



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**JR NO. 591 OF 2011**

**REPUBLIC.....APPLICANT**

**AND**

**THE REGISTRAR OF TITLES, MOMBASA.....1<sup>ST</sup> RESPONDENT**

**THE CLERK OF THE COUNTY COUNCIL OF KWALE....2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**GREEN TURTLE LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**GIDIEON TOWETT MOI.....2<sup>ND</sup> INTERESTED PARTY**

**HITESH RATHROD.....3<sup>RD</sup> INTERESTED PARTY**

**GANDA PRASAD BHANDANI.....4<sup>TH</sup> INTERESTED PARTY**

**KAMAL HEMRA BHUNDA.....5<sup>TH</sup> INTERESTED PARTY**

**AND**

**MOUNT ROBBIN LIMITED.....EX-PARTE APPLICANT**

**JUDGMENT**

**INTRODUCTION**

1. The Ex-parte applicant is a limited liability Company incorporated under the Companies Act (Cap 486). The 1<sup>st</sup> Respondent is the Registrar of Titles for Mombasa area created under the Registration of Titles Act (Cap 281). The 2<sup>nd</sup> Respondent is the Executive Officer appointed under the Local Government Act (Cap 265) and he was in-charge of the County Council of Kwale. The 3<sup>rd</sup> Respondent is the Registrar of Companies whereas the 4<sup>th</sup> Respondent is the Chief Principal Legal Advisor to the Government of Kenya. The 1<sup>st</sup> Interested Party is a Limited Liability Company whose Director is the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Interested Parties. The 2<sup>nd</sup> Interested Party was at all material times the registered proprietor of the suit property.

**PETITION**

2. The ex-parte applicant filed a chamber summons application on 1<sup>st</sup> July 2011, seeking to file a judicial Review application out of time. Upon grant of leave the applicant filed a Notice of Motion dated 27<sup>th</sup> July 2011 supported by its director an affidavit sworn by its Director Nagib Tadjin and a Statutory Statement dated 1<sup>st</sup> July 2011. The applicant alleges that on 17<sup>th</sup> June 2008 it executed a Transfer document with the 2<sup>nd</sup> Interested Party for transfer of a property known as L.R No. 13441 Kwale C.R No. 19516 pursuant to a sale agreement for a consideration of Ksh.50,000,000/= executed between Annur Holdings Limited and the 2<sup>nd</sup> Interested Party. The transfer was registered on 19<sup>th</sup> June 2008 as C.R No. 19516/7 which extinguished any claim of ownership or rights over the parcel of land.

3. The 1<sup>st</sup> respondent proceeded to issue a provisional certificate of Title for the same property on the 28<sup>th</sup> July 2008 as L.R No. 13441. This was unprocedural, without justification and, therefore, a procedural flaw and an error on the part of the 1<sup>st</sup> respondent. There was no notice that was issued to the applicant that another party was claiming ownership of the property. The 2<sup>nd</sup> Interested Party transferred the same parcel to the 1<sup>st</sup> Interested Party for a consideration of Ksh.21,000,000/= and the transfer was registered on 21<sup>st</sup> October 2008 as L.R No. 19616/8. At the time the applicant was purchasing the land the 1<sup>st</sup> Interested Party was non-existent till the 17<sup>th</sup> May 2011 when it was established. In addition to this the 2<sup>nd</sup> respond altered its record to show that the ratepayer was the 1<sup>st</sup> Interested Party.

4. The applicant also sought for leave to serve the 1<sup>st</sup> to 5<sup>th</sup> Interested parties by way of substituted service due to lack of knowledge of their whereabouts since no physical address was given in Mombasa H.C.C.C No. 324 of 2010. The following specific orders were sought:

a. CERTIORARI to bring into this honorable court to quash the decision of the 1<sup>st</sup> respondent to issue a provisional Certificate of Title dated 28<sup>th</sup> July 2008 in respect of L.R No. 13441 Kwale C.R No. 19516 done by the 1<sup>st</sup> respondent under Section 71 of the Registration of Titles Act and registered as C.R. 19516/7.

b. CERTIORARI to bring into this Honorable Court to quash the decision of the 1<sup>st</sup> Respondent to make an entry on the Register for L.R No. 13441 Kwale C.R No. 19516 of a transfer dated 6<sup>th</sup> October 2008 between the 2<sup>nd</sup> and 1<sup>st</sup> Interested Party which transfer was registered on the Register of the 1<sup>st</sup> Respondent on the 21<sup>st</sup> September 2008 as C.R No.19516/8.

c. PROHIBITION as against the 1<sup>st</sup> respondent from registering any other entries on the register for L.R No. 13441 Kwale C.R No. 19516 and recording such other entries on the register as C.R No. 19516/7.

d. MANDAMUS compelling the 1<sup>st</sup> respondent to in accordance with Section 60 of the Registration of Titles Act to issues summons upon 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties to deliver up to the 1<sup>st</sup> Respondent for the purposes of correction and cancellation the Provisional Certificate of Title dated 28<sup>th</sup> July 2008 for L.R No. 13441 Kwale C.R No. 19516 held by the 1<sup>st</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Interested Party and recorded on the register of the 1<sup>st</sup> Respondent as C.R No. 19516/7.

e. PROHIBITION as against the 3<sup>rd</sup> Respondent from registering any other company by the name of Green Turtle Limited.

f. Costs.

5. The facts of the case are set out in the Statement filed under Order 53 Rule 1(2) of the Civil Procedure Rules 2010 together with the reliefs sought and grounds therefor. The applicant averred that a search on L.R No. 13441 Kwale C.R No.19516 and it was found that it was duly registered to the 2<sup>nd</sup> Interested Party, Annur Holdings Limited executed a sale agreement with the 2<sup>nd</sup> Interested Party at a consideration

of Ksh.50,000,000/=, under which the 2<sup>nd</sup> Interested Party transferred the property to the applicant. The 1<sup>st</sup> respondent registered the title on 19<sup>th</sup> June 2008 and the conveyance process was conducted by M/S Ochanda Onguru & Company Advocates who registered it. Upon successful registration of transfer the applicant was issued with the original title for the property. A subsequent search on 23<sup>rd</sup> June 2008 the applicant carried out another search to verify details showed they were the owner of the property.

6. The 2<sup>nd</sup> Interested Party had made a report on 10<sup>th</sup> March 2008 that he had lost or misplaced the title for L.R No. 13441 Kwale C.R No. 19516. On 18<sup>th</sup> March 2008 the 2<sup>nd</sup> Interested Party had sworn an affidavit in support of his application to the 1<sup>st</sup> respondent to issue him with a provisional Certificate of Title for the property. The 1<sup>st</sup> respondent advertised in the Kenya Gazette Notice as Gazette Notice no. 2976 of 18<sup>th</sup> April 2008 the loss of the title to the property. On 28<sup>th</sup> July 2008 the 1<sup>st</sup> respondent issued a provisional certificate, which had been registered as C.R No.19516/7. On 6<sup>th</sup> October 2008 the 2<sup>nd</sup> Interested Party sold to the 1<sup>st</sup> Interested Party the said property at a cost of Ksh 21,000,000/=. The 1<sup>st</sup> respondent registered the transfer and issued title as C.R No.19516/8 on 21<sup>st</sup> October 2008.

7. The applicant contends that the action by the 1<sup>st</sup> respondent was fraudulent, ultra vires, unlawful, void and a nullity since the applicant had registered its title on 19<sup>th</sup> June 2008 yet the original title was with M/S Ochanda Onguru & Company Advocates under instructions of the 2<sup>nd</sup> Interested Party as per the sale agreement dated 4<sup>th</sup> March 2008.

