REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

JUDICIAL REVIEW APPLICATION NO. 7 OF 2017

IN THE MATTER OF

AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION

AND MANDAMUS PURSUANT TO

ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF

THE GOVERNMENT LANDS ACT CAP 280 OF

THE LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF

THE REGISTRATION OF TITLES ACT CAP 281 OF

THE LAWS OF KENYA (REPEALED)

AND IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

THE SURVEY ACT CAP 299 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF

THE REGISTERED LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF

THE WATER ACT NO. 2 OF 2002

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

MINISTRY OF LANDS, HOUSING AND

URBAN DEVELOPMENT.....1ST RESPONDENT

SETTLEMENT FUND TRUSTEES.....2ND REPONDNENT

DIRECTOR OF SURVEY.....3RD RESPONDENT

DIRECTOR OF LAND AND SETTLEMENT.....4TH RESPONDENT

NATIONAL LAND COMMISSION .....5TH RESPONDENT

AND

JEREMIAH OTIENO OKENYE.....INTERESTED PARTY

EX-PARTE APPLICANT.....OSORO KENNEDY OMWOYO

JUDGMENT

INTRODUCTION

1. The Ex-parte Applicant filed a Notice of Motion dated 29th December 2017 seeking the following orders:

i. An order of Certiorari to remove into the High Court and quash the decision of the 1st, 2nd, 3rd and 4th Respondents to allocate all that public parcel of land known as Gesima Settlement Scheme No. 812, and 813 to the Interested Party.

ii. An order of Prohibition be issued restraining the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, their employees, servants, and/or agents or any other person(s) claiming through or under them from allocating, transferring, selling, disposing, encumbering or in any other way whatsoever and howsoever dealing with all that parcel of land known as Gesima Settlement Scheme No. 812 and 813 in furtherance to the decision to allocate the said Land No. Gesima Settlement Scheme No. 812 and 813 to the Interested Party.

iii. An order of Mandamus be issued to compel the 1st, 2nd, 3rd, 4th and 5th Respondents to cancel the allocation, sell, (sic) auction, and alienation of public parcel of land known as Gesima Settlement Scheme No. 812 and 813 to the Interested Party or any other person.

iv. An order of Mandamus be issued to compel the 1st, 2nd, 3rd, 4th and 5th Respondents to cancel the letter of allotment, grant, certificate of title or any other documents issued to the Interested Party or any other in respect to the public parcel of land known as Gesima Settlement Scheme No. 812 and 813.

v. In the alternative an order of mandamus be issued to compel the 1st, 2nd, 3rd, 4th and 5th Respondents to revoke, annul and cancel the title deeds for Gesima Settlement Scheme No. 561, 562, 563, 564, and 565 and reinstate plot no. Gesima Settlement Scheme No. 812, 813 and 45 to its original boundaries and sizes as demarcated and surveyed by the Respondents vide the development Plan/Map of 22nd December 1964.

vi. The court be at liberty to make such further and other orders as it may deem fit to meet the ends of justice.

vii. The costs of the application be in the cause.

2. The Applicant's case is set out in the Statutory Statement in support of the Notice of Motion and his Verifying Affidavit sworn on the 29th December. 2017. The Applicant avers that he is the registered owner of land parcel no. 625 Gesima Settlement Scheme, the same being a sub-division of the original parcel no. Gesima Settlement Scheme No. 79 while the Interested Party is the proprietor of the parcel known as Gesima Settlement Scheme No. 45 which was separate and distinct from plot no. Gesima Settlement Scheme No. 812 and 813.

3. He avers that plot No. Gesima Settlement Scheme No. 812 was set aside by the Respondents as a cattle dip and the Applicant and members of the public have utilized it for dipping their cows against pesticides and parasites and a ground for artificial insemination, hot iron branding, ear notching and tattooing, dehorning and castration of animals over the years. On the other hand, plot no. 813 was set aside as a water catchment point for domestic use for both humans and animals and it includes and water pump from which water is pumped to the cattle dip for use by the farmers in the area.

4. The Applicant avers that sometime in 1985, the 3rd Respondent published a Survey Map and plan where they unlawfully consolidated and amalgamated plot no. 812 and 813 with plot no. 45 belonging to the Interested Party. The 2nd Respondent thereafter opened a green card for parcel no. Gesima Settlement Scheme 45 inclusive of parcels no. 812 and 813 and had it registered in the name of the Settlement Fund

Trustees.

5. It is the Applicant's averment that the 1st, 2nd and 4th Respondents being the sole custodians of the records in respect of parcel no. Gesima Settlement Scheme 45, 812 and 814 unlawfully and unprocedurally enhanced the acreage of parcel no. Gesima Settlement Scheme 45 to 8.3 Hectares.

6. He avers that on 4th December 2003, the 2nd Respondent transferred Gesima Settlement Scheme No. 45 to the Interested Party and he was issued with a title deed. In 2006, the Interested Party sub-divided Gesima Settlement Scheme into 5 portions namely; Gesima Settlement Scheme No. 561 measuring 6.28 Hectares; Gesima Settlement Scheme No. 562 measuring 0.34 Hectares; Gesima Settlement Scheme No. 563 measuring 1.00 Hectares; Gesima Settlement Scheme No. 564 measuring 0.41 Hectares and Gesima Settlement Scheme No. 565 measuring 0.23 hectares.

7. It is the Applicant's contention that plots no 812 and 813 having been delineated on the Survey Map and set aside as a water catchment area and cattle dip together with an access road had already been set aside for public purposes and the said plots were therefore not available for allocation to the Interested Party. He contends that once land is reserved for a public purpose, it cannot be allocated to an individual and that the purported allocation of plots no. 812 and 813 by the Respondents to the Interested Party was illegitimate and in excess of jurisdiction. He adds that the 1st, 2nd, 3rd and 4th Respondents and the Interested Party acted fraudulently by conspiring to steal land parcels no. 812 and 813 from the public.

8. The Applicant avers that the facilities on Gesima Settlement Scheme no. 812 and 813 have been in existence since the colonial days and they serve the inhabitants of Gesima Settlement Scheme, most of whom engage in farming activities. He avers that as one of the farmers in Gesima Settlement Scheme he had a legitimate expectation of receiving the benefits that accrue from plots 812 and 813.

9. He accuses the Interested Party who served as chairperson of the cattle dip of having betrayed the trust bestowed upon him by the inhabitants of Gesima Settlement Scheme. He contends that the orders sought are warranted in the public interest in order to check the wanton and illegal grabbing of public properties with the connivance of public officials.

10. In response to the application, Jeremiah Otieno Okenye, the Interested Party herein swore a Replying Affidavit on 3rd January 2018 in which he denied the Applicant's claim and stated that the same was misleading. He deponed that the Government purchased parcels of land hitherto owned by white settlers and placed them under the care of the Settlement Fund Trustees who were responsible for allocating parcels of land under their custody to deserving persons. He deponed that he was allocated plot No. Gesima Settlement Scheme /45 by the 2nd Respondent on 3rd December 1964. He annexed a copy of the Letter of allotment as annexture J001. That thereafter, the 3rd Respondent prepared a Preliminary Index Diagram and Registry Index Map showing the ground location of each plot. He referred to the map annexed to the Applicant's affidavit. It is his averment that after making the requisite payment indicated in his letter of allotment, he was issued with a title deed on 14.12 2003 as indicated on the Green card annexed to his affidavit.

11. In order to confirm the boundaries of his land the Interested Party sought the services of the Department of Survey whose officials visited the land and wrote a letter dated 4th February 2004 confirming the boundaries of parcel No. Gesima Settlement Scheme/45. He denies that parcels number 812 and 813 existed within Gesima Settlement Scheme as they were not included in the area map where all the parcels in Gesima Settlement Scheme are captured.

12. The Interested Party avers that the issue of the existence of plots no. 812 and 813 was dealt with in **Kisii ELC Case No. 38 of 2007** where the court rendered its judgment on 28th July 2017 and held that the said plots did not exist. A copy of the said judgment is annexed to his Replying Affidavit. The Plaintiffs in the said case did not appeal against the said judgment. It is the Interested Party's averment that the decision to allocate parcel No. Gesima Settlement Scheme/45 which is alleged to have been amalgamated with utility plots no. 812 and 813 was made way back in 1964 and the decision cannot be reviewed more than 53 years later as it is statute barred.

13. The Interested Party avers that the Applicant has not availed any evidence to show that plots no. 812 and 813 were reserved as public utility plots. He adds that if indeed the said plots were amalgamated with parcel no. Gesima Settlement Scheme /45 the acreage of parcel no. 45 ought to have increased, which is not the case. He avers that the order of mandamus cannot issue against the Respondents as they have no powers to revoke or nullify certificate of title. He further contends that the 1st, 3rd, 4th and 5th Respondents played no role in the allocation of parcel No. Gesima Settlement Scheme/45 to the Applicant and therefore they did not make any decision that is capable of being quashed.

