



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 404 OF 2013**

**IN THE MATTER OF AN APPLICATION TO FILE JUDICIAL REVIEW PROCEEDINGS IN THIS COURT**

**AND**

**IN THE MATTER OF APPLICATION TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENT**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE LAND ACT AND LAND REGISTRATION ACT LAWS OF KENYA**

**AND**

**IN THE MATTER OF REASONABLENESS WITH RESPECT TO THE ACTIONS OF MACHAKOS COUNTY GOVERNMENT**

**AND**

**IN THE MATTER OF ALLEGED LAND GRABBING OF COMMUNITY AND PRIVATE LANDS**

**AND**

**IN THE MATTER OF DEVELOPMENT OF MACHAKOS CITY**

**AND**

**IN THE MATTER OF PRINCIPLES OF PROPORTIONALITY AND LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE DOCTRINE OF REASONABLENESS IN THE EXERCISE OF POWER AND RATIONALITY**

**AND**

**IN THE MATTER OF THE DOCTRINE OF NEMO DAT QUOD NON HABET**

**BETWEEN**

**REPUBLIC……..……....APPLICANT**

**-VERSUS-**

**MACHAKOS COUNTY GOVERNMENT…..…….. RESPONDENT**

**AND**

**CS, FOR AGRICULTURE, LIVESTOCK &**

**FISHERY……..……..……..1ST INTERESTED PARTY**

**NZILANI MUTETI……...…2ND INTERESTED PARTY**

***EX-PARTE:* HON. SENATOR JOHNSTONE MUTHAMA**

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 4th February, 2014, the *ex parte* applicant herein, **Hon. Senator Johnstone Muthama**, the Senator for Machakos County, seeks the following orders:

> **a. That court be pleased to issue an order of certiorari to quash the decision by the Respondent to excise the land belonging to the Interested Party for its own use and giving the same away for free or any other consideration to potential investors in the New Machakos City Investment Programme for the development of the New Machakos City.**
>
> **b. That the Court be pleased to issue an order of prohibition to prohibit and restrain the Respondent whether by itself, agents, employees, contractor, representative, assigns or anybody whomsoever from in any way launching, commencing of the construction and/or development of the New Machakos City, demanding and or any other dealings on the land measuring 4,000 acres earmarked for the said project and giving the same away to investors for free or any other consideration to potential investors for the purposes of developing the said New Machakos City.**
>
> **c. Costs.**

### *Ex Parte* Applicant's Case

2. The application was based on the following grounds:

> 1) The Applicant is the Senator of Machakos County and thus represents the interests of the people of the said county in all respects as part of the leadership of the said county.
>
> 2) The Respondent as the County Government in charge of the Machakos County has come up with what is calls the New Machakos City and Investment Programme as part of its development plan

where it plans the commencement of the Development and/or construction of the said New Machakos City with a ceremony slated for the 8th of November 2013 at the New Machakos City site in Machakos town and the Governor of the said County, **Dr, Alfred N. Mutua**, has invited other dignitaries including His Excellency the President of the Republic of Kenya for the said launch of the city project.

3) The said Machakos City Investment Programme involves investment in real estate, tourism, hotels, health, ICT, education, trade, water, transport, industry, entertainment, communication, banking, agriculture, aviation among other investment opportunities and to attract investors in the said sectors it has offered free land as an incentive to attract the prospective investors.

4) That the County Government of Machakos has set aside about 4,000 acres of land for the said New Machakos City and in doing so has excised and encroached on land belonging to the Interested Party and more specific, land belonging to the veterinary services department of the Interested Party herein which property measures 1,420 acres and is known as Machakos Veterinary Farm and sought to take over the said parcel of land without any consultations with the Central Government whatsoever.

5) That Machakos Veterinary Farm is part of lands that were initially preserved under two gazette notices Nos. 751 of 28/11/1963 and 750 of 22/11/1963. The said farm has been under the authority of the Interested Party since then and has been in use by the Department of Veterinary Services as a holding ground for cattle destined for Kenya Meat Commission (KMC); as Farmers Training Centre for extension training to livestock producers in Machakos County and contiguous areas; for attachment for various levels of trainees in animal health as a veterinary farm with 117 cattle and 82 sheep and goats and is also used for veterinary drugs and vaccines trials; as a livestock multiplication centre and gene bank; and as a mitigation for drought by producing hay for sale to farmers at subsidized prices.

6) That the Interested Party through its respective Cabinet Secretary, wrote and complained to the National Land Commission laying claim to ownership of some of the land that the Respondent has earmarked for the construction of the said New Machakos City and the said Ministry has requested to be issued with a title deed for its property which it had earlier on applied for.

7) The Interested Party had commissioned survey work on the said property to be conducted so as to protect its property from illegal encroachment and excision and the said exercise was completed and the requisite application for an issue of the title deed for the said farm lodged.

8) Further, the Interested Party through the Livestock Principal Secretary has stated that the Interested Party has not agreed with the Respondent, the Machakos County Government, to take over any of its land wherever situate and therefore the land cannot be free as earlier claimed by the Machakos County Government in its promotion of the said Investment Programme in media reports.

9) That the acts of the Respondent through its officers and agents are illegal and not sanctioned by any known written law.

10) That it is apparent that the Respondent herein has breached the rules of Natural justice by purporting to excise land belonging to the Interested Party herein for its own use without any colour of right whatsoever or any express authority to do so and therefore the said act is unlawful.

11) That the acts of the Respondent are completely in breach of clear principles of natural justice which require that no person whether a body corporate or otherwise shall be dispossessed of their property without valid grounds being preferred for any such action against it.

12) That the acts of the Respondent were carried out by a public authority which failed to have

regard to all relevant considerations and have perpetrated an illegality against the Interested Party and the prospective investors in its project christened "New Machakos City" under its Machakos City and Investment Programme.