8. Further, section 28 of the Registered Land Act gives priority to the time and date of registration and as such the applicant's title was registered first in time. Article 40 and 47 of the Constitution gives the applicant the right to protection of their property and the property cannot be arbitrarily disposed of without their consent and they are further entitled to fair administrative decisions, which are lawful, reasonable and procedurally fair. The 3<sup>rd</sup> respondent confirmed on 28<sup>th</sup> April 2011 that there was no such Company that had been incorporated. On 11<sup>th</sup> May 2011 there was no entity known as Green Turtle Limited that was able to enter into a valid agreement. The 1<sup>st</sup> Interested Party was incorporated as a Company Called Green Turtle Limited on 17<sup>th</sup> May 2011 with a PIN Certificate No.P051359327J. The 3<sup>rd</sup> respondent did this and the Directors of the Company were Mount Mayfair Limited and Mirmark Estates.

9. The Ex-parte Applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties are parties to a suit Mombasa H.C.C.C No. 342 of 2010 Mount Robbin Ltd v. Gideon Towett Moi & Green Turtle Limited in which the property L.R No. 13441 Kwale C.R No. 19516 is the subject suit. It is their averment that they should be allowed to enjoy unfettered quiet possession of the property and any attempt to deprive the same has to be conducted with a fair measure of reasonableness which attributes the 1<sup>st</sup> respondent has failed.

10. Mr. Nagib Tadjin the Director of the ex-parte applicant swore an affidavit on 6<sup>th</sup> July 2011 in verification of the Statement. He averred that he is also the Director of Mount Mayfair Limited and he had been shown the property in Tiwi, Kwale area of Coast Province. Mr. William Ochanda Onguru was his advocate whereas the 2<sup>nd</sup> Interested Party had instructed the firm of M/S J.O Magolo & Company Advocates vides a letter dated 13<sup>th</sup> September 2007 (A letter dated 13<sup>th</sup> September 2007 instructing the firm was annexed). A search showed the property was 4.048 Ha and the 2<sup>nd</sup> Interested Party was dully-registered owner. The council rates and land rates were paid the using the deposit paid for the property. On 17<sup>th</sup> June 2008 after meeting all the conditions of the sale agreement the 2<sup>nd</sup> Interested Party transferred all the rights and privileges in the property to the ex-parte applicant. On 19<sup>th</sup> June 2008 the property was registered as C.R No. 19516/7. A search carried out on 23<sup>rd</sup> June 2008 showed the subject suit property was registered in the applicant's name. The applicant came to learn in July 2010 that an entity called Green Turtle Limited claimed the suit property as theirs.

11. In addition, the applicant went to Spring Valley Police Station and it was found that the entry recorded as OB/20/10/03/2008 was not for the loss of a Certificate of Title but it had been made for the

loss of a Blackberry mobile phone. Also on 28<sup>th</sup> April 2011 he went to the 3<sup>rd</sup> respondents office and enquired on a Company by the name of “Green Turtle Limited” and he was informed there was no such Company and he registered a company using the name and was given registration number as CPR/2011/47798 with a PIN Certificate no. P0513593273.

12. Their former advocate Mr. Onguru swore an affidavit opposing the 2<sup>nd</sup> Interested Party’s claim that the title deed had gotten lost. It was his averment that the title was placed in his possession and he had acted under his instructions and had disbursed the sale proceeds to the 2<sup>nd</sup> Interested Party.

13. The applicant contends that upon the execution of the transfer dated 17<sup>th</sup> June 2008 and its registration on 19<sup>th</sup> June 2008 all rights and privileges of the 2<sup>nd</sup> interested person over the property were extinguished. The issuance of the provisional certificate of Title by the 1<sup>st</sup> respondent was an ultra vires action since there was no legal entity called Green Turtle Limited thus no valid binding Transfer could have been conducted. No notice was issued to them in accordance with Section 60 of the Registration of Titles Act. He urged the court to grant the orders sought since they stand to suffer great loss and damage. A valuation report was annexed and it showed the estimate market value of the suit property as at 7<sup>th</sup> July 2011 was Ksh.54,000,000/=.

## **RESPONSES**

### **1<sup>st</sup> respondent’s replying affidavit**

14. The Senior Registrar of Titles Mombasa, Mr. Renson Mulele Ingonga, swore an affidavit on 1<sup>st</sup> March 2012 and averred the suit land Plot No.13441 was registered as C.R 19516/1 and the owner as M/S Green Turtle Ltd. The registration was processed on 24<sup>th</sup> October 2008 as entry No. C.R 19516/8 after a provisional certificate of Title was issued on 28<sup>th</sup> July 2008 through Kenya Gazette Notice No. 2976. The new title was registered on 18<sup>th</sup> April 2008 as Entry No. C.R 19516/7.

15. There was no entry under the ex-parte applicants name and neither was there a record to show that the applicant had presented original Certificate of Title. The deponent annexed a true copy of the Original Title.

### **2<sup>nd</sup> respondent’s replying affidavit.**

16. The 2<sup>nd</sup> respondent filed Grounds of Opposition dated 14<sup>th</sup> December 2011 opposing the applicant’s Notice of Motion dated 27<sup>th</sup> July 2011. It stated that the application did not demonstrate any legal wrong or breach by the 2<sup>nd</sup> respondent. The application did not satisfy any provision of Order 53 of the Civil Procedure Rules and the application was a gross abuse of the process of the court, and the same should be struck out.

17. The deponent Ndurumo Wa Gakui swore an affidavit on 4<sup>th</sup> June 2012 stating that he was the Clerk to Council of the County Council of Kwale. The suit property was Plot No. L.R No. 13441 Kwale C.R 19516. The ex-parte applicant did not have any claim against him or his office. The 2<sup>nd</sup> respondent did not have powers to quash or issue titles. He contended that payment of rates is not proof of ownership of land, and further that pursuant to Article 162(2) read with Article 165(5) the High Court does not have jurisdiction on matters dealing with title, occupation and use of land and prayed that in the interest of justice the application against the 2<sup>nd</sup> respondent be dismissed.

### **2<sup>nd</sup> Interested Party replying affidavit**

18. The 2<sup>nd</sup> Interested Party filed a replying affidavit dated 4<sup>th</sup> November 2011 where he denied knowing the existence of the firm of J.O Magolo & Associate Advocates and he denied having signed any instructions letter. The signature on the letter is not his and the applicant should have carried out due

diligence before paying the said amount. He confirmed to be the registered owner of the suit property, which measures 4.048 Ha.

19. He stated that he had been allocated the suit property L.R No.13441 situate in Mombasa Municipality in Kwale District, by the Commissioner of Lands in 1988 and realized his title for the suit property was lost when he entered into negotiations to sell it. He went to the Spring Valley Police Station on 13<sup>th</sup> March 2008 to report on the loss of the title and upon advice of his advocates he swore a declaration on 18<sup>th</sup> March 2008 confirming the loss of the title in order to be issued with a provisional Grant. The declaration and the police abstract were forwarded to the Ministry of Lands and Settlement.

20. On the 18<sup>th</sup> April 2008 he received a Kenya Gazette as Gazette Notice No. 2976 through his advocates, and he was informed that there was no objection raised during the notice period and hence a provisional certificate of Title had been issued. He then entered into an agreement with the 1<sup>st</sup> Interested Party on 6<sup>th</sup> October 2008. On 24<sup>th</sup> September 2008 he cleared all the outstanding rates and interest and was issued with a Clearance Certificate No.0415. On 19<sup>th</sup> September 2008 his advocates wrote to the Commissioner of Lands seeking for consent to transfer the property, which was granted on 14<sup>th</sup> October 2008. The transfer lodged in favor of the applicant could not be possible.

21. The ex-parte applicant could not have paid the outstanding Council rates, as he had not availed any receipt. The Registrar who had signed the transfer on the 19<sup>th</sup> June 2008 is the same officer who had signed the letter dated 4<sup>th</sup> April 2008 requesting the Government printers to publish a request for issuance of a provisional certificate. The certificate of Postal search annexed by the applicant is in question since it did not bear the official stamp of the Registrar.

22. He further denied having received any consideration in regard to the suit land from the ex-parte applicant or its agents, directors or employees. Further, his advocates informed him that a sale agreement in the absence of an advocate is void and unenforceable in law. The ex-parte applicant had not shown that there was full payment of the full consideration thus the contract was voidable. The applicant had ill intentions to acquire the property illegally.

23. In addition, the 1<sup>st</sup> Interested Party was a Company and it had been incorporated on 18<sup>th</sup> July 2008 and an annexure of the same was attached. The ex-parte applicant had annexed a sale agreement whose photo, P.I.N no., identity card number and signature appended were not his. His advocates had lodged a complaint at the Criminal Investigation Department and also wrote a letter to the on 5<sup>th</sup> September 2011 to the Director of National Registration requesting for verification of the correctness of his identity card number 7112415 in comparison to the one used in the sale as 6716880. The former was his correct identity card. The Kenya Revenue Authority also confirmed his P.I.N Number to be A000128478W and not A001005017P.

24. He contended that the ex-parte applicant has moved the court with unclean hands since the directors had been involved in forgery and were not entitled to the orders sought. A notice could not be issued to the applicant since he did not have a legal interest or claim in law. The application was barred the rules on limitation on time as found in order 53 rule 2 of the Civil Procedure Rules 2010.

### **The 5<sup>th</sup> Interested Party replying affidavit**

25. Mr. Kamal Hemraj Bhunda, the 5<sup>th</sup> Interested Party on behalf of himself and the 3<sup>rd</sup> and 4<sup>th</sup> Interested swore an affidavit as a Director of Green Turtle LTD, the 1<sup>st</sup> Interested Party and opposed the application as defective and bad in law citing the following specific reasons:

- I. The order for certiorari was made after expiry of 6 months from the day the decision to be quashed was made and an order for prohibition cannot lie against the 1<sup>st</sup> respondent in the absence of any anticipated decision.

II. There was no explanation that was given for the delay and Order 53 of the Civil Procedure Rules does not allow an extension of time.

III. The ex-parte applicant had filed a suit in the Mombasa High Court, which was pending hearing and determination of an interlocutory application, which raised similar issues to those in this instant application.

26. He averred that he had been informed there was no sale transaction between the 2<sup>nd</sup> Interested Party and the applicant over Plot L.R No. 13441. He came to know of the applicants claim to the suit premises on 28<sup>th</sup> September 2010 when an article appeared in the Daily Nation which revealed a law suit namely **Mombasa HCCC No. 342 of 2010 Mount Robbin Ltd v. Gideon Towett Moi & Green Turtle Ltd**. The applicant sought for an injunction restraining Green Turtle Ltd from constructing a perimeter fence or building. It was their averment that issues such as fraud, misrepresentation and illegalities can only be heard in the High Court matter, which has jurisdiction to hear and determine issues raised. The action by the applicant to register a similar company Green Turtle Ltd CPR/2011/47798 was an abuse of the process. The 3<sup>rd</sup> respondent had issued a Notice through the Kenya Gazette of its intention to strike out the registration of the 'New' Green Turtle Limited.

27. The 2<sup>nd</sup> Interested Party was in possession of the property and passed it on to the 1<sup>st</sup> Interested Party after the sale. The provisional certificate was lawfully and procedurally obtained since they are the bona-fide purchaser for value, which was confirmed by the Registrar of Titles, Mombasa. He further averred that the 4<sup>th</sup> respondent was improperly joined in the proceedings since there was no relief being sought against him. In addition to the above the applicant cannot aver to be the valid ratepayer since the documents held by them do not originate from the Lands Registry. He annexed documents that they rely on including those used in the High Court Civil suit.

#### **SUPPLEMENTARY AFFIDAVIT**

28. The ex-parte applicant sought leave of the court to file a further affidavit which leave was granted on 31<sup>st</sup> July 2012. Mr. Nagib Tajdin swore an affidavit on 7<sup>th</sup> April 2011 attaching a forensic report on the validity of the signature by one Mr. G.G. Gacathi who was a Senior Registrar of Titles of Mombasa. He had executed the transfer documents with the 2<sup>nd</sup> Interested Party.

29. The 2<sup>nd</sup> Interested Party filed a supplementary affidavit in opposing the Judicial Review application. In support of his claim of fraud and misrepresentation allegedly surrounding the transaction relied on by the ex-parte applicant a basis of his claim, he averred that the police had charged one Joseph Juma Oyier with 5 counts of forgery, and attached a copy of the charge sheet.

#### **SUBMISSIONS**

##### *Ex-Parte Applicant's Written Submissions*

30. As regards purpose of leave, the ex parte applicant set out the chronology on how they acquired the plot from the 2<sup>nd</sup> Interested Party which events are also shown in the application, statement and affidavits. It is their submission that leave was granted on 6<sup>th</sup> July 2011 to commence judicial review application. Lord Diplock held that the purpose was to prevent the time of the court being wasted by busy bodies in **R v. In-land Revenue Commissioner Ex-parte National Federation of Self Employed and Small Business Limited** [1982] AC 617.

31. Responding to the objection that these proceedings were defective in that they were brought outside the 6-month period prescribed under Order 53 Rule 2 of the Civil procedure Rules, the ex parte applicant pointed out that section 26 of the Limitation of Actions Act states that in instances of fraud the issue of limitation is based from the time a party became aware of the fraud. In this case when the 2<sup>nd</sup> Interested Party swore an affidavit on 23<sup>rd</sup> March 2011 in H.C.C.C No.324 of 2010.

32. The government offices have to be transparent as was held in *NGM v. Public Procurement Administrative Review Board & Others* [2010] 1 EA 291. Article 159 of the Constitution, which states that, supports this, “**Justice shall be administered without undue regard to procedural technicalities**”. Also Section 62 of the Registration of Titles Act gave the applicant the power to commence this judicial review application.

33. The parties in these proceedings have been joined and no prejudice shall be suffered by them as was held by Woolf LJ in *R v. Comm for Local Administration, ex-parte Croydon London Borough Council* [1989] 1 ALL ER 1033, the court should exercise care where a litigant delays in making an application and, in any event, the parties did not make a formal objection to the grant of leave.

34. As regards the purpose of judicial review, the applicant relied on *R v. East Berkshire Health Authority* [1985] QB 152 where the court held that the applicant had to show he had been denied a public law right which is a right to be heard and the right to fair administrative action by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The transfer between the applicant and 2<sup>nd</sup> Interested Party was lodged within the 90 period and they were to be issued with a notice of issuance of a provisional Certificate of Title. The 1<sup>st</sup> respondent did not respond to the applicant’s request on 30<sup>th</sup> June 2011 to cancel the provisional certificate. Section 60 of the Registration of Titles Act has given the 1<sup>st</sup> respondent duty to perform and in default of which section 62 gives authority to an aggrieved party to commence judicial Review proceedings.

35. In *Commissioner of Land v. Hotel Kunste Ltd* [1995-98] 1 EA 1, the Court held that Judicial Review is concerned not with the private rights or merits of the decision being challenged but with the decision making process and also that the exercise of that power was judicial in nature and he was obliged to hear all those who were likely to be affected by the decision. The same was held in H.C Misc Civ. App no.259 of 2008 (Nbi) (U.R) *Ex-parte Cannobio Pietro*. The action of fair administrative action and a fair hearing are rights enshrined under Article 47 and 50 of the Constitution.

36. Section 60 of the Registration of Titles Act (RTA) empowers the Registrar to summon the person whom the grant had been issued for purposes of correction. It was their submission that the use of the word “may” suggested a discretionary power, which was coupled with a duty to exercise it in a proper way. When a party failed to act, then the court can intervene. In *Republic v. The Council of Legal Education ex-parte James Njuguna & 14 Others* [2007] eKLR where it was held that performance of a statutory duty by a public entity is discretionary and the courts could intervene. The same was held in *Padfield & Other v. Minister of Agriculture, Fisheries and Food & Others* [1968] AC 997 at 1006. The officer could not perform, as he liked. The 1<sup>st</sup> respondent did not deny in his replying affidavit that the ex-parte applicant did raise an objection and that the title held was a forgery.

37. On the issue of fraud and the 2<sup>nd</sup> Interested Party’s allegation that he did not instruct the firm of J.O Magolo, Advocate, it was submitted that the same was untrue since he could have obtained an affidavit from the advocate. The applicant further made a search at the 1<sup>st</sup> respondent’s office and it showed that it was the registered owner. The report entered at Spring Valley Police station as OB/20/13/2008 was for the loss of a Black berry mobile phone. Further, the Interested Party introduced a letter from the officer in charge and the same cannot be introduced as evidence as per Section 71 of the Evidence Act. The Interested Party swore affidavits in the High Court case and in this instant suit, which gave the date of loss of the Title as 10<sup>th</sup> March 2011 and 13<sup>th</sup> March 2008 respectively making it hard to know the exact date for the loss of title.

38. It was further submitted that the respondents failed to follow section 71 of the RTA which states as follows:

*“In the event of a grant or certificate being lost or destroyed, the proprietor of the land, together with other persons, if any, having knowledge of the circumstances, may make a declaration, stating the facts of the case, the names and descriptions of the registered owners and the particulars of all changes and other matters affecting the land and the title thereto to the best of the declarant’s*

*knowledge and belief, and **the registrar if satisfied as to the truth of that declaration and the bona fides of the transactions, may issue to the proprietor of the land a provisional certificate of title which shall contain an exact copy of the original grant or certificate of title bound up in the register, and of every memorandum and endorsement thereon and shall also contain a statement why the provisional certificate is issued and the registrar shall at the same time enter in the register notice of the issuing of the provisional certificate, and the date thereof, and why it was issued and the provisional certificate shall be available for all purposes and uses for which the grant or certificate of title so lost or destroyed would have been available as valid to all intents as the lost grant or certificate: provided the registrar before issuing a provisional certificate shall give at least ninety days' notice in the Gazette of his intention so to do.***

The provisional title was to have attached an exact copy of the original title, grant or certificate of title in the register, which was not the case herein. The copies of the title attached to the affidavits of the 1<sup>st</sup> respondent and the interested parties had a serial number GPK 2005-IM-10/79 which is the serial number for the Government of Kenya Printer for the year 2005. The Registrar who is the 1<sup>st</sup> respondent is mandated to keep copies of all original certificates and grants as per section 25 of the RTA which it failed. The 1<sup>st</sup> respondent has a duty to call all parties involved to ascertain the veracity of these claims. The 1<sup>st</sup> respondent failed to adhere to Article 47, which gives every person a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

39. The applicant also raised an issue on incorporation of "Green Turtle Limited" which is the 1<sup>st</sup> Interested Party herein and its directors as the 3<sup>rd</sup> to 5<sup>th</sup> Interested persons and it was submitted that there was no such company as at 28<sup>th</sup> April 2011 and that in order to protect its interest, the applicant formed such a company, which was registered by the 3<sup>rd</sup> respondent on 17<sup>th</sup> May 2011 with a Company No.CPR/2011/47798. The 3<sup>rd</sup> respondent could only strike out a name of a Company as per section 339 of the Company Act when the Registrar had reasonable cause to believe that a company is not carrying on business or in operation, he may send to the Company by post a letter inquiring whether the company is carrying on business or in operation. The 3<sup>rd</sup> to 5<sup>th</sup> interested parties sought to deregister the Green Turtle Company and the 3<sup>rd</sup> respondent issued a notice, which was contrary to the above law. It is their submission that the Green Turtle claimed to be owned by the 3<sup>rd</sup> to 5<sup>th</sup> Interested parties does not exist at all. The PIN numbers used by the parties are for the firm of Ibrahim Issack & Company Advocates and the 3<sup>rd</sup> Interested parties.

40. It was their submission that the 2<sup>nd</sup> Interested Party was involved in a fraud in that he had not alleged that he had not to be involved in any transaction with the ex-parte applicant and that the annexed document from KRA is dated 10<sup>th</sup> October 2011, which was a public holiday and no Government office opens on a public holiday. Further, the PIN number he alleges to be genuine was created on 23<sup>rd</sup> September 2010. This PIN is different from what was used to pay for the alleged land rents on 25<sup>th</sup> August 2008.

41. A rates clearance certificate was issued to the ex-parte applicant. The 2<sup>nd</sup> respondent had issued a demand Notice to the ex-parte applicant on 5<sup>th</sup> March 2010 for him to pay rates. This was proof that the owner to the suit property was the ex-parte applicant. There was another notice issued to the 1<sup>st</sup> Interested Party, which was amended by hand to read the 2<sup>nd</sup> Interested Party. It was submitted that the 3<sup>rd</sup> respondent failed to file any affidavit in reply despite having been served with all proceedings. The ex parte applicant consequently urged the court to allow the application.

#### **1<sup>st</sup> and 4<sup>th</sup> Respondents' submissions.**

42. It was their submission that the prayers sought by the ex-parte applicant are not available as the court derives its jurisdiction to grant judicial review remedies from the provisions of the Law Reform Act Cap 26, which prescribe that the orders have to be sought within 6 months from the challenged action. The cause of action in this case arose on 28.7.2008 and 21.9.2008 but leave to file this suit was granted on

7.7.2011. Order 53 Rule 2 of the Civil Procedure Rules which provides as follows:

“2. Leave shall not be granted to apply for an order of Certiorari to remove any judgment, order decree conviction or other proceedings for the purpose of it being quashed unless the application for leave is made earlier than six months after the date of the proceeding or such shorter period as may be prescribed by any Act and where the proceedings is subject to appeal and a time is limited by law for the proceedings is subject to appeal and a time is limited by law for the bringing and the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appeal was expired.”

They further relied on the Court of Appeal in **Mombasa Technical Institute v. Agnes Nyevu Charo & Ors, Mombasa Case No.82/2010** [2012] eKLR, where the court held that leave cannot be granted for an application for certiorari unless the decision sought to be challenged was made less than six months previously.

43. Further, it was urged, the applicant did not raise any objection within the prescribed time against the issuance of a provisional certificate when it was gazetted. The application raises issues of land ownership and fraud, which are beyond the scope of a judicial review application. They, consequently, prayed that the application be dismissed with costs.

### **2<sup>nd</sup> Respondent's submission**

44. The party relied on the replying affidavit sworn by the Clerk of the County Council of Kwale, Ndurumo Wa Gakui and submitted that the applicant did not establish any claim against them in that the accusations are against the 1<sup>st</sup> respondent for cancelling the title, which they did not contribute in any way. They only collected land rates, which is their duty and as held in **Bishop v. Attorney General of Uganda & Anor.** [1967] EA 293 where the Attorney General was a defendant, it would be wrong to join a Minister in his official capacity as the Government and the Minister could not be made liable for the same tort at the same time, and, consequently, urged the court to strike out their name from the proceedings.

45. Relying on Order 1 Rule 10 (2) of the Civil Procedure Rules, they submitted that the court may at any stage of the proceedings either upon or without the application of either party who has been improperly joined be struck out. They further relied on sections 1A and 1B as expanding the power of the court in order to achieve the overriding objective citing Civil Appeal No. 214 of 1996 **Housing Finance Company of Kenya Limited v. Faith W. Kimeriah & Harrison Kimeriah** where the wife had enjoined the bank as a party but the court found no cause against the bank. They urged the court to dismiss the application with costs.

