



**Republic v Regional Surveyor-Nyanza Region & another; Genga & 4 others
(Exparte Applicants); Odera & 6 others (Interested Parties) (Judicial Review
Application E004 of 2023) [2024] KEELC 6573 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E004 OF 2023
SO OKONG'O, J
OCTOBER 3, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE REGIONAL SURVEYOR-NYANZA REGION 1ST RESPONDENT

THE LAND REGISTRAR-KISUMU 2ND RESPONDENT

AND

AUGUSTINE GENGA EXPARTE APPLICANT

PAMELA OMINO EXPARTE APPLICANT

VICTOR OKEYO EXPARTE APPLICANT

ALLOYS ODUNY EXPARTE APPLICANT

**CHRISTOPHER ABONYO (SUIING ON THEIR OWN BEHALF AND ON
BEHALF OF THE OTHER OWNERS OF 991 PARCELS OF LAND WITHIN
KISUMU KOGONY REGISTRATION SECTION) EXPARTE APPLICANT**

AND

CHRISTABEL ACHIENG ODERA INTERESTED PARTY

WILSON OGOLA ODENY INTERESTED PARTY

CARRILUS OLANDO ODARI INTERESTED PARTY

JOSEPH OMOLLO INTERESTED PARTY

FLORENCE ATIENO ODERA INTERESTED PARTY

JOHN OKONGO OGENDO INTERESTED PARTY



JUDGMENT

1. Pursuant to the leave that was granted on 17th May 2023, Augustine Genga, Pamela Omino, Victor Okeyo, Alloys Oduny And Christopher Abonyo (hereinafter referred to only as “the Applicants”) brought this judicial review application on their own behalf and on behalf of 29 other persons by way of Notice of Motion dated 31st May 2023 seeking the following orders;
 1. An order of prohibition prohibiting the 1st Respondent from implementing the proceedings and decision of the 1st Respondent dated 14th April 2023 in respect of Kisumu/Kogony Registration Section Diagram No. 18.
 2. An order of mandamus compelling the 1st and 2nd Respondents to ratify the distribution of the parcels of land constituted in Kisumu/Kogony Registration Section Diagram No. 18 in favour of Kisumu Kogony Clan (community) pursuant to the orders issued on 29th March 2022 in Kisumu ELC No. 146 of 2012, Christabel Achieng Odera & others vs. Christopher Juma Akinyi & others.
 3. An order of certiorari to bring into this court for the purposes of being quashed the proceedings and decision of the 1st Respondent dated 14th April 2023 in respect of Kisumu/Kogony Registration Section Diagram No. 18.
 4. The costs of the application.
2. The application was brought on the grounds set out in the supporting affidavit sworn by the 1st Applicant, Augustine Genga on 17th May 2023 and the statutory statement of the same date filed in support of the Applicants’ application for leave.
3. The Applicants averred that they were members of Kisumu Kogony Clan (hereinafter referred to only as “the clan”). The Applicants averred that the application concerned land situated within Kisumu Kogony Registration Section Diagram Sheet No18 which was their ancestral land, and which some Government officers erroneously assumed to be part of the land that was allegedly acquired compulsorily by the Government of Kenya for the expansion of Kisumu Municipality through Gazette Notice No. 3400 dated 6th November 1976 that was published in the Kenya Gazette of 19th November 1976. The Applicants averred that they managed to get back the said parcel of land (hereinafter referred to as “the suit property”) and had the same registered and subdivided into 991 land parcels although there was a dispute over the distribution of the same among the Applicants. The Applicants averred that the court resolved the dispute on 29th March 2022 in Kisumu ELC No. 146 of 2012, Christabel Achieng Odera & others vs. Christopher Juma Akinyi & others. The Applicants averred that some of them had already developed the parcels of land which they acquired following the distribution of the suit property while some of them had sold their parcels of land to third parties who had also developed the same with permanent structures. The Applicants averred that the suit property measured about 91 acres and was valued at about 546,000,000/- at the rate of Kshs. 6,000,000/- per acre.
4. The Applicants averred that in Kisumu ELC No. 146 of 2012, Christabel Achieng Odera & others vs. Christopher Juma Akinyi & others, the court declared that the block of land that had been registered and was comprised in Map Sheet/Diagram No. 18 which was referred to as KOGONY C-18 SCHEME and comprising of but not limited to Land Parcel No. Kisumu/Kogony/5000 up to Kisumu/Kogony/6012 was the Applicants’ ancestral land and should revert to the Applicants. The Applicants



averred that it was capricious and an act of impunity for the 1st Respondent to purport to expunge the said 991 parcels of land from Kisumu/Kogony Registration Section Map/Diagram Sheet No. 18. The Applicants averred that land in Kisumu Kogony was not compulsorily acquired by the Government of Kenya for the expansion of Kisumu Municipality through Gazette Notice No. 3400 dated 6th November 1976 that was published in the Kenya Gazette of 19th November 1976. The Applicants averred that the parcels of land that were compulsorily acquired by the Government for public use were situated at Kanyakwar, South Kajulu, Manyatta and Nyalenda Pand Pieri. The Applicants averred that in the circumstances, the alleged compulsory acquisition of the suit property could not be a basis for expunging the said 991 parcels of land from Kisumu/Kogony Registration Section Map /Diagram Sheet No. 18. The Applicants averred that in any event, the process of compulsory acquisition of land was not followed in the purported compulsory acquisition of the suit property. The Applicants averred that the decision of the 1st Respondent to expunge the Applicants' parcels of land from Kisumu/Kogony Registration Section Map/Diagram Sheet No. 18 was unreasonable and was in breach of the rules of natural justice.

5. The Applicants' application was opposed by the Respondents through a replying affidavit sworn by Joseph Nanzala on 14th September 2023. In his affidavit, Joseph Nanzala averred that the Director of Surveys and the 1st Respondent discovered that some parcels of land in Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 were fraudulently included in the said Kisumu Kogony Registration Section. He averred that during the subdivision of the original parcel Kisumu/Kogony/2409 which measured 1.9Ha. the sizes(areas) of the subdivisions(portions) were blown to 38.02Ha. He stated that this increase in the area of the original parcel from 1.9Ha. to 38.2Ha. had no explanation to support it. He stated that the subplots which originated from Kisumu/Kogony/2409 following the said subdivision fell outside the boundaries of the said original parcel and the Kisumu/Kogony Registration Section Map/Diagram Sheet No. 18. He stated that Kisumu Kogony was declared Adjudication Section on 15th October 1981. He stated that land adjudication was only carried out in respect of areas in which land rights had not been ascertained. He stated that at the time of that declaration, the boundary of Kisumu Municipality as extended through Gazette Notice No. 3400 dated 6th November 1976 published on 19th November 1976 existed in the vicinity of the said Adjudication Section.
6. Joseph Nanzala stated that the Director of Surveys and the 1st Respondent were aware of the judgment delivered in Kisumu ELC No. 146 of 2012, Christabel Achieng Odera & others vs. Christopher Juma Akinyi & others but were unable to implement the same for the reason that there was no Registry Index Map/Diagram or Registration Section known as Kogony C-18 Scheme. He stated that the area that the land that was the subject of Kisumu ELC No. 146 of 2012, Christabel Achieng Odera & others vs. Christopher Juma Akinyi & others is situated ceased to be ancestral land when the same was compulsorily acquired by the Government through the aforesaid Gazette Notice. He stated that land parcels Kisumu/Kogony/5000 to Kisumu/Kogony/6012 referred to in the said judgment fell in various Registry Index Maps/Diagrams namely; Kisumu/Kogony Registration Section Map /Diagram Sheet Nos. 2, 3, 5, 6, 7, 8, 9, 11 and 12. He stated that there was no ancestral land to be distributed amongst the Applicants. He stated that the Commissioner of Lands created leasehold titles in the whole of the land that was compulsorily acquired by the Government and that some parcels of land in the range Kisumu/Kogony/5000 to Kisumu/Kogony/6012 overlap some of the said leasehold titles. He gave the particulars of 318 parcels of land which he claimed to have overlapped on the said leasehold titles. The particulars of the affected leasehold titles are also given. He stated that if the Director of Surveys were to implement the said judgment, it would infringe on the rights of the registered owners of the leasehold titles.



7. He stated that the letter dated 14th April 2023 complained of by the Applicants was intended to notify the members of the public of the said overlaps by these parcels of land which resulted from the unexplained increase in the area upon subdivision of the original parcel Kisumu/Kogony/2409 from 1.9Ha. to 38.2Ha. over the leasehold titles aforesaid, and of the intention of the 1st Respondent to commence the process of rectifying the anomalies. He stated that no proceedings were undertaken or decisions made on 14th April 2023. He stated that the letter dated 14th April 2023 was just a notice to the would-be affected members of the public that there were anomalies in Kisumu Kogony Registration Section Diagram No. 18 and to accord them an opportunity to be heard. He stated that no decision had been made to expunge the affected parcels of land from Kisumu Kogony Registration Section Diagram Sheet No. 18. He stated that the 1st Respondent could not unilaterally make such a decision. He stated that the Applicants' application was brought to court prematurely.
8. The Interested Parties were added to the application on 21st June 2023. The Interested Parties filed a replying affidavit to the application sworn by the 1st Interested Party, Christabel Achieng Odera on 7th August 2023. The Interested Parties supported the reliefs sought by the Applicants but contended that the reliefs should be granted in favour of the Interested Parties rather than the Applicants whom they claimed their titles were cancelled. The 1st Interested Party averred that she was the first Plaintiff in Kisumu ELC NO. 146 of 2012. The 1st Interested Party averred that the Interested Parties were members of Kogony clan and owners of the parcel of land claimed by the Applicants which in the official records is known as Kisumu/Kogony C.18 Scheme. The 1st Interested Party averred that the said scheme comprised of land parcels, Kisumu/Kogony/5000 up to land parcel Kisumu/Kogony/6012. The 1st Interested Party averred that the said parcels of land were the Interested Parties' ancestral land. The 1st Interested Party averred that Kisumu/Kogony C.18 Scheme (the suit property) was not adjudicated during the land adjudication in Kogony Adjudication Section. The 1st Interested Party averred that although the land remained unadjudicated and unsurveyed for several years, the Kogony Clan was the beneficial owner of the property. The 1st Interested Party averred that in 2011, the District Land Adjudication and Settlement Officer decided that the suit property be adjudicated in favour of the members of Kogony Clan. The 1st Interested Party averred that they appointed representatives to assist in the said adjudication exercise on behalf of the clan who included Augustine Genga. The 1st Interested Party averred that the said officials caused the suit property to be adjudicated and registered in their names and the names of other people who were not members of Kogony clan. The 1st Interested Party stated that this is what led to the filing of Kisumu ELC No. 146 of 2012. The 1st Interested Party averred that Kisumu ELC No. 146 of 2012 was filed by the Kogony Clan against the said officials and others. The 1st Interested Party averred that the court entered judgment in their favour on 18th March 2022. The 1st Interested Party averred that the court found that the block of land that was comprised in Kisumu Kogony Registration Section Map/Diagram No. 18 known as Kogony C-18 Scheme comprising of land parcels Kisumu/Kogony/5000 up to 6012 was Kogony Clan's ancestral land and belonged to the Interested Parties and Kogony Community. The 1st Interested Party averred that the court ordered that the said parcels of land should revert to the community. The Interested Party averred that the order issued by the court was served upon the Respondents herein but they had not complied with the same.
9. The 1st Interested Party averred that the 1st Respondent's letter dated 14th April 2023 was based on Kisumu Kogony Registration Section Diagram Sheet No. 18 and Gazette Notice No. 3400 of 1976 which were the subject of Kisumu ELC No. 146 of 2012. The 1st Interested Party averred that the court found that the land comprised in Kisumu Kogony Registration Section Diagram Sheet No. 18 belonged to Kogony Clan. The 1st Interested Party averred that the parcel of land between Kogony



and Kanyakwar Registration Sections which was referred to as Kogony C-18 Scheme had never been surveyed, adjudicated and demarcated save for the fraudulent survey which was the subject of Kisumu ELC No. 146 of 2012 and whose resultant titles were revoked by the court. The 1st Interested Party averred that the Kogony land was not compulsorily acquired by the Government of Kenya through Gazette Notice No. 3400 of 1976. The 1st Respondent averred that the original title that gave rise to the parcels of land claimed by the Applicants herein was cancelled by the court which cancellation should be implemented by the Respondents.

10. The judicial review application was heard through written submissions.

The Applicants' submissions

11. The Applicants filed submissions dated 27th September 2023. The Applicants framed several issues for determination by the court which they submitted on. The first issue framed by the Applicants was whether the parcels of land owned by the Applicants within Kisumu/Kogony Registration Section Diagram Sheet No. 18 fell within the land that the Government of Kenya acquired through Kenya Gazette Notice No. 3400 dated 6th November 1976 published on 19th November 1976. The Applicants submitted that the land that the Government acquired compulsorily for the extension of Kisumu Municipality were situated at Kanyakwar, South Kajulu, Manyatta and Nyalenda Pandpieri sub-locations of the then Kisumu District. The Applicants submitted that Kogony Clan's ancestral land which form part of Kisumu Kogony Registration Section Diagram Sheet No. 18 was not acquired compulsorily by the Government. The Applicants argued that in the circumstances, the Applicants' parcels of land within Kisumu Kogony Registration Section could not be said to have overlapped the parcels of land that were created by the Commissioner of Lands on the land that the Government acquired compulsorily. The Applicants submitted that the 1st Respondent's letter dated 14th April 2023 purported to extend the land that the Government acquired compulsorily through Kenya Gazette Notice No. 3400 dated 6th November 1976 published on 19th November 1976 to include the ancestral land belonging to Kogony clan which was not acquired by the Government. The Applicants submitted that the decision of the 1st Respondent contained in its letter dated 14th April 2023 was erroneous to the extent that it purported to include the ancestral land that belonged to Kogony clan as part of the land that the Government acquired compulsorily through Gazette Notice No. 3400 dated 6th November 1976. The Applicants urged the court to find that the 1st Respondent's said decision in which it purported to expunge the Applicants' parcels of land from the Kisumu Kogony Registration Section Diagram No. 18 so that the land is committed for public use was ultra vires, illegal and void ab initio. The Applicants cited *PAK & Another v. A.G & 3 Others, Malindi High Court, Petition No. E009 of 2020*, and Republic v. Joe Mucheru, Fred Matiangi, the A.G & Others, Milimani J.R No. E1138 of 2020 in support of their submissions.
12. The second issue framed by the Applicants for determination was whether the Respondents should be compelled to register the land parcels within Kisumu Kogony Registration Section in accordance with the redistribution schedule agreed upon by Kogony clan. The Applicants submitted that the Respondents should be compelled to ratify the distribution of the land parcels within Kisumu Kogony Registration Section to the members of Kogony clan in accordance with the orders issued by the court in Kisumu ELC No. 146 of 2012 on 29th March 2022. The Applicants submitted that the Respondents were parties to the said suit and that they never appealed against the said decision of the court. The Applicants urged the court to compel the Respondents to ratify and implement the ultimate redistribution arrangement regarding the parcels of land within Kisumu Kogony Registration Section as shall be agreed on and presented to the Respondents by Kogony clan which arrangement



would correct the previous errors, omissions and failures that oppressed not only the Kogony clan who were the ancestral owners of the land but also third parties who legitimately purchased land from them.

The Respondents' submissions

13. The Respondents filed submissions dated 15th February 2024. The Respondents framed only one issue for determination namely; whether the judicial review orders of certiorari, mandamus and prohibition sought should be granted. The Respondents submitted that the order of prohibition sought by the Applicants was premature in that the Respondents had not commenced any proceedings neither had they made any decision. The Respondents submitted that the 1st Respondent in its letter dated 14th April 2023 merely notified the interested persons and the public of the existence of anomalies in Kisumu Kogony Registration Diagram Sheet No. 18 and gave them an opportunity to be heard. The Respondents submitted that there were no proceedings or decisions made on 14th April 2023. The Respondents submitted further that they had not expunged the suit properties from Kisumu Kogony Registration Section, Diagram Sheet No.18, and the land registry records. The Respondents submitted 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, Kisumu/Kogony/2409 measured 1.9Ha., the suit properties which were claimed to have resulted from the subdivision of the said parent title measured a total of 38.02 Ha. The Respondents submitted further that it was within their mandate to correct any irregularities in the land records and that the order of prohibition sought if granted would hinder the exercise of the said mandate. The Respondents submitted that if the orders sought were granted, more illegalities would be committed in relation to the suit properties. The Respondents cited *Republic v. Kenya National Examination Council Ex Parte Gatbenji & Others, Court of Appeal Civil Appeal No. 266 of 1996* and submitted that an order of prohibition looks to the future and that it would not be efficacious against a decision that has already been made. 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 outside the boundaries of the parent parcel of land and were created from the area that was set aside for the expansion of Kisumu Municipality through Gazette Notice No. 3400 dated 6th November 1976 published on 19th November 1976. The Respondents submitted that the parcels of land owned by the Applicants overlap on the leasehold titles created by the Commissioner of Lands on the said land that was set aside for the expansion of Kisumu Municipality. The Respondents submitted that most of the suit parcels of land owned by the Applicants were public land that was acquired illegally. The Respondents submitted that land which is acquired illegally and unprocedurally does not enjoy the protection of law. In support of this submission, the Respondents relied on Section 26 of the *Land Registration Act*, 2012, and *Dina Management Limited v. County Government of Mombasa & 5 Others*, Petition No. 8 (E010) of 2021.
14. On the Applicants prayer for Mandamus to compel the Respondents to ratify the distribution of the land parcels within Kisumu Kogony Registration Section Diagram Sheet No. 18 in favour of Kogony Clan pursuant to the orders that were given in Kisumu ELC No. 146 of 2012, the Respondents submitted that they were aware of the orders that were made in the said suit. The Respondents reiterated that they were unable to implement the orders made in the said suit because there was no map or Registration Section known as Kogony C-18 Scheme which was the subject of the suit. The Respondents reiterated that the land claimed by the Applicants ceased to be ancestral land following the setting aside of the same by the Government for the expansion of Kisumu Municipality through Gazette Notice No. 3400 dated 6th November 1976. The Respondents submitted that the Applicants could not enforce orders in respect of a non-existent map or registration section. The Respondents



submitted that if the court were to grant the order of mandamus sought, the court would be compelling the Respondents to commit an illegality as there is no ancestral land to be distributed amongst Kogony clan. The Respondents submitted further that the 2nd Respondent had power to determine whether the parcels of land owned by the Applicants had overlapped on public land. In support of this submission, the Respondents cited Sections 18 and 19 of the *Land Registration Act*, 2012, and *George Kamau Macharia v. Dexka Limited* [2019]eKLR. The Respondents submitted that judicial review is a discretionary remedy and as such even where the court finds that a public body has acted wrongly, the court could still exercise its discretion against granting the order. The Respondents cited *Republic v. Anti-Counterfeit Agency & Director of Public Prosecutions Ex-parte FRM (EA) Packers Limited & Another*[2017]eKLR in support of this submission.

15. With regard to the prayer for certiorari, the Respondents reiterated that the order was prematurely sought and that the Respondents were not engaged in any illegality. The Respondents submitted that they were in no way trying to illegally acquire private land for public use. The Respondents submitted that they were only concerned with the encroachment into public land. The Respondents urged the court to dismiss the Applicants' application with costs.

The Interested Parties' submissions

16. The Interested Parties filed submissions dated 21st November 2023. The Interested Parties framed two issues for determination namely; whether the orders of prohibition, mandamus and certiorari sought should be issued, and whether given the judgment made in Kisumu ELC No. 146 of 2012, the orders sought can be issued. The Interested Parties submitted that in Kisumu ELC No. 146 of 2012 in which the 2nd Respondent herein and the Attorney General were parties, the court issued a declaration that; all that block of land known as Kogony C-18 was the Interested Parties' ancestral land and should revert to them; all the title deeds that were issued in respect of land forming part of the said Kogony C-18 to the 1st, 2nd and 3rd Defendants in that suit who are the Applicants herein and/or other third parties be cancelled, and that the remaining parcel of land forming part of the said Kogony C-18 which had not been transferred or alienated be equally and justly shared between all the beneficiaries entitled to the same including the Interested Parties. The Interested Party submitted that the orders of the court made in the said suit were served upon the Respondents herein and the Attorney General. The Interested Parties submitted that instead of the Respondents complying with the said order, the 1st Respondent issued a notice of its intention to expunge from the Kisumu Kogony Land Registration Section Diagram Sheet No. 18 the parcels of land that had been declared to belong to the Interested Parties by the court. The Interested Parties submitted that the Attorney General who was a party to Kisumu ELC No. 146 of 2012 did not appeal against the judgment that was made in that suit in favour of the Interested Parties. The Interested Parties submitted that the 1st Respondent's decision to expunge the said parcels of land from Kisumu Kogony Land Registration Section Diagram Sheet No. 18 was against the judgment and orders made by the court in Kisumu ELC No. 146 of 2012 which were still in force. The Interested Parties submitted that the said decision was unreasonable and in excess of the jurisdiction of the Respondents.
17. The Interested Parties submitted further that in its letter dated 14th April 2023, the 1st Respondent purported to include the parcels of land in Kisumu Kogony Land Registration Section Diagram Sheet No. 18 among the land that was set aside for the expansion of Kisumu Municipality through Gazette Notice No. 3400 of 1976 while the same did not appear in the said Gazette Notice. The Interested Parties submitted that the purported inclusion of the said parcels of land in the said Gazette Notice was illegal and beyond the jurisdiction of the Respondents. The Interested Parties submitted that the parcels of land that the 1st Respondent wanted to expunge from Kisumu Kogony Land Registration Section Diagram Sheet No. 18 were the same parcels of land whose titles the court had



ordered to be cancelled in Kisumu ELC No. 146 of 2012. The Interested Parties submitted that the 1st Respondent was attempting to overturn the said judgment. The Interested Parties submitted that the 1st Respondent is bound to implement the judgment. The Interested Parties submitted that the action by the 1st Respondent amounted to an abuse of office and an illegality. The Interested Parties urged the court to grant the order of mandamus sought by the Applicants.

Analysis and determination

18. I have considered the Applicants' application together with the statutory statement and the affidavits filed in support thereof. I have also considered the replying affidavits filed by the Respondents and the Interested Parties, and the submissions by the advocates for the parties. The parties have raised several issues which in my view can be summarized into one, namely, whether the Applicants have made a case for the grant of the orders of judicial review sought.
19. 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.”

20. 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...”

21. 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”.

22. 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.”



23. 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.”

24. 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.”

25. 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.”

26. 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.”



27. 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.”

28. 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 disproved, 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.”
29. It is on the foregoing principles that the Applicants’ application falls for consideration. From the material before me, the Applicants and the Interested Parties have admitted that before the suit properties came into being, there was in existence Kisumu Kogony and Kisumu Kanyakwar Registration Sections and that the Government had compulsorily acquired some land in the neighbourhood of these registration sections in 1976 for the expansion of Kisumu Municipality. The Applicants and the Interested Parties’ contention before this court and in Kisumu ELC No. 146 of 2012 is that a portion of Kogony clan’s ancestral land was inadvertently included in the land that was compulsorily acquired by the Government in 1976 which led to eviction of the members of the said clan from the land in 1978. According to the Applicants and the Interested Parties, this Kogony clan’s ancestral land was between Kisumu Kogony Registration Section and Kanyakwar Registration Section. According to the Applicants and the Interested Parties, this parcel of land was not adjudicated and demarcated as part of Kisumu Kogony Registration Section and Kanyakwar Registration Section. The Kisumu District Land Adjudication and Settlement Officer referred to this parcel of land in his letter dated 15th March 211 as “a small strip”. In the said letter, the Kisumu District Land Adjudication and Settlement Officer stated that due to its size, the land could not be declared an adjudication section but could be “surveyed directly” and merged with Kogony Registration Section. The land was referred to as “Gap between Kogony and Kanyakwar” and subsequently as “Kisumu/Kogony C18 Scheme”. It is not clear from the record how this latter name came about. It is clear from the foregoing that the said parcel of land which I will henceforth refer to as “the suit property” was neither part of Kogony Registration Section nor Kanyakwar Registration Section. This was unsurveyed and undemarcated land. Its dimensions could not be known until after the survey was conducted.
30. According to the Applicants’ and the Interested Parties’ case before this court and in Kisumu ELC No. 146 of 2012, after the Kisumu District Land Adjudication and Settlement Officer had agreed that the suit property be surveyed, adjudicated and registered in the name of the occupants who were mainly from Kogony Clan, the Kogony Clan who had formed a group chose the officials of the group (hereinafter referred to only as “the officials”) who were some of the defendants in Kisumu ELC No. 146 of 2012 to undertake the exercise of survey and registration of the suit property in the names of the members of Kogony Clan. According to the evidence that was tendered in Kisumu ELC No. 146 of 2012, the suit property measured about 8 Ha. The Applicants and the Interested Parties herein who



were the Plaintiffs in Kisumu ELC No. 146 of 2012 told the court in Kisumu ELC No. 146 of 2012 that the 1st, 2nd, 3rd and 4th Defendants in that suit and others who were not sued led by the 1st Defendant, Christopher Juma Akinyi grabbed their land which had not been registered and registered it as theirs. The court was told in Kisumu ELC No. 146 of 2012 that the parcel of land Kisumu/Kogony/4617 was not part of the suit property that was owned by Kogony clan which was the subject of the Plaintiffs' claim. The Plaintiffs in Kisumu ELC No. 146 of 2012 told the court that the parcel of land Kisumu/Kogony/4617 which was registered in the name of 1st Defendant, in that suit, Christopher Juma Akinyi was used by the said 1st, 2nd, 3rd and 4th Defendants in that suit and others who were not sued to grab the suit property, subdivide it into several parcels some of which were registered in the names of the members of Kogony clan while others were sold to strangers. The court was told that whereas the 1st, 2nd and 3rd Defendants in that suit were members of Kogony clan, the 4th Defendant, Jane Kambaga who was an employee of the Ministry of Lands was not a member of Kogony clan. The Applicants and the Interested Parties herein who were the Plaintiffs in Kisumu ELC No. 146 of 2012 told the court in that suit that the 1st Defendant in that suit, Christopher Juma Akinyi used his parcel of land Kisumu/Kogony/4617 to subdivide the suit property that belonged to Kogony clan. The court was told that Kisumu/Kogony/4617 upon subdivision overlapped on the suit property. The Applicants and the Interested Parties herein who were the Plaintiffs in Kisumu ELC No. 146 of 2012 told the court that the subdivisions that resulted from Kisumu/Kogony/4617 were bigger in size compared to Kisumu/Kogony/4617.

