette Notice No. 3400 of 19th November 1976. The Respondents averred that they had not interfered with land parcel Kisumu/Kogony/5185. The Respondents averred that the land appears in Kisumu Kogony Registration Section, RIM Sheet No. 5. The Respondents averred that the 2nd Respondent sent out notices to the registered owners of the suit properties and disputed parcels and instructed the 1st Respondent to put on hold all transactions involving the parcels of land concerned until after investigations have been carried out on the irregularities mentioned. The Respondents averred that this was to stop more irregularities and illegalities being perpetuated against the public. The Respondents averred that the orders sought were premature as they could not cancel titles or remove the suit properties from the Registry Index Maps without notice.



7. The Applicants replied to the Respondents replying affidavit through a further affidavit sworn on 10th June 2023 by George G.N.Otieno. In their further affidavit, the Applicants averred that save for paragraphs 11 and 12 of the replying affidavit, the contents of the rest of the replying affidavit by the Respondents were irrelevant to the issues raised in the Applicants' application. The Applicants averred that judicial review is concerned with the decision making process and not with the merit of the decision. The Applicants averred that what they were challenging was the process through which they had been denied the right to deal with the suit properties by the Respondents and the Respondents' unilateral decision to expunge their parcels of land from the RIM without affording them a hearing.
8. With regard to the Respondents' claim that the area of land parcel Kisumu/Kogony/2409 (Plot No. 2409) increased from 1.90 hectares to 38.02 hectares, the Applicants averred that Plot No. 2409 was subdivided into Kisumu/Kogony/4616 and Kisumu/Kogony/4617. The Applicants averred that the owner of Kisumu/Kogony/4617 applied to the Respondents for a resurvey of the parcel of land which was carried out by the Respondents. The Applicants attributed the increase in the area of Plot No. 2409 to the resurvey of Kisumu/Kogony/4617 by the Respondents. The Applicants averred that it was not open to the Respondents who carried out the said resurvey to claim that the increase in the area of Plot No. 2409 from 1.90 hectares to 38.02 hectares was fraudulent. The Applicants averred that there was also no evidence that the suit properties had overlapped on leasehold properties created from the land that was reserved for the expansion of Kisumu Municipality through Gazette Notice No. 3400 of 19th November 1976. The Applicants averred further that there was no evidence that any of the owners of the alleged leasehold parcels of land had complained over the alleged overlap. The Applicants averred that the surveyor that they had engaged confirmed that their parcels of land did not overlap the alleged leasehold properties. The Applicants averred further that Kogony was not mentioned in Gazette Notice No. 3400 of 19th November 1976 as one of the areas earmarked for setting apart for the expansion of Kisumu Municipality. The Applicants denied that they were served with a notice by the Respondents before their parcels of land were expunged from the RIM by the Respondents. The Applicants urged the court to allow their application. The application was heard through written submissions.

The Applicants' submissions

9. The Applicants filed submissions dated 15th December 2023. In their submissions, the Applicants also covered ELC JR No. E004 of 2023. ELC JR No. E004 of 2023 was a stand-alone application. The same was not consolidated with ELC JR No. E001 of 2023 and ELC JR No. E005 of 2023. I will therefore ignore in this judgment the submissions relating to ELC JR No. E004 of 2023. The Applicants submitted that their primary complaint against the Respondents was over their unilateral decision to deny the Applicants service and access to the records at the lands office relating to the suit properties. The Applicants submitted that the Respondents had admitted denying the Applicants service. The Applicants denied that they were served with any notice by the Respondents before the said denial of service. The Applicants submitted that the Respondents did not produce the said notice before the court. The Applicants submitted that the court had jurisdiction to give the Applicants redress for Respondents' act of denying them services. The Applicants submitted that the decision of a public authority may be quashed by the court where the authority has acted without jurisdiction or has exceeded its jurisdiction, or has failed to comply with the rules of natural justice, or where there is an error of law on the face of the record, or where the decision is unreasonable. The Applicants submitted that judicial review is concerned with the decision making process and not with the merit of the decision. The Applicants cited several authorities in support of these submissions which I have considered.



10. The Applicants submitted that it was not disputed that they owned the suit properties which were within Kisumu Kogony Registration Section RIM Sheet No. 18. The Applicants submitted that they produced before the court, Kisumu Kogony Registration Section RIM Sheet No. 18 which had their parcels of land. The Applicants submitted that they also placed before the court subsequent versions of Kisumu Kogony Registration Section RIM Sheet No. 18 in which their parcels of land (the suit properties) had been erased or deleted thereby making it impossible for the Applicants to deal with their parcels of land. The Applicants averred that the Respondents undertook this exercise without giving them an opportunity to be heard. The Applicants submitted that the actions of the Respondents were unjustified since they acquired the suit properties lawfully in good faith. The Applicants averred that the Respondents had not proved the fraud alleged against them. The Applicants averred that most of the variations in land areas which the Respondents attributed to fraud came about as a result of re-surveys that were undertaken by the Respondents. The Applicants reiterated that there was no evidence that the suit properties had overlapped on leasehold titles. The Applicants submitted that it would serve the interest of justice if the orders were granted.

The Respondents submissions

11. The Respondents filed submissions dated 21st November 2023. The first issue framed by the Respondents for determination was whether the orders of judicial review sought by the Applicants should be granted. The Respondents submitted that they had not expunged the suit properties from land registry records and Registry Index Map (RIM) Sheet No. 18 for the Kisumu Kogony Registration Section. The Respondents submitted that in the circumstances, the order of certiorari sought was premature in that it was not necessary. The Respondents submitted that what they did was to put on hold all transactions/dealings with the suit properties on account of fraud to give them time to investigate the same. The Respondents submitted that the fraud which they were investigating was the unsupported/unexplained expansion of the area of the land parcel Title No. Kisumu/Kogony/2409 from which the suit properties arose upon subdivision (save for Title No. Kisumu/Kogony/5186) from 1.90 hectares to 38.02 hectares. The Respondents submitted further that the order of prohibition sought was also premature and should not be granted because the Respondents had the mandate to correct the irregularities that they had highlighted. The Respondents submitted that granting the said order would hinder them from fulfilling their mandate. The Respondents cited *Republic v. Kenya National Examinations Council ex-parte Gathenji & others, Civil Appeal No. 266 of 1996*, where the court stated that an order of prohibition would only issue to forbid a tribunal or a public body from continuing with proceedings in excess of or in the absence of jurisdiction, or in contravention of the law of the land, or in breach of the rules of natural justice.
12. The Respondents submitted that where land is subdivided, the subplots must fall within the boundaries of the parent parcel of land. The Respondents submitted that in the case before the court, the suit properties were situated outside the boundaries of the parent parcel of land from which they originated. The Respondents submitted that the extra land used to create the suit properties was acquired from a neighbouring parcel of land which was acquired by the Government for the expansion of Kisumu Municipality in 1976 and in respect of which the Commissioner of Lands had issued leasehold titles. The Respondents submitted that the suit properties were overlapping the said leasehold interests. The Respondents submitted that it was upon realisation of this anomaly that they stopped all dealing with the suit properties to allow for investigations. The Respondents submitted that if the orders sought by the Applicants were granted, more illegalities would be committed. The Respondents submitted that a large portion of the suit properties was public land that was acquired by the Applicants unprocedurally and illegally. The Respondents submitted that land that is acquired illegally does not enjoy the protection of the law. The Respondents submitted that the orders sought



by the Applicants were in the nature of mandamus and if the same were granted, the court would be compelling the Respondents to commit an illegality. The Respondents submitted that the Land Registrar had the mandate under Sections 18 and 19 of the *Land Registration Act*, 2012 to determine the issue before the court that concerned the overlap of the suit properties upon leasehold titles created by the Government.

13. The Respondents submitted that the orders of judicial review are discretionary and that even if the court finds that a public body had acted wrongly, the court does not have to grant the remedy. The Respondents submitted that the orders sought if granted would further the illegalities which had already been committed. The Respondents submitted that a judicial review court need not intervene where illegality, irrationality or procedural propriety is not established. The Respondents urged the court to dismiss the Applicants' application with costs.

Judicial Review Application No. E005 Of 2023

14. Pursuant to the leave that was granted on 17th May 2023, Godfrey Bigogo, Collate Owich And Vincent Ojiambo (hereinafter referred to only as "the Applicants") brought this judicial review application by way of a Notice of Motion dated 31st May 2023 seeking the following orders;
 1. An order of Certiorari to remove into this court the decision of the Respondents communicated through the 1st Respondent's letter dated 14th April 2023 to expunge from the records the parcels of land within Kisumu Kanyakwar "b" Registration Section, Diagram Nos. 2 And 3, And Kisumu/ Kogony Registration Section, Diagram No. 18 for the purposes of it being quashed.
 2. An order of Certiorari to remove into this court the decision of the Respondents communicated through the 1st Respondent's letter dated 14th April 2023 to hold a dissemination meeting at Kisumu Ardhi House on 18th May 2023 for the purposes of it being quashed.
 3. An order of prohibition to prohibit the decision of the Respondents communicated through the 1st Respondent's letter dated 14th April 2023 to expunge from the records the parcels of land within Kisumu Kanyakwar "b" Registration Section, Diagram Nos. 2 And 3, And Kisumu/ Kogony Registration Section, Diagram No. 18.
 4. The costs of the application.
15. The application was based on the verifying affidavit sworn by the applicants jointly on 16th May 2023 and the statutory statement of the same date filed in support of the Applicants' application for leave.
16. The Applicants averred that they were owners and were residing on various parcels of land situated within Kisumu Kanyakwar and Kisumu Kogony Registration Sections. The Applicants averred that most of their parcels of land were developed at a great expense and were occupied either by the owners or tenants. The Applicants averred that they all purchased their parcels of land for valuable consideration after undertaking due diligence which included conducting searches at the offices of the 1st, 2nd and 3rd Respondents which confirmed that it was safe to purchase the said parcels of land. The Applicants averred that the offices of the 3rd Respondent registered the transfers in their favour and issued them with titles. The Applicants averred that a number of them had used their parcels of land as securities for loans advanced to them which securities were accepted and registered by the 3rd Respondent. The Applicants averred that in early May 2023, they came across a letter by the 1st Respondent in which the 1st Respondent communicated the decision of its department to expunge from its records the parcels of land within Kisumu Kanyakwar "b" Registration Section, Diagram



Nos. 2 And 3, And Kisumu Kogony Registration Section, Diagram No. 18. The Applicants averred that through the same letter, the 1st Respondent also communicated its decision to hold a meeting at Ardhi House Grounds, Kisumu to formally communicate its decision to the affected land owners. The Applicants averred that their parcels of land were listed in the schedule that was attached to the said letter among the parcels of land which were to be expunged from the Respondent's records.

The Applicants averred that they stood the risk of losing their properties once the 3rd Respondent's said decision was implemented. The Applicants averred that they were not notified that the legality of their parcels of land was under review and as such they were not part of the decision-making process although they were to be affected by it. The Applicants averred that there was no public participation before the said decision was made. The Applicants averred that having not been notified before a decision to expunge their titles from the Respondents' records was made, their right to fair administrative action was violated. The Applicants averred that the 1st Respondent's decision was arbitrary, high-handed and as such illegal. The Applicant averred that the impugned decision of the 1st Respondent if implemented would result in the cancellation of the Applicants' titles, a jurisdiction that the 1st Respondent did not have. The Applicants averred that the decision by the Respondents complained of violated their right to acquire and own property guaranteed under Article 40 of *the Constitution*. The Applicants averred that the said decision was also contrary to the law and the rules of natural justice. The Applicants averred that the decision was also unreasonable and oppressive. The Applicants urged the court to grant the reliefs sought in their application.

17. The Applicants' application was opposed by the Respondents through a replying affidavit sworn by Joseph Nanzala on 20th June 2023. In his affidavit, Joseph Nanzala reiterated the contents of his replying affidavit sworn on 21st April 2023 in opposition to the application filed by the Applicants in Judicial Review Application No. E001 OF 2023 concerning the parcels of land that originated from Kisumu/Kogony/2409. Since the said application is consolidated with the application under consideration, it is not necessary to repeat the contents of the affidavit as concerns Kisumu Kogony/2409. With regard to Kanyakwar "B" Registration Section Diagram/Registry Index Map (RIM) Sheet No. 2, the Respondents averred that there was unsupported expansion of the size (area) of the parent parcel of land following the subsequent subdivision of Kisumu/Kanyakwar "B"/452. The Respondents averred that the parcels of land that resulted from the subdivision of Kisumu/Kanyakwar "B"/452 did not geographically fall within the boundaries of Kisumu/Kanyakwar "B"/452. Concerning Kanyakwar "B" Registration Section RIM Sheet No. 3, the Respondents averred that there was unsupported expansion in the size (area) of land following the subdivision of Kisumu/Kanyakwar/ 299, 300, 301, 302, 304, 308 and 335 which subdivisions had overlapped on leasehold parcels of land which were created by the Commissioner of Lands from the land that was acquired by the Government of Kenya for the expansion of Kisumu Municipality through Gazette Notice No. 3400 of 19th November 1976. The Respondents averred that the survey department had notified the affected land owners of the problems with their parcels of land and advised the Land Registrar to stop all land transactions involving the suit properties pending proper investigations. The Respondents averred that this was to prevent further illegalities being committed. The Respondents averred that the orders sought were premature as no decision had been made to expunge the suit properties from the Respondents' records. The Respondents averred that such a decision could not be made before notices were served on the affected landowners and relevant stakeholders. The Respondents urged the court to dismiss the application.
18. The Interested Party also responded to the application through a replying affidavit sworn on 22nd June 2023. The Interested Party averred that he was the registered owner of land parcel No. Kisumu/Kanyakwar "B"/384 and 385. The Interested Party averred that the two parcels of land were ancestral



land and that he inherited the same from his deceased father who had also inherited the same from the Interested Party's grandfather. The Interested Party averred that the Applicants' application was devoid of merit and amounted to an abuse of the process of the court. The Intended Interested Party filed an application dated 21st September 2023 on the same date seeking to be joined in the suit as an interested party in the application. The Interested Party averred that he was the registered owner of land parcels Title Nos. Kisumu/Kanyakwar "B"/ 947, 948, 949 and 494 which fell within Kisumu Kanyakwar "B" Registration Section RIM Sheet Nos. 2 and 3. The Interested Party averred that his parcels of land were affected by the decision contained in the 1st Respondent's letter dated 14th April 2023. The Intended Interested Party averred that his parcels of land were among those that were to be expunged from Kisumu Kanyakwar "B" Registration Section RIM Sheet Nos. 2 and 3. The Intended Interested party averred that he had developed his parcels of land and stood to suffer great loss if the said parcels of land were removed from the 1st Respondent's records. The Applicants' application was heard through written submissions.

