



**REPUBLIC OF KENYA**

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

**(MILIMANI LAW COURTS)**

**MISCELLANEOUS CIVIL APPLICATION NO. 142 OF 2014**

**IN THE MATTER OF ORDER 53 R3 OF THE CIVIL PROCEDURE RULES;**

**AND**

**IN THE MATTER OF AN APPLICATION BY UNITED STATES INTERNATIONAL  
UNIVERSITY FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA 2010 AND THE LAND ACT 2012**

**AND**

**IN THE MATTER OF THE CONSTRUCTION OF THE NORTHERN BYPASS CUTTING  
THROUGH UNITED STATES INTERNATIONAL UNIVERSITY LAND EFFECTIVELY  
CREