



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 95 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY ARYAN LIMITED FOR LEAVE TO APPLY  
FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: THE DECISION BY THE LAND REGISTRAR MOMBASA  
CONTAINED IN THE LETTERS DATED 12<sup>TH</sup> SEPTEMBER, 2012 AND 2<sup>ND</sup> NOVEMBER 2012  
TO RECALL THE TITLE TO THE PARCEL OF LAND KNOWN AS TITLE NUMBER  
MOMBASA/BLOCK XX/265A FOR PURPOSES OF RECTIFYING THE SAME**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR.....RESPONDENT**

**AND**

**1. THE ATTORNEY-GENERAL**

**2. FIDELITY COMMERCIAL BANK**

**3. THE ADMINISTRATOR OF THE ESTATE OF THE LATE**

## RULING

### Introduction

1. Pursuant to the leave granted by this court on 7th December, 2012, ARYAN LIMITED (hereinafter “the Ex parte Applicant”) moved the court by a Notice of Motion dated and filed on 10<sup>th</sup> December 2012 in which it seeks the following:

- i. An **order of certiorari** to remove into this Honourable Court the decision of the Land Registrar, Mombasa (the Respondent herein) contained in the letters dated 12<sup>th</sup> September, 2012 and 2<sup>nd</sup> November, 2012 to recall and rectify the title to the parcel of land known as **Mombasa/Block XX/265A** for the reason that the same has an error for purposes of quashing the said decision.
- ii. An order of **prohibition** to prohibit the Land Registrar, Mombasa from recalling, rectifying, making entries in the register of Title Number Mombasa/Block XX/265A and or in any other manner impeaching the Applicant's title to the parcel known as Title Number Mombasa/Block XX/265A and or acting in any other way prejudicial to and/or inconsistent with the Applicant's registered proprietorship of Title Number Mombasa/Block XX/265A.
- iii. An order of **prohibition** to prohibit the Land Registrar, Mombasa from further disseminating, publishing, placing advertisements, notifications to the public or to any person or institution in any form of letters, media, expressing, and from making written representations and or verbal utterances, to anyone in any way or manner or at all, of any matter or material which may be inconsistent with the legality of the registered proprietorship of Aryan Limited over Title Number Mombasa XX/265A.

2. The Application is supported by the Affidavit Verifying the Facts of MAHESH S.K. SHAH sworn on 4<sup>th</sup> December, 2012, the Statutory Statement dated 5<sup>th</sup> December, 2012 and a Further Affidavit sworn by the same deponent on 10<sup>th</sup> July, 2013.

### The Ex parte Applicants' Case

3. The Ex parte Applicant's case is that it is the registered owner of the property known as **Mombasa/Block XX/265A** (hereinafter “the suit property”) being a leasehold interest for 99 years from 1<sup>st</sup> October, 1951 and holds the original title for the same issued on 19<sup>th</sup> May, 2009. The ex parte Applicant also pleads that it is the third registered owner of the suit property having purchased it from **Silpy Nimish Shah** and **Nimish Jayantilal Shah** in 2009 and that the suit property is charged to FIDELITY COMMERCIAL BANK LIMITED, the 2<sup>nd</sup> Interested Party herein, as security for a loan of Kshs. 40,000,000.00 through a charge dated 19<sup>th</sup> September, 2011.

4. The ex parte Applicant avers that by letters dated 12<sup>th</sup> September, 2012 and 2<sup>nd</sup> November, 2012, the Respondent made a decision to recall the ex parte Applicant's title to the suit property for the purposes of rectifying the same by removing the name of the Government of Kenya and substituting the same with the Estate of the Late Mohammed Raffiq Kanji.

5. The ex parte Applicant contends that the Respondent's decision to recall the title is *ultra vires* the provisions of the Land Registration Act, 2012 which does not give the Land Registrar any power to recall a title for purposes of rectifying the same and that the Respondent's decision is in excess of the powers conferred by the applicable law, is biased, malicious, mischievous and has caused the ex parte Applicant damage.

### **The Respondent's Case**

6. The Respondent, the Land Registrar, opposed the Application through a Replying Affidavit sworn by HASHIM GOT SAT on 17<sup>th</sup> July, 2013. The Respondent's position is that the title had a typographical error which needed to be corrected in that the same indicated the Government of Kenya as the lessor instead of Mohamed Rafiq Kanji who owned the suit property as the absolute freehold owner.

7. The Respondent stated that the Land Registrar had powers under **section 8 (a-e)** of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) and now **section 14 (a)** of the Land Registration Act to require any person to produce any instrument, certificate or other documents or plan relating to the land in question. Further that **section 142 (1)** of the repealed Registered Land Act gave the Registrar powers to rectify the register and that **section 79** of the Land Registration Act expressly stipulates that the Registrar may rectify the register.

### **The 1<sup>st</sup> Interested Party' Case**

8. The First Interested Party, the Attorney General, filed Grounds of Opposition to the Application dated 25<sup>th</sup> June, 2013. The opposition is on the following grounds:

- i. that the Application is misconceived, frivolous, vexatious and an abuse of the court process.
- ii. that the orders sought are untenable and a nullity
- iii. that the Applicant is the author of its own misfortunes.

9. The First Interested Party did not file any Replying Affidavit or Submissions to elaborate on the above grounds of opposition. Neither were the same urged orally before court.

### **The Second Interested Party's Case**

10. The Second Interested Party, Fidelity Commercial Bank Limited, filed a Replying Affidavit sworn by its Deputy General Manager, SUKESHA DABHOLKAR, on 8<sup>th</sup> October, 2013. The Second Interested Party also filed its Written Submissions dated 21<sup>st</sup> July, 2015.

11. According to the Second Interested Party, the Respondent had power under **section 142** of the Registered Land Act to rectify the title. The Second Interested Party argues that although the Registered Land Act was repealed, under section 107 (1) of the Land Registration Act that replaced it, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the Land Registration Act shall continue to be governed by the law applicable to it immediately prior to the commencement of the Land Registration Act. That, therefore, since the process calling for the surrender of the title for rectification commenced in February, 2012 when the Registered Land Act was still in force, the Respondent had power to continue with the said rectification process irrespective of the repeal of the Registered Land Act.

12. The Second Interested Party states that the ex parte Applicant charged the suit property to it knowing too well that interest they purport to hold in the suit property was a subject of rectification long before the ex parte Applicant purported to charge the property to the Second Interested Party.

13. In its Written Submissions, the Second Interested Party contends that these proceedings are time-barred because the Respondent's decision to call for the certificate of lease for rectification was made by a letter dated 14<sup>th</sup> February, 2012 and therefore the six-month period provided for under **Order 53 Rule 2** of the Civil Procedure Rules, 2010 expired on 14<sup>th</sup> August, 2012.

14. The Second Interested Party also submitted that the court has no jurisdiction to issue orders of certiorari to quash the Respondent's decision because the two letters by the Respondent are not orders,

judgments, decrees, convictions or other proceedings which are the only instruments amenable to the remedy of certiorari.

15. Further, it was the Second Respondent's submission that the ex parte Applicant's argument that it purchased the suit property for value does not help its case since the ex parte Applicant did not purchase the property but a leasehold interest in the land. Further that the issue of ownership was not the subject of the Respondent's letters as the Respondent only called for the certificate of lease to rectify the same but not to cancel it. The Second Interested Party also argued that rectification of the certificate of lease by removing the Government of Kenya as lessor and replacing it with the actual lessor is a formality that does not materially affect the interests of the ex parte Applicant since the ex parte Applicant is the proprietor of a lease and not of the land.

16. The Second Interested Party contends that there is no requirement under **section 142 (1) (a)** of the Registered Land Act (now repealed) requiring the Registrar to hear any person before correcting formal errors and omissions and that the person who could complain about the intended rectification is the Government of Kenya because the Respondent proposes to delete Government of Kenya from the proprietorship section.

17. The Second Interested Party concluded by submitting that the question of how the Government of Kenya was included as lessor in the title is one that cannot be resolved in judicial review proceedings and the ex parte Applicant ought to file substantive proceedings to enable a full inquiry as to how the error came about.

### **The Third Interested Party's Case**

18. The Third Interested Party, the Estate of Mohammed Raffiq Abdulla Kanji, opposed the Application by the ex parte Applicant through the Replying Affidavit of MOHAMMED IQBAL MOHAMMED RAFFIQ sworn on 6<sup>th</sup> May, 2013 and written submissions dated 7<sup>th</sup> July, 2015 and filed on 9<sup>th</sup> July, 2013.

19. The Third Interested Party states that the estate of the late Mohammed Raffiq Abdulla Kanji owns the suit property on a freehold basis that the original title of the suit property was Mombasa/Block XX/2 but the parcel was fraudulently subdivided to several portions including the suit property and a certificate of lease irregularly issued in favour of the ex parte Applicant indicating the Government of Kenya as lessor.

20. The Third Interested Party avers that the ex parte Applicant's contention that the Respondent acted *ultra vires* cannot stand as the ex parte Applicant refused to furnish the Respondent with the title documentation for verification and rectification but instead opted to institute these proceedings before the Respondent could make any decision capable of being quashed.

21. While relying on the case of **REPUBLIC v. COMMISSIONER FOR LANDS & 13 OTHERS EX PARTE ERERI CO. LTD & 8 OTHERS [2013] eKLR**, the Third Interested Party submitted that a decision by the Land Registrar to recall and revoke a title to land does not constitute a decision capable of being quashed, that under **Order 53 Rule 2** of the Civil Procedure Rules, 2010, a decision capable of being quashed would either be a judgment, order, decree, conviction or any decision emanating from a proceeding.

22. Just like the Second Interested Party, the Third Interested Party submitted that the underlying dispute in this case is the ownership of the suit property which will remain unresolved even if the orders sought are granted. The Third Interested Party avers that even if the notice under challenge is quashed, the parties will still have to go before a court with the requisite jurisdiction to have the question as to ownership and authenticity of the titles to the suit property determined and that to grant the prerogative orders sought will therefore be in vain.

### **The Issue for Determination**

23. In my view, the main issue for the court's determination is whether the Application merits the judicial review remedies of certiorari and prohibition sought by the ex parte Applicant. In order to answer that broad question, I will address my mind to the following questions:

- i. Whether the circumstances herein warrant the granting of the orders sought;
- ii. Whether the Respondent's decision contained in the letters dated 12<sup>th</sup> September, 2012 and 2<sup>nd</sup> November, 2012 is a decision capable of being quashed through an order of certiorari;
- iii. Whether the Application by the ex parte Applicant is time-barred.

### Analysis

#### Whether the Circumstances Herein Warrant the Granting of the Orders Sought

24. I have carefully considered the documents presented before court and upon doing so it is manifestly clear to me that the underlying issue here is ownership of the suit property. The Third Interested Party contends that the suit property belongs to it having acquired the freehold title thereto and that the same was fraudulently subdivided and a Certificate of Lease irregularly issued in favour of the ex parte Applicant. The ex parte Applicant on the other hand contends that the suit property belongs to it having purchased the same as a third party innocent purchaser from **Silpy Nimish Shah** and **Nimish Jayantilal Shah** in 2009. The Respondent on its part seems to acknowledge that there was a problem with the manner in which the ex parte Applicant's Certificate of Lease was issued and seeks to rectify the same. The issue of who is the rightful owner of the suit property cannot be determined through these proceedings. It is an issue that requires the adducing and hearing of *viva voce* evidence.

25. In the case of **REPUBLIC V OFFICER COMMANDING TRAFFIC NAIROBI AREA & 2 OTHERS [2014] eKLR**, Odunga, J. held that:

**“Judicial review applications as is well known is not the right forum to resolve disputed matters of evidence as to do so would require the parties to adduce *viva voce* evidence. As was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354 -**

**“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy,**

which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts.”

26. In my view, on the basis that the dispute herein is one of ownership of the suit property and requires determination in an appropriate forum other than in these proceedings, the orders sought should not be granted. I say so because, as was pointed out in **Sanghani Investment Limited, supra**, judicial review remedies are discretionary in nature. The court can only exercise that discretion in a situation where such exercise will result in resolution of the issues in dispute. In the circumstances herein, it is clear that even if the Respondent's letters in issue are quashed, the dispute as to ownership of the suit property will remain unresolved. A court of law should not act in vain. For the avoidance of doubt, I wish to put reliance for the above finding on the case of **REPUBLIC vs. REGISTRAR OF TITLES & EX PARTE KENYA SHELL LIMITED[2013] eKLR** where Odunga, J. held as follows:

“Determination of the issues raised herein necessarily requires that oral and/or documentary evidence be adduced in the absence of which, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review powers under sections 8 and 9 of the *Law Reform Act Cap 26 Laws of Kenya*.

Where the determination of the dispute before the Court requires the Court to make a resolution on conflicting issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the same reason that the court would require *viva voce* evidence to be adduced for the determine the case on the merits before the rights of the parties herein. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. Here, there are serious factual issues which require to be resolved and which go beyond the Court's jurisdiction in judicial review proceedings. See Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995.

In Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders.”