### **3<sup>rd</sup> Respondent's submissions**

46. Counsel for the 3<sup>rd</sup> respondent urged that the ex-parte applicant had filed other proceedings against them which case was pending hearing and determination and therefore, in order to prevent questions of *res judicata* and *sub-judice*, the issue on registration of the 1<sup>st</sup> Interested Party should be addressed in Mombasa HC Pet No.95 of 2012, **Green Turtle Limited v. The Registrar of Companies.** The applicant had registered a Company having the 1<sup>st</sup> Interested Party's name but the same had been deregistered.

47. It was urged that the principles to be followed in granting judicial review orders was laid in **Nai CA 266 of 1996 Kenya National Examination v. Republic ex-parte Geoffrey Githinji Njoroge** where by the High Court compels the performance of a public duty which is imposed on a person or body of persons by 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.

48. In addition to the above, the registrar could not have registered transfer of land to the ex-parte applicant yet a Gazette notice had been published. The registrar did not have knowledge that the applicant had interest on the same land.

49. Further, the ex-parte applicant alleges issues involving fraud and obtaining money by false pretenses. The 2<sup>nd</sup> Interested Party had lodged a complaint with the police on the loss of the title but the applicant refused to co-operate and surrender the original Certificate of Title. The issue on ownership of land cannot be determined by judicial review. The same can be solved by the Environment and Land Court where the witnesses will be called and cross-examined and a finding made on merits as held in Eldoret HCMCA 65 OF 2006 **Republic v. The Officer in charge GK Prisons Eldoret. Ex-parte David Kibiwot Achikwa** where Ibrahim J. (as he then was) refused to grant judicial review orders in a case where the dispute was entirely one on ownership as opposed to administrative action and stated that the case should have been filed in a civil court. Counsel therefore urged the court to dismiss the suit with costs.

### **1<sup>st</sup> Interested Party's submission**

50. The counsel urged that there were issues that the parties agree: First is that the 2<sup>nd</sup> Interested Party was the registered proprietor of the suit property and that at some point he sold it to either to the applicant or the 1<sup>st</sup> Interested Party. It is on those issues that counsel framed issues as follows:

I. Privity of Contract.

II. Whether in law, judicial review orders could issue.

51. It was their submission that the documents on record reveal one of the transactions was fraudulent. There was no contract between the registered owner and the applicant as evidenced by Nagib Tadjin evidence that he was enticed by his friend Mr. Rafique Ibrahim to purchase the property. The applicant did not state how he came to know of the property and how the purchase price of Ksh 50,000,000/= was arrived at. Also the subject sale agreement dated 4<sup>th</sup> March 2008 was between Annur Holdings Ltd and the 2<sup>nd</sup> Interested Party and it does not mention the applicant as the nominee and the agreement was witnessed by the purchaser's advocates only but not the vendor's advocates.

52. In addition, the PIN number used A000100517P for the 2<sup>nd</sup> Interested Party does not exist in the records of Kenya Revenue Authority. Further that the alleged transaction between the 2<sup>nd</sup> Interested Party and the applicant is null and void. This is for the reason that the transfer dated 17<sup>th</sup> June 2008 was forged. The identity card number used was not his and the photograph used was not his too. An allegation of fraud has to be proved and it is not on a balance of probability as in ordinary civil suits. The applicant had filed a suit HCCC No. 342 of 2010 seeking similar orders. The issues raised in the instant application can be dealt with in the civil suit.

53. Counsel urged the court that rights and liabilities, which are subject to a contract, can only rest in a party to the said contract. Citing **Teddy v. Sterious (1904) 1 Ch. 354** that a contract only binds the parties to it, the 1<sup>st</sup> Interested Party urged that the court cannot be called upon to enforce a contract that never existed in the first instance, and that the application, therefore, ought to be dismissed with costs.

### **The 2<sup>nd</sup> Interested Party's submissions**

54. For the 2<sup>nd</sup> Interested Party it was submitted that the title is in the name of the 1<sup>st</sup> Interested Party and not in the ex parte applicant's name. It was contended that the 2<sup>nd</sup> Interested Party was granted a provisional certificate of title after full compliance with section 71 of the Registration of Titles Act following loss of the original which was duly reported to the police under OB/20/13/03/08 and an abstract therefor obtained as deponed to in the Replying affidavit of the 2<sup>nd</sup> Interested Party. Notice of Loss of title was gazetted in the Kenya Gazette giving notice to the public of the intended issue of provisional certificate; the Registrar could not have given notice to the ex parte applicant as it was not registered on the title. Pointing to the two sets of titles in possession of the ex parte applicant and the 2<sup>nd</sup> Interested Party, Counsel submitted that the entries nos. 1-6 on the two were the same resting with the removal of a caveat on 31/8/2007. Thereafter, the ex parte applicant's version of the Title showed transfer of title on 19/6/08 to Mount Robbin, while on the 2<sup>nd</sup> Interested Party's version there was no entry on Mount

Robbin before the issuance of the Provisional Certificate of Title.

55. It was submitted that the 2<sup>nd</sup> Interested Party had noticed the loss of the Title when he wanted to transfer the property to Green Turtle Ltd., which he did after obtaining a Provisional Title and consent of the Commissioner for Lands, payment of the land rent and issuance of clearance Certificate.

56. It was urged that Green Turtle existed as at 21/10/2008 pointing to a letter by the Registrar of Companies dated 23/8/11 confirming that the 1<sup>st</sup> Interested Party was registered on 18/7/2008. It was submitted that the Registrar of Companies had on becoming aware of the existence of the 1<sup>st</sup> Interested Party revoked the inadvertent registration of the company registered in the same name y the ex parte applicant in a bid to take the land.

57. Counsel submitted that 2 individuals had purported to sell the property belonging to the 2<sup>nd</sup> Interested Party at agreed price of 60million as shown in the Notice of Motion. It was pointed out that the purported letter to J.O. Magolo advocate of 13/9/07 is contradicted by a letter of 209/07 by the same advocate stating that the property is sold at 55 million while the sale agreement shown the purchase price as 50million and the sale is shown as between the 2<sup>nd</sup> Interested Party and Annur Holdings Ltd and or nominee. Counsel wondered why the sale price 'agreed' at 60million fell to 55 and subsequently to 50million.

58. In further demonstration of the alleged fraud, Counsel pointed to the discrepancies in the spelling of the 2<sup>nd</sup> Interested Party's first name, variously as **Gedion** and **Gideon**, and in the reference section and postal addresses, on the letters produced by the ex parte applicant as proof of the sale transaction. Referring to various cheques alleged to have been for the payment for the purchase price but which were not shown to have been presented at a Bank, counsel submitted that there was no payment for the suit property as alleged by the ex parte applicant. In addition, it was pointed out that there was no evidence of payment of stamp duty whose assessment is irregularly, Counsel submitted, made on 3/6/2008 before the Transfer dated 17/6/2008. It was submitted, therefore, that there was no consideration between the ex parte applicant and the 2<sup>nd</sup> Interested Party for the sale of the suit property and no evidence that the latter signed the agreement for sale, and there can therefore be no suit in land unless signature for both parties is witnessed, citing section 3 (3) of the Law of Contract Act.

59. Relying on the High Court decision of *Kosegei v Boit*, Eldoret HCCC No. 411B of 2012, counsel submitted that in accordance with the holding of that case that where there were conflicting opinions of handwriting/document examiners he court must look at the entirety of the case, the contradictions in documents in this case should lead the court to disregarding the opinion of the document examiner instructed by the ex parte applicant herein.

60. Counsel concluded that the 2<sup>nd</sup> Interested Party had gone to the police when it was discovered that some people were masquerading and after investing the documents that they were using went to the Registrar of Persons on the ID, PIN Certificate which did not belong to the 2<sup>nd</sup> Interested Party, and that the Police had instituted investigations and preferred charges against Joseph Juma Oyier for various offences including forgery and obtaining money by false pretences. Counsel urged that the ex applicant was unknown to the 2<sup>nd</sup> Interested Party and the application before the court should be dismissed on the merits, if the court overrules the objection by the Respondent and the Interested Party.

### **Issues for determination**

61. The court has referred to the notice of Motion application dated 27<sup>th</sup> July 2011, the statement of facts, the responses by the respondents and the Interested Parties and the submissions and found the following issues to arise for determination:

- I. Whether the Court validly granted leave granted to the ex-parte applicant to commence judicial review proceedings.

II. Whether or not the 2<sup>nd</sup> respondent may be struck off the proceedings.

III. Whether on the merits the 1<sup>st</sup> respondent acted *ultra vires* in issuing a provisional title and registering the subsequent transfer of the suit to property 1<sup>st</sup> Interested Party.

IV. Whether the ex-parte applicant is entitled to the reliefs sought.

## **Determination**

### ***The Law***

#### *Power of the Registrar in cases of wrongful or fraudulent entries*

62. The Registrar has *quasi judicial* power under section 60 of the RTA to correct errors on a title to land resulting from fraudulent or wrongful entries as follows:

“60. (1) Where it appears to the satisfaction of the registrar **that a grant, certificate of title or other instrument has been issued in error,** or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or **that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained,** he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.

(2) If that person refuses or neglects to comply with the summons, or cannot be found, **the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.**”

63. The Statutory jurisdiction of the Court under s. 62 of the RTA is as follows:

*62. If any person is dissatisfied with any act, omission, refusal, decision, direction or order of the Registrar-General or a registrar, that person may require the Registrar-General or registrar to set out in writing under his hand the grounds of the act, omission, refusal, decision, direction or order, and thereupon that person may apply to the court for **an order of mandamus.***

64. The court has, in addition to the power to grant mandamus under section 62 of the RTA, a general power to make judicial review orders under Article 23 of the Constitution in appropriate proceedings, and section 9 of the Law Reform Act as elaborated in Order 53 of the Civil Procedure Rules.

#### *Whether other proceeding to be interpreted ejusdem generis*

65. The ex-parte applicant herein moved the court by way of an ex-parte chamber summons seeking leave to commence judicial review proceedings against the respondents. The court heard the matter and granted leave on 6<sup>th</sup> July 2011. The respondents object that the proceedings were barred by the requirement of Order 53 rule 2 that leave be obtained within six months after the decision challenged. The ex parte applicant urged the court to construe other proceeding in the rule *ejusdem generis* to exclude decisions in purely administrative proceedings which are not judicial in nature.

66. In ***Republic v. Kenya Bureau of Standards & Ors., Ex parte Car Importers Association***, Mombasa HC JR NO. 8 of 2014, this court considered the issue of ***ejusdem generis*** application of the rule as follows:

## ***Is the application for Certiorari time barred?***

17. The *ex parte* applicant, applying the *eiusdem generis* rule to Order 53 rule 2 submitted that the 6 months limitation for the filing for certiorari relates only to a class of decisions of a court of law and not to ministerial decisions such as in this case. Accordingly, the prohibition in the rule as in section 9 of the Law Reform Act does not apply in this case. On this, the case of ***R. vs Judicial Commission of Inquiry into the Goldenberg Affair & Others***, Nairobi Misc Civil Application No. 1279 of 2004 was cited, in which the court (Nyamu, Ibrahim & Makhandia, JJ.) held that the 6 months bar applied only when questioning formal judgments, orders, decrees, conviction or other proceedings of an inferior court or Tribunal and not to the act of publishing an *ultra vires* rule stating that, "...We hold that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of the nullities...". Also cited was the case of ***R. vs Maseno University Staff & Others***, Nairobi Misc. Civil Application No. 963 of 2007 in which Wendo, J applied the Goldenberg Case stating that, "...a nullity cannot be subject of the 6 months period because it does not exist and so can be challenged outside the 6 months..."

I would agree that the time bar in Order 53 Rule 2 of the Civil Procedure Rules apply to decisions made in the nature of judicial proceedings as represented by the terminology of ***judgment, decree, order and conviction*** in the said rule. And it makes sense that in the interests of certainty and finality of judicial process, the limit as to the period as to when they should be open to challenge is reasonable. Not so for purely administrative decisions which, if *ultra* and therefore a nullity as held in the ***Goldenberg*** and ***Maseno University*** decisions, *supra*, should not be left to stand no matter the time lapse.

67. Similarly in ***Republic v. The Land Registrar, Kilifi & Anor. ex p. Cecilia Gathoni Wangare***, Mombasa HC JR No. 64 of 2011, this Court considered the same question and held:

### **"Application time barred?"**

8. Objection was taken by the Respondent and the Interested Party that the decision challenged in the judicial review proceedings was made on 10<sup>th</sup> April 2002 and the proceedings commenced outside the 6 months period provided in Order 53 rule of the Civil Procedure Rules. For the applicant, it was contended that the provisions of Order 53 rule 2 are subsidiary legislation which is trumped by the substantial justice principle of article 159 of the Constitution as a procedural technicality and the authority of ***Ogendo & Anor. v. Nzioka & Anor.*** [1993] LLR 332 (CAK) was relied on for the proposition that formal technical procedural requirements such as in that case for leave before commencement of judicial review application should not affect the exercise of the court's jurisdiction to hear the matter on the merits.

9. I, however, do not consider that the jurisdiction of the court is affected in this case by the filing of the challenge on the decision of the Respondent outside the provision of six months because **the rule applies only to decision of judicial or quasi judicial nature not administrative decisions such as those taken by the respondent in this case.** Order 53 rule 2 of the Civil Procedure Rules is based on section 9 (3) of the Law Reform Act which provides that –

***"9. (3) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings fro the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order. Decree, conviction or other proceedings or such shorter period as may be prescribed under any written law...."***

Construed *eiusdem generis*, the provisions of section 9 (3) of the Law Reform Act apply only to judgments, rulings, decrees, orders or other determinations or directions in proceedings of judicial nature."

68. The judicial review application herein was, therefore, not barred by the time stipulation of Order 53 rule 2 of the Civil Procedure Riles as the decision challenged is not a judicial proceedings alike to a

judgment or order of the court as anticipated by the rule. The court agrees that the words “other proceeding” in the said rule is to be construed *ejusdem generis* the words of the rule, ‘**any judgment, order, decree, conviction**’ as follows:

“[Order 53, rule 2.] **Time for applying for certiorari certain cases.**

2. Leave shall not be granted to apply for an order of certiorari to remove **any judgment, order, decree, conviction or other proceeding** for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

69. The order of certiorari sought out of time in **James Githinji Kiara v. William Wachira Mwaniki** [2005] eKLR relied on by the respondents was against orders made by Karatina Land Disputes Tribunal in Land Disputes Tribunal Case No. 2 of 2003, which are obviously judicial in nature, and I respectfully agree with the decision of Okwengu, J. (as she then was) therein rejecting extension of time; which circumstances are different from the present case.