31. According to the evidence that was given in Kisumu ELC No. 146 of 2012 by the 1st Defendant in that case, Christopher Juma Akinyi, the parcel of land, Kisumu Kogony C18 (the suit property) was surveyed and registered as part of Kisumu/Kogony/4617. The 1st Defendant told the court that Kisumu/ Kogony/4617 measured 0.48 Ha. while the suit property which was surveyed and registered as part of it measured about 8Ha.
32. In the judgment delivered in Kisumu ELC No. 146 of 2012, the court found that the parcel of land, Kogony C-18 (the suit property) was community land and that it belonged to the members of Kogony clan who were in occupation thereof. In the judgment, the court noted that in a letter dated 29th July 2011, the District Surveyor had informed the District Land Registrar that the land known as Kogony C-18 did not exist in the survey records. The court found further that the 1st, 2nd and 3rd Defendants in the suit were appointed by the members of Kogony clan to ensure that the suit property was registered and titles issued in the names of the members of the clan and that the said Defendants caused the suit property to be registered and transferred in the names of persons who were not members of the Kogony clan and sold portions thereof to third parties. The court found that the 1st, 2nd and 3rd Defendants in the suit acted fraudulently. The court declared that the suit property that had now been registered as part of Kisumu Kogony Registration Section Map /Diagram Sheet No. 18 as but not limited to Kisumu/Kogony/5000 up to Kisumu/Kogony/6012 belonged to Kogony clan/community. The court also ordered that all the title deeds that were issued to the 1st, 2nd, 3rd and 4th Defendants and/or third parties in respect of land that formed part of the suit property be cancelled. The court made a further order that the parcels of land forming part of the suit property that had not been transferred or alienated be equitably and justly shared between and distributed to all the beneficiaries entitled to the same including the plaintiffs.
33. I am not sitting on appeal from the judgment made in Kisumu ELC No. 146 of 2012. From the material before me, I am satisfied that there was a parcel of land that existed between Kisumu Kogony Registration Section and Kanyakwar Registration Section. This parcel of land (the suit property) was not declared as an adjudication section and as such was not surveyed and adjudicated during the land adjudication exercise in Kogony and Kanyakwar Adjudication Sections. The evidence before the court



shows that the persons who had occupied this piece of land who are said to be from Kogony clan were evicted in 1978 in the belief that the piece of land was part of the land that was compulsorily acquired by the Government in 1976 for the expansion of Kisumu Municipality. As I have mentioned earlier, this parcel of land (the suit property) was neither surveyed nor registered. There is no explanation on record why the suit property which is said to be ancestral land was not declared as an adjudication area during the adjudication of land in Kogony and Kanyakwar. In my view, it could only be because the land was part of the land that was compulsorily acquired by the Government in 1976 for the expansion of Kisumu Municipality or was thought to have been so acquired. This means that the suit property was adjacent to the land that was acquired compulsorily by the Government in 1976. What is not disputed however is that since the suit property had not been surveyed, the size and extent thereof had not been ascertained.

34. Even after being evicted from the suit property, the Kogony clan continued to lay a claim over the same. I am not sure whether the District Land Adjudication and Settlement Officer had the power to authorise the survey and registration of unadjudicated, unsurveyed and unregistered ancestral land existing between two registration sections in the names of “occupants”. That was however what the Kisumu District Land Adjudication and Settlement Officer proposed in his letter dated 15th March 2011 to the Provincial Surveyor and Provincial Physical Planner, Nyanza province. According to the letter, the suit property which was “a small strip” was supposed to be surveyed and registered in the name of the occupants under Kogony Registration Section.
35. The question that begs for an answer is whether the suit property (Gap between Kogony and Kanyakwar registration sections/Kogony C-18 Scheme) was surveyed and registered. There is no evidence placed before this court and none was placed before the court that determined Kisumu ELC No. 146 of 2012 showing that the suit property was surveyed and registered in accordance with the manner the Kisumu District Land Adjudication and Settlement Officer proposed in his letter dated 15th March 2011. Kisumu ELC No. 146 of 2012 was brought to challenge a fraudulent subdivision, registration and alienation of the suit property. A fraudulent process could not give rise to valid titles. It was common ground before the court in Kisumu ELC No. 146 of 2012 and before this court that the suit property (Gap between Kogony and Kanyakwar registration sections/Kogony C-18 Scheme) was never surveyed.
36. From the evidence before this court, one, Joyce Ogoye and Petronala Akumbe owned a parcel of land known as Kisumu/Kogony/2409. The parcel of land was in Kisumu Kogony Registration Section Map/Diagram Sheet No. 18. On 8th October 2005, the two registered owners of Kisumu/Kogony/2409 which measured 1.9 Ha. subdivided the same into two portions namely, Kisumu/Kogony/4616 measuring 1.42 Ha. and Kisumu/Kogony/4617 measuring 0.48 Ha. This parcel of land, Kisumu/Kogony/4617 measuring 0.48 Ha. was transferred to Christopher Juma Akinyi, who was the 1st Defendant in Kisumu ELC No. 146 of 2012. According to the Plaintiffs in Kisumu ELC No. 146 of 2012, it is this Kisumu/Kogony/4617 measuring 0.48 Ha. that Christopher Juma Akinyi, used to grab the suit property through a fraudulent subdivision process. According to the Respondents herein, the successive subdivision of the said Kisumu/Kogony/4617 measuring 0.48 Ha. yielded over 900 parcels of land with a total measurement of over 38Ha. The Respondents contention in the present application agrees with the case that the Applicants herein and the Interested Parties put before the court in Kisumu ELC No. 146 of 2012 in which they claimed that through fraudulent subdivision, Christopher Juma Akinyi’s Kisumu/Kogony/4617 which measured 0.48 Ha. overlapped on the suit property. The Respondents herein have claimed that several parcels of land created through the fraudulent subdivision of Kisumu/Kogony/4617 have overlapped on land that was compulsorily acquired by the Government for the expansion of Kisumu Municipality. Christopher Juma Akinyi admitted in Kisumu ELC No. 146 of 2012 that he and others who were chosen to represent Kogony



clan in the survey, adjudication and registration of the suit property in the names of the members of Kogony clan did not do that. According to his evidence, the suit property was surveyed as part of Kisumu/Kogony/4617 and thereafter subdivided. In my view, that form of survey is unknown in law. There is no way an unregistered and unsurveyed piece of land belonging to a group of people can be surveyed and registered as part of an existing parcel of land belonging to another person. The Kisumu District Land Adjudication and Settlement Officer in his letter dated 15th March 2011 to the Provincial Surveyor and Provincial Physical Planner, Nyanza province which was the basis of the purported survey did not state that the suit property would be surveyed as part of Christopher Juma Akinyi's land parcel, Kisumu/Kogony/4617 which measured 0.48 Ha. It is no wonder that the court in Kisumu ELC No. 146 of 2012 found the whole process of survey and registration of the suit property carried out by Christopher Juma Akinyi fraudulent.

37. Since the suit property was not surveyed, its measurement is unknown. Christopher Juma Akinyi in his testimony in Kisumu ELC No. 146 of 2012 told the court that the suit property measured about 8Ha. As mentioned earlier, the parcels of land that resulted from the subdivisions of Kisumu/Kogony/4617 which was owned by Christopher Akinyi Juma measured a total of over 38Ha. This means that the total size of the parcels of land that resulted from the subdivision of Kisumu/ Kogony/4617 exceeded not only the measurement of Kisumu/Kogony/4617 but also the size of the suit property which was described as a small strip between Kogony and Kanyakwar Registration Sections. There is therefore a possibility that the fraudulent subdivision of Kisumu/Kogony/4617 encroached on the land that was compulsorily acquired by the Government for the expansion of Kisumu Municipality as claimed by the Respondents herein. In their replying affidavit sworn on 14th September 2023, the Respondents have mentioned a total of 318 parcels of land that resulted from the subdivision of Kisumu/Kogony/4617 which are said to have encroached on the land that was compulsorily acquired by the Government for the expansion of Kisumu Municipality.
38. Due to lack of survey of the suit property, the court is unable to say which parcels of land that resulted from the illegal and fraudulent subdivision of Kisumu/Kogony/4617 form part of the suit property and which ones do not. The court is also unable to determine the number of these parcels of land which have overlapped on the land said to have been acquired by the Government for the expansion of Kisumu Municipality. Such a determination can only be made in a civil suit filed for that purpose. I agree with the Applicants and the Interested Parties herein that the 1st Respondent herein and the Attorney General were parties to Kisumu ELC No. 146 of 2012. I must point out however that the issue of whether or not the parcels of land that were created from the fraudulent subdivision of Kisumu/Kogony/4617 encroached on the land that was compulsorily acquired by the Government for the expansion of Kisumu Municipality was not in contention in that suit. The court was also not called upon in that suit to determine whether the land that was referred to as a "Gap between Kogony and Kanyakwar" registration sections/"Kogony C-18 Scheme" had been acquired by the Government in 1976 for the expansion of Kisumu Municipality. As I have mentioned earlier, the court in Kisumu ELC No. 146 of 2012 noted that the Kisumu District Surveyor had informed the District Land Registrar that land known as Kogony C-18 Scheme did not exist in its records. I do not therefore agree with the Applicants and the Interested Parties that the Respondents intended to overturn the judgment of the court made in Kisumu ELC No. 146 of 2012.
39. I will now consider the reliefs sought by the Applicants and the Interested Parties. The first prayer is for the prohibition of the 1st Respondent from implementing the proceedings and decision of 14th April 2023. I find this prayer bad for being too general. The Applicants were not authorised by all the owners of the parcels of land within Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 to bring the present application. Again, not all the parcels of land within Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 originated from what has been referred to