Applicants' submissions

19. The Applicants in this application filed submissions dated 16th February 2024. The Applicants framed two issues for determination by the court namely; whether the Applicants had made a case for the grant of the orders of certiorari and prohibition sought in their application, and who should pay the costs of the application? The Applicants averred that in its letter dated 14th April 2023, the 1st Respondent intimated that a determination had been made that the boundaries of Kisumu Kanyakwar Registration Section, RIM Sheet Nos. 2 and 3 and Kisumu/Kogony Registration Section, RIM Sheet No. 18 had been breached, and that the 1st Respondent intended to formally expunge the affected parcels of land that were not within the borders of the mentioned Registration Sections from the record. The Applicants submitted that the letter also called for a meeting on 18th May 2023 when the decision of the 1st Respondent would be communicated to the affected landowners. The Applicants averred that the decision to expunge their parcels of land from the Kisumu Kanyakwar Registration Section, RIM Sheet Nos. 2 and 3 and Kisumu Kogony Registration Section, RIM Sheet No. 18 was made without consulting them. The Applicants averred that they were not even aware that the creation of their titles was under review although the said review was likely to affect them. The Applicants averred that the 1st Respondent's said decision if carried out would result in the cancellation of their titles for the suit properties. The Applicants submitted that the Respondents' claim that they had not made a decision to expunge the Applicants' parcels of land from Kisumu Kanyakwar Registration Section, RIM Sheet Nos. 2 and 3 and Kisumu Kogony Registration Section, RIM No. 18 was contrary to the contents of the said letter of 14th May 2023. The Applicants averred that the decision had already been made and what remained was the communication of the decision.
20. The Applicants submitted that as those who would be affected by the decision, they ought to have been consulted before the decision was made. The Applicants averred that the meeting that was scheduled to take place on 18th May 2023 would not have satisfied the public participation requirement. The Applicants submitted that if the titles of the suit properties were cancelled following the said decision, they would be denied their properties arbitrarily contrary to Article 40 of *the Constitution* and Section 24 and 24 of the *Land Registration Act* 2012. The Applicants submitted that only a court of law could cancel an interest in land. The Applicants averred that the Respondents' decision was unfair and offended the provisions of the *Fair Administrative Action Act*, 2015. The Applicants urged the court to quash the Respondents' decision. The Applicants cited various authorities in support of these submissions.



20. On the second issue, the Applicants submitted that they had established that the 1st Respondent had exceeded its powers by purporting to cancel the Applicants' titles to the suit properties without a court sanction. The Applicants submitted that the Respondents had no power to declare the Applicants' titles void. The Applicants urged the court to grant the order of prohibition sought against the Respondents. On the issue of costs, the Applicants submitted that costs follow the event. The Applicants submitted that the application be allowed with costs to the Applicants.

The Respondents' submissions

21. The Respondents filed submissions dated 15th February 2024. The Respondents framed only one issue for determination namely; whether the orders of certiorari and prohibition sought should be granted. The Respondents reiterated that the order of prohibition sought by the Applicants was premature to the extent that the Respondents had not expunged the suit properties from Kisumu Kanyakwar Registration Section, RIM Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section, RIM Sheet No. 18, and the land registry records. The Respondents reiterated that they only stopped dealings with the suit properties to allow them to investigate the fraud that had been committed in the creation of the properties that involved the unsupported expansion of the areas of the suit properties that exceeded the areas of the parent parcels of land. The Respondents submitted that, whereas one parent parcel of land measured 1.9 hectares, the suit properties which were claimed to have resulted from the subdivision of the said parent title measured a total of 38.02 hectares. The Respondents submitted that through its letter dated 14th April 2023, the 1st Respondent sought to notify the interested parties and the general public of this anomaly and to accord them an opportunity to be heard before any further action in the matter was taken. The Respondents submitted that they could not be prohibited from exercising their mandate. The Respondents submitted that they had the power to correct any irregularities in their records. The Respondents submitted that if the orders sought were granted, more illegalities would be committed. The Respondents submitted that they were intent on following the law in correcting the anomalies that had been highlighted by among others, making changes to the Land Registration Maps as provided under Section 16 of the *Land Registration Act* 2012. The Respondents submitted that they had shown that they intended to hear the affected parties before taking any action. The Respondents submitted that this was clear from their letter dated 14th April 2023 through which they scheduled a meeting on 18th May 2023 for that purpose.
22. The Respondents submitted further that the order of prohibition sought by the Applicants was also premature and unwarranted. The Respondents submitted that the meeting of 18th May 2023 which the Applicants sought to stop was meant to give the owners of the affected parcels of land an opportunity to be heard before any action was taken by the Applicants. The Respondents submitted that they wished to use that opportunity to inform the members of the public and the interested parties about the anomalies in Kisumu Kanyakwar Registration Section, RIM Sheet Nos. 2 and 3 and Kisumu Kogony Registration Section, RIM Sheet No. 18 and to accord them an opportunity to be heard as required by law before any action was taken or final decision made on the matter. The Respondents submitted that the law does not protect land that has been acquired illegally. The Respondents submitted that part of the parcels of land owned by the Applicants were public land that was acquired illegally. The Respondents urged the court to dismiss the application with costs.

The Interested Party's submissions

23. The Interested Party filed his submission dated 30th October 2023. The Interested Party reiterated that the parcels of land Kisumu/Kanyakwar "B"/384, 385 and 469 were his ancestral land and that he inherited the same from his father. The Interested Party submitted that there was no evidence that



these parcels of land were part of the land owned by the Applicants neither was it shown that they had overlapped on leasehold titles as claimed by the Respondents. The Interested Party urged the court not to allow the Applicants' application.

The Intended Interested Party's submissions

24. Although the Intended Interested Party had not been formally granted leave to join the application as an interested party, he filed submissions dated 30th March 2024. The Intended Interested Party reiterated that he was the registered proprietor of all the parcels of land known as Kisumu/Kanyakwar "B"/947, 948, 949 and 494. The Intended Interested Party submitted that he acquired the properties in good faith and had developed the same. The Intended Interested Party submitted that the decision by the Respondents contained in the 1st Respondent's letter dated 14th April 2023 if implemented would have the effect of cancelling the Intended Interested Party's titles to the said parcels of land without following the due process. The Intended Interested Party submitted that the Respondents' decision aforesaid if implemented would amount to arbitrary deprivation of the Intended Interested Party of his parcels of land. The Intended Interested Party submitted that the Applicants had made a case for the grant of the orders sought and urged the court to grant the same.

Analysis and determination

25. I will consider the two applications together. I have considered the Applicants' applications together with the statutory statements and the affidavits filed in support thereof. I have also considered the replying affidavits by the Respondents and the Interested Party and the submissions by the advocates for the parties. The issue arising for determination in the two applications before me is whether the Applicants have made a case for the grant of the orders of judicial review sought.
26. In *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4(E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), the Supreme Court stated as follows on judicial review:

- "76. We note that judicial review was introduced to Kenya from England in 1956 through Sections 8 and 9 of the *Law Reform Act*, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law.
77. Prior to the promulgation of *the Constitution* in 2010 there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan Courts found in Sections 8 and 9 of the *Law Reform Act* Cap 26, which constituted the substantive basis for judicial review of administrative actions on the one hand, and, Order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.
78. However, the entrenchment of judicial review under *the Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, Article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



81. The entrenchment of judicial review in *the Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opines that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.
85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision per se.”

27. In *Municipal Council of Mombasa v. Republic & another* [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

“...And as the Court has repeatedly said, judicial review is concerned with the decision - making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”

28. 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”.

29. In the book, H. W. Wade and C. F. Forsyth, *Administrative Law*, 10th Edition, the authors 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.”

30. In *Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996*, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“....prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land....Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

31. 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.”

32. In *Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others*(supra), the court stated as follows on the remedy of Mandamus:

“What do these principles mean? They mean that an order of mandamus will compel 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.”



33. 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.”

34. In *Republic v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd* [2015] eKLR, the court dealing with a similar issue stated as follows:

“26. As was held in *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354:

“Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce* evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced...It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce* evidence at another forum preferably the Civil Courts.”

27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial



review applications do not deal with the merits of the case but only with the process. In other words, in judicial review applications the Court's jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

34. In Republic v. Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR the court stated as follows:

"56. It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been upheld by our superior courts on numerous occasions. In Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo (2015) eKLR it was held: -

"55 where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits." (Emphasis supplied)

57. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.

59. I am fortified by Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another [2014]eKLR which held that: -

"...Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive



law and Order 53 of the Civil Procedure Rules being the procedural law....” (Emphasis added)

60. Also relevant is Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR which held that: -“...where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. ...”(Emphasis added)
61. The above excerpts illuminate the legal position with sufficient clarity and settle the issue at hand. In Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others [2016] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. On this ground alone, the applicant’s case collapses.”
35. It is on the foregoing principles that the Applicants’ applications would be determined. In ELCJR No. E001 of 2023, the Applicants’ case is that they are the registered owners of the suit properties and that without any notice, the Respondents in the application had stopped them from having any dealings with the said parcels of land at the land registry and had also proceeded to remove the properties from the relevant Registry Index Map (RIM). The Applicants contended that they had been put in a situation whereby they were unable to enter into any transaction involving the suit properties. The Applicants averred that they were unable to conduct searches on the titles of the suit property and as such were unable to obtain development approvals or bank loans on the security of their properties. The Applicants contended that no explanation was given to them for this action on the part of the Respondents. Although the Applicants had claimed that the problem started in 2020, no evidence in the form of correspondence between the Applicants and the Respondents on the issue was placed before the court.
36. The Respondents admitted that they stopped all dealings with the suit properties. They claimed that the freezing of dealings with the suit properties was a temporary measure to allow them investigate fraud that had been committed in the creation of the said properties. The Respondents highlighted the alleged fraud in their replying affidavit. The Respondents claimed that the Applicants were informed of the said investigations. The Respondents denied however that they had deleted or removed the suit properties from Kisumu Kogony Registration Section RIM Sheet No. 18. The Respondents contended that they could not expunge the suit properties from the said RIM without involving the Applicants and other stakeholders.
37. I have considered the material placed before me by both parties. I am of the view that the dispute before the court touches on the validity of the titles held by the Applicants in respect of the suit properties. The properties the subject of the application under consideration are; Title Nos. Kisumu/



Kogony/5102, 6055, 5704, 5705, 5123, 5850, 5934, 7276, 6183, 6056, 5142, 5186, 5870, 5915, 5845, 5846, 7492, 6023, 5139, 5143, 5144, 5565, 5118, 6619, 6191, 5893, 6913, 6912, 7277, 6245 and 5136. I have looked at the First Edition of the Registry Index Map (RIM) Sheet No. 18 for Kisumu District Kogony Registration Section. The area where most of the parcels of land in dispute are situated was not part of Kisumu Kogony Registration Section RIM Sheet No. 18. The last parcel of land in that area was Kisumu/Kogony/2409 (“the original parcel”). The said parcel of land measured 1.07 hectares. The original parcel was re-surveyed at the request of the owner and the area thereof increased to 1.9 hectares. According to the Mutation Form dated 8th October 2005 through which the original parcel was subdivided for the first time, the said parcel of land which measured 1.9 hectares was subdivided into two portions, Kisumu/Kogony/4616 and 4617 measuring 1.42 hectares and 0.48 hectares respectively. Kisumu/Kogony/4617 which measured 0.48 hectares was subsequently subdivided into 60 portions (Kisumu/Kogony/5093 to 5152) of various sizes. The total area of the said portions measured 10.72 hectares. This means that the total area of the subdivisions exceeded the area of the parent plot (Kisumu/Kogony/4617) by up to 10.24 hectares. This was just the beginning of the miraculous increase in the areas of the parcels of land that originated from the original parcel Kisumu/Kogony/2409 which measured 1.9 hectares. The next subdivision was that of Kisumu/Kogony/5097 which was a subdivision of Kisumu/Kogony/4617. Kisumu/Kogony/5097 which after the unexplained increase in the area of Kisumu/Kogony/4617 measured 0.30 hectares was subdivided into 5 portions. The total area of the subplots came to 0.71 hectares This means that the area of Kisumu/Kogony/5097 also increased by 0.41 hectares. The other portion of Kisumu/Kogony/4617 that was subdivided and resulted in exponential increase in area was Kisumu/Kogony/5095 which following unexplained increase in the area of Kisumu/Kogony/4617 also measured 0.30 hectares. This parcel of land was subdivided into 3 portions. The total area of the subdivisions came to 0.68 hectares resulting in an increase of 0.38 hectares. The other portion of Kisumu/Kogony/4617 that was subdivided with the same result was Kisumu/Kogony/5103. Kisumu/Kogony/5103 was also said to measure 0.30 hectares. Upon subdivision of Kisumu/Kogony/5103 into 35 portions, the total area of the subdivisions came to 5.42 hectares. This means that the area of the parent parcel, Kisumu/Kogony/5103, increased miraculously by up to 5.12 hectares. The subdivision of subplot Kisumu/Kogony/5107 into 4 portions resulted in an increase of 0.07 hectares the same as the subdivision of Kisumu/Kogony/5112. The subdivision of subplot Kisumu/Kogony/5113 into 5 portions increased its size by 0.13 hectares while the subdivision of Kisumu/Kogony/5106 into two portions increased its area by 0.06 hectares. The subdivision of subplot Kisumu/Kogony/5105 increased its area by 0.62 hectares. The subdivision of subplot Kisumu/Kogony/6093 increased its area by 0.62 hectares while the subdivision of subplot No. 6065 increased its area by 0.09 hectares. The subdivision of subplot Kisumu/Kogony/6084 with an area of 0.20 hectares into 14 portions increased its area by 0.22 hectares while the subdivision of subplot Kisumu/Kogony/6083 into 5 portions increased its size by 0.075 hectares. The subdivision of subplot Kisumu/Kogony/6241 into 8 portions increased its area by 0.12 hectares while the subdivision Kisumu/Kogony/6075 into 8 portions resulted in an increase of the total area by 0.12 hectares. The subdivision of subplot Kisumu/Kogony/5145 which was said to measure 0.24 hectares into 189 portions (Kisumu/Kogony/5823 to 6012) increased the total area to 19.1 hectares an increase of the parent parcel by 18.86 hectares. In summary, Kisumu/Kogony/2409(original parcel) measuring 1.90 hectares was subdivided into a total of 208 parcels measuring 38.02 hectares. This subdivision resulted in the increase of the area of the original parcel by 36.12 hectares.

38. The Respondents contended that this extra land measuring 36.12 hectares was acquired from land that was not part of Kisumu Kogony Registration Section RIM Sheet No. 18. The Respondents contended that the subdivision of the resultant land parcels that originated from the original parcel, Kisumu/Kogony/2409 extended the area that was covered by the said original parcel beyond its



boundary into land that had been acquired by the Government of Kenya in 1976 for the expansion of Kisumu Municipality. The Respondents gave the particulars of the parcels of land created by the Commissioner of Lands within the land that was acquired by the Government for the extension of Kisumu Municipality which had been overlapped by some of the suit properties as follows; L.R Nos. 30412, 30413, 29490, 30415, 30416, 23167, 23168, 28597, 28698, 29492,29493, 29494, 29496 and 29497. The particulars of the survey plans that created these parcels of land were also provided. In addition, the Applicants provided the details of the suit properties which had overlapped on these parcels of land created by the Commissioner of Lands.

39. The different versions of Kisumu Kogony Registration Section RIM Sheet No. 18 produced in evidence by the Applicants and the Respondents showed that the suit properties were not within the boundaries of the original area of Kisumu/Kogony/2409. The suit properties were also not within Kisumu Kogony Registration Section RIM Sheet No. 18. Due to what I have referred to above as miraculous increase in the size of land that measured 1.9 hectares to over 38 hectares, the parcels of land created from this extra land are outside Kisumu Kogony Registration Section RIM Sheet No. 18 and according to the Respondents, have overlapped on leasehold parcels of land that were created by the Commissioner of Lands from the land that was acquired for the expansion of Kisumu Municipality the particulars of which I have given above. The Respondents contended that the unexplained and unsupported increase in the sizes of land mentioned above during the subdivision was fraudulent and that the suit properties among others were included in the Kisumu Kogony Registration Section RIM No. 18 fraudulently. The Respondents contended that it was this fraud that they were investigating and which resulted in the freezing of dealings with the suit properties. The Respondents produced in evidence several survey maps to substantiate these allegations.
40. The Applicants did not deny that the suit properties originated from Kisumu/Kogony/2409 which measured 1.9 hectares. The Applicants did not deny that the total area of the suit properties exceed 1.9 hectares. The Applicants did not also not deny that the suit properties were outside the boundaries of what was known as Kisumu/Kogony/2409 and that the same were situated outside the boundaries of the Kisumu Kogony Registration Section, RIM Sheet No. 18 as depicted in the First Edition of the said Map/Diagram.
41. From the material placed before me by the parties, there is prima facie evidence that the suit properties were created irregularly and fraudulently. I say prima facie because the issues raised by the parties touch on the legality of the titles held by the Applicants in respect of the suit properties which can only be determined with finality in a civil suit. This court cannot determine with finality in a judicial review application whether the suit properties were fraudulently created as alleged by the Respondents. From the evidence placed before this court by the Respondents, the surveyors who subdivided the portion of the original parcel Kisumu/Kogony/2409 known as Kisumu/Kogony/4617 which measured 0.48 hectares and its resultant subplots knowingly colluded with the owners of the said parcels of land and fraudulently created titles from land that did not belong to them. How can one explain the increase in the area of land that initially measured 1.9 hectares to 38.02 hectares? Where did the extra land come from? From the evidence before the court, it appears that the said landowners and surveyors used the purported subdivision to grab Government land that was adjacent to Kisumu/Kogony/2409 which had been acquired in 1976 for the expansion of Kisumu Municipality which was outside the boundaries of Kisumu Kogony Registration Section, RIM No. 18. It is no wonder that the suit properties breached the boundaries of Kisumu Kogony Registration Section, RIM No. 18.
42. The court takes judicial notice of the fact that there are suits which have been filed in this court some of which are pending regarding the overlap of titles created through the purported subdivisions of the parcels of land said to be within Kisumu Kogony Registration Section, RIM No. 18 onto the leasehold



parcels of land that were created by the Commissioner of Lands from the land that was acquired by the Government of Kenya in 1976 for the expansion of Kisumu Municipality. I am of the view that once it was brought to the attention of the Respondents that a parcel of land measuring 1.9 hectares was subdivided into over 200 portions with a total area of over 30 hectares, that the said portions of the original parcel had extended beyond the boundaries of the original parcel and the relevant Registration Section, and that some of the subplots had overlapped on existing titles, the Respondents were within the powers conferred upon them by law to investigate the circumstances under which these anomalies occurred to inform corrective measures if any to be undertaken to address the situation.

43. I find the decision that was made by the 1st Respondent to freeze all dealings with the suit properties pending the said investigation reasonable in the circumstances. Such action was necessary in the public interest. If such action was not taken, innocent members of the public stood the risk of acquiring the properties or taking the same as security in good faith oblivious of the ongoing investigations on the legality of the titles for the properties. The current registered owners could also continue to further subdivide the suit properties thereby exacerbating the irregularities and illegalities which were being investigated. I agree that the Applicants as the registered owners of the suit properties were entitled to be notified of the reason for the freezing of the dealings with the suit properties. It was however not necessary to involve them in the investigation that was being undertaken by the Respondents which was internal in nature.
44. The Applicants as the registered owners of the suit properties were also entitled to be informed of the outcome of the investigations. They also had a right to be heard before any action was taken on the findings of the said investigation. The Applicants' complaint is that the Respondents stopped them from dealing with the suit properties without giving them any reason and proceeded to expunge the suit properties from the land registry records and the relevant Registry Index Map without giving them a hearing. The Respondents have denied these accusations. From the material before the court, there is no evidence that the suit properties have been removed or expunged from the relevant registers at the land registry, Kisumu. The 1st Respondent has power under Section 79(1) and (2) of the [Land Registration Act](#) 2012 and the Regulations made thereunder to rectify the register of land in cases like the one before the court in which it is alleged that the total area of the suit properties exceed the area of the parent parcel of land by over 36 hectares and that the properties were created through fraudulent surveys. The only caveat to the exercise of the powers conferred upon the 1st Respondent under Section 79 of the [Land Registration Act](#), 2012 is that it has to give the parties likely to be affected by its decision to rectify the register a hearing before doing so. This is provided for in Regulations 91, 92 and 93 of the Land Registration (General) Regulations 2017. There is no evidence before the court that the 1st Respondent intends to rectify the registers of the suit properties without hearing the Applicants and other stakeholders. I find no reason to interfere with the 1st Respondent's exercise of the powers conferred upon it by law which in any event are yet to be exercised.
45. There is also no evidence that the suit properties have been expunged from the survey records kept by the Director of Surveys. All the published Registry Index Maps/Diagrams(RIM) Sheet No. 18 for Kisumu Kogony Registration Section have the suit properties save for the 1st Edition of the said Map/Diagram. The latest edition of the Registry Index Map/Diagram Sheet No. 18 for Kisumu Kogony Registration Section that was produced in evidence has the suit properties. What the Applicants have placed before the court as evidence of removal/deletion of the suit properties from the survey records/maps is what I would refer to simply as a drawing or a map prepared by the 2nd Respondent to show the boundaries of Kisumu District Kogony Registration Section, Map/Diagram Sheet No. 18 before what they have referred to as fraudulent subdivisions. The drawing/map is re-traced from the 36th and 85th editions of Kisumu District Kogony Registration Section, Map/Diagram Sheet No. 18 and has left out



the suit properties. The drawing/map shows the position of parcel No. Kisumu/Kogony/4617 which measured 0.48 hectares before it was subdivided into several portions which miraculously increased the area of the land to over 38 hectares. The suit properties are part of the said 38 hectares of land that originated from the said original parcel of land that measured 0.48 hectares. This map or drawing that the Applicants have relied on is not an officially published Registry Index Map/Diagram for Kisumu District Kogony Registration Section, Map/Diagram Sheet No. 18. The map/drawing has no edition on the face of it. As I have mentioned earlier, the Respondents have denied expunging the suit properties from the official survey records. They have contended that they could not do so without notice to the Applicants and other stakeholders. I have noted that indeed the 2nd Respondent had issued a notice of its intention to hold a public meeting on 18th May 2023 in which it intended to; explain to the registered owners of the parcels of land which are said to have been created through the alleged fraudulent survey the reason why they had decided that the same were so created, inform them of its intention to initiate the process of expunging the said parcels of land from the relevant registration maps, and to receive representations from the affected land owners on the issue. That notice is the subject of Judicial Review Application No. E005 of 2023 which I will consider shortly. What I wish to say is that the said notice would not have been necessary if the 2nd Respondent had already expunged the suit properties from the Kisumu District Kogony Registration Section, Map/Diagram Sheet No. 18. Due to the foregoing, it is my finding that the Applicants have not established that the suit properties have been expunged from the registration maps kept by the Respondents.