### **Application to striking the 2<sup>nd</sup> respondent off the proceedings**

70. The 2<sup>nd</sup> respondent urged the court to be struck out of the proceedings since the claim by the applicant was against the 1<sup>st</sup> respondent who had cancelled the title. The 2<sup>nd</sup> respondent had a duty to collect rates from landowners. Counsel urged the court to refer to the case in **Bishop v. Attorney General of Uganda (supra)**, which relates to the orders that had been sought against the same parties who had authority to perform same function. In this instant application the applicant enjoined the party since they had written a letter to the ex-parte applicant. In **Nairobi HCCC No. 213 of 2010 Pastor Antony Makena Chege v. Nancy Wamaita Magak & Or** [2015] eKLR where the learned judge held that the purpose of joining a party as a defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party. In **Kenya Commercial Bank v. Suntra Investment Bank Ltd** [2015] eKLR the court held that the guiding principle is that every court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it.

71. No relief is sought against the 2<sup>nd</sup> respondent. His presence in the proceedings does not assist the case of either of the parties because the cause of action is for judicial review orders against the 1<sup>st</sup> and 3<sup>rd</sup> respondent. It was not alleged that the 2<sup>nd</sup> respondent had failed to carry out a statutory duty or exercised any administrative action outside his jurisdiction or unreasonably. There cannot be any justification for suing the 2<sup>nd</sup> Respondent as a defendant in the proceedings. If it was sought to show that the 2<sup>nd</sup> respondent recognized the ex parte applicant as a bona fide owner of the suit property, the same is the subject of evidence and submissions which can be adduced without the 2<sup>nd</sup> respondent being enjoined as a party.

72. The 2<sup>nd</sup> respondent shall of course suffers prejudice in being joined the proceedings because of having to participate defend the same at unnecessary cost.

73. **Judicial review proceedings should under Order 53 rule 3 (2) of the Civil Procedure Rules be served upon ‘all persons directly affected’, as follows:**

“(2) The notice shall be served on **all persons directly affected**, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”

74. **Order 53 rule 3 (4) of the Civil Procedure rules, the court may order service upon parties it**

**considers ought to have been served as follows:**

*“(4) If on the hearing of the motion the High Court is of the opinion that **any person who ought to have been served therewith has not been served**, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that **the notice may be served on that person**, upon such terms (if any) as the court may direct.”*

75. Implicit in the power under Order 53 rule 3(4) to order service on persons who ought to have been served must reverse power to order the striking out of persons who ought not have been joined in the proceedings. Happily, however, Order 1 Rule 10(2) of the Civil Procedure Rules expressly provides that the court may strike out a party from a suit or proceedings at any time, as follows:

*“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, **order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out**, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

76. The 2<sup>nd</sup> Respondent will be struck out from the suit, and his costs paid by the ex parte applicant.

### ***The purpose of judicial review proceedings***

77. The special nature of judicial review proceedings is shown in the strict regime for the consideration and grant of order of certiorari under Order 53 rule 7 of the Civil Procedure rules as follows:

**“[Order 53, rule 7.] Provisions as to orders of certiorari for the purpose of quashing proceedings.**

*7. (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.”*

78. In *Commissioner of Land v. Kunste Hotel Ltd [1995-1998] 1EA 1 (CAK)* laid the principle on Judicial review whereby the Court of Appeal held that, “in ***exercising the power to issue an order of certiorari, the court would be exercising a special jurisdiction***”. In an oft-cited passage, the Court further said that-

**“Judicial Review is concerned not with the private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected”** as was held in *Republic v. Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 ALL ER 282*.

79. The ex parte applicant sought to present its case a violation of fundamental right to property. However, such a submission would offend the limits of the special judicial review procedure of litigation. This Court had occasion to consider the nature of judicial review proceedings in *Ex-Parte Cecilia Gathoni Wangare*, supra, as follows:

**“Special jurisdiction of the Court**

10. The *ex parte* applicant sought to place reliance on the provisions of the Constitution of Kenya in his judicial review application to justify the grant of the orders on the grounds of deprivation of property under Article 40 of the Constitution and reliance placed on **Beatrice Wairimu Kiiru v. Director of Surveys & 2 Ors.** [2011] eKLR where Ouko, J. (as he then was) relied on Article 40 as further justification for the grant of order of certiorari against a decision of the Director of Surveys holding that “[b]y arbitrarily amending the register to remove the applicant’s title, the 1<sup>st</sup> respondent was in breach of article 40 of the Constitution which prohibits the State from depriving a person of private property.”

11. However, in a decision which binds this Court, **Makupa Transit Shade Ltd v. KPA**, *supra*, the Court of Appeal held that it is improper to combine the judicial review application and the constitutional jurisdiction of the court in seeking orders based on both processes, in view of the special jurisdiction of the judicial review, as follows:

“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and **order 53** of the Civil Procedure Rules. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under **Article 23** of the Constitution that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. **One cannot come to Court *vide* Judicial Review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.**”

Accordingly, the applicant ought to urge the breaches of the constitution in suitable proceedings filed in that behalf in as an ordinary suit or constitutional petition rather than a judicial review court.”

80. The *ex-parte* applicant urged the court to issue the prerogative orders of mandamus, certiorari and prohibition. The Court in **Shah v. Attorney –General of Uganda (No. 3)** [1976] EA 543 stated that “where a duty has been directly imposed by statute for the benefit of the subject upon a Crown servant as *persona designate* and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the crown, the courts have shown readiness to grant applications for persons who have a direct and substantial interest in securing the performance of this duty.”

81. The prayer for Mandamus in this suit is consequential upon the grant of the application of the Orders of Certiorari sought in Prayers (a) and (b) of the Notice of Motion to quash respectively the Registrar’s issuance to the 2<sup>nd</sup> Interested Party of the provisional Certificate of Title and the registration of the subsequent transfer of the suit property to the 1<sup>st</sup> interested Party. The Prayer for Mandamus therefore fails with the prayers for order of Certiorari.

### **The private nature of the dispute between the parties herein**

Whether there was a **contract** between the *ex-parte* applicant and the 2<sup>nd</sup> Interested Party

82. The *ex-parte* applicant urged that there was a contract between the 2<sup>nd</sup> Interested Party who was the initial *bona fide* registered owner and them. The 1<sup>st</sup> Interested Party disputed this fact. On the part of the *ex-parte* applicant they urged that sale agreement was between Annur Holdings Ltd and the 2<sup>nd</sup> Interested Party the consideration price was 50,000,000/= . The Interested Party and the *ex-parte* applicant both annexed their transfer documents for the court to refer to. The *ex-parte* applicant further annexed a forensic report dated 11/3/2012 to verify that it was the same Registrar of Titles by the name of G.G.

Gachathi who authorized their transfer and the purported 1<sup>st</sup> Interested Party's transfer.

83. In addition to the above the ex-parte applicant and the 1<sup>st</sup> Interested Party both claim the ownership of the properly L.R No. 13441 Kwale C.R No. 19516. The 2<sup>nd</sup> Interested Party in his Submissions and Replying Affidavit averred that he did not sell the above plot number to the ex-parte applicant. He went further to deny knowing the firm of Ochanda Onguru & Co. Advocates and M/s J.O. Magolo & Associates, Advocates who had been involved in the transfer of the land from him to the ex-parte applicant. In his Supplementary Affidavit dated 27/2/2012 he deponed that the police had charged one Joseph Juma Oyier.

84. The ex parte applicant and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties allege fraud against each other. The ex-parte applicant urged the court to find that the 1<sup>st</sup> Interested Party, which is Green Turtle Limited, is non-existent and that it was established by the 2<sup>nd</sup> Interested Party to fraudulently transfer the suit property, which he had already sold to the ex parte applicant. The 3<sup>rd</sup> Respondent in this proceeding is the Registrar of Companies. The ex-parte applicant averred its **Green Turtle Limited** is the duly registered company by the 3<sup>rd</sup> Respondent and that it had been issued with a certificate of Incorporation no. CPR/2011/47798 on 17/5/2011 and it was issued with a PIN Certificate number P0513593273 on 11/7/2011. The issue on whether the 1<sup>st</sup> Interested Party had been incorporated by the ex parte applicant or 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Party is the subject of another suit against the 3<sup>rd</sup> Respondent.

85. The 1<sup>st</sup> Interested Party alleged further that the PIN Number A00100517P alleged to belong to the 2<sup>nd</sup> Interested Party was not his. The 2<sup>nd</sup> Interested Party gave his PIN Number as A000128478W. Further the 2<sup>nd</sup> Interested Party averred that the I.D Number and signature used in the alleged sale transfer between the ex-parte applicant and himself were not his. It was his submission that there could not be any transfer based on fake documents. The 2<sup>nd</sup> Interested Party urged the court that he never met the ex-parte applicant and he did not effect a transfer to him citing House of Lords decision in **James Cindy and T. Bevington v. Thomas Lindsay & Ors (1877 – 78) L.R. 3 APP Cases 459.**

86. The Court, however, takes the view that although the parties herein have produced documents in evidence of this matter, the suit before the court is a Judicial Review matter not suitable for determination of disputed facts and that this court as a judicial review court is only concerned with the decision making process and not the merits of the decision itself. The court respectfully agrees with the 3-judge bench in **Uwe Meixner & Anor v. Attorney General** [2005] eKLR Mombasa Civil Appeal No. 131 of 2005 where it held that “*Judicial Review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to Judicial Review*”

87. In **ex parte Cecilia Gathoni Wangare**, supra, this Court in a case where a parcel of land subject of judicial review proceedings was claimed by two disputants, ruled that -

21. “*Clearly, the dispute as to the existence of the two parcels of land the subject of these judicial review proceedings calls for determination of the merits of the decision to issue a title to the Interested Party, not merely the process of the exercise by the Registrar of his powers or mandate under then applicable Registered Land Act, cap 300 Laws of Kenya. For the Court to determine that a parcel of land no. 945 was created by subdivision of original plot no. 941 and transferred to the applicant prior to a purported transfer and registration of the said original parcel of land no. 941 to the Interested Party, the Court will have to take evidence from the Department of Surveys responsible for subdivisions of land, the private surveyor who made the report attached to the applicant's supplementary affidavit, the owner of the land who purportedly transferred the land to the two disputant parties – the ex parte applicant and the Interested Party – the Land Registrar and the parties themselves with possible witnesses of the respective sale agreements and transfers.*”

22. *The need for full trial of the question of existence and ownership of plot no.945 and its prior registration in the name of the ex parte applicant before the subsequent registration of plot no.941 in the name of the Interested Party, which was the basis of these judicial review proceedings,*

*requires direct evidence to be adduced viva voce with cross-examination for veracity of witnesses and therefore calls for a procedure amenable to full hearing on the merits such as a suit by plaint or originating summons or by constitutional petition before the Environment and Land Court or the Constitutional Division of the Court. The judicial review court is wholly unsuited for this type of inquiry/hearing.”*

This position that judicial review is not the appropriate procedure for such determination of disputed matters of fact, has been taken in severally by the High and the Court of Appeal decisions. See **Kunste**, supra, and **Franns Investments Limited v. Registrar of Titles and 2 Ors., Mombasa** Petition No. 63 of 2012.

88. In light of the above, and the fact that the parties herein have before the Court a civil case Mombasa H.C.C No. 342 of 20101 **Mount Robbin Ltd v. Green Turtle Ltd and Gideon Towett Moi** the matter of the determination of the disputed facts as to whether any contractual relation exists between the ex parte applicant and the 2<sup>nd</sup> Interested Party will be determined in the suit as the right forum where parties can adduce all the evidence and produce the documents herein. This court cannot in the judicial review proceedings determine the facts of the case as to who is the legitimate registered owner between the 1<sup>st</sup> Interested Party and the ex-parte applicant. The counter-allegations of fraud made by the ex parte applicant and 2<sup>nd</sup> Interested Party may only be properly dealt with in a court proceeding that permits the production of evidence, with necessary cross-examination, to prove the fraud to the required standard of above the ordinary civil standard of balance of probability.

#### *Two companies one name*

89. The ex parte applicant has in Prayer (e) of the Motion herein sought an order of prohibition to prohibit the registration of another company in the name of Green Turtle Limited. The Court is not satisfied that the Registrar of Companies can lawfully register another company in the same name as the existing 1<sup>st</sup> Interested Party. However, the matter of registration of the company is already before the court in Petition No. 95 of 2012, which the constitutional court with its competence to delve into the merits of the dispute and possibility of oral evidence and cross-examination being had on the disputed facts is the better forum than this judicial review which examines the legality and process of decision-making rather than the merits thereof.

90. The intriguing question as to why the ex parte applicant directors registered a company in the name Green Turtle Limited when the 2<sup>nd</sup> Interested Party had already executed a transfer to the company in the same name with different directors must be answered by the civil proceedings for determination of the validity of the incorporation of the company and the **two** sale transactions on the subject property, and the related criminal proceedings for forgery respecting one of the alleged sale transactions. The case smacks of illegalities, some which have become the subject of active criminal prosecution, which may only be resolved upon in depth consideration of the facts in dispute and a determination on the facts made in order to pass judgment upon the application of the law on the established facts. The task is wholly unsuited for a judicial review court. Accordingly, the judicial review orders sought in this case will be declined. The dispute will be resolved through appropriate court proceedings as the parties may be advised by their legal advisers.

#### **Conclusion**

91. In conclusion, a party to a dispute, such as the ex parte applicant, who employs self help to steal a march on the other party, in this case by registering a company in the same name of a company which is a beneficiary to a transfer of property in which such a party claims an interest cannot claim protection of the court of law and equity to support its interest. Such a party must be left to his chosen devices. If true, the procurement of a provisional certificate title to land under the pretext that the original is lost while, in truth, the party has already sold the property to another is fraudulent, and the party involved in such deception cannot claim the court's protection.

92. But the determination of disputed facts, including whether the ex parte applicant was ever registered as the proprietor of the suit property, as it alleges, so as to support its claim herein to an order of certiorari against issuance of the provisional title, must be left to a fact finding civil court rather than an administrative review court which looks only into the procedure of decision making and not the merits of the decision itself. The issues in the matter before the court exceed the mere illegality in the process and breach of administrative law principles because the facts upon which the claim is based are disputed and unclear.

93. To grant the judicial review orders sought herein would be to determine that there was indeed a valid contract for the sale and transfer of the suit property by the 2<sup>nd</sup> Interested Party to Annur Holdings Limited - the person under whom the ex parte applicant claims and that, therefore, the 2<sup>nd</sup> Interested Party's application and procurement of a provisional Certificate of Title and subsequent transfer of the suit property to the 1<sup>st</sup> Interested Party with the 3-5 Interested Parties as its directors was, fraudulently calculated to deprive the ex parte applicant of its rights as registered proprietor under the prior contract of sale and transfer. It would also impact on the criminal proceedings for forgery against named persons alleged to have been involved in purported transfer of the suit property to Annur Holdings Limited. Such adjudication may only properly be made in suitable civil and criminal proceedings.

94. The judicial review procedure, being unsuited for the determination of the private dispute herein, is unavailable to the ex parte applicant.

### **Orders**

95. Accordingly, for the reasons set out above, the court makes the following orders:

1. The application dated 27/07/2011 is declined.
2. There shall be an order for costs to be paid by the ex parte applicant to the Respondents and Interested parties.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JUNE, 2018.**

**E.K.OGOLA**

**JUDGE**

### **Appearances:**

Dr. Khaminwa for Ex Parte Applicant

Mr. Eredi for the 1, 3 & 4 respondents

Mr. Athuok for 1, 3, 4 & 5 Interested Parties

N/A for the 2<sup>nd</sup> Respondent.