13) That the Respondent's purported acts of giving out free land to prospective investors in their project is against the doctrines of equity and more particularly the doctrine of *"nemo dat quod non habet"* which reiterates that one cannot give what they have no title to, thereby negating their acts of dishing out land belonging to the Interested Party herein to unsuspecting invertors under the pretext of ownership of the same.

14) That the Respondent has illegally usurped the powers bestowed on the National Land Commission which is not only recognized by the Constitution but also the land legislations as having the power to manage land in Kenya and determine the use of such land as the Respondent purports to do.

15) The Applicant questions the authority of the Respondent by purportedly usurping the powers of the Central Government as it is the only one that can compulsorily acquire property and only in instances where the public good outweighs the interest of a few and that such acquisitions are always done in a fair and transparent manner contrary to the Respondent who has not demonstrated that they had authority to acquire the said land from the Interested Party.

16) That unless the Respondent is barred from commencing the planned launch of the New Machakos City on the 8th of November 2013 or at any other time, the Interested Party stands to lose its property and the people of Machakos will be denied the benefits of the research that is carried out on the said parcel of land by the Interested Party.

17) That the Respondent's actions are arbitrary and are unlawful and hence ought to be stopped forthwith by operation of the law.

18) That the impugned decision by the Respondent was not only unconstitutional but also unreasonable and contrary to the legitimate expectation of all the persons affected.

19) That the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for its impugned actions and adverse decisions.

20)That this court has immense powers to issues to issue the orders sought herein.

3. According to the applicant, he was aware from his own knowledge and information from the media and elsewhere that the County Government of Machakos had what appeared to be plans to develop a modern Central Business District with ultra-modern buildings within Machakos County and towards that end had advertised in the Print and sound Media inviting investors to come and invest in the said Machakos City project.

4. It was averred by the applicant that it had come to his knowledge that land upon which the project was supposed to be situate belongs to the Ministry of Agriculture, Livestock and Fishery and the same was earmarked for a veterinary project. He averred that he was also aware of the illegal acts of the County Government of Machakos that is intended to grab all adjacent lands both private and community without the consent or approval from the legal owners thereof. The applicant contended that he had never been made aware of any meeting held by the County Government of Machakos inviting the owners of the adjacent parcels of land and consulting them over the intended project but only learnt from the Newspapers and radio announcements that the Governor of Machakos County Government had invited the President to preside over a meeting for the official unveiling to the people of Machakos and investors the Machakos City Project, a meeting which was scheduled to be held in Machakos on the 8th November, 2013 at which the said investors were expected to attend alongside other personalities who had been promised free land to invest on.

5. In the applicant's view, there is no known concept as free land that is capable of being dished to investors as the Government of Machakos County proposed hence the move by the Machakos County was not only unreasonable but illegal and wanting since it was premised on an illegality which is the encroachment of the land belonging to National, Community and Private individuals without their consent, knowledge or information. The applicant asserted that the manner in which the whole exercise had been hurriedly conducted was suspect and left a lot to be desired. In his view the Respondent could not purport to be seen to be taking up measures to improve the welfare of the Machakos people in a manner that is so arbitrary and in violation of the proprietary rights of the same people.

6. It was revealed that a majority of the people affected by the decision were opposed to the said mega project in Machakos County as there was no published impact assessment report on the intended project and every concerned citizen had been kept in the darkness about the whole venture.

7. It was averred that in his speech during the launch of the Investors Conference held in May 2013, the Governor confirmed the intention to create a new City of Machakos on part of a 4,000 acre piece of land and admitted to having encroached onto the Interested Party's land, stating that "they could amicably solve any issues". Further, the Governor claimed to have already been allocated L.R. No. 1491/R by the National Land Commission ("the Commission") for investment purposes. This was however contradictory to paragraph 23 of the same replying affidavit where he claimed that this application was premature as the processes to be legally undertaken prior to reservation and/or allocation of land to the respondent by the Commission are still underway.

8. According to the applicant, the Commission was not joined in the matter because there is no evidence that it located the said land to the respondent as the chairman of the Commission was on record stating that there were issues concerning the said land in dispute and that these matters needed to be "ironed out" before implementation.

9. The applicant disclosed that whereas the Governor of Machakos admitted that the key decisions on the Machakos City and Investment Program had not been made, he had already spent colossal amount of tax payers' money in the "launch" of the same.

10. To the applicant, it is imperative to note that all land-grabbing cases in Kenya have always been associated with private investment, with the land finally ending up being sold to third parties. It was averred by the applicant that there was no allocation made to reserve the said land in dispute for development of Machakos City as the said land was for construction of public utilities.

11. The applicant disclosed that there exists a case filed in the High Court of Kenya by Kiima Kimwe residents and which has been pending since 1998 (HCCC No. 2765 0f 1998: Danson Mutuku Mwema & others versus County Council of Masaku & others) as well as HCCC No. 255 of 2009 (Machakos) between Danson Mutuku Mwema & Others versus County Council of Masaku & Others.

12. According to the applicant, all land in Kenya and the issues that accompany it are vested upon the Commission in accordance with provisions of article 67(2) of the Constitution of Kenya, 2010.

13. According to the applicant he has never received the alleged invitations as purported by the Respondent and that he only received an invitation to lunch with the Governor which, although he had initially accepted, he later had to cancel due to engagements in the then Makueni Senatorial by-election campaigns. He therefore reiterated that no consultative meetings to sensitize citizens were ever held and that this was why, on 15th November 2013, Machakos County residents demonstrated against this lack of public participation and consultative process on issues touching on their lives. It was contended that there was no agreement showing the commitment of Kshs. 1.5 trillion by investors and if any such agreement exists, it is yet to be made public. In his view, the total budget of the entire country is about Kshs. 1.6 billion. The applicant denied that he was the only one opposed to the "project" and referred to the number of people who came out to demonstrate on the 15th of November and asserted that as the elected senator for Machakos County, he as all the rights to raise questions over matters affecting the County, including issues on the land in dispute.

**2nd Interested Party's Case**

14. The application was supported by the 2nd interested party herein, **Nzilani Muteti**, who averred that he has been a resident of Machakos Town since 1968 and is very familiar with the current land issue the subject matter of this cause. According to him, in the year 1995 a notice appeared in the daily newspapers the *Nation* and *Standard* advertising plots for allocation within Machakos town which notice directed interested parties to purchase forms from the then Machakos Municipal Council offices. The same notice was published in the Kenya Gazette of 2nd June 1995 vide gazette notice No. 2957.

15. Pursuant thereto, the 2nd interested party averred that he personally purchased an application form and paid the requisite fees and attached all the required documents and submitted them as set out in the said gazette notice but unfortunately did not keep copies then. According to him, other than the above plots gazetted vide the Kenya gazette on the 2nd June 1995, other plots had also been gazette vide gazette notice No. 2958 and 2959 all relating to plots at Kyandani township and Kaseve township all falling under Machakos County Council now within Machakos county.

16. It was averred by the 2nd interested party that his application for allotment was successful and he received a letter of allotment in respect of residential plot No. 89 Machakos dated 10th December 1996 after which he proceeded to the lands office at Ardhi House, Nairobi and paid all required amounts by way of bankers' cheque and was issued with an official receipt. He subsequently proceeded to Machakos Municipal Council offices for purposes of survey and identification of the plots but before this could be done he was informed that a suit had been filed challenging the allocations. Upon following up on the same he discovered that a suit vide Nairobi HCCC No. 2765 of 1998 by Danson Mutuku Muema & Others for and on behalf of 116 others against County Council of Machakos, and 3 Others had been filed. Attached to the pleadings in the suit was a complete list of all the allottees supported by the minutes of 6th August 1996 and his name appeared on page 21 in respect of plot No. 89. It was disclosed by the 2nd interested party that Nairobi HCCC No. 2765 of 1998 was subsequently transferred to Machakos High Court and is now Machakos HCCC No. 255 of 2009 and to his knowledge the matter had proceeded to defense hearing by the time the elections of March 2013 were held and Machakos became a County and the matter has not been concluded.

17. According to the 2nd interested party, in view of the case filed by the parties challenging the allocations he was unable and also to his knowledge the majority of the allottees were unable to take possession of their respective plots since 1997 and have patiently been awaiting the outcome of the case.

18. He was therefore surprised to learn from the print media and radio that the Respondent had invited investors to the County of Machakos and was offering them free land as an incentive to invest in Machakos. In his view, the land being offered as incentive was part of the same land that is LR No 1491 Machakos that had been allocated to various beneficiaries including himself way back in 1996 that was the subject of the court cases cited above herein. It was contended by the 2nd interested party that having been a resident of the county specifically Machakos town for the last forty eight (48) years he was very happy and enthusiastic to be a party to the development agenda and was ready and rearing to develop the plot allocated only to learn that even he had no right to it as the County Government had decided to give it away to strangers. In his understanding, the respondent should have awaited the outcome of the pending case not to nullify the said allotments without due and just process. He however averred that he was unaware of the nullification of the other allotments gazetted the same time though they all fall within Machakos County.

19. According to the 2nd interested party, the National Land Commission had no legal authority to allocate land that had already been allocated and also subject to a court case. Further, the ***Land Registration Act*** of 2010 to his knowledge does not have retrospective application and it was not intended to nullify or affect previous allotments and the Constitution too does not anywhere promote or subscribe to grabbing or depriving citizens of their legally acquired property but to the contrary promotes protection and preservation of proprietary rights. He therefore averred that his rights to his allocated plot No. 89 are

rights protected and enshrined in the Constitution and he deserves to be given a hearing and due process in any event. To him, the respondent is playing politics and in the process failing to acknowledge rights that existed even long before enactment of the new Constitution that creates the County Government.

20. The 2nd interested party's case was that in the interest of justice all parties and beneficiaries to the disputed land should be given an opportunity to participate in these proceedings and state their respective interests. He clarified that he has no interest whatsoever in the politics of the respondent and his desire to be joined to these proceedings is to seek and ensure that justice is rendered and the true spirit of the law and procedure adhered to.

**Respondent's Case**

21. The Respondent, on its part opposed the application. According to it, the application is misconceived, malicious and made in bad faith as the land which the respondent has set apart for construction and development of Machakos City is L.R. No 1491/R, which is different from the one in respect of which the interested party has as interest, which is L.R. No. 1491/2.

22. According to the Respondent, it was allocated L.R. No. 1491/R by the National Land Commission, which is the authority in charge of land allocation, for investment purposes. However the said Commission has not been joined in these proceedings for purposes of the writ of prohibition.

23. To the Respondent, the print advertisement annexed to the applicants verifying affidavit is only an invitation to launch of Machakos City and investment program, and not a decision hence an order of certiorari cannot issue as there is nothing to be quashed. To the Respondent, the application herein is a non-starter as the relief sought in the statement of facts is leave to apply for orders of certiorari and prohibition.

24. In the Respondent's view, the application is based on suspicion, devoid of evidence of actual threat of land grabbing by the Respondent and that L.R. No. 1491/R reserved for development of Machakos City was trust land under the independence Constitution of Kenya (now repealed) and the same now vests in the respondent by virtue of the new Constitution of Kenya, 2010 and the new land laws being the ***Land Act*** no. 6 of 2012; the ***Land Registration Act*** no. 3 of 2012 and the ***National Land Commission Act*** no. 5 of 2012. According to the Respondent, no evidence whatsoever has been tendered by the applicant by way of copies of title deeds or even complaints by the community or the purported owners of the purported adjacent land and that the County Governor is empowered, by virtue of section 12 of the ***Land Registration Act*** and the new Constitution of Kenya 2010 to transfer interest in land held by the County Government for the people, by way of lease, which is what is intended by the respondent's county governor.

