Republic v National Land Commission & another; Oceanview Plaza Limited (Exparte Applicant) (Judicial Review Application 10 of 2021) [2023] KEELC 16653 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16653 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION 10 OF 2021

LL NAIKUNI, J

MARCH 7, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

LAND REGISTRAR, MOMBASA ..... 2ND RESPONDENT

AND

OCEANVIEW PLAZA LIMITED ..... EXPARTE APPLICANT

JUDGMENT

I. Preliminaries

1. This Judgement pertains to suit instituted by the "Ex parte Applicant, "OceanView Plaza Limited". Having sought and thereby granted the leave of Court, the Applicants moved this Honorable Court through filing of a substantive Notice of Motion application dated 9th December, 2021. It was premised on the provisions of Sections 8 & 9 of the *Law Reform Act* Cap. 26 of the Laws of Kenya, Sections 7, 9 and 11 of the Fair Administrative Actions Act No. 4 of 2015, Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21 and Order 53 Rule 3(1) of the Civil Procedure Rules 2010. The Application sought the following prerogative orders/writs that:-

    a. An order of Certiorari to remove into this Honourable Court and to quash the decision of the National Land Commission (the hereinafter referred to as "The NLC") dated 14th February, 2020 (the NLC decision) whereby the NLC resolved to:-

        i. Direct the Land Registrar, Mombasa to place Restriction/Caveats on properties Title L.R. Nos. MN/I/9892 and MN/I/9933, Mainland North, Mombasa County (the "suit properties") until the investigation is finalized;

b. An order for Certiorari to remove into this Honourable Court and to quash the Restriction effected under Section 76(2)(b) of the *Land Registration Act* by the 2nd Respondent in respect of the suit properties registered as encumbrances;

c. An order of Prohibition restraining the NLC from relying upon or acting on information received in respect of this suit properties without according the Applicant a fair hearing and/ or an opportunity to be heard;

d. An Order prohibiting the 2nd Respondent from invoking, implementing or in any order way acting or relying on the provisions of Section 76 (2)(b) of the *Land Registration Act* pursuant to NLC'S instructions;

e. An order of Mandamus directing the NLC to furnish the Applicant with all information, documents and evidence of inquiring in relation to the investigations launched in respect to the suit properties as indicated in the NLC decision aforementioned;

f. An order of Mandamus directing the NLC to forthwith withdraw its instructions to the 2nd Respondent to place Restriction/Caveats on the subject properties and/or further encumber the titles of the subject property under other provision of the law;

g. An order of Mandamus directing the 2nd Respondent to forthwith remove/vacate the Restriction placed under Section 76(2)(b) of the *Land Registration Act* effecting the decision of the NLC dated 14th February, 2020.

h. The Costs of this application be granted to the Applicant.

i. Upon service, the 2nd Respondents filed their Replying Affidavit. also filed. The Court provided directions on how the matter was to proceed and finalised accordingly.

II. The Ex Parte Applicant's case

3. The application is premised on the grounds founded under the the Statutory Statement dated 1st October, 2021 and the Verifying Affidavit of Naresh Kotak sworn on 1st October, 2021 and the ten (10) annextures marked as "NK – 1 to 10.

4. The grounds upon which this Application is based are set out in the Verifying Affidavit and on the grounds contained in the accompanying statement dated the 1st October, 2021 filed herein and reproduced below;

a. Under the provision of Section 6 of the *National Land Commission Act*, the NLC launched investigations into the suit properties upon receipt of a letter of complaint from one Mohamed Omar, Secretary, Mombasa Residents Associations requesting the NLC to remove or cancel the titles of the suit property for alleged reasons that the suit properties had encroached on a road reserve;

b. The NLC upon the receipt of this complaint immediately wrote to the 2nd Respondent asking it to place Restrictions/Caveats on the subject properties until the matter was fully finalized by the commission. This directive was issued on the 14th February, 2020;

c. It was not until June 2020 when the Applicant while carrying out a search in the Land Registry to regularize its registration details that it obtained a search reflecting that there existed an encumbrance in the nature of a Restriction which was placed by the 2nd Respondent under the provisions of Section 76(2)(b) of the *Land Registration Act*, No. 3 of 2012;

d. Upon further inquiry by the Applicant from the 2nd Respondent, it was established that the Restriction was placed on the suit properties pursuant to the directives issued by the NLC vide their letter dated 14th February, 2020;

e. The Applicant was and had never to date been accorded an opportunity to be heard and to produce evidence in support of its position, neither had the NLC forwarded to the Applicant any letters, documents or evidence in respect of any "launched investigations" for well over a year now;

f. The NLC Act and the *Land Registration Act* requires that there be accorded on affected party or registered proprietor of the property an opportunity to be heard before any such findings and/or recommendations can be made;

g. The Applicant had, through numerous correspondences written to the Respondents herein requesting for more information on the pending investigations into the complaint while further seeking to be involved in the investigations. The Applicant had further sought to obtain copies of any documents in respect to a complaint lodged against it with the NLC. These letters had elicited no response to date.

h. The Applicant could not and had been unable to find any evidence of the existence of a "Mombasa Residents Association", the Complainant before the NLC proceedings. The Applicant had justifiable apprehension that the same was an amorphous busy body lodging false claim to the NLC while leaving the Applicant to bear the brunt of having its properties titles improperly restricted;

i. The NLC is a body sanctioned under Section 6 of the NLC Act to investigate and look into matters of land to protect the public interest. In carrying out its Constitutional and statutory mandate, it must fairly and without any bias resist from jeopardizing the Applicant's proprietary interests under malicious complaint without due process;

j. The 2nd Respondent in acting under the instructions of the NLC had since refused, was unwilling and/or unable to remove the Restrictions over the suit properties a fact which was now extremely prejudicial to the Applicant in its intention to transact over the suit properties;

k. At no level had the Respondents accorded the Applicant an opportunity to be heard so as to determine the weight of the complaint lodged with the NLC against the evidence in support of its opposition of its opposition including a High Court Judgment delivered in HCCC No. 527 of 2001 declaring that the Applicant's suit properties were not encroaching any road reserve;

l. The NLC and the 2nd Respondent had acted illegally in directing and implementing that Restriction be placed on the suit properties without according the Applicant an opportunity to be heard;

m. Unless the orders sought were granted, the Applicant's suit properties would permanently and unjustly be encumbered founded on a decision that was unprocedural thereby prejudicing its legitimate right to expect a fair hearing and fair administrative action.

5. The application was grounded upon the matters set out in the Statutory Statement and the Verifying affidavit duly sworn and such other grounds and reasons to be adduced at the hearing hereof. It the statement the Applicant avers that:

i. This Honourable Court do grant leave to the Applicant to apply for:

a. An order of Certiorari to remove into this Honourable Court and to quash the decision of the National Land Commission (the NLC) dated 14th February, 2020 (the NLC decision) whereby the NLC resolved to:-

ii. Direct the Land Registrar, Mombasa to place Restriction/Caveats on properties Title L.R. Nos. MN/I/9892 and MN/I/9933, Mainland North, Mombasa County (the "suit properties") until the investigation is finalized;

a. An order for Certiorari to remove into this Honourable Court and to quash the Restriction effected under Section 76(2)(b) of the *Land Registration Act* by the 2nd Respondent in respect of the suit properties registered as encumbrances;

b. An order of Prohibition restraining the NLC from relying upon or acting on information received in respect of this suit properties without according the Applicant a fair hearing and/or an opportunity to be heard;

c. An Order prohibiting the 2nd Respondent from invoking, implementing or in any order way acting or relying on the provisions of Section 76 (2) (b) of the *Land Registration Act* pursuant to NLC'S instructions;

d. An order of Mandamus directing the NLC to furnish the Applicant with all information, documents and evidence of inquiring in relation to the investigations launched in respect to the suit properties as indicated in the NLC decision aforementioned;

e. An order of Mandamus directing the NLC to forthwith withdraw its instructions to the 2nd Respondent to place Restriction/Caveats on the subject properties and/or further encumber the titles of the subject property under other provision of the law;

f. An order of Mandamus directing the 2nd Respondent to forthwith remove/vacate the Restriction placed under Section 76 (2) (b) of the *Land Registration Act* effecting the decision of the NLC dated 14th February, 2020.

ii. The costs of this application be costs in the cause.

iii. The grounds are as stated in the grounds on the face of the Notice of Motion.

6. Through their Verifying Affidavit dated 1st October, 2021, the Director of the Applicant Company, Naresh Kotak averred that:

i. He was the Director of the Applicant Company herein fully conversant with the facts of this case and with full authority to swear this affidavit annexing a copy of the Authority under seal as NK-1.

ii. Applicant was the registered proprietor of the suit property as reflected in the copies of the titles annexed as "NK – 2".

iii. Sometimes in August 2019, the Applicant was desirous to sell and had identified a purchaser in respect of the suit properties. The potential purchaser engaged the law firm of Messrs. Mogaka Omwenga & Mabeya Advocates to act on their behalf and carry out due diligence on the suit properties prior to execution of the sale agreement, copies of correspondence exchanged between the said Advocates and the Advocates on record in these proceedings marked as "NK – 3".

iv. Later on in November 2019, the potential purchaser appointed the Law firm of Messrs. Y.A. Ali & Associates, Advocates to take over the conveyance transaction from the Law firm of Messrs. Mogaka Omwenga & Mabeya, Advocates. The Applicant's firm of Advocates on record, which was also acting for the Applicant in the transaction, continued further negotiations with the potential purchaser's Advocates and particularly on how the transaction would be expedited copies of correspondence between the Advocates on records annexed as "NK – 4".

v. From the correspondence referred to as annexure "NK -4" it would reflect that through the progress made in realizing the transaction was quite substantive, one of the titles to the suit property being MN/I/9892 expressed a patent error. The same reflected as "Ocean View Plaza Limited" as opposed to "Oceanview Plaza" a discrepancy which referred to another company as having owed the said property.

vi. It was this discrepancy that needed to have been properly rectified in the Lands Registry, since efforts to have the Company known as "Ocean View Plaza Limited" to declare no interest in the property was not successful.

vii. In a bid to follow up with the Lands Registry and rectify this prejudice patent error even as the Applicant was still pursuing the conclusion of the Conveyance transactions over the two suit properties, an official search record dated 18th June, 2020 was obtained. The same reflected that not only was there a patent error in respect to the proprietor's details; there was placed an encumbrance on the same being a restriction under Section 76(2)(b) of the *Land Registration Act*. He annexed and marked "NK – 5" a copy of the said search in respect of Plot No. MN/I/9892.

viii. Pursuant to receiving this information from the registry, he was informed by his advocate Mr. Nishit Maru that he sought audience with the 2nd Respondent to inquire the circumstances leading to placing a restriction on the said property.

ix. Upon the inquiries into the restrictions, it was established that NLC had in February 2020 written the Lands Registry, Mombasa directing the Restrictions/Caveats be placed in the suit properties as investigations into a complaint on the same had been launched. He annexed and marked "NK – 6" a letter from the NLC dated 14th February, 2020.

x. He instructed his Advocate on record to write to the NLC seeking among other things, details of the complaint leading to the investigations and requesting for an opportunity to be heard in the on the same. The letter dated 24th September, 2020 and received by the NLC on 5th October, 2020 did not elicit any response. He annexed and marked "NK – 7" a copy of the letter dated 24th September, 2020 addressed to the Registrar of Companies.

xi. The Applicant continued to pursue a clarification and rectification of the error in respect to the names as appeared on the title of Plot No. MN/I/9892, his advocates on record wrote a letter to the Registrar of Companies in essence demanding that either the name "Ocean View Plaza Limited" be struck out from the Companies Register or that there be directions issued to the identical company to change its company name. He annexed and marked as "NK – 8" the letter dated 12th November, 2022 addressed to the Registrar of Companies.

xii. Upon receiving no response to the letter dated 24th September, 2020 his advocates wrote two letters under separate covers both to the NLC and the 2nd Respondent seeking to know the progress of the investigations and demanding to be involved further demanding to be involved,

further demanding that failure to which the Restrictions placed on the suit properties ought to be removed and/or lifted forthwith. These letters also put the Respondents on notice of being sued in the absence of either a fair opportunity being accorded or the restriction on the suit property having been lifted. He annexed and marked the same as "NK – 9" letters dated 29th January, 2021.

xiii. The NLC's decision to direct that restrictions be placed on the suit properties was not only irregular and unprocedural but also in blatant disregard of the principles of fair administrative action as guaranteed under the Kenyan Constitution.

xiv. The NLC's power to place a Restriction was only limited to any land that was subject to a historical land injustice claim that has been admitted under Regulation 7(6)(a) pending investigation and determination of the claim. The claim received by the NLC as reflected in its letter dated 14th February, 2020 is in respect of an allegation that the suit properties encroach on a road reserve and not a historical land injustice claim.

xv. Had the NLC granted an opportunity to the Applicant to be heard in these ongoing investigations which have taken well over a year without any invitation from the NLC, the Applicant would have availed a High Court judgment in HCCC No. 527 of 2001 in which the Court held that the suit properties were not encroaching on any road reserve which the same was annexed and marked as "NK – 10".

xvi. The failure by the NLC to comply with the procedures of fair administrative hearing in accordance with the NLC's Regulations was very prejudicial as against the Applicant as it could no longer proceed with any dealings in the suit properties including finalizing the pending sale with the potential purchaser who may not be interested to proceed with the same if the relief sought for in these proceedings are not granted as prayed.

xvii. The real estate industry had been adversely affected as a result of the economic downtime experienced in the recent past due to the Corona Virus pandemic and most real estate investors are either shying away from purchase of property or pushing for very low purchase price against the property market value. If the reliefs sought for herein were not granted as prayed, there is a high likelihood that the potential purchaser would walk away and this would prejudice the Applicant.

xviii. There had been no previous proceedings in any Court between the Applicant and the Respondents herein over the same subject matter and that the cause of action relates to the Applicant named in the Application.

xix. Save for otherwise stated, the matter deponed to herein were within his own knowledge or derived from documents in his possession or from advice tendered to him by his Advocate Mr. Nishit Maru from Daly & Inamdar Advocates. In so far as the matters deponed to herein were within his own knowledge they were true and insofar as they were derived either from documents which he had read or from advice given by his said Advocates.