16. The 1st-5th Respondents were granted adequate time to file their Replying Affidavits but they did not file any documents.

17. Before the substantive motion was set down for hearing, the Applicant filed a Notice of Preliminary Objection dated 3rd January 2018 in which he raised a number of issues. The first issue was that the leave granted to the Applicant to institute Judicial Review proceedings offended the provisions of Order 53 Rule 1 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act and the application was therefore invalid.

18. The second one was that the application was barred by the provisions of the Land Registration Act no. 3 of 2012. The third issue was that the matter was *res judicata* as the issues raised in the application, particularly the existence of plots number 812 and 813 Gesima Settlement Scheme had been determined in **Kisii ELC Case No. 38 of 2007**. The fourth issue was that the application herein was barred by the Limitation of Actions Act and that the Applicant had not met the statutory threshold to warrant the orders of Judicial Review in the nature of Certiorari, Mandamus and Prohibition.

19. In his ruling delivered on the 8th day of March 2019, Justice Mutungi dismissed the Preliminary Objection on all the grounds save for the one touching on whether the Applicant had established the ground for the grant of orders of Certiorari, Mandamus and Prohibition. Before

the matter could be set down for hearing Jeremiah Otieno Okenye (the Interested Party) passed away on 25th September 2019 and he was substituted by Evans Otieno Getange pursuant to an application for substitution dated 15th September 2020. The application was canvassed by way of written submissions. The Applicant and the Interested Party filed their submissions and the court allowed their counsel to orally highlight their submissions on 24th May 2021.

EX-PARTE APPLICANT'S SUBMISSIONS

20. Mr. Omwoyo advocate, who is the Ex-parte Applicant submitted that Judicial Review deals with procedure and in this matter he is concerned with the procedure followed by the Interested Party and Respondents in issuing parcels no. Gesima Settlement Scheme No. 812 and 813 as well as the access road. It was his contention that due process was not followed. He submitted that the suit property being agricultural land the process is provided in Part 1V (sections 19-26) of the Governments Lands Act (repealed). The process entailed that Commissioner of Lands causing the land that was available for alienation to be surveyed and divided into farms before the said farms were sold by public auction through a Notice in the Kenya Gazette. Those who bought the farms were required to pay one–tenth of the purchase price immediately. Thereafter the purchasers were required to notify the Commissioner of Lands in writing about their intention to pay the balance of the purchase price together with the annual rent reserved by the lease and state whether they would pay it at once or by installments. After payment of the full purchase price the purchaser would be entitled to a lease of the farm.

21. He submitted that when the suit properties were issued in 1963, there was as Survey Plan which settled people in Gesima Settlement Scheme (Annexture "OKO2"). It was his submission that on the said plan there is an access road between plots no. 812, 813, 76 and 45. He submitted that the access road on plot no. 812 and 813 was unlawfully taken by the owner of plot no. 45. He further submitted that there are public utilities on the 2 plots as well as a permanent source of water. It was his contention that the two plots were illegally acquired by the Interested Party when he was the Chairman of the Dispensary and the Cattle Dip.

22. He submitted that in the Survey Plan annexed to his Supporting Affidavit as annexture "OKO5" plot no. 45 has encroached on plots no. 812, 813 and the access road. He contended that plot no. 45 was irregularly amalgamated with plot no. 812 and 813, although the index to the Survey Plan does not show the amalgamation. He submitted that after acquiring plot no. 45, 812 and 813, the Interested Party sub-divided the land into 5 plots. He cited the case of **Joseph Kagunya v Boniface Muli & 3 Others** where the court relied on the decision of **Daudi Kiptugen V Commissioner of Lands & 4 Others (2015) eKLR** for the proposition that where there is contention that a Certificate of lease held by an individual was improperly acquired, then the holder thereof must demonstrate that the same was properly acquired. He submitted that the Interested Party had acquired public land including a crater source unlawfully and that the said titles ought to be nullified.

23. Mr. Omwoyo submitted that as one of the residents of Gesima Settlement Scheme he had a legitimate expectation to be notified before the suit properties were issued to the Interested Party but he was never notified.

INTERESTED PARTY'S SUBMISSIONS

24. Mr. Oguttu learned counsel for the Interested Party relied on the Interested Party's Replying Affidavit sworn on the 3rd January 2018 and filed in court on 11th January 2018. He submitted that the burden of proof lies with the one who alleges as provided by section 107 and 108 of the Evidence Act. It was his submission that in the instant case the standard of proof is on a balance of probabilities. He contended that in this case the Ex-parte Applicant has alluded to the existence of plots no. 812 and 813 and stated that the same were amalgamated with plot no 45, but there is no explanation by the Director of Land Settlement and Adjudication that plots no. 812 and 813 ever existed.

25. Similarly, there is no record from the Settlement Fund Trustees to confirm the existence of these two plots. He submitted that what the court had been shown was annexture "OKO2" which is a Preliminary Index Diagram which can only be interpreted by a Surveyor and not a lay person. He argued that the said document was neither certified not sealed and it was therefore inadmissible and of no probative value as provided by section 78 of the Evidence Act. He submitted that paragraphs 17, 18 and 19 of the Interested Party's Replying Affidavit had not been controverted by the Ex-parte Applicant. In the said paragraphs the Interested Party deponed that the District Surveyor visited the suit properties and ascertained the boundaries.

26. Counsel submitted that Order 53 rule 7 of the Civil Procedure Rules requires that for one to seek an order of Certiorari, the order sought to be quashed be exhibited and verified by a Verifying Affidavit. It was his contention that since the Ex-parte Applicant had not complied with Order 53 Rule 7, the order of Certiorari could not be granted.

27. With regard to the order of Prohibition, counsel submitted that Prohibition looks at the future and not the past. He referred to the case of **Kenya National Examination Council V Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR.** It was counsel's contention that the two plots having been amalgamated with plot no. 45, an order to cancel them would be an exercise in futility. He submitted that the order of Mandamus to revoke the letter of allotment, Grant and Certificates of title could not be granted as none of the Respondents were reposed with the power to cancel the said documents since it is the court and the Land Registrar that are vested with such powers. He argued that the court could not compel the Respondents to perform an illegality. Counsel submitted that the entire Motion before the court seeks reliefs which cannot be granted by the court.

28. Counsel submitted that the Applicant's contention that parcel no. 45 had encroached on parcels no. 812 and 813 was not well founded as the size of parcel no. 45 did not expand after the alleged encroachment. He said that according to the Area List, the size of parcel no. 45 was 8.3 hectares in 1964 and after sub-division of the said parcel into parcels no. 551 to 565 in December 2003, the total acreage did not change. He referred to annextures "J002" and "J004". He argued that if the amalgamation happened in 1964, this was not borne out by the Applicant's documents.

29. Responding to the Ex-parte Applicant's submission on the doctrine of legitimate expectation, counsel submitted that whereas as a resident of Gesima Settlement Scheme the Ex-parte Applicant would have been entitled to a notice, the alleged allocation happened in 1964, the amalgamation is alleged to have happened in 1985 while the titles were issued in 2003. He argued that by the time the alleged

amalgamation took place, the Ex-parte Applicant did not own land in Gesima Settlement Scheme and therefore the doctrine of legitimate expectation does not apply to him.

30. Counsel for the Interested Party submitted that the photos annexed by the Ex-parte Applicant as annextures "OKO4" and "OKO5" were subject to section 106 B of the Evidence Act which requires that they be accompanied by a certificate. He submitted that the absence of the certificate rendered them inadmissible.

31. Turning to the Registry Index Map exhibited by the Ex-parte Applicant as annexture "OKO5" counsel for the Interested Party submitted that though the map was certified, it did not support the contention that plots no. 812 and 813 existed. He finally submitted that the issue of fraud cannot be addressed by way of Judicial Review and therefore the application was devoid of merit.

32. In a brief rejoinder, Mr. Omwoyo referred the court to the case of **Republic v Commissioner of Lands & 4 Others Ex-parte Associated Steel Limited (2014) eKLR** where the court issued orders of Certiorari, Mandamus and Prohibition after finding that a public road had unlawfully been allocated to the Interested Parties.

ISSUES FOR DETERMINATION

33. Having considered the Notice of Motion, rival affidavits and the submissions of the Applicant and Interested Party, the following issues arise for determination

i. Whether parcels no. Gesima Settlement Scheme /812 and 813 were set aside as public utility plots.

ii. Whether the Applicant had a legitimate expectation to parcels no. Gesima Settlement Scheme 812 and 813 together with the surrounding access road.

iii. Whether the parcels no. 812 and 813 were available for alienation and allocation to the Interested Party.

iv. Whether parcels No.Gesima Settlement Scheme/ 812 and 813 were unlawfully amalgamated with parcel no. Gesima Settlement Scheme/45

v. Whether the Applicant is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

34. It is the Applicant's contention that land parcels no. Gesima Settlement Scheme 812 and 813 and the access road shown on the Survey Map dated 22nd December 1964 which was annexed to the Applicant's supporting affidavit as annexture "OKO2" are public utilities. On the other hand, the Interested Party denies the existence of the two plots known as Gesima Settlement Scheme 812 and 813. He contends that he was allocated parcel no. Gesima Settlement Scheme/45 which measures 8.3 hectares and its position on the ground was verified by the District Surveyor through his letter dated 5th February 2004 which makes no mention of utility plots on his land.

35. The Interested Party further refers to the judgment in **Kisii ELC Case No. 38 of 2007** where some residents of Gesima Settlement Scheme had sued the Interested Party claiming that he had fraudulently caused public utility plots no. 812 and 813 to be amalgamated with his plot no. 45 thereby denying the other members of Gesima Settlement Scheme the use of the two plots where public services and utilities were being offered. In the said judgment, the court held that the Plaintiffs had not provided any proof that there were public utility plots designated as plot no. 812 and 813 Gesima Settlement Scheme.

36. The court observed that if indeed there were any public utility plots that were included in parcel no. 45 Gesima Settlement Scheme then the same formed part of the said plot and the person allocated the plot became the owner. The fact that the owner of parcel no. 45 may have allowed continued use of the members of the public of the facilities could not affect his right of ownership.

37. In arriving at its decision the court relied on the evidence that had been adduced by the parties as well as the documentary proof which included the area Survey Maps and the Area List which did not show the existence of the said plots. In the instant suit the Applicant has annexed several documents to his Supporting Affidavit including a copy of the Development Plan for Gesima Settlement Scheme dated 22nd December 1964, photographs showing a water catchment area and cattle dip, a survey map dated August 1985 and a copy of a green card showing that the Interested Party is the registered owner of land parcel no. Gesima Settlement Scheme/45 measuring approximately 8.3 hectares.

38. Unfortunately, just like in **Kisii ELC Case No. 38 of 2007**, the Ministry of Lands, Housing and Urban Development, the Settlement Fund Trustee, the Director of Survey, the Director of Land and Settlement and the National Land Commission who were sued as the 1st-5th Respondents in the instant case did not file any response to the application thus depriving the court critical of evidence regarding land parcels no. 812 and 813. For instance, even though the Development Plan for Gesima Settlement Scheme dated 22nd December 1964 clearly shows that the two plots are marked on the said plan on the upper side of plot no. 45, there is no index to the map describing them as public utility plots.

39. Furthermore, the 1st, 2nd and 3rd Respondents who are the custodians of the said Development Plan did not provide any explanation as to whether the two plots existed as separate and distinct plots and whether they were set aside as public utility plots. The subsequent map dated August 1985 annexed to the Applicant's verifying affidavit as annexture "OKO 5" does not depict the two plots.

40. Although the Applicant alleges that there was amalgamation of the said plots with parcel no. Gesima Settlement Scheme /45, the index at the foot of the said map which explains the amendments made to the various parcels of land including sub-divisions and combinations does not mention land parcels no. 45, 812 or 813. However, in annexture "OKO 12" the index shows that parcel no. 45 was sub-divided into parcels no. Gesima Settlement Scheme 561, 562, 563, 564 and 565 respectively.

From the foregoing, I am unable to make a finding that parcels no. Gesima Settlement Scheme 812 and 813 existed as Public Utility plots.

41. I will now move to the second issue which is whether the Applicant had a legitimate expectation on plots no. 812 and 813 Gesima Settlement Scheme.

The doctrine of legitimate expectation was defined in the case of **Akaba Investments Limited v Kenya Revenue Authority [2007] Eklr** where the court cited the case of **Council of the Civil Service Union v Minister for the Civil Service 1985 AC 374 H.L as follows:**

> ***"Where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefits or privilege and if so, the courts will protect his expectation by judicial review as a matter of public law"***

And as explained by **Lord Diplock in Oreilly v Mackman (1983)2A.C 237**

> ***"legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonable expect"***

42. The Applicant has argued that he had a legitimate expectation that plots no. 812 and 813 together with the access road surrounding the said plots would remain public land and available only for purposes of a cattle dip, water source/spring, hospital, water pump and access road. It is his further contention that the allocation of the two plots to the Interested Party has injured him and the inhabitants of Gesima Settlement Scheme as it has diminished the attraction, farming activities, availability of water and reduced the value of the applicant's property.

43. The remedy of judicial review would have been available to protect the Applicant's legitimate expectation to the services and facilities offered on plots no. 812 ad 813, if the Applicant had demonstrated that the said plots were public land. However, as I have held earlier in this judgment, there is no proof that the said plots are indeed public utility plots and therefore the doctrine of legitimate expectation does not apply.

44. The next two issues as to whether plots no. 812 and 813 were available for alienation and whether their amalgamation with the Defendant's parcel no. 45 was lawful shall be answered together. The Applicant has submitted that exhibits "OKO 2", "OKO 3" "OKO 4" and "OKO 13" demonstrate that the plot no. 812 and 813 were public properties. With respect, this is not correct as exhibit "OKO 2" which is the Development Plan dated 22nd December 1964 was never interpreted by the Ministry of Land Housing and Urban Development or Director of Survey who are the experts and custodians of the said map. On the other hand, exhibits "OKO 3", "OKO 4" and "OKO 13" are photographs of a cattle dip, water source and hospital whose location on the ground has not been captured in the said photographs in order for the court to make any conclusive findings as to whether they are situated on public land. Furthermore, the section 106 B requires that that said photos be accompanied by a certificate, yet there was no certificate attached to the said photographs. They are therefore of no evidentiary value.

45. The allegations of impropriety and purported breach of the provisions of the Government Lands Act (repealed) by the Respondents that have been alluded to by the Applicant are not backed up by sufficient evidence as it is not clear whether plots no. 812 and 813 were set aside as public utility plot and whether the alleged amalgamation took place in 1964 or 1985. Unlike the case of **Republic v Commissioner of Lands & 4 Others Ex-parte Associated Steel Limited (2014) eKLR** where most facts were undisputed and the Commissioner of Lands disowned the letter of allotment issued to the 2nd Interested Party, none of the Respondents in the instant case presented any evidence to support the Ex-parte Applicants claims. In the absence of evidence that the plot No. 812 and 813 were set aside as public land, the court is unable to make a finding that their allocation or purported amalgamation with parcel no. 45 was unlawful. It is regrettable that the Respondents who would have shed light on the existence and ownership of plot no. 812 and 813 opted not to file any response.

46. Finally, on whether the reliefs sought by the Ex-parte Applicant can be granted, the court has been referred to case of **Kenya National Examination Council V Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR.** In the said case the court discussed the remedies of Prohibition, Mandamus and Certiorari and observed as follows:

> ***"That now brings us to the question we started with, namely, the efficacy and scope of Mandamus, Prohibition of Certiorari. These remedies are only available against public bodies such as the Council in this case. 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. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…***
>
> ***…… That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision."***

With regards to Mandamus the court noted that:

> ***"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.***
>
> ***Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons"***

47. Applying the above principles in the instant case, it clear that the relief of Prohibition is not available to the Ex-parte Applicant as the wrongs complained of happened many years ago and can therefore not be prevented. The Applicant sought an order of mandamus directed at the 1st 2nd, 3rd 4th and 5th Respondents to cancel the allocation sale and alienation of public land known as Gesima Settlement Scheme/812 and 813, and order of Mandamus to compel the 1st and 2nd Respondents to cancel the letter of allotment , grant and title issued to the Interested Party and an order of Mandamus to compel the 1st, 2nd, 3rd, 4th and 5th Respondents to revoke, annul, and cancel the title deeds for Gesima Settlement Scheme 561, 562, 563 and 565.

48. As pointed out earlier in this judgment, the evidence adduced by the Applicant is insufficient for the court to arrive at the decision that the two plots were unlawfully amalgamated with parcel no. Gesima Settlement Scheme/45. Similarly, the prayer for Certiorari is not well-founded as the applicant has not demonstrated that the decisions made by the Respondents were in excess of jurisdiction or against the rules of natural justice. What the Applicant tried to demonstrate was fraud on the part of the Respondents and the Interested Party which would have best been addressed in an ordinary civil suit rather than judicial review. In the circumstances, I am on the view that an order of Certiorari would not be an efficacious remedy.

49. It must already be clear that based on the material placed before the court, the orders of judicial review by way of Certiorari, Prohibition and Mandamus sought by the Ex-parte Applicant cannot be granted. The upshot is that the application lacks merit and it is hereby dismissed. Each party shall bear his own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF SEPTEMBER 2021.

J.M ONYANGO

JUDGE