25. The Respondent averred that the Governor had, together with the county Executives, held consultations with all nine (9) Members of Parliament and all sixty (60) county representatives in various fora and an investment program has been agreed. That during the aforesaid consultations he always invited the applicant herein but he blatantly refused to attend the same and/or participate in related consultations. It was disclosed that the Governor had held, through his government machinery and County Assembly Members county-wide consultations to sensitize citizens and had received their support for the project which is now captured in the county integrated development plan which is documented as development road map.

26. To the Respondent, the orders sought in this application are intended to frustrate a programme/project worth over one and a half trillion shillings and that this suit is likely to scare investors not only in Machakos County but also in Kenya as a country which would have a negative impact on the fight against poverty. To the Respondent, nobody else other than the applicant is opposed to the creation of Machakos City and the applicant is only being a sworn political rival of the respondent's governor, dragging political fights to the court arena at the expense of development of Machakos County. Further, the applicant does not like the Governor's leadership due to various reasons and that he made his intentions to oppose any of the Governor's plans on the grounds that the Governor is not beholden to him

27. It was averred that the application is premature as the processes to be legally undertaken prior to reservation and/or allocation of land to the respondent by the National Land Commission are still underway and that the gazette notice annexed to the application is obsolete as the same was published prior to the independence Constitution (now repealed) and is superseded by the land policy under the new Constitution of Kenya, 2010, as well as the aforementioned new land laws. Further to the foregoing, the said gazette notice does not confer any rights to the interested party herein in respect of L.R. No. 1491/R on which Machakos city is to be developed.

28. The Respondent averred that the facts contained in the statement of facts upon which the application is premised hinge on land that is claimed by the veterinary farm, which is different from the land referred to hereinabove (L.R. No. 1491/R).

**1st Interested Party's Case**

29. The 1st Interested Party herein, the **Cabinet Secretary for Agriculture, Livestock and Fisheries**, in opposing the application relied on the following grounds of opposition:

> **1) That the *Ex parte* Applicant lacks the *locus standi* to institute any proceedings on behalf of the 1st Interested Party.**
>
> **2) That the *Ex parte* Applicant is neither a legal representative nor an agent of the 1st Interested Party.**
>
> **3) That in the event there is a dispute between the Interested Party and the Respondent the 1st Interested Party suffers no legal disability or incapacity that the *Ex parte* Applicant would institute proceedings on his behalf.**
>
> **4) That the provisions of Article 156 of the Constitution are explicit in stating that it is the Attorney General who shall represent the National Government in Court or in any legal proceedings to which the National Government is party.**
>
> **5) That in the event of a dispute over land between the National Government and the County Government the provisions of Article 189 (3) provides a mechanism for resolution which is not the one resorted to by the *Ex parte* Applicant in the present case.**
>
> **6) That there is a statutory mechanism for the settlement of inter-governmental disputes pursuant to legislation passed under Article 189(4) of the Constitution and the present application is diametrically opposite to the same.**
>
> **7) The application is bad in law.**

**Determinations**

30. I have considered the issues raised herein. The first issue for determination is whether the applicant herein had the *locus standi* to institute these proceedings. The applicant is the Senator of Machakos County, the subject of these proceedings. Under Article 96(1) of the Constitution, one of the roles of the Senate is to represent the counties and to protect the interests of the counties and their governments. It is therefore clear that one of the roles of a Senator is to represent his county and protect the interests of that particular county as well as the County Government at the national level.

31. In **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, in which the Court expressed itself as follows:

> **"over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a**

**grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy… In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi.* Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"**

32. The Court continued:

**"In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect**

**means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."**

33. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

**"…our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."**

34. In **Republic vs. The Minister For Lands and Settlement Ex Parte Narankaik & Another [1988] KLR 693, Tunoi, J** (as he then was) held that Certiorari lies, on the application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they should be quashed, or to quash such proceedings. It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury. The phrase "a person aggrieved" was defined in **Yusuf vs. Nokrach [1971] EA 104,** as a person who has suffered legal grievance. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi And Another [2008] 2 EA 311, Rawal, J** (as she then was) expressed herself as follows:

**"In Kenya, the functions and remedies of orders of *certiorari, mandamus* and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the right or duties or liberty of any person. The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not of mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."**

35. In **R. vs. Liverpool Corporation Ex Parte Liverpool Taxi Fleet Operators Association [1972] 2 All ER 589; [1972] 2 QB 299 Denning, J** stated:

**"…the writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved" and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it does include any person who has a genuine grievance because something has been done or may be done which affects him."**

36. **De Smith's *Judicial Review*** 6th Ed. At para 2-057 states:

**"In accord with the developments which were taking place on applications for Judicial Review there was clearly discernible trend away from the restrictive and highly technical approach to who is a person aggrieved."**

37. In support of this position they cited **Njoya & 6 Others vs. AG Misc Application 82 of 2004 (OS)** where the court stated that if the role of challenging the constitutionality of law and actions was left to the Attorney General, then one might as well hope to reach a mirage as it would be unrealistic to expect the Attorney General to challenge the validity of certain state actions given that he is often the adviser, the author and pilot of the government laws and actions. Thus, **Ringera, J,** as he was then, adopting the decisions of this court in **Ruturi & Another vs. Minister of Finance & Another (2001) 1 EA 253** stated *inter alia*:

**"…we are persuaded by the second school of thought for reasons that in our view the court's first role should be to uphold constitutionalism and the sanctity of the constitution. We think such a role cannot be well performed by shutting the door of the court on the face of persons who seek to uphold the constitution on the ground that such persons have no peculiarly personal stake in a matter which belongs to all. Furthermore if the matter were to be left to the intervention of the Attorney General, we think that one might as well hope to reach a mirage…he could not naturally be expected to challenge the constitutionality of his own creations…"**

38. Article 258 of the Constitution which provides as follows:

***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

39. Under the current constitutional dispensation Article 3(1) provides that every person has an obligation to respect, uphold and defend the Constitution. Accordingly where a person is of the *bona fide* view that a provision of the Constitution has been violated or is threatened, the person is not only entitled to but is enjoined to bring an action to protect the Constitution.

40. Long before the promulgation of the current Constitution, it was held on 11th March, 1970, in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289** that:

**"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and**

**is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."**

41. The issue of standing was also dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

**"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others…Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue…Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"…Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them…The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for**

**private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."**

42. The applicant herein, it is my view, is not only entitled as a person to commence judicial proceedings in order to protect the Constitution but is also entitled to and obliged as a Senator to institute appropriate proceedings in order to protect the interests of the county which he represents. Accordingly, I find that the applicant was properly within his rights to institute these proceedings and the same cannot be defeated on the mere ground that the applicant has no *locus standi*.

43. It was however contended that the provisions of Article 156 of the Constitution are explicit in stating that it is the Attorney General who shall represent the National Government in Court or in any legal proceedings to which the National Government is party. This contention calls for the role of the Attorney General in litigation.

44. Article 156(4) of the Constitution provides:

***(4) The Attorney-General—***

***(a) is the principal legal adviser to the Government;***

***(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and***

***(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.***

45. Section 12 (1) of the ***Government Proceedings Act*** provides thus;

***"Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be".***

46. The question that therefore calls for an answer is whether it is mandatory to sue the Attorney General where the conduct of the Government or its proceedings is in issue.

47. Pursuant to the above constitutional provisions, Parliament also enacted the ***Office of the Attorney General Act of 2012*** and its section 5(1) states that the functions of that office are as follows;

***(a) Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;***

***(b) Advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;***

***(c) Negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of Government and its agencies;***

***(d) Coordinating reporting obligation to international human rights treaty bodies to which Kenya is member or on any matter which member States are required to report;***

***(a) Drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;***

***(b) Reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire functions of the purchase and coat of arms;***

***(c) Reviewing and overseeing legal matters pertaining to the administration of estates and trusts;***

***(d) In consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;***

***(e) Representing the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act;***

***(f) Representing the Government in matters before foreign Courts and tribunals; and***

***(g) Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney General.***

48. Looking at the law above, it is clear that under Article 156(4)(b) of the Constitution, the Attorney General can represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. The key word here is ***representation***. Accordingly, whereas the Constitution permits the Attorney General the right to represent the National Government in Court proceedings, it does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government is alleged to be culpable. In my view suing and being sued in one's name is different from representation.

49. However, Article 156(4)(c) of the Constitution provides that the Attorney General shall perform any other functions conferred on the office by an Act of Parliament or by the President. It follows that an Act of Parliament may properly confer certain functions on the Attorney General which are not expressly conferred by the Constitution as long as such functions do not conflict with or are inconsistent with the Attorney General's constitutional functions. Pursuant to the foregoing section 12(1) of the ***Government Proceedings Act*** provides that unless otherwise provided by any other written law, civil proceedings by or against the Government are to be instituted by or against the Attorney General as the case may be. In other words, where a particular written law provides that civil proceedings are to be instituted against a particular department of the Government, all civil proceedings are to be instituted against the Attorney General. Where however a written law establishes an authority with express powers of suing and being sued, such proceedings ought to be instituted against that authority rather than the Attorney General, in which event the Attorney General is permitted to represent the said department. This must necessarily be so because the Attorney General also has a mandate to represent the national and public interest in Court proceedings and where organs comprising the National Government are minded to seek his representation, there is no illegality in the Attorney General's office representing such organ - See **Isaac Aluoch Polo Aluochier vs. Uhuru Muigai Kenyatta and Anor, Petition No. 360 of 2013** and **Okiya Omtatah Okoiti & Another vs. Attorney General and 7 Others Petition No. 446 of 2013**.

50. It must however be stressed that the aforesaid provision only applies to civil proceedings. Apart from the express reference to civil proceedings therein, the preamble to the *Government Proceedings Act* states that it is:

***An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.***

51. Judicial review, it has however been held are neither civil nor criminal in nature. This was the position

adopted by the Court of Appeal in **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1** where the Court expressed itself as follows:

> **"…in exercising the power to issue or not to issue an order of certiorari the Court in neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the *Government Lands Act,* and also, S. 13 A of the *Government Proceedings Act,* which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "Suit" in S. 2 of the Civil Procedure Act is envisaged…It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."**

52. It must always be remembered that while sitting as a judicial review Court, the High Court is exercising its supervisory jurisdiction pursuant to Article 165(6) of the Constitution which is neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis.*

53. According to the applicant, all land in Kenya and the issues that accompany it are vested upon the Commission in accordance with provisions of Article 67(2) of the Constitution of Kenya, 2010. The said provision states that:

> ***The functions of the national land commission are-***
>
> ***1. To manage public land on behalf of the national and county governments;***
>
> ***2. To recommend a national land policy to the national governments;***
>
> ***3. To advise the national government on a comprehensive programme for the registration of the title in land throughout Kenya;***
>
> ***4. To conduct research related to land and use of natural resources, and make recommendations to appropriate authorities;***
>
> ***5. To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;***
>
> ***6. To encourage the application of traditional dispute resolution mechanisms in land conflicts;***
>
> ***7. To assess tax on land and premiums on immovable property in any designated by law; and***
>
> ***8. To monitor and have oversight responsibilities over land use planning throughout the country.***

54. In my view, it is important in the context of these proceedings to put the land issue into perspective moreso as relates to the current constitutional dispensation. Chapter Five of the Constitution is the reference-point, in seeking clarity on the issue of land ownership and land administration. Article 62 affirms that all land belongs to the people of Kenya collectively, as a nation, as communities, and as individuals. It specifies the manner in which public land vests, as well as the institution responsible for its administration. Article 62(2) of the Constitution provides that public land shall vest in and be held by a County Government, in trust for the people resident in the county, and shall be administered on their behalf by the Commission. Article 62(3) provides that certain classifications of public land shall vest in and be held by the National Government in trust for the people of Kenya, and shall be administered on their behalf by the Commission.