46. I find however that the 1st Respondent erred in its decision to freeze dealings with the suit properties without notice to the Applicants and without giving them an opportunity to be heard. I am of the view however that having regard to the nature of the investigation that was being undertaken by the Respondents, freezing of dealings with the suit properties was necessary in the public interest as it was intended to protect the public from transacting in land whose titles were under investigations and risked being cancelled.
47. Having found that the Respondents have not expunged the suit properties from the land registry and survey records, the court cannot issue an order of mandamus compelling the 1st Respondent to reinstate and maintain the land registry records relating to the suit properties. The court has also made a finding that there is prima facie evidence that the suit properties were created illegally and fraudulently and that freezing of dealings with the same was in the public interest. I am not inclined in the circumstances to compel the 1st Respondent to allow the Applicants to deal with the suit properties until the dispute over the legality of the titles for the suit properties is determined. As was stated in some of the authorities that I have cited earlier in the judgment, a mandamus can only compel the performance of a public duty which a body or person is required to perform by the law. I do not think that the 1st Respondent has a duty in law to allow the Applicants to deal with land whose titles are suspected to have been created through fraudulent and illegal survey.
48. I have made a finding that the 2nd Respondent has not expunged the suit properties from the relevant Registry Index Map/Diagram. There is no reason therefore why I should compel the 2nd Respondent by an order of Mandamus to reinstate the suit properties in the said Registry Index Map/Diagram. With regard to maintaining the suit properties in the said Registry Index Map, I will reiterate what I have stated earlier. The suit properties were put in the said Registry Index Map through a process. The investigation conducted by the Respondents has disclosed that there is a possibility that the process of creating the suit properties and entering the same in the relevant Registry Index Map was fraudulent. The Respondents are yet to hear the Applicants and make a decision on what action to take. I am of the view that I cannot interfere with that process by compelling the 2nd Respondent at this stage to maintain the suit properties in the Registry Index Map/Diagram. The Applicants' last prayer is for



prohibition. I am of the view that in this prayer, the Applicants are approbating and reprobating at the same time. The Applicants who have maintained in the present application that the Respondents have already expunged the suit properties from the land registry and survey records cannot at the same time seek an order to prohibit the Respondents from striking off, removing and/or cancelling the suit properties from the land registry records and the Registry Index Map. That said, there is no evidence before the court that the 1st Respondent intends to expunge the suit properties from the land registers kept at the land registry. As I have mentioned elsewhere in the judgment, should the 1st Respondent decide to do that, it will have to follow due process. For the 2nd Respondent, there is evidence that it intends to expunge the suit properties from Kisumu District Kogony Registration Section, Map/Diagram Sheet No. 18. A gain as I have stated elsewhere in this judgment, the 2nd Respondent has no power under either the Land Registration Act 2012 or the Survey Act, Chapter 299 Laws of Kenya to expunge land parcels from a Registry Index Map/Diagram unless the titles for such parcels of land have been lawfully cancelled. Since the titles for the suit properties have not been cancelled by the Land Registrar or by the court, the 2nd Respondent would be acting in excess of its powers should it purport to expunge the suit properties from the Kisumu District Kogony Registration Section, Map/Diagram No. 18. A case has therefore been made for the grant of a prohibitory order limited only to restraining the 2nd Respondent from expunging the suit properties from the said Registry Index Map/Diagram. The Applicants Notice of Motion dated 7th February 2023 as amended by the addition of the 21st to 30th Applicants to the application would succeed only to that extent. I am of the view that the dispute before the court was wrongly brought to court by way of a judicial review application. As I mentioned earlier in the judgment, the underlying dispute concerns the legality of the titles held by the Applicants in respect of the suit properties. This is an issue that can only be determined through oral evidence. The court is not in a position to determine whether the suit properties were created lawfully or through a fraudulent survey process on the basis of the affidavit evidence placed before me by the parties. I am of the view that the Applicants should have filed a normal civil suit against the Respondents for the determination of these issues. I will therefore grant the prohibition order but limit its duration. I will also give further orders that in my view would facilitate the determination with finality of the dispute over the suit properties not only as between the parties before the court but also the other parties out there who have not been joined in this suit but who have interest in the subject matter of the suit.

49. With regard to the Judicial Review Application No. E005 of 2023, the following is my view: The Applicants in this application are the registered proprietors of all those parcels of land known as Kisumu/Kanyakwar “B”/1324, 1677, 1417, 1211, 1320, 1293, 1325, 1503, 1430, 1299, 1447, 1438, 1315, 2869, 1309, 1433, 1427, 1428, 1208, 1312, 1321, 1442, 1310, 1562, 2384, 1416, 1440, 1311, 1446, 2385, 1322, 2719, 1204, 1304, 1426, 1350, 1507, 1441, 1288, 1434, 1443 and 1195, and Kisumu/Kogony/5410, 5798, 5928, 5947, 5946, 5951 and 5723. The Interested Party in the application is said to be the proprietor all those parcels of land known as Kisumu/Kanyakwar “B”/385, 384, 844, 846, 391 and 395. The Proposed Interested Party is the registered proprietor of all those parcels of land known as Kisumu/Kanyakwar “B”/947, 948, 949 and 494. All the parcels of land the subject of this application are in Kisumu Kanyakwar “B” Registration Section, Map/Diagram Sheet Nos. 2 and 3, and Kisumu/Kogony Registration Section Map/Diagram Sheet No. 18.
50. The application was prompted by the 1st Respondent’s letter dated 14th April 2023 addressed to the Chief, Kanyakwar and the Chief, East Kisumu Location copied to among others; The Office of the Attorney General, The Chief Officer Lands County Government of Kisumu, the Legal Office



of the Director of Surveys, the Land Registrar Kisumu, the County Coordinator National Land Commission, and the Kenya Bankers Association. The letter was on the following terms:

“Re: Notice To Formalize Expunging Of Land Parcel Numbers As Per Attached Lists From Kisumu/Kanyakwar B Registration Section Diagram Numbers 2 And 3, And Kisumu/Kogony Registration Section Diagram No. 18, Kisumu County

51. The office of the Director of Surveys, Kisumu Survey Office, has determined that the boundaries of Kisumu/Kanyakwar B Registration Section, specifically diagrams 2 and 3, and Kisumu/Kogony Registration Section, Diagram number 18 have been breached on subdivision of land parcels neighboring land that was set apart for the extended areas of the then Kisumu municipality.
52. The evidence used to reach this decision include the 1st Edition Maps of the two registration section diagrams (2 and 3, and 18 respectively), Gazette Notice No. 3400 that set apart land for the extended areas of Kisumu Municipality appearing in the Kenya Gazette Vol. LXXVIII-No. 47 of 19th November, 1976, and the sub-division documents (Mutation Forms) that show astronomical increase in acreage (size) of subdivided land parcels different from acreage at first registration.
53. The office of Director of Surveys, Kisumu Survey Office, intends to formally expunge the land parcel numbers that are without the borders of both Kisumu/Kanyakwar B and Kisumu/Kogony Registration Sections.
54. This is to request your office to notify the registered land proprietors of the listed land parcels, as per the attached lists, of a meeting at Kisumu Ardhi House Grounds on the 18th of May, 2023, starting at 10.00hours for:
 1. Explanations by the office of the Director of Surveys, Kisumu Survey Office, as to why the subject land parcels are deemed to be beyond the published boundaries of the subject registration sections;
 2. Passing of information to affected/interested land proprietors by the office of the Director of Surveys, Kisumu Survey Office’s, intention to initiate the process of expunging the subject land parcels from the relevant registration maps;
 3. Receiving from affected/interested land proprietors’ valid reasons as to why intended action by the office of the Director of Surveys, Kisumu Survey Office ought not to be carried out, and
 4. Any other issue relevant to the subject matter.

Attendance on its part, the office of the Director of Surveys, Kisumu Survey Office, has placed posters (fliers) about the scheduled meeting at Kisumu Ardhi House, at County Government of Kisumu offices for Lands and on your permission, at your offices for the benefit of the affected/interested parties.

Joseph Nanzala

Regional Surveyor,

Nyanza Region

Encls: 3 Lists of Land Parcels outside Kisumu/Kanyakwar B and Kisumu/Kogony Registration Sections”

55. As mentioned earlier in the judgment, the Applicants in this application sought an order of certiorari to quash the decision of the respondents communicated by the 1st Respondent through the said letter



dated 14th April 2023 to expunge land parcels from Kisumu/Kanyakwar B Registration Section, Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section, Map/Diagram Sheet No. 18, an order of certiorari to quash the decision of the Respondents communicated by the 1st Respondent through the said letter dated 14th April 2023 to hold a dissemination meeting at Kisumu Ardhi House on 18th May 2023, and an order of prohibition to prohibit the decision of the Respondents communicated by the 1st Respondent through the said letter dated 14th April 2023 more particularly the decision to expunge the land parcel numbers comprised in Kisumu/Kanyakwar B Registration Section, Map/Diagram Sheet Nos. 2 and 3, and Kisumu/Kogony Registration Section, Map/Diagram Sheet No. 18 from the said Maps/Diagrams.

56. In response to the application, the Respondents reiterated that some of the parcels of land in Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18 were inserted in the said Registration Section fraudulently through a subdivision process in which land parcel, Kisumu/Kogony/2409 which measured 1.9 hectares gave rise upon subdivision to land parcels measuring a total of 38.02 hectares. The Respondents averred further that they also discovered that a similar fraud had also taken place in respect of Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram (RIM) Sheet Nos. 2 and 3. The Respondents averred that there was unexplained increase in the areas of the parcels of land that resulted from the subdivisions of Kisumu Kanyakwar B/ 452, 460 and 461 within Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 2. Whereas Kisumu Kanyakwar B/ 452, 460 and 461 measured 0.35 hectares, 0.39 hectares and 0.005 hectares respectively upon registration making a total of 0.745 hectares, the 18 parcels of land created from them upon subdivision yielded an extra land measuring a total of 5.29 hectares. The Respondents averred that there were also parcels of land mapped on Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 2 which originated from subdivision of the parcels of land mapped on Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 3 which means the said parcels of land were outside Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 2. The particulars of these parcels of land were provided. The Respondents put the total number of the parcels of land created within Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 2 following the subdivision of parcels of land situated outside the said Registration Section Registry Index Map/Diagram Sheet No. 2 at 74 with a total area of 8.87 hectares.
57. The Respondents averred that there was also unexplained increase in the areas of the parcels of land that resulted from the subdivisions of Kisumu Kanyakwar B/299, 300, 301, 302, 304, 308 and 355 within Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 3. The Respondents gave detailed particulars of the said increase. The Respondents averred that there were also parcels of land in Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 3 whose origin could not be explained as they had no basis on adjudication or subdivision records. The particulars of the said parcels of land which were subsequently subdivided were also given. The Respondents averred that there were also parcels of land mapped on Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 3 which originated from subdivision of the parcels of land mapped on Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 2 which means the said parcels of land were outside Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet No. 3. The particulars of these parcels of land were also given. The Respondents put the total number of the parcels of land created through subdivisions which were outside this registration section at 606 with a total area of 52.834 hectares.
58. The Respondents averred that the extra area that was used to create the said parcels of land came from the land that had been acquired compulsorily by the Government of Kenya in 1976 for the expansion of Kisumu Municipality. The Respondents averred that the Commissioner of Lands had created leasehold interests in this parcel of land that was acquired by the Government on which the



illegally and fraudulently created parcels of land said to be within Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3 had overlapped. The Respondents averred that they had put on hold dealings with the concerned parcels of land pending proper investigations. The Respondents averred that the Applicants' application was premature since no decision had been made by the Respondents to expunge the Applicants' properties from the survey records.

I have considered this application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the Interested Party and the Proposed Interested Party. Finally, I have considered the submissions on record. From the material on record, there is a prima facie evidence that the parcels of land owned by the Applicants and the Proposed Interested Party herein (the suit properties) were created irregularly and illegally through a manipulated subdivision process which increased the sizes/areas of parcels of land that were being subdivided without any explanation or supportive documentation. Some of the parcels of land were also created through subdivision of land the existence of which had no basis either in the land adjudication or subdivision records. Some of the parcels of land were also created within Kisumu Kanyakwar B Registration Section Map/Diagram Sheet No. 2 through the subdivision of land within Kisumu Kanyakwar B Registration Section Map/Diagram Sheet No. 3 and vice versa. These anomalies affected over 600 parcels of land. The parcels of land owned by the Applicants and the Proposed Interested Party are only some of the affected parcels of land. The Applicants and the Proposed Interested Party have not denied these anomalies in the creation of the suit properties. Their case is that they purchased the suit properties in good faith and were issued with titles. For the Interested Party, it is not clear as to why he joined this application. The parcels of land he claims to own are not affected by the 1st Respondent's letter dated 14th April 2023.

59. In the letter dated 14th April 2023 which gave rise to the present application, the 1st Respondent stated that it had determined that the boundaries of Kisumu Kanyakwar B Registration Section Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 had been breached on subdivision of land parcels neighbouring the land that was set apart for the extension of the then Kisumu Municipality and that the 1st Respondent intended to formally expunge from the two Registration Sections the parcels of land that were outside the borders thereof. The Respondents have placed evidence before the court showing that the suit properties were created irregularly and are situated outside the two registration sections, and that a number of them are overlapping on leasehold parcels of land that were created by the Commissioner of Lands on the land that was compulsorily acquired by the Government for the expansion of the former Kisumu Municipality. The Respondents have contended that these parcels of land were created fraudulently while the Applicants and the Proposed Interested Party have maintained that they hold valid titles in respect of these parcels of land. As I found with regard to the issues raised in Judicial Review Application No. E001 OF 2023, the issues raised in the present application touch on the legality of the titles held by the Applicants and other persons who own land which are said to be situated outside Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18. The issues regarding validity of a title to land or ownership of land cannot be determined on a judicial review application. The court takes judicial notice that there is a pending case namely; ELC No. 196 of 2013, Peter Wellington Wambura v. Mary Atieno & 24 others in which the issue of the legality of some of the parcels of land created within Kisumu Kanyakwar B Registration Section Map/Diagram Sheet Nos. 2 and 3 has been raised for determination by the court. The parcels of land the subject of that suit are; Kisumu/Kanyakwar B/ 1330, 1331, 1351, 1352, 1353, 1355, 1356, 1357, 1358, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1510, 1511, 1513, 1515, 1516, 1518, 1519, 1520, 1522, 1523, 1793 and 1794. These parcels of land are among the parcels of land which are the subject of this suit, and in fact, Kisumu/Kanyakwar B/ 1503 and 1507 are owned by some of the Applicants herein.



I hold the view that this dispute should have been brought to court through a normal civil suit. The determination of the issues raised by the parties require oral evidence.

60. Sections 15 and 16 of the [Land Registration Act](#), 2012 provides as follows:

- (1) The office or authority responsible for the survey of land shall prepare and thereafter maintain a map or series of maps, to be known as the cadastral map, for every registration unit.
- (2) The parcel boundaries on such maps shall be geo- referenced and surveyed to such standards as to ensure compatibility with other documents required under this Act or any other law.
 - (1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.
 - (2) Notwithstanding subsection (1), any alteration made shall be made public and whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.
 - (3) The office or authority responsible for the survey of land may prepare new editions of the cadastral map or any part thereof, and may omit from the new map any matter that it considers obsolete.

60. Section 15 of the [Land Registration Act](#) 2012 gives the 2nd Respondent power to prepare and maintain Registry Index Maps or Diagrams for land Registration Sections or Areas. Section 16(3) of the said Act gives the 2nd Respondent power to prepare new editions of the said Registry Index Maps or Diagrams. I am of the opinion that the power given to the 2nd Respondent to prepare, maintain and update Registry Index Maps/Diagrams extends to investigating any irregularities noted in the said Registry Index Maps/Diagrams and communicating the outcome of such investigation to the public and those who may be affected by the same. The 1st and 2nd Respondents had power therefore to investigate the breach of the boundaries of Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18 and to communicate its findings to the public and other interested parties. I have however not found any power either in the [Land Registration Act](#), 2012 or the [Survey Act](#), Chapter 299 Laws of Kenya and the regulations made thereunder authorising the 2nd Respondent to expunge a parcel of land from the Registry Index Map/Diagram while such parcel still exists in the land register. I am of the view that the 2nd Respondent can only expunge a parcel of land from the Registry Index Map/Diagram where the title of the parcel has been cancelled by the court or where the Land Registrar has been authorised to do so, where the Land Registrar has rectified the register of the parcel of land by cancellation and has communicated the same to the 2nd Respondent. The 2nd Respondent can expunge such parcel of land whose title has been lawfully cancelled from the Registry Index Map/Diagram under the powers conferred upon it by Section 15(1) and 16(3) of the [Land Registration Act](#), 2012 aforesaid. I think that there will be a lot of confusion in land registration and management if we were to have registered parcels of land which do not exist in the relevant Registry Index Maps/Diagrams.

61. I am of the view that the process of cleaning the mess that was created by surveyors in Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18 should start with the cancellation of the titles that have been found to be illegal. The removal of the parcels of land whose titles have been cancelled from the relevant Registry Index Maps/Diagrams would follow as a matter



of course. Cancellation of a title would involve the determination of the legality thereof. That exercise cannot be undertaken in a judicial review application. A normal civil suit is required for that purpose. In the circumstances of this case, such suit can be brought by the Attorney General or other persons who are aggrieved with the creation of the parcels of land in dispute.

62. Due to the foregoing, I find nothing wrong with the 1st Respondent's letter dated 14th April 2023 to the extent that through it, the 1st Respondent sought to inform the public of the investigations it had carried out with regard to the anomalies it had noted in the Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18, the findings of its investigations and what it intended to do to correct the said anomalies. There was also nothing wrong with the 1st Respondent seeking the views of the public and those who were to be affected by the outcome of the said investigations. It is not true as claimed by the Applicants and the Proposed Interested Party that in the said letter, the 1st Respondent communicated its decision to expunge the suit properties from Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18. The letter merely communicated the findings of the investigation the 1st and 2nd Respondents had carried out and the action they intended to take. It is clear from the letter that the 1st and 2nd Respondents intended to seek the views of the affected land owners and other stakeholders before a final decision was made on the matter. For clarity, I wish to say that the Applicants and the Proposed Interested Party were not entitled to take part in the 1st and 2nd Respondents' internal investigations. They however had a right to be informed of the outcome of the said investigations and to be heard before any action was taken by the 1st and 2nd Respondents on the recommendations or outcome of the said investigations. This in my view is what the 1st and 2nd Respondents intended to achieve through the impugned letter dated 14th April 2023.
63. In the circumstances, I am of the view that a case has not been made by the Applicants for the orders of certiorari sought to quash the alleged decision of the 1st Respondent to expunge the suit properties from the said Registry Index Maps/Diagrams contained in the said letter. For the reasons already given, I am also not inclined to grant an order of certiorari to quash the decision by the 1st and 2nd Respondents to hold a meeting with the public, the affected land owners and other interested parties to discuss the outcome of their investigations on the anomalies in Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18.
64. A case has however been made for an order of prohibition to prohibit the expunging of the suit properties from Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18. As I have stated earlier in this judgment, the 1st and 2nd Respondents have no power under the [Land Registration Act, 2012](#) and the [Survey Act, Chapter 299 Laws of Kenya](#) to expunge parcels of land from Registry Index Maps/Diagrams before the title of such parcel of land has been cancelled.

Conclusion

65. In conclusion, I hereby make the following orders in the consolidated applications;
1. Save where a title to a parcel of land said to be situated within the registration section has been lawfully cancelled, the Regional Surveyor, Nyanza Region and the Director of Surveys are prohibited from expunging from Kisumu Kanyakwar B Registration Section Registry Index Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section Registry Index Map/Diagram Sheet No. 18 the parcels of land said to have been created outside the boundaries



of the two registration sections, whose particulars are set out in the lists that were attached to (enclosed in) the 1st Respondents letter dated 14th April 2023 and in the consolidated applications herein.

2. The Attorney General of the Republic of Kenya on behalf of the Republic of Kenya or the Director of Surveys shall be at liberty to file a civil suit in the Environment and Land Court within 90 days from the date hereof against the registered owners of the parcels of land said to have been illegally created outside the boundaries of Kisumu Kanyakwar B Registration Section, Map/Diagram Sheet Nos. 2 and 3, and Kisumu Kogony Registration Section, Map/Diagram Sheet No. 18 whose particulars are set out in the lists that were attached to (enclosed in) the 1st Respondents letter dated 14th April 2023 and in the consolidated applications herein for the determination of the legality of the said parcels of land and appropriate orders. The fact that such a suit would have been filed pursuant to the court's direction shall not take away any defence a party may have against the same.
3. If the Attorney General fails to file a suit as ordered in No. 2 above, the Land Registrar, Kisumu, the Regional Surveyor, Nyanza Region and the Director of Surveys shall allow the owners of the parcels of land referred to in order Nos. 1 and 2 above, save where the title of the parcel of land has been cancelled by the court, to freely deal with their parcels of land and whoever is aggrieved with such dealing or with the existence or creation of the said parcels of land shall be at liberty to file the necessary suit/s for redress.
4. Each party shall bear its costs of the consolidated applications.

DELIVERED AND DATED AT KISUMU ON THIS 3RD DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

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

Mr. Odeny for the Applicants in JR. No. E001 of 2023

N/A for the Applicants in JR. No. E005 of 2023

Ms. Muthoki h/b for Ms. Juma for the Respondents

N/A for the Interested Party

Ms. Ohayo for the Intended Interested Party

Ms. J.Omondi-Court Assistant