Whether the Respondent's Decision in the Subject Letters is a Decision Capable of Being Quashed

27. I wish to reproduce the letters in issue verbatim for their full meaning and import. The letter dated 12<sup>th</sup> September, 2015 was as follows:

“MINISTRY OF LANDS

DEPARTMENT OF LANDS

P.O. BOX 80053-80100

MOMBASA

REF: CF 3674 12<sup>th</sup> September 2012

Chief Land Registrar,

P.O. Box 30089,

**NAIROBI.**

**RE: MOMBASA BLOCK XX/2 (SUBPLOTS MSA/BLOCK XX/256 & 265 FORMERLY LT 2 FOLIO 439 FILE 630**

Please kindly refer to several correspondences terminating with your letter No. MSA/A/24/VOL.XI/76 of 29<sup>th</sup> August, 2012 and would like to inform you as hereunder:-

First and foremost, according to the records held herein, at no time has the Government of Kenya acquired an interest on (sic) the aforesaid pieces of parcels (sic) or land. It must have been an error of the side of the office which must be corrected to avoid any future litigation.

Further my letter No. 3674 of 18<sup>th</sup> April, 2012, addressed to M/S ARYAN LIMITED of P.O. BOX 84869-80100 Mombasa and another of Ref. No. 3674/1/012 of 14<sup>th</sup> February, 2012, Photostat copies of which are in your possession, explained the historical background of the registration particulars and confirmed that the parcel is a freehold/absolute land owned by MOHAMED RAFFIQ KANJI who created a lease instrument in favour of KENYA ESTATE LIMITED. The lessor, therefore, is MOHAMED RAFFIQ KANJI.

I intent (sic) therefore, to invoke the powers bestowed upon me by the Act to recall the aforesaid title for rectification which then registrar had acted upon.

By a copy of this letter we are informing the parties concerned to surrender the title for rectification and will keep you posted.

Thank you.

HASHIM G S

LAND REGISTRAR

**MOMBASA**

CC.

M/S ARYAN LTD

P.O. BOX 84869-80100

**MOMBASA.**

MOHAMED RAFFIQ KANJI'S ESTATE

P.O. BOX 80843-80100

**MOMBASA.**

M/S FIDELITY COMMERCIAL BANK LTD

P.O. BOX 98538

**MOMBASA.”**

28. The above letter was responded to by the ex parte Applicant's advocates, E.W. Njeru through their letter dated 31<sup>st</sup> October, 2012 in which the said advocates disputed the Respondent's powers to rectify the title. In response to the ex parte Applicant's advocates, the Respondent wrote the second letter which is under review dated 2<sup>nd</sup> November, 2012 in the following terms:

“MINISTRY OF LANDS

DEPARTMENT OF LANDS

P.O. BOX 80053-80100

**MOMBASA.**

REF: CF 3674 2<sup>nd</sup> November 2012

M/S E.W Njeru & Co. Advocates,

P.O. Box 1382-80100,

**MOMBASA.**

**RE: TITLE NUMBER – MOMBASA/BLOCK XX/265(A)**

**REGISTERED IN THE NAME OF ARYAN LIMITED AND**

**CHARGE TO FIDELITY BANK LIMITED**

Your letter ref: No. A/90/12/CIV of 31<sup>st</sup> October 2012 refers.

It is indeed surprising that you have decided to personalized (sic) the whole matter for reasons best known to you and avoiding the legal facts with regard to the registration procedures and practices.

The powers bestowed upon the undersigned are clearly stipulated on the relevant acts of parliament and without prejudice, I am inviting you to read the following here below provisions:-

- a. The general powers of the land registrar under section 8 (a-e) of the RLA Cap. 300 Laws of Kenya (now repealed).
- b. Section 142 (1) (a) of the RLA Cap. 300 Laws of Kenya (now repealed) on the rectification of the title and
- c. Section 14(a) of RLA 2012 – on the rectification of titles.

Further to the aforesaid letter under reference was addressed to the Chief Land Registrar's Office, Nairobi, in response to the various correspondence and complaint raised by the Administrators of the estate of the late MOHAMED RAFFIQ ABDULLA KANJI who are the lessor in the said title. It was an error for the lessor to be indicated as the Government of Kenya and yet this was a private property.

I wish to inform you once again that I have no personal interest in this matter but just performing my duties in good faith. In any case you are aggrieved by my action; you should seek legal redress in competent court of law other than issue threats and intimidation aimed at avoiding the real issues.

It is my humble appeal to you to call on the undersigned during normal office working hours and verify all the facts by perusing the relevant documents. I instrument (sic) in our records to confirm that the true position instead of writing uncalled for letter and in bad faith.