55. Article 62 (4) provides that:

***Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.***

56. To give effect to those terms, Article 67 establishes the Commission, whose function includes the management of public land on behalf of the National and County Governments, as well as any other functions as may be prescribed by legislation. Pursuant thereto, Parliament enacted the ***National Land Commission Act*** (hereinafter referred to as "the Act"), the ***Land Act*** and the ***Land Registration Act***. Apart from the functions listed under Article 67(2) of the Constitution, section 5(2) of the Act provides that the Commission shall:

***"(a) on behalf of, and with the consent of the National and County Governments, alienate public land;***

***(b) monitor the registration of all rights and interests in land;***

***(c) develop and maintain an effective land information management system at National and County levels; and***

***(d) manage and administer all unregistered trust land and unregistered community land on behalf of the County Government."***

57. The ***Land Ac***t defines "alienation" as the sale or other disposal of rights to land. It is therefore clear that the powers of sale or other disposal of rights in public land belongs to the Commission which power is only exercisable with the consent of the National and County Governments as the case may be. The Commission is effectively granted the power to sell or dispose of public land, on behalf of the National and County Governments though the National or County Government have to give consent, for such disposal.

58. It is therefore clear that the power of alienation (sale of or disposal of interest in) public land is one of the ways through which the Commission administers such land while the requirement of consent to such a transaction, from the National or County Government, operates as a check-and-balance between the State organs involved. The Commission's function of monitoring the registration of all rights and interests in land, is similarly a mechanism of checking the powers of the body responsible for registration.

59. Section 8(d) of the ***Land Act*** provides that in managing public land on behalf of the National and County Governments the Commission may require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument. Section 9 of the ***Land Act*** provides for the conversion of land from public to private, and *vice versa*, with a specific provision that any major transaction involving conversion of public land to private land, requires the approval of both the National Assembly and the County Assembly and provides as follows:

***"(1) Any land may be converted from one category to another in accordance with the provisions of this Act or any other written law.***

***"(2) Without prejudice to the generality of subsection (1):***

***(a) public land may be converted to private land by alienation;***

***(b) subject to public needs or in the interest of defence, public safety, public order, public morality, public health or land use planning, public land may be converted to community land;***

***(c) private land may be converted to public land by¾***

***(i) compulsory acquisition;***

***(ii) reversion of leasehold interest to Government after the expiry of a lease; and***

***(iii) transfers; or***

***(iv) surrender.***

***(d) Community land may be converted to either private land or public land in accordance with the law relating to community land enacted pursuant to Article 63(5) of the Constitution…***

***(3) Any substantial transaction involving the conversion of public land to private land shall require approval by the National Assembly or County assembly as the case maybe."***

60. Under Section 10 of the ***Land Act***, the Commission is empowered to develop guidelines on the management of public land by public agencies and bodies that are in actual occupation, or that use such land while section 11 further requires the Commission to take measures to maintain such public land as serves as custody for endangered species of flora and fauna, as well as any protected areas. Section 12 makes general provisions for the manner in which the Commission may allocate public land, on behalf of the National or County Governments and provides that:

***"(1) The Commission may on behalf of the National or County Governments, allocate public land by way of:***

***a. public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;***

***b. application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;***

***c. public notice of tenders as it may prescribe;***

***d. public drawing of lots as may be prescribed;***

***e. public request for proposals as may be prescribed; or***

***f. public exchanges of equal value as may be prescribed.***

***(2) …***

***(3) Subject to Article 65 of the Constitution, the Commission shall set aside land for investment purposes."***

61. Part III of the Act *('administration of public land')*confers upon the Commission further functions related to issuance of leases, licences, and agreements regarding public land while section 20 permits the Commission to issue licences for the use of un-alienated public land, for a period not exceeding five years, on specified terms and conditions. Section 23(2) on the other hand provides for a grant of public land to be made in the name of the Commission, on behalf of the National or County Government. It is however clear that the responsibility of the Commission to issue licences, leases and grants in respect of public land, is subject to the conditions set out in law.

62. Section 107 (1) of the Act provides that when the National or County Government seeks to compulsorily acquire public land, it is to submit a request for acquisition thereof to the Commission, to acquire the land on its behalf and provides that:

***"Whenever the National or County Government is satisfied that it may be necessary to acquire some particular land under Section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the***

***Commission to acquire the land on its behalf***."

63. Section 110(1) specifies that land can only be compulsorily acquired upon certification by the Commission, that such land is required for public purposes, or in the public interest while section 111(2) requires the Commission to make rules to guide the assessment of just compensation, in relation to the compulsory acquisition of land. Sections 112 and 113 of the Act require the Commission to make necessary inquiries, and to consider claims for compensation, before allowing compulsory acquisition of land and the ***Land Act*** makes provisions for compensation-inquiry proceedings, in the context of Article 10(2) of the Constitution to the effect that the process of inquiry is to be fair, equitable, transparent and accountable, and is subject to judicial review, in a proper case.

64. From the foregoing it is clear that the Commission is entrusted with the responsibility of protecting and overseeing the public's rights and interest, under the Constitution, though its powers are not absolute but is subject to various systems of checks and balances.