as the “Gap between Kogony and Kanyakwar/Kogony C-18 Scheme” nor were they all the subject of Kisumu ELC No. 146 of 2012. Secondly, the letter dated 14th April 2023 had several components, the letter was a notice to the public and the affected land owners of the anomalies that had been detected by the 1st Respondent in Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 and Kisumu Kanyakwar Registration Section Map/Diagram Sheet Nos. 2 and 3 and what the 1st Respondent intended to do to correct the said anomalies. It was also an invitation to the public and the said affected land owners to a meeting to discuss the same issue. The Applicants should have been specific on what they wanted the court to prohibit. In the said letter dated 14th April 2023, the 1st Respondent indicated among others that it intended to expunge the parcels of land that had breached the boundaries of Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 and Kisumu Kanyakwar Registration Section Map/Diagram Sheet Nos. 2 and 3 from the said Registration Sections. As I have stated in Kisumu ELC JR No. E001 of 2023 and ELC JR No. E005 of 2023 (consolidated) over the same subject matter, the 1st Respondent has no power under the Land Registration Act, 2012 and the Survey Act, Chapter 299 Laws of Kenya to expunge a land parcel from a Registry Index Map/Diagram unless the title for such parcel of land has been lawfully cancelled. This court has found from the evidence before it that the parcel of land that is said to have been owned by Kogony clan was not surveyed and that the purported survey that was carried out by Christopher Juma Akinyi and his team was fraudulent and could not give rise to valid titles. This is the same finding that was reached by the court in Kisumu ELC No. 146 of 2012. The court in Kisumu ELC No. 146 of 2012 cancelled all the titles that had been issued to the Defendants in that case which included Christopher Juma Akinyi, Augustine Genga Ondingo, Vitalis Ouru Akinyi and Jane Kambaga. In my view, this cancellation affected all those parcels of land that resulted from the fraudulent subdivision of the parcel of land known as Kisumu/Kogony/4617. The titles for all these parcels of land are supposed to be cancelled from the land registers and the relevant Registry Index Maps/Diagrams so that a proper survey and adjudication is done in respect of the land that is said to belong to Kogony clan and sharing or distribution done as directed by the court. During this process, the Director of Surveys and the Director of Land Adjudication and Settlement would be able to delineate the boundaries of the said parcel of land owned by Kogony clan and the land that was compulsorily acquired by the Government for the expansion of Kisumu Municipality. The process shall also involve the third parties whose parcels of land are alleged to have been overlapped by the parcels of land that were created following the fraudulent subdivision of the parcel of land known as Kisumu/Kogony/4617 that incorporated land that is said to belong to Kogony clan. The Respondents herein have the power to cancel land parcels from the land registers and to expunge the same parcels from the land Registry Index Maps/Diagrams where the court has cancelled the titles of such land parcels like in the present case. This court cannot therefore prohibit the Respondents from cancelling the titles that originated from the fraudulent subdivision of the parcels of land known as Kisumu/Kogony/4617 that incorporated land that was said to belong to Kogony clan and expunging the same from the fraudulent survey records. In their submissions, the Interested Parties had expressed reservations over the granting of the order of prohibition for the same reasons that I have given. I would therefore decline to grant the order of prohibition sought by the Applicants for the reasons given.

40. The second relief sought by the Applicants and the Interested Parties is an order of mandamus compelling the Respondents to ratify the agreed mode of distribution of the parcels of land within Kisumu Kogony Registration Section Diagram Sheet No. 18 amongst the members of Kogony Clan (community) pursuant to the orders issued on 29th March 2022 in Kisumu ELC No. 146 of 2012, *Christabel Achieng Odera & others v. Christopher Juma Akinyi & others*. I have already commented on my understanding of the orders that were given by the court in Kisumu ELC No. 146 of 2012. The court had made a finding that the parcel of land that was referred to as Kogony C-18 Scheme was



Kogony clan's ancestral land. The court nullified the titles that had been issued to the 1st, 2nd, 3rd and 4th defendants in that suit and other third parties in respect of the said land known as Kogony C-18 Scheme following a fraudulent survey and alienation. As far as the cancellation of all the titles that were issued to the 1st, 2nd, 3rd and 4th Defendants and "third parties" following the fraudulent survey is concerned, the Applicants and the Interested Parties are at liberty to pursue the enforcement of the order in Kisumu ELC No. 146 of 2012 where the order was given. It is not necessary for them to bring an application for judicial review to enforce the order. With regard to the limb of the application seeking ratification of the agreed mode of distribution of the said land known as Kogony C-18 Scheme, there is no evidence that a valid survey, demarcation, and adjudication has been done in respect of the said parcel of land that can form a basis for the distribution of the land. This is because, the distribution of the said land known as Kogony C-18 Scheme cannot be undertaken on the basis of a survey and subdivision which this court and the court in Kisumu ELC No. 146 of 2012 found to have been fraudulent. Although the Applicants and the Interested Parties have sought the ratification of "distribution", they have not presented to the court any proposed mode of distribution. In their submissions, the Interested Parties admitted that they were yet to agree on the said distribution. Given the foregoing, this court will not grant the order of mandamus sought by the Applicants.

41. The last relief sought by the Applicants is an order of certiorari to bring into this court for the purposes of being quashed the proceedings and decision of the 1st Respondent dated 14th April 2023 in respect of Kisumu Kogony Registration Section Diagram Sheet No. 18. I agree with the Respondents that there were no proceedings by the Respondents conducted on 14th April 2023 or any decision made on that date. From the material before the court, there is also no evidence that the parcels of land owned by the Applicants had been removed or expunged from Kisumu/Kogony Registration Section Diagram No. 18. All the published Registry Index Maps/Diagrams for Kisumu Kogony Registration Section Map/Diagram Sheet No. 18 have the properties owned by the Applicants save for the 1st Edition of the said Map/Diagram. The Respondents have denied expunging the suit properties from the survey records. They have contended that they could not do so without notice to the Applicants and other stakeholders. Due to the foregoing, it is my finding that the Applicants have not established that the suit properties have been expunged from Kisumu District Kogony Registration Section, Map/Diagram Sheet No. 18 to warrant the grant of the order of certiorari sought.

Conclusion

42. In conclusion, I find no merit in the Applicants' Notice of Motion application dated 31st May 2023. The application is dismissed. Each party shall bear its own costs.

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:

Ms. Nyambeki for the Applicants

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

Mr. Nyakiangana for the Interested Parties

Ms. J. Omondi-Court Assistant