III. The 2nd Respondent's case

7. The Respondents through a 10 paragraphed Replying affidavit sworn by Samwuel Mwangi dated 31st January, 2022, averred that he was the duly appointed Land Registrar, Mombasa and represented the 2nd Respondent herein therefore competent to make oath and state the following that:

a. According to records in their custody both parcels of land plot no. MN/I/9892 and MN/I/9933 were registered as new grants being fresh allocation of former government land in the year 1997.

b. The two grants were assigned title numbers on 1st Registration as follows; MN/I/9892 (CR 29303) and MN/I/9933 (CR 29190) hereby annexed as SM- 1(a) and (b).

c. The registered owner therefore from 1st Registration was documented as John Cheruiyot of P.O. Box 81737 Mombasa in respect of plot no. MN/I/9892 (CR 29303) and to Ocean View Plaza Limited of P.O. Box 99394 Mombasa in respect to parcel No. MN/I/9933 (CR 29190).

d. For title register in respect of parcel MN/I/9892 (CR 29303), their records indicated that the same was transferred to Ocean View Plaza Limited by transfer dated 29th March 1997 for Kshs 1,900,000/-.

e. In a letter dated 14th February, 2020 reference no. NLC/LEGAL/DET/6/10/19 the Director Legal Affairs and enforcement National Land Commission communicated to the Land Registrar, Mombasa that the commission was undertaking investigations concerning revocation of title in respect to MN/I/9892 and MN/I/9933, a copy of which was attached and marked as SM-2.

f. Consequently, the National Land Commission requested that the Registrar do place a restriction against the subject property until the matter was fully finalized and to protect the public interest.

g. It was on the basis of the above advise that the registrar if titles registered a restriction under section 76 of the Act No. 3 of 2012 and issued the caution notice to the registered owner, a copy of the notice is hereby marked as "SM – 3".

IV. Submissions

8. On diverse dates of 3rd and 17th February, 2022 for while all parties were present in Court, they were directed to have the Suit be disposed off by way of written Submissions. Upon compliance by the Ex – Parte and the 2nd Respondent in filing their written submissions. On 5th April, 2022 the three parties herein – the Ex – parte Applicant, 1st and 2nd Respondents consented and were accorded an opportunity to highlight their written submission, a task they executed with great diligence, devotion, dedication and commitment. The Honorable Court wishes to profusely and sincerely and express its gratitude to all the three Counsels, M/s. Collette Akwana, Mr. Emanuel Makuto together with M/s. Nimwaka Kiti and Mr. Solomon Mbuthia Advocates. Subsequently, the Honorable reserved to deliver the Judgement on notice.

A. The Written Submission by the Ex Parte Applicants'

9. On 2nd February, 2022 Learned Counsel for the Ex – Applicants, through the law firm of Messrs. Daly Inamdar Advocates LLP filed their written submissions on 2nd February, 2022. M/s. Akwana Advocate submitted that upon obtaining leave on the 6th December, 2021 to file the substantive motion and served the same upon the 1st and 2nd Respondents, the Applicant filed its Notice of Motion application dated 9th December, 2021 on the 16th December, 2021. The application was served upon the 1st and the 2nd Respondents on the 21st December, 2021 and 16th December, 2021 respectively, within the twenty - one (21) days ordered by the Court.

10. She averred that the Respondents having received the substantive motion were directed to have filed their respective Replying Affidavits. In the case of the 1st Respondent, the Replying affidavit was to be filed and served on or before the 23rd January, 2022 and in the case of the 2nd Respondent, the Replying affidavit was to be filed and served on or before the 27th January, 2022. At the time of preparing these submissions, the 2nd Respondent filed and served its Replying Affidavit on the 31st January, 2022 and 1st February, 2022 respectively.

11. The application was instituted under the provisions of Sections 8 and 9 of the *Law Reform Act*, Sections 7, 9 and 11 of the *Fair Administrative Action Act* No. 4 of 2015, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 together with Order 53 Rule 3(1) of the Civil Procedure Rules, 2010. Attached to the application was a statement setting out the facts in this matter supported by a Verifying Affidavit sworn by Naresh Kotak on the 1st October, 2021.

12. The Learned Counsel opined that the facts of the suit were that sometime in August 2019, the Applicant through its proprietor approached the firm of Daly Inamdar Advocates to represent it in a transaction for the sale of its properties L.R. No. MN/I/9933 and L.R. No. MN/I/9892 (hereinafter referred to as the "subject properties". As deponed at paragraphs 4, 5 and 6 of the Verifying affidavit, the sale transaction could not have been expeditiously concluded for reasons that one of the titles suit properties (MN/I/9892) reflecting a patent error of the Applicant's name in reading "Ocean (space) View Plaza Limited" as opposed to "Oceanview Plaza Limited". It was this discrepancy that needed to have been regularized by the 2nd Respondent that led to this discovery of the issues the of this application.

13. The Learned Counsel held that in carrying out a search at the Land Registry, the record of the official search dated 18th June, 2020 reflected that not only was there an error in the names of the proprietor of the suit properties but it was also discovered that an encumbrance in the form of a restriction under Section 76 (2)(b) of the *Land Registration Act*, had been placed on the said title by the 2nd Respondent.

14. The Learned Counsel submitted that after numerous follow – ups on the circumstances that led to the restrictions, the 2nd Respondent explained to the Applicant that the 1st Respondent had issued instructions to the 2nd Respondent to place the restriction following a complaint that had been lodged with the 1st Respondent by a group known as Mombasa Residents Association. This letter from the 1st Respondent to the 2nd Respondent was dated 14th February, 2020. Upon learning of these instructions issued to the 2nd Respondent by the 1st Respondent, the Applicant in a bid to seek an opportunity to be heard and present its documentation on the real position with the 1st Respondent, made numerous visits to the Lands Registry through its Advocates on record and requested for any documentation in respect of the complaint letter and the proceedings leading to the 1st Respondent's decision.

15. Her contention was that not only did the Applicant seek for an opportunity to be heard by the 1st Respondent, it made numerous attempts to seek audience with the 2nd Respondent and present its case. The Respondents never accorded the Applicant an opportunity to be heard as a result of which it lost an opportunity to effect the sale transaction. Further the Applicant had now been indefinitely and unjustifiably restricted from handling the suit properties in a matter that would be beneficial to it during these tough economic times. The Applicant in one of its letters to the 1st Respondent dated 29th January, 2021 attached a Judgment delivered by Court in HCCC No. 572 OF 2001 "B" [2002] eKLR in which Onyancha (J) issued orders to the Attorney General through the 2nd Respondent to uplift, cancel and vacate the restriction or any encumbrance placed in the suit properties. The 2nd Respondent in its Replying Affidavit made no mention of this court judgment and particularly that the Court in 2001 determined the ownership of the suit properties in favour of the Applicant. Had the Applicant

been granted hearing prior to its decision, the Applicant would had presented this judgment to clarify any issues that may have been raised.

16. The Learned Counsel averred that as stated in paragraph (i) – (l) both inclusive of the statement, the Respondents had jointly and severally prejudiced the Applicant's proprietorship rights of the suit properties by failing to carry out their Constitutional and statutory mandates prior to placing and rejecting the vacation of the of the restriction on the suit properties, hence this application. There was no lawful and/or justifiable legal explanation offered by the Respondents herein why they did not accord the Applicant an opportunity to a fair hearing on the material issues surrounding the restriction. Secondly, there was no notice of the decision arrived at issued to the Applicant. The transparency of the Respondents in handling this matter raised and continues to raise questions around the integrity of the Respondents' decision making process.

17. The Learned Counsel argued that the role of the National Lands Commission as per the provision of Article 67 of *the Constitution* of Kenya, 2010 establishes the 1st Respondent. Under sub -Article 2 one of the functions of the 1st Respondent was to initiate investigations, on its own initiative or on complaint, into present or historical land injustices and recommend appropriate readdress as provided for under Article 67(2)(e).

18. The Learned Counsel averred that the provision of Section 6 of the *National Land Commission Act* No. 5 of 2012 makes provision for the powers of the Commission. In carrying out its constitutional mandate, the Commission shall have power to:-

> 6(2)(a) "gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;"

19. The Learned Counsel submitted that upon receiving the letter from the complainant, Mombasa Residents Forum, the 1st Respondent was statutorily mandated to have exercised its investigative function to request the Applicant to furnish it with any documents and/or information in respect to the issues raised in the complainant's letter. At the time of preparing these submissions, the Applicant had never seen a copy this letter and had never been called upon to provide any information in support of its position.

20. Her assertion was that in failing to exercise its statutory powers, the 1st Respondent violated the Applicant's right to fair administrative action by failing to accord the Applicant an opportunity to read and respond to the complainant's letter, failing to accord the Applicant an opportunity to present its position and provide documentation in support of its proprietary rights over the suit property, failing to respond to the Applicant's written requests for consideration of reviewing its decision as expressed in its letter dated 14th February, 2020 and resultant from the above denied the Applicant an opportunity to exercise its right to property hence could not proceed with the sale transaction of the said properties.

21. The Learned Counsel submitted that under the provision of Section 76(1) of the *Land Registration Act* No. 3 of 2012, provides for the procedure to be followed by the 2nd Respondent prior to effecting a restriction. This section provides as follows:-

> " 76. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served

and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge."

22. Section 76(2) proceeds to expressly provide that:-

(2) A restriction may be expressed to endure—

(a) for a particular period;

(b) until the occurrence of a particular event; or

(c) until the making a further order is made.

23. The Learned Counsel contended that a reading of Section 76(1) of the *Land Registration Act* No. 3 of 2012 was crystal that the 2nd Respondent, in exercising its power to register a restriction must firstly, direct inquiries to be made into an application for restriction, secondly, ensure that notices into such inquiries are served and thirdly accord a hearing to such persons as it may consider fit and particularly such persons likely to be affected by the affected by the decision to register a restriction.

24. The Learned Counsel submitted that the 2nd Respondent did not follow any of the three-step process prior to effecting the restriction. In failing to comply with these steps prior to the registration, the 2nd Respondent violated the Applicant's right to fair administration. Not only did the 2nd Respondent failed to comply with the provisions of Section 76(1) of the *Land Registration Act* No. 3 of 2012, the 2nd Respondent failed to remedy this breach as invited to do so by the Applicant pursuant to Section 78 of the Act in removing the restriction, hence the subject application.

25. She relied on the provision of Section 4 of the *Fair Administrative Action Act* No. 4 of 2015 which provides as follows:-

"4 (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) .....

(f) .....

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action."

26. The Learned Counsel also relied on the provision of Section 6 of the Act further provides as follows:-

> " 6 (1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.
>
> (2) The information referred to in subsection (1), may include–
>
> (a) the reasons for which the action was taken; and
>
> (b) any relevant documents relating to the matter.
>
> (3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.
>
> (4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason."

27. It was the considered view of the Learned Counsel that not only did the Respondents failed to comply with the express provisions of their governing statutes but also to comply with the provisions of the *Fair Administrative Action Act*, hence prejudicing the Applicant's right to property. The Respondents had to date failed to furnish the Applicant with a copy of the complaint subsequent to which they invited this Honourable Court to make the finding that there were no good reasons to arrive at their respective decisions.

28. The Learned Counsel submitted that the Applicant sought for the orders as apparent on the face of the application. She asserted that in respect to the Certiorari orders, the Applicant prayed for this Honorable Court to quash the decision of the 1st Respondent where vide its letter dated 14th February, 2020 it resolved to direct the 2nd Respondent to place a restriction on the suit properties. The Applicant also prayed that this Honorable Court do quash the 2nd Respondent's decision to effect a restriction under Section 76 (2) (b) of the *Land Registration Act* in respect of the suit properties.

29. To buttress its point, the Counsel cited the case of "Republic – Versus - National Land Commission and another Ex parte: Farmers Choice Limited [2020] eKLR, the Court granted the Applicant the Certiorari orders prayed for, holding that it had not been accorded a fair administrative action. In the Farmer's Choice, the 1st Respondent made a decision to revoke the Applicant's title deeds without granting the Applicant an opportunity to be heard and make representations and information, materials and evidence that was relied on in making the decision.

30. The Learned Counsel further relied on the case of:- "Municipal Council of Mombasa – Versus - Republic and Umoja Consultants [2002] eKLR, the Court of Appeal stated as follows:-

> " 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?"

31. She also made reference to the case of: Pastoli – Versus - Kabele District Local Government Council and Others (2008) 2 EA 300, where the Court stated as follows:-

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

32. Additionally, the Counsel cited the case of: "Republic – Versus - Secretary of Firearms Licensing Board and 2 Others EX Parte: Senator Johnstone Muthama [2018] eKLR, the Court held as follows:

> "I find that as the 1st and 2nd Respondents have been found to have acted ultra vires the *Firearms Act*, unprocedurally and unfairly, the Applicant is entitled to the order sought of certiorari to quash the impugned decision in the 1st Respondent's letter dated 30th January 2018."

33. Her submissions were that in respect to the prohibition orders, the Applicant averred that the 1st Respondent was to be prohibited from replying upon or acting on information received (as relates the suit properties) without according the Applicant a fair hearing and/ or opportunity to be heard. The Applicant also sought for a prohibitory orders against the 2nd Respondent from implementing the provisions of Section 76(2)(b) of *Land Registration Act* pursuant to NLC's instructions, if arrived at without procedural fairness.

34. On this point, the Counsel relied on the case of Kenya National Examination Council Versus - Republic Ex Parte: Geoffrey Gathenji Njoroge and 9 Others [1997] eKLR, the Court of Appeal in stating when the grounds of prohibition may issue stated as hereunder:-

> "What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice."

35. She referred Court to the case of "Esther Victoria Wanjiru Mahoro – Versus - Mary Wambui Githinji and 3 Others [2021] eKLR, the Court having found that the Respondent acted unfairly and in excess of jurisdiction held that:-

> " Any orders that were made ought to be quashed and the proceedings struck out. Further the 4th Respondent is hereby prohibited from proceeding with the matter."

36. She further referred Court to the now well known case of: "Farmers Choice Limited case (supra), whereby the Court having found that the NLC acted unfairly and unprocedurally issued the prohibitory orders sought for by the Applicant. The Applicant also prayed for an order of Mandamus directing the 1st Respondent to furnish it with all information, documents and evidence of inquiry in relation to the investigations launched in respect to the suit properties as indicated in the 1st Respondent's decision. The Applicant also sought for an order of Mandamus directing the 1st Respondent to forthwith withdraw its instructions to the 2nd Respondent to place restriction on the subject properties and/or further encumber the titles of the subject property. It further sought for order of Mandamus directing the 2nd Respondent to forthwith remove/vacate the restriction placed under Section 76(2)(b) of the *Land Registration Act* effecting the decision of the NLC dated 14th February, 2020.

37. In support of her case, the Counsel referred to the decision in "Republic – Versus - Kenya National Examination Council Ex-Parte: Gathenji and 9 Others [1997] eKLR where it was held that Mandamus could issue against a person, corporation or inferior tribunal as follows:

> " The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 FROm Paragraph 89. That learned treatise says:- "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.
>
> 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."

38. The Learned Counsel submitted that Mandamus was an equitable remedy that served to compel a public authority to perform its public legal duty and it was a remedy that controlled procedural delays. The first for Mandamus was set out in the case of: "Apotex Inc – Versus - Canada (Attorney General) 1993 Can. LII 3004 [F.C.A] and Dragon vs Canada (Minister of Citizenship and Immigration [2003] FCT 211 (Ca. LII) as relied on in the case of Republic vs National Employment and 3 Others Ex - Parte Middle Ease Consultancy Services Ltd [2018] eKLR as follows:

    (i) There must be a public legal duty to act;

    (ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

39. According to the Counsel, the Applicant having satisfied the above seven pre-requisites in seeking for the Mandamus orders sought for, the same ought to be granted. In conclusion the Learned Counsel opined that the Applicant had demonstrated that the Respondents never acted procedurally in taking the administrative action of issuing and effecting the registration of the restriction on the suit properties. Such glaring irregularity could not be enabled by this Honourable Court to stand. It is in the interest of justice, *the Constitution* and the *Fair Administrative Action Act* that the substantive Notice of Motion Application dated 9th December, 2021 by the Ex Parte Applicant be allowed as prayed with costs to the Applicant.

B. The Oral Submissions by the 1st Respondent.

40. On 5th April, 2022, the Learned Counsel for the 1st Respondent submitted orally by to wit that the foundation of the dispute herein emanated from a complaint lodge by one Mr. Brian Abdalla of Mombasa Residents Forum. They claimed that the title deeds held by the Ex Parte Applicant were fraudulently acquired and were on a road reserve. They urged the 1st Respondent to undertake investigation.

41. According to the Learned Counsel, based on the said complaint and the Legal mandate that the 1st Respondent has as founded from the provision of Article 67 (2) (e) of *the Constitution* of Kenya, 2010 and Section 5 of the *National Land Commission Act* they undertook the investigation process in earnest. As a starting point, on 14th February, 2020 they wrote a letter to the Land Registrar, Mombasa to place and/or register a restrictions/Caveat onto the suit properties pursuant to the provisions of Section 76 (1) (2) & (3) of the *Land Registration Act*, No. 3 of 2012 awaiting the finalization of the investigation thereof. The Land Registrar has the legal mandate to register a Restriction/Caveat.

42. Furthermore, the Learned Counsel averred that the action by the Applicant to come to court was premature on two fronts. Firstly, the Applicant failed to exhaust other available mechanism to have the Restriction/Caveat lifted and/or removed as provided for under Section 78 of the Act. The procedure for the removal of the restriction is such that the Registrar upon receiving an application or its own motion and after giving the affected persons notice and opportunity of being heard, order the removal or variation of a restriction. Upon the application of a proprietor affected by a restriction and upon notice to the Registrar, the Court may order for the restriction to be removed, varied or other as it

may deem fit to do. The Learned Counsel argued that this internal mechanism or procedure was never exhausted at all. He sought refugee from the provision of Section 9 of the Fair Administrative of Action Act where Courts will never entertain any Judicial Review case unless all the internal mechanisms were exhausted. Secondly, the Applicant had to await the outcome of the investigation to have been able to come to court and challenge the out come investigation report being the right decision for the Judicial review process. He held that they never raised the biasness, and unreasonability principles required for Judicial review to be entertained.

43. In conclusion, the Counsel held that based on the principle of legitimate expectation bestowed by the established Constitutional bodies to be allowed by Court to fully exercise their legal mandates without any interference by Court. He urged that the suit be dismissed.

C. The written Submission for the 2nd Respondent

44. On 24th February, 2022 the Learned Counsel for the 2nd Respondent, the State Counsel office under the Honorable Attorney General, filed their written submissions dated even date. Mr. E. Makuto, the State Counsel commenced his submission by stating that the Applicant in this application filed a suit seeking an order of Certiorari to remove into this Court and to quash the decision of the 1st Respondent dated 14th February, 2020 where the 1st Respondent sought to resolve to direct the Land Registrar, Mombasa to place a restriction on properties title L.R. M/N/I/9892 and MN/I/9933, amongst other orders as enumerated in the application. The Learned Counsel in his submission relied heavily on the averments of Replying Affidavit dated 31st January, 2022 and filed on the same date and

45. The Learned counsel submitted that from the Replying Affidavit of the 2nd Respondent, it was clear that an application was made by the 1st Respondent and this had been informed through the letter dated 14th February, 2020 (annexure "SM -2") and consequently requested that the 2nd Respondent place a restriction until the matter was fully finalized and to protect public interest. It was his contention that the Applicant was informed of the placement of the restriction on the same dated 14th February, 2020 (annexure "SM – 3"). The provision of Section 14(1) of the National Land Commission grants the 1st Respondent powers to review all grants or disposition of public land to establish their property or legality. Further Section 14 of the *National Land Commission Act* gives the 1st Respondent powers to deal with review of public land but not privately-owned freehold titles. It was not in doubt that the suit land was a leasehold allocated from former government land which was within the purview of the Land Commission as the same was public land before it was allotted.

46. The Learned Counsel referred to the case of "National Land Commission & Another Ex parte: Muktar Saman Olow [2015] eKLR, where the court held that:

> "Under Section 14 of the *National Land Commission Act*, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of *the Constitution* and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of *the Constitution* to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent."

47. He concluded the submission by holding that the 2nd Respondent as deponed in the Replying Affidavit acted on instructions given by the 2nd Respondent.

III. The Issues for Determination.

48. I have carefully considered the filed pleadings with regard to the Judicial Review substantive Notice of Motion application dated 9th December, 2021 by the Ex – Parte Applicant, the Replies by the 1st and 2nd Respondents, the written and oral submissions of the parties, the myriad authorities cited by the parties, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statures thereof. For the Honorable Court to arrive at an informed, Just, reasonable, fair and equitable decision, it has condensed the subject matter into the following five (5) salient issues for its determination. These are:-

    a. What is the nature, scope and meaning of Judicial Review and the prerogative writs?

    b. Whether through the Notice of Motion application date 9th December, 2021 the Ex parte Applicant has established any grounds to warrant the Court to grant the Judicial Review prerogative writs/orders sought?

    c. Whether the 1st and 2nd Respondents owe a public duty to the Applicants?

    d. Whether the parties are entitled to the relief sought.

    e. Who will bear the Costs of the Notice of Motion application dated 9th December, 2021.

IV. Analysis & Determination

Issue No. a). What is the nature, scope and meaning of Judicial Review and the prerogative writs?

49. In the Kenyan legal parlance and jurisprudence, Judicial review is founded under the provisions of Order 53 Rules 1 to 7 of the Civil Procedures Rules 2010 where the prerogative orders are issued. Primarily, the provisions of Sections 8 and 9 of the *Law Reform Act* Cap 26 of the Laws of Kenya where the Provisions of Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules 2010 was borrowed from the case of Farmers Bus Services – Versus - Transport Licensing Appeals Tribunal (1975) E.A. 523. And upon the promulgation of *the Constitution* of Kenya in 2010 Article 47 of *the Constitution* of Kenya introduced the provisions of Sections 7, 9 and 11 of the Fair Administration of Action, Act of 2012 which is the statutory framework governing judicial review and the Administrative law in Kenya currently. Judicial Review is about the decision-making process, not the decision itself. The role of the Court in Judicial Review is supervisory. Judicial Review is the review by a Judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the Courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. In considering the said issues, it is imperative at the outset to delineate the parameters of this Court's powers in judicial review.

50. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, without any biasness, capriciousness, fairness, not acted ultra vires, bad faith, favour and the decision

is within the confines of the law, a Court will not interfere. As was held in the case of Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR:-

> "Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines 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 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. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."

The broad grounds for the exercise of judicial review jurisdiction were stated in the case of Pastoli – Versus - Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304 thus:

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).
>
> Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....
>
> Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

51. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of Municipal Council of Mombasa – Versus - Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

> " 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 decider; acting as an appeal court over the decider 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." Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-
>
> > "a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or
>
> **b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it."**

52. In an application for Judicial review the Applicant must be a person with a sufficient interest – (Locus Standi) and who commences proceedings promptly. To support this legal concept on judicial review, I have made indepth references to several literature review and court decisions – "Pharmaceutical manufacturers Association of South Africa in re- exparte president of Republic of South Africa - 2000 S.A. 674 CC at 33 Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic –Versus- Stanley Mambo Amuti (2018) eKLR."; the Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996.

The Court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is not necessary, or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative order it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized.

An administrative or quasi-judicial decision can only be challenged for its illegality, irrationality and procedural impropriety. An administrative decision is flawed if it is illegal. A decision is illegal if it: -

(a) contravenes or exceeds the terms of the power which authorizes the making of the decision;

(b) pursues an objective other than that for which the power to make the decision was conferred;

(c) is not authorized by any power;

(d) contravenes or fails to implement a public duty.

As stated above, this court has powers under Sections 8 and 9 of the *Law Reform Act*, Cap. 26 of the Laws of Kenya to issue prerogative writ of Certiorari, which brings into this court to

quash a decision which is ultra vires. A writ of prohibition intended to forbid or prevent an action by a public officer from taking place is granted alongside Certiorari, since it's a similar remedy but more prospective than retrospective. While certiorari looks at the past, prohibition looks at the future. The provision of Section 8 of the *Law Reform Act*, also provides for a writ of prohibition which primarily prohibits a tribunals, judicial bodies or subordinate courts from doing or taking an action in excess of its jurisdiction.

In the book of "Administrative Law", Sir. W. Wade and C. Forsyth, Page 605 noted that:-

> "I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.
>
> Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

The legal efficacy and scope of the statutory order of Mandamus, Prohibition and Certiorari are remedies granted by High Court to persons inferred by the exercise of administrative of judicial powers. These prerogative orders are only available against public bodies. Their origins lie in the expansion of common law in England and the jurisdiction of the Court of King Bench to acquire Superintendence over the observance of law by officials. These orders are predicated upon the fact that without law, society cannot function with fundamental values such as social order, social justice and personal freedom. Today public authorities determine an overwhelming extent how much of these values are enjoyed. Their decision affect vast numbers of people collectively and individually "Ipso Facto" unlawfully decision, must be available to Judicial Scrutiny hence judicial Review. The social need for how and the protection of legality is violated when a public official exceeds his/her authority or does not use his/her power in the prescribed manner.

The writ of Certiorari.

The prerogative writs of "Certiorari" derives from the Latin word "Certiorari" which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made. Under the provision of Order 53 Rule 7 of Civil Procedure Rules, which provides:-

1. In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before

the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

2. Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court.

This provision, requires that any party seeking an order of Certiorari must annex to his application a copy of the order or decision he seeks to challenge or if does not, he must give to court a satisfactory reason for that failure. Order 53 Rule 7 is a precondition to seeking an order of Certiorari and failure to comply renders the entire application incompetent since the court is not in a position to determine whether there in fact existed an order capable of being quashed. The rationale behind it is to enable court satisfy itself of the existence of the orders or decision their contents and whether the application was filed in time.

The Writ of Mandamus

The order of "Mandamus" is derived from the Latin word "Mandare" meaning to command. It is issued in cases where there is a duty of a public or a quasi-public nature or a duty imposed by statute, it compels the fulfillment of a duty where there is a lethargy on the part of a body or officer concerned.

An order for Mandamus is normally issued when an officer or an authority by compulsion of statute is required to perform a duty and that duty, despite demand in writing, has not been performed. The effect of grant of an order of Mandamus was considered in extenso in in "Shah – Versus - Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543" where Goudie, J expressed himself, inter alia, as follows:

> " Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the

Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty... Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the *Government Proceedings Act* shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government....Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the *Government Proceedings Act*. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order.

The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as persona designata, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by mandamus on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which mandamus will not lie for this reason alone are comparatively few...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under Section 20 (3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as persona designate to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or

indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of mandamus will issue as prayed with costs."

1. In the case of High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the case of "Republic – Versus - The Attorney General & Another ex parte James Alfred Koroso, this Court expressed itself as hereunder:

> " ...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of *the Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with *the Constitution* in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit...The institution of judicial review proceedings in the nature of mandamus cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore

a public officer declines to perform the duty after the issuance of an order of mandamus, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

The circumstances under which judicial review order of Mandamus are issued were set out by the Court of Appeal in the case of "Republic – Versus - Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

The Writ of Prohibition

The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.

In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.

Issue No. b). Whether through the Notice of Motion application date 9th December, 2021 the Ex parte Applicant has established any grounds to warrant the Court to grant the Judicial Review prerogative writs/orders sought?

52. Under this sub title, the Court will now proceed to implement and apply the above legal principles to this instant case. Fundamentally, the Ex-Parte Applicant has sought the writ prerogative Orders of

Mandamus, Certiorari and Prohibition. The main decision being challenged here by the Ex – Parte Applicant is the letter dated 14th October, 2020, reference numbers NLC/LEGAL/DET/6/10/19 by the Director Legal Affairs and Enforcement of the National Land Commission, the 1st Respondent to Land Registrar, Mombasa, the 2nd Respondent herein to place and/or register restrictions/Caveat onto the suit properties until investigations was finalised. Indeed, based on the strength of the said letter, the 2nd Respondent proceed to register the said restriction under the provisions of Sections 76 and 77 of the *Land Registration Act*, No. 3 of 2012. It is imperative to note that it under these provision of the law that the 1st and 2nd Respondents heavily anchored their justification while making the decision carried out from the letter of 14th February, 2020 to cause the registration of the restriction/Caveat against the suit properties.

53. Thus, it is critical for this Court before embarking on the issues under this sub heading to discern the provisions of Sections 76 and 77 of the *Land Registration Act*, No. 3 of 2012. These provisions provide that:

> 76. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
>
> (2) A restriction may be expressed to endure—
>
> (a) for a particular period;
>
> (b) until the occurrence of a particular event; or
>
> (c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
>
> (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.
>
> "77. (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. (2) An instrument that is inconsistent with it shall not be registered while the restriction is still registered except by order of the court or of the Registrar."

ISSUE b). Whether the 1st and 2nd Respondents owe a public duty to the Applicants?

54. Under this Sub title, having extrapolated the legal principles with regard to Judicial review, the next pertinent issue is whether the 1st and 2nd Respondents owed a public duty to the Ex – parte Applicant herein. The answer is in affirmative. First, it not disputed that notwithstanding the minor error or discrepancies on the company names, Ocean View Plaza Limited" and "Oceanview Plaza" , the suit properties are legally registered in the names of the Applicant. Evidently, upon receiving this letter, the 2nd Respondent ought to have granted the Ex – parte Applicant an opportunity to be heard through a properly structured hearing of all parties before reaching the decision to register the restrictions/ Caveats against the suit properties by issuing them a notice to that effect pursuant to the provision of Section 76 (2) (b) of the *Land Registration Act*, No. 3 of 2012. From the averments founded from the Replying Affidavit sworn by the Land Registrar, they insist that they issued a notice marked as "SM –

3" but which was addressed to P. O Box 99394 Mombasa to the director of Ocean View Plaza Limited. The Ex – Parte Applicant are known as "Oceanview Plaza Limited". Its instructive to note that the way its registered is "Ocean (without space) View Plaza" They emphatically held from the correspondence referred to as "NK – 4" reflects that the property known as MN/I/9892 expressed a patent error as the same reflected as "Ocean View Plaza Limited" (With space in between) as opposed to "Oceanview Plaza Limited" a discrepancy which referred to another company as having owned the said property. It was this discrepancy that needed to have been properly rectified in the Lands Registry, since efforts to have the Company known as "Ocean View Plaza Limited" to declare no interest in the property was not successful. In a bid to follow up with the Lands Registry and rectify this prejudice patent error even as the Applicant was still pursuing the conclusion of the Conveyance transactions over the two suit properties, an official search record dated 18th June, 2020 was obtained. The same reflected that not only was there a patent error in respect to the proprietor's details; there was placed an encumbrance on the same being a restriction under Section 76(2)(b) of the *Land Registration Act*. He annexed and marked "NK – 5" a copy of the said search in respect of Plot No. MN/I/9892.

55. It is stated that the Applicant instructed his Advocate on record to write to the NLC seeking among other things, details of the complaint leading to the investigations and requesting for an opportunity to be heard in the on the same. The letter dated 24th September, 2020 and received by the NLC on 5th October, 2020 did not elicit any response. He also annexed and marked "NK – 7" a copy of the letter dated 24th September, 2020 addressed to the Registrar of Companies. The Applicant continued to pursue a clarification and rectification of the error in respect to the names as appeared on the title of Plot No. MN/I/9892, his advocates on record wrote a letter to the Registrar of Companies in essence demanding that either the name "Ocean View Plaza Limited" be struck out from the Companies Register or that there be directions issued to the identical company to change its company name. He annexed and marked as "NK – 8" the letter dated 12th November, 2022 addressed to the Registrar of Companies. Hence, based on this detailed background information which was never controverted by the 1st and 2nd Respondents, it is my own opinion that the 1st and 2nd Respondents acted prejudicially against the Ex Parte Applicant. Secondly, the Ex Parte Applicant held that despite of them never being notified of the registration of the restriction/Caveat, the Ex – parte Applicant had never to date been informed through letters, documents or evidence of any allegations or wrongs or investigation being undertaken by the 1st Respondent pertaining to the said suit properties. In my own view, while the 1st Respondent all along proceeded to be conducting an investigation over the suit properties and the 2nd Respondent registering the restriction exceeded their statutory powers for their actions of omission and commission over the suit properties belonging to the ex - parte applicant without involving the owners of the property. Certainly, the decision by the Respondents was illegal and ultra vires contrary to the provisions of the law, Section 76 (2) (b) of the *Land Registration Act*, No. 3 of 2012. Thirdly, as already stated out, this decision that was made by the 1st and 2nd Respondents ought to be quashed as acted without jurisdiction or in excess of its powers or if the "decision" is so perverse or unreasonable that it would be against the sense of justice to allow it to stand. In saying so, the Court holds that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of the discretion by the 1st and 2nd in the following situations:

(1) where there is an abuse of discretion;

(2) where the decision-maker exercises discretion for an improper purpose;

(3) where the decision-maker is in breach of the duty to act fairly;

(4) where the decision-maker has failed to exercise statutory discretion reasonably;

(5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;

(6) where the decision-maker fetters the discretion given;

(7) where the decision-maker fails to exercise discretion;

(8) where the decision-maker is irrational and unreasonable. See the case of Republic – Versus - Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.

Issue No. c). Whether the parties are entitled to the relief Sought

56. Under this sub heading, the Court has already caused elaborate analysis on the matters at hand. It is well spelt out the legal roles and responsibilities of the public officers in as far as the making the process of making and executing the decision by public officers to register a Restriction and caveat is concerned. In the instant case, the Applicants are the legal and absolute registered owners to the suit properties as per the Certificate of title deeds annexed and marked as "NK – 2" of their bundles. This position has not been challenged at all by any of the Respondents or any one else. The Applicant's position is that the 2nd Respondent exceeded their powers when they put a restriction/Caveat on the suit properties without informing the Applicant and making inquiries and due diligence. The Honorable Court underscores that the 2nd Respondent was however obliged to comply with the provision of Sections 76 (1) and 77 of the said Act and direct such inquiries to be made and notices to be served and hear such persons as the Registrar considered fit. One of such persons to be heard ought to have been the registered proprietor of the land upon which a restriction was sought to be registered. Even if such inquiries were not made before registration of the restriction, the 2nd Respondent was required by the provision of Section 77(1) thereof to give notice, in writing, of the restriction to the proprietor affected by the restriction, in this case the Ex parte Applicants. The applicant contended this was never done and there is no evidence to the contrary.

57. This position was confirmed in case of "Matoya – Versus - Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140 where it was held that:

> " A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented."

58. In my view, in exercising his/her discretion on whom to hear the Registrar must consider the provisions of the relevant law and *the Constitution* and with respect to *the Constitution* of Kenya 2010, under the provision of Article 47 thereof provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

59. As discussed in this ruling procedural fairness encompasses that an opportunity of a hearing be afforded to the persons who are likely to be affected by the administrative decision. In my view one of the persons who ought to be given an opportunity of being heard before a restriction is registered proprietor of the land in question in this instant case the Ex-Parte Applicant is the registered owner of the suit properties.

60. In this instant case, the 1st and 2nd Respondents have not explained in the response the circumstances under which the restriction was registered. From their pleadings, the 1st Respondent held that their decision was based on their legal mandate founded under the provision of Article 67 (e) of *the Constitution* of Kenya, 2010 to wit:-

61. "to initiate investigation, on its own initiative or on a complaint into present or historical land injustices, and recommend appropriate redress" . Be that as it may, it is the legal onus of the 1st and 2nd Respondents to shed light on whether the their existed any complaint or wrong over the suit property based on present or historical injustice, the nature, scope and meaning of the said allegation, involvement of all the parties concerned based on the principles of natural justice and the provisions of Section 76(1) of the Act were complied with. Evidently, it is stated that the 1st Respondent received a letter from the complainant, an entity known as Mombasa Residents Forum to that effect. The Applicant holds that upon receipt of that letter the 1st Respondent were under the statutory mandate to have notified and furnished the Applicant with all the information and/or documents in respect to the issues raised by the Complainants before the restriction was registered. The Applicant strongly state that to date, these information nor communication has never been received from the 1st Respondent. Therefore, in so doing the 1st Respondent violated the Applicant's right to fair administrative action by failing to accord them an opportunity to read and respond to Complainant's letter, and to present their position by providing documentation in support of their proprietary rights and interest over the suit properties. They even failed to respond to the Applicant's requests for consideration of reviewing its decision as expressed in its letter dated 14th February, 2020 and the resultant from this denial their right to property in as far as the sale of it was concerned. The provision of Article 47 of *the Constitution* of Kenya, 2010 must be complied with before a person is deprived of his or her interest in any property of any description or his interest therein is restricted. That Article requires that the process be procedurally fair and one of the ingredients of a fair procedure is the right to be afforded an opportunity of being heard before a decision is made.

In other words it was asserting a negative and as was held by Seaton, JSC in the Uganda case of "J K Patel – Versus - Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

> " The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises."

62. Further, under the provision of Article 40 (3) of *the Constitution* bars the State from depriving a person of property of any description, or of any interest in, or right over, property of any description unless certain conditions including the requirement that the deprivation be carried out in accordance with *the Constitution*, are met. In the instant case, in the absence of any evidence that the 1st and 2nd Respondents complied with the provisions of Section 76 (1)of the *Land Registration Act*, this Court has no option but to find that from the available evidence, it would seem that the said restriction was improperly registered hence the decision may well have been tainted with procedural impropriety. See Ezekiel Misango Mutisya – Versus - National Lands Commission & 6 Others and In the case of:- "Matter of An Application by Reuben Wamburu Karoba and Nairobi Miscellaneous Civil Application No. 31 of 2015.

63. With regard to the argument advanced by the 1st Respondents to the effect that the Applicant moved this Court prematurely before exhausting all the available internal mechanisms available to resolve the matter and citing the provision of Section 78 of *Land registration Act*, it is important to fully appreciate the parameters of that Section. Section 78 of the aforesaid Act provides:

> "(1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.
>
> (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs."

64. To begin with, the assumption is that the Applicant had been notified of any investigations being carried out by the 1st Respondent and also the existence of any restriction or caveat by the 2nd Respondent. It is evident from correspondences that the Applicant made all efforts to pursue the matter with the 1st and 2nd Respondents but without much success. They became desperate and were at the vague of wanting to dispose off the suit properties to a third party. The 1st and the 2nd Respondents completely failed to communicate to the Applicant even in form of issuing them a notice on the restriction. As was held in the case of: Republic – Versus - Kenya National Examinations Council ex parte Gathenji & Others (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. In my view the 2nd Respondent is under an obligation to consider an application to register the restrictions/caveat in question by issuing notices to all the parties concerned – the Complainant – Mombasa Residents Forum, the NLC and the Applicant.

65. Hence, the Respondents are obliged under Article 47(2) to furnish the applicants with written reasons after considering the application where the decision is likely to adversely affect the applicant and where no reasons are given and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. Similarly, where the authority fails to exercise discretion and does not furnish reasons for the failure to do so or gives reasons which are unsatisfactory, the Court would be entitled to conclude that there were no reasons to failure to act in which event it would be perfectly in order to compel the authority to act in a particular manner. Similarly, as was held in the case of Municipal Council of Mombasa – Versus - Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 the Court would be entitled to interfere if the decision maker fails to consider relevant matters or considers irrelevant matters. Upto this moment, two issues stand out clearly and which require this Courts attention – the actual position of the Complainant. Do they really exist at all or its an imaginary entity? They do not seem to feature any where at all in these processes. Secondly, what are the actual parameters of the investigation to be undertaken by the 1st Respondent in terms of time frame? In my view, the registration of the restriction or Caveat or not does not in any way deprive the 1st Respondent from exercising its Constitutional legal mandate or legitimate expectation as a constitutional body under Article 67 (2) (e) of conducting an investigation onto the suit properties. By and large, the Court notes that there were adequate breaches on the procedure perpetrated by the public officers and which were marred with ultra vires, biasness, unreasonability, natural justice, equity and conscience and bad faith for failure to disclose material facts, information and documents pertaining to the said complaint. For

these reasons, the Court finds that the Ex – Parte Applicant is entitled to all the reliefs sought from the filed suit.

Issue No. e). Who will bear the Costs of the Notice of Motion Application dated 9th December, 2021?

66. It is trite law that the issue of Costs is under the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of a legal action, process or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the Civil procedure Rules, 2010 hold that Costs follow the events (See the Supreme Court case of:- "Jasbir Rai Singh Rai – Versus - Tarchalon Singh (2014) eKLR and Mary Wambui Munene – Versus – Ihururu Dairy Co operatives Societies Limited (2014) eKLR). By events, it means the results of the legal action, process or proceedings by parties thereof.

67. In the instant case, the Ex parte Applicant has successfully established their case against the decision made out by the 1st and 2nd Respondent as claimed and prayed from the Notice of Motion application dated 9th December, 2021. Thus, they are entitled to costs of the suit.

V. Conclusion & Disposition

68. In the long run, having caused an idepth and detailed analysis of the framed issues, the Honorable Court finds that the Notice of Motion application dated 9th December, 2021 meritorious and in their favour of the Ex – parte Applicant against the 1st and 2nd Respondents jointly and severally with costs hereof. For avoidance of doubt, the Honorable Court do order as follows: -

    a. That the Notice of Motion application dated 9th December, 2021 be and is hereby found to have merit and hence it is allowed with costs.

    b. That an order of Certiorari is hereby granted to remove into this Honourable Court and to quash the decision of the National Land Commission, the 1st Respondent herein vide its letter reference numbers NLC/LEGAL/DET/6/10/19 by the Director Legal Affairs & Enforcement of the national land Commission dated 14th February, 2020 resolving to direct the Land Registrar, Mombasa, the 2nd Respondent herein to place Restriction/Caveats on properties known as Land Reference Numbers Nos. MN/I/9892 and MN/I/9933, Mainland North, Mombasa County (the "suit properties") until the investigation is finalized.

    c. That an order for Certiorari be and is hereby issued to remove into this Honourable Court and to quash the Restriction effected under Section 76(2)(b) of the *Land Registration Act* by the 2nd Respondent in respect of the suit properties registered as encumbrances;

    d. That an order of Prohibition be and is hereby issued restraining the 1st Respondent from relying upon or acting on information received in respect of this suit properties without according the Applicant a fair hearing and/or an opportunity to be heard.

    e. That an Order of Prohibition be and is hereby issued against the 2nd Respondent from invoking, implementing or in any order way acting or relying on the provisions of Section 76 (2)(b) and 77 (1) of the *Land Registration Act*, No. 3 of 2012 pursuant to instructions of the 1st Respondent;

    f. That an order of Mandamus be and is hereby issued directing the 1st Respondent to furnish the Applicant with all relevant and/or appropriate information, documents and evidence of inquiring in relation to the said Complaint lodged by the Complainants – Mombasa Residents Association/Forum and the ongoing investigations launched in respect to the suit properties as indicated in the 1st Respondent decision's aforementioned pursuant to the provisions of

Articles 35 (1) & 67 (2) (e) of *the Constitution* of Kenya, 2010 and Section 5 of the National Land Commission within the next fourty five (45) days from the date of delivery of this Judgement hereof.

g. That an order of Mandamus be and is hereby issued directing the 1st Respondent within the next fourteen (14) days from date of the delivery of this Judgement withdraw its instructions to the 2nd Respondent to place Restriction/Caveats on the subject properties and/or further encumber the titles of the subject property under other provision of the law;

h. That an order of Mandamus be and is hereby issued directing the 2nd Respondent within the next thirty (30) days from the date of the delivery of this Judgement remove/vacate the Restriction and/or Caveat placed and/or registered against all the suit properties under the provisions of Section 76 (2)(b) of the *Land Registration Act*, No. 3 of 2012 effecting the decision of the 1st Respondent dated 14th February, 2020.

i. That the Costs of this application shall be awarded paid to the Ex – Parte Applicant to be borne by the 1st & 2nd Respondents.

It is ordered accordingly.

JUDGEMENT DELIVERED THROUGH THE MOCRO SOFT TEAMS VIRTUAL MEANS , SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF MARCH 2023

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT AT

MOMBASA

In the presence of:

a. M/s. Yumna Hassan, the Court Assistant.

b. M/s. Oruta Advocate holding brief for M/s. Akwana Advocate for the Ex – Parte Applicant.

c. No appearance for the 1st & 2nd Respondents.