65. In dealing with the Commission's mandate, the Supreme Court in **National Land Commission vs. Attorney-General & 7 others [2015] eKLR** expressed itself as follows:

> **"It emerges from the foregoing account that the NLC's mandate, which is required to function in a collaborative and consultative constitutional and legal setting, belongs squarely to the mechanism of checks-and-balances, rather than that of an isolated fourth arm of government, entrusted with tasks unrelated to those falling under the dockets of other State organs. Indeed, the neat paradigm of a fourth arm of government appears not to be in the contemplation of the Constitution of Kenya, 2010 which specifies [Article 1(3)] that the people's sovereign power devolves to just three vital State organs: the Executive; the Legislature; and the Judiciary and independent tribunals…The Constitution's mandate falls to the three State organs, in an operational context of check-and-balances: and the various Commissions act as oversight and watchdog mechanisms. Hence, each of the functions of the NLC and the Ministry stands to be checked by the one or the other, in order to avoid abuse of power in matters relating to land. The unchanging theme throughout the Constitution, is that the relationship between these two bodies is inter-dependent, and based upon co-operation; it is not an agency relationship. As the Ministry conducts its functions, the NLC acts as a watchdog, to ensure compliance with the Constitution, and with legislation. Likewise, the NLC as an oversight body, maintains its functional, financial and operational independence, while still being overseen and checked by the public, by other independent offices, and by the three arms of government…The conditioning medium within which these functions have to be conducted, is constituted by the national values and principles outlined in Article 10 of the Constitution: in particular, the rule of law; participation of the people; equity; inclusiveness; human rights; non-discrimination; good governance; integrity; transparency and accountability. It is to be noted that, the very essence of checks-and-balances touches on the principles of public participation, inclusiveness, integrity, accountability and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity, transparency, good governance and accountability. In view of the troubled history of land in Kenya, the NLC and the Ministry have to involve the public when carrying out their functions. Only through public participation is it possible to realize the principles of land policy, as set out in Article 60(1)…From the foregoing assessment, it is clear that the applicant's specific request, that this Court delineate the respective functions of the NLC and of the Ministry of Land, is already answered with sufficient clarity: the allocation of discrete functions to the one or the other is not possible, or indeed necessary. The essence of the Supreme Court's Advisory Opinion is that the vital subject of land-asset governance runs in functional chains, that incorporate different State agencies; and each of them is required to work in co-operation with the others, within the framework of a scheme of checks-and-balances—the ultimate goal being to deliver certain essentials to the people of Kenya. Falling within that broad opinion are more limited sub-sets—an important one being this: The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task**

**of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government. That the Ministry of Land is the special entity with authority to register and issue land title, in this Court's opinion, bears restating. Land title, by its singularity as the mark of entitlement to landed property, is the ultimate expression of a vital property right, quite apart from being the very reference-point in numerous financial and business transactions: national and international. On that account, the sole national repository to issue, and to guarantee the validity and integrity of title, is the central State machinery, as a player on the international plane, acting through the Executive organ…"**

66. What emerges from the foregoing is that a single entity or state organ cannot undertake the process of alienation of land. The process has to be consultative and must operate under a system of checks and balances. Even before the promulgation of the Constitution of Kenya, 2010, it was appreciated by the Courts that the executive had no right to single-handedly alienate public land. This was the position in **Kenya Guards Allied Workers Union vs. Security Services & 38 Others High Court Miscellaneous Application No. 1159 of 2003** where it was held that:

**"public interest must be engine of the millennium and it must where relevant occupy the centre stage in the courts...should the Land Acquisition Act give shelter to the land grabbers of public land or are courts going to invent equally strong public interest vehicles to counter this, should individual land rights supersede the communal land, catchments and forests? How far are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indivisibility of title? Are courts going to stay away and refuse to rise to the greater public good call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the constitution. I venture to suggest that such titles ought to be nullified on this ground and thrown to the dustbins".**

67. This position was adopted in **Mureithi & 2 Others (For Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443,** where the Court expressed itself as follows:

**"The President has power to alienate land by way of lease under the *Government Lands Act* which came into force on 18th May 1915. His powers relate to Government land as defined in s 2 of the same Act, this includes the land described in the Kenya Independence Order in Council 1963 by section 204 and 205 of the Constitution (see schedule 2 of the order) and section 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Thus, under s 3 of the Act, the President, in addition to, but without limiting any other right, power or authority vested in law under the Act, may subject to any other written law, make grants or disposition of any estates, interests or rights in or over un-alienated Government land. The President's powers under this section were delegated to the Commissioner in some cases for example in respect of land for religious, charitable, educational or sports purposes and for general purposes of the Government. Unalienated Government land means Government land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment – see s 3 of the Act. The President has powers under s 12 to grant leases of town plots to individual and companies. Under s 19 he has power to alienate land available for agricultural purposes to be surveyed and subdivided into farms. He can direct the Commissioner in this regard. He can grant leases of farms under s 20. His powers under s 3 except as provided, s 12, 20 are not delegable to the Commissioner. Since Kenya is a democracy, pursuant to s 1 and 1A of the Constitution the doctrine of public trust does also apply to public land except where it is excluded by the Constitution because alienating public land is not a practice which is necessary in any democratic state…[I]n all the Acts the President's powers to alienate are defined and in any event after adjudication and consolidation in the former special areas the effect of registration was to extinguish any clan or tribal interest in the land. The President through**

**the Commissioner does have powers to allocate Government land for the purposes set out in s 3 of the *Government Land Act* which are principally public purposes. To me the doctrine of public trust is implied in the relevant Acts and ought to apply in respect of Government land except the town plots which can be alienated as leases after public advertisement. "Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability." At the end of the day, we must remember those famous words of a famous jurist – Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the Courts...Should the *Land Acquisition Act* give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins."…It is clear from the above constitutional provisions that the doctrine of public trust is recognized and provided for by the superior law of the land i.e. the Constitution and applies in a very explicit way as regards trust land. The doctrine is however not only confined to Trust lands and covers all common properties and resources…it applies to public land. Although the doctrine had origins in Roman law it is now a common heritage in all countries who adopted the English common law. To many African communities land was owned by the communities or possessed by their community. The doctrine has deep roots in African communities and is certainly not inherited from the Romans. Forests and other common resources have never been individually owned. Its basis was the belief that certain common properties such as rivers, the seashore, forests and the air were held by the State in trust for the general public. Under the English common law ownership of common properties vested in the sovereign and the sovereign could not grant ownership in them to private owners if the effect of such grant was to interfere with the public interest because such resources were held in trust by the sovereign for the benefit of the public, such property may not be sold or converted to other kinds of use…It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and s 1A of the Constitution or under the doctrine of public trust, a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept…In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in "a democratic society." This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency…A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view. Sections s 1 and 1A of the Constitution expressed the democratic foundations of this nation and *inter-alia* that the people cannot be prevented from giving birth to a new Constitution because these sections were designed by the framers to secure and preserve avenues for political change and the**

**people could not, in a democracy, be restrained from bringing that change by way of a new Constitution. Any undemocratic practice is therefore challengeable under these provisions… Under the judicial review jurisdiction the grant of judicial orders is at the end of the day discretionary and watertight reasons for the grant of orders after 40 years would be mandatory, because as stated above, promptness is the hallmark of judicial review proceedings. In addition, in exercising that discretion I would have to take into account the needs of a stable system of land registration. To unravel a system of registration going back almost a hundred years one, must reflect on the hardships and prejudice to third innocent parties. In such situations the virtues of certainty, predictability and stability of the land registration system, do in my view heavily out-weigh the short term individual gains since a compensation fund as recommended above could do the trick in rectifying some of the injustices of the past. The policy makers would have to have regard to the principle of proportionality. Whereas the objective or aim may be legitimate, the means of attaining the objectives must be necessary, reasonable and proportionate. Finally, as is apparent from the facts in this case no evidence has been offered on the method used in the alienation of the three parcels. Each case would have to turn on the evidence offered or not offered and the exercise of discretion has to be on the basis of evidence since discretion cannot be exercised in a vacuum. The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and "*kayas*" just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land."**

68. In effect therefore the Respondent cannot unilaterally alienate public land without the input of the National Land Commission.

69. In this case, however, the Respondent has taken two positions which are not necessarily consistent. According to the Respondent, it was allocated L.R. No. 1491/R by the National Land Commission. If that position is correct, it would follow that L.R. No. 1491/R is public land which pursuant to Article 62(2) of the Constitution vests in and is held by the Respondent, in trust for the people resident in Machakos County, and ought to be administered on their behalf by the National Land Commission. On the other hand the Respondent contended that the application is premature as the processes to be legally undertaken prior to reservation and/or allocation of land to the respondent by the National Land Commission are still underway.

70. From the above inconsistent positions one cannot state with certainty the stand taken by the Respondent. It is however clear from the Respondent's position that it believes that it is empowered, by virtue of section 12 of the ***Land Registration Act*** and the Constitution of Kenya 2010 to transfer interest in land held by the County Government for the people, by way of lease, and that it intends to do so.

71. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

**"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an**

**inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way…These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."**

72. In **Captain Geoffrey Kujoga Murungi vs. Attorney General Misc Civil Application No. 293 of 1993** it was stated that:

**"Certiorari deals with decisions already made…Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...".**

73. It is therefore clear that where a decision has not been made an order of certiorari cannot issue as there is nothing to be quashed. In this case, the Respondent contends that the print advertisement annexed to the applicants verifying affidavit is only an invitation to launch of Machakos City and investment program, and not a decision hence an order of certiorari cannot issue as there is nothing to be quashed. It is true that the applicant has not exhibited any decision excising the land belonging to the 1st interested party as alleged. Order 53 rule 7(1) of the ***Civil Procedure Rules*** provides:

***(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.***

74. The rationale for the requirement that what is sought to be quashed is to be exhibited is informed by the fact that the Court ought to be satisfied that there is in fact a decision that has been made and exists whose quashing is to be done since the court does not ordinarily grant orders in vain. Secondly, the court must be satisfied that what is exhibited is in fact the correct decision. Thirdly, the court must be satisfied as to the exact time when the decision was made in light of the limitation period of six months stipulated under the ***Law Reform Act*** Cap 26 Laws of Kenya.

75. In the circumstances of this case the Curt cannot find that there exists a decision which ought to be quashed and accordingly an order of certiorari cannot issue.

76. With respect to an order of prohibition, it is clear that the Respondent intends to alienate the subject land to private investors. There is no evidence presented before me that the intended transaction has been initiated in accordance with the law despite the fact that the Respondent has already invited investors to express interest therein. As stated herein above, prohibition looks to the future so that if a tribunal or authority were to announce in advance that it intends to proceed with an action in excess of its jurisdiction or in contravention of the laws of the land the High Court would be obliged to prohibit it from so acting by issuing and order of prohibition to prevent the making of the contemplated decision. In these circumstances therefore an order of prohibition may properly issue.

**Order**

77. In the premises the order which commends itself to me a which I hereby grant is an order of prohibition prohibiting and restraining the Respondent from alienating the suit land being LR No. 1491/R or LR No. 1991/2 situate within Machakos County unless and until all legal and constitutional requirements in particular Article 10 of the Constitution are strictly adhered to.

78. As the applicant has not wholly succeeded in the application, and as these proceedings were substantially in the nature of public interests litigation, each party will bear own costs of these proceedings.

**Dated at Nairobi this 2nd day of December, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Dr Khaminwa for the applicant***

***Mr Nzamba Kitonga, SC for the Interested Party***

***Mr Kyalo for Mr Nyamu for the Respondent***

***CA Mwangi***