Kindly advise your client to surrender the above named title for rectification in accordance with registration procedures even though there is an existing encumbrance.

Thank you.

HASHIM G S

LAND REGISTRAR

**MOMBASA**

CC.

The Chief Land Registrar

**NAIROBI.**

M/S Fidelity Commercial Bank Ltd

P.O. Box 98538

**MOMBASA.**

M/S Aryan Limited

P.O. Box 84869-80100

**MOMBASA.**

The Administrator of the Estate

Mohamed Raffiq Kanji's (deceased)

P.O. BOX 80843-80100

**MOMBASA.”**

29. It is the above two letters that triggered the present case. A similar issue on whether the Registrar's letter is a decision capable of being quashed arose in the case of **REPUBLIC vs. COMMISSIONER FOR LANDS & 13 OTHERS EX PARTE ERERI CO. LTD. & 8 OTHERS [2013] eKLR**. Omondi, J. addressed her mind to the issue as follows:

**“The focus in this matter is the letter dated 15<sup>th</sup> June 2011 by the Chief Registrar to Eleri Company Ltd., advising it to surrender the Head Titles. The reason for such intimation was so as to enable the Chief Land Registrar’s office to complete the exercise of conversion of titles to RLA titles. The recall was necessary (according to the letter) because the Head titles had been obtained unprocedurally from the lands office, before the exercise of conversion of titles was complete.**

**Is the said letter capable of creating a right, or whether was it an opinion which is not binding? Does the letter constitute a decision that can be quashed? These considerations are necessary because an order of certiorari issues where there has been a decision or proceedings making a determination and which is carried out in excess of jurisdiction or error of law on the face of the record or breach of the rules of natural justice – this position has been stated in several decisions which counsel in this matter have cited...**

The contentious letter is reproduced in part here below – being entitled ***Surrender of Head Titles:-***

**“As you are aware the above titles were released on 25<sup>th</sup> August 1994 from this office to James Kariuki Muchiri who purported to be the company secretary. The same titles had been earlier surrendered to this office to facilitate registration of surrenders with an aim of converting the titles into RLA. The release of the titles back to the company through Mr. Muchiri was unprocedural.**

**Under the circumstances, you are therefore required as a matter of urgency to surrender all the above named titles to enable this office complete the exercise of conversion it had commenced. In any case the titles are not in the custody of the Company, confirm to this office within twenty one (21) days from the date hereof to enable us gazette the titles for.... under Cap 281. Any members/party still interested with nullification of the already issued title deeds under RLA should seek redress from the court. On receipt of valid court orders, the issued title deeds will be cancelled but in the meantime they remain as valid as issued.”**

***My comprehension of the contents of the letter is that the Chief Land Registrar had made a decision on procedure followed regarding the release of the head titles applicants had***

*and requested/advised them to surrender them. The letter explained that the surrender was so as to enable him complete his job. It was not a decision validating the titles, and it is misplaced for the applicants to state that the letter declared validity of Title Deeds for the parcels under reference. Indeed as submitted by Mr. Njengo, the letter merely pointed out that the Head titles were released in an unprocedural manner and called upon the applicants simply to confirm whether they were ready. It further indicated the steps to be taken in the event that the applicants did not have the titles and advised any aggrieved party to seek legal redress.*

*Surely the applicants would not be seeking redress over advice which they had choice to either accept or reject. They would only seek redress if what was being communicated to them was a decision adversely affecting them.*

*The major concern is whether this decision is capable of being quashed by way of certiorari. This court was urged to be guided by Republic vs. Ministry for Transport and Communication and 5 others, Misc. Civil Application No.617 of 2003 where it was held that a gazette notice was a mere report by the Minister for consumption of the general public and therefore not capable of being quashed by an order of certiorari. The relevance of this comes in the light of provisions of Order 53 Rule 2 of the Civil Procedure Rules (2010) which is to the effect that a decision capable of being quashed would either be a judgment, order, decree, conviction or any decision emanating from a proceeding. It is argued on behalf of the interested parties that the letter by the Chief Land Registrar does not fall within the category.*

*The court's attention is also drawn to holding No.(a) which stated that:-*

**“The letters containing the decision of KPA to terminate the licence issued did not contain a decision capable of being quashed by way of certiorari.”**

My view is that this was decision arrived at by considering the procedure adopted in releasing those letters, and its contents did not constitute a decision capable of being quashed by way of certiorari. Having found that the release was unprocedural, the Chief Land Registrar simply communicated to say:-

**'This was not corrected, we need those titles so as to convert them to RLA, please hand them over – if you are unhappy with the steps taken, please seek legal redress in court.'**  
**(underlining mine)**

30. The evidence adduced shows that the Respondent realized that there was an error in the Certificate of Lease issued to the ex parte Applicant in that the same indicated the lessor as the Government of Kenya instead of Mohamed Raffiq Kanji who was the freehold title holder. The Respondent therefore called for the Certificate of Lease to rectify the same to reflect the right position and he explained as much in the subject letters. He did not in any way nullify the ex parte Applicant's Certificate of Lease so as to warrant quashing his decision.

31. My understanding of the letters is that they merely expressed the Respondent's intention to recall the titles for purposes of rectification. In the letter dated 2<sup>nd</sup> November, 2012, the Respondent even advised the ex parte Applicant to seek redress if they felt aggrieved by his actions. As was held by Omondi, J. in the above case, an advice which the ex parte Applicant had a choice to ignore cannot amount to a decision capable of being quashed. The Respondent therefore did not do anything capable of being quashed. It is until the Respondent rectifies the Certificate of Lease that the ex parte Applicant can challenge such an action, if aggrieved by it.

### **Whether the Application by the Ex parte Applicant is time-barred**

32. The 2<sup>nd</sup> Interested Party argues that the decision of the Respondent to recall the Certificate of Lease for rectification was made on 14<sup>th</sup> February, 2012 and therefore these proceedings should have

commenced latest in September, 2012.

33. To the Replying Affidavit of Mohammed Iqbal Mohammed Raffiq sworn on 6<sup>th</sup> May, 2013 is attached a letter from the Department of Lands, Mombasa dated 14<sup>th</sup> February, 2012 addressed to the ex parte Applicant. The said letter was entitled “MOMBASA/BLOCK XX/265A” and stated in part that:

**“Please note that the certificate of lease issued to you by this office on 19th February 2008 by way of transfer of lease from Namish Jayantlal Shah and Shilpy Nimish Shah... has a clerical/typographical error. Whereas it is indicated on your Certificate of lease that the lessor is Government of Kenya, according to our records the lessor should be one Mohamed Raffiq Abdalla Kanji and others who is the freehold owners of the parcel number MSA/BLOCK XX/265A...**

**In view of the foregoing, under the powers conveyed to me by section 142(a) of the Registered Land Act (Cap. 300) by this letter you are hereby kindly requested to call upon the undersigned together with the original certificate of lease for rectification and put our records in order within 21 days from the date hereof.”**

34. At paragraph 8 of the Further Affidavit worn by Mahesh K. S. Shah on 10<sup>th</sup> July, 2013, the ex parte Applicant admitted that it received the above letter of 14<sup>th</sup> February, 2012. It is clear therefore that the move by the Respondent to recall the Certificate of Lease was conveyed to the ex parte Applicant on 14<sup>th</sup> February, 2012. The letter dated 12<sup>th</sup> September, 2012, which also made reference to the one of 14<sup>th</sup> February, 2012 was simply a reminder.

35. Order 53 Rule 2 of the Civil Procedure Rules, 2010 provides as follows:

**“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.”**

36. The Application for leave to apply for the judicial review remedies should have been made latest by 15<sup>th</sup> August, 2012. The application for leave in this case was filed on 5<sup>th</sup> December, 2015, clearly out of time. Although leave was granted, I believe the court only acted on the basis of the letters dated 12<sup>th</sup> September, 2012 and 2<sup>nd</sup> November, 2012 which were presented before it by the ex parte Applicant. If it was brought to the attention of the court that the communication complained of had been made on 14<sup>th</sup> February, 2012 perhaps the court would not have granted leave. Be that as it may, it is my view that the orders sought should not be granted because the application for leave was filed out of time thereby rendering the substantive motion equally defective.

### **Conclusion**

37. For the foregoing reasons, I find and hold that the judicial review orders sought do not lie. The Notice of Motion dated and filed on 10<sup>th</sup> December, 2012 is therefore dismissed with costs to the Respondents and Interested Parties.

38. There shall be orders accordingly.

**Dated, signed and Delivered in Mombasa this 4<sup>th</sup> day of March, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

No Appearance for Applicant

Mr. Mogaka holding brief Ms. Kipsang for Interested Parties

Miss Lutta for Respondent

Mr. Kaunda Court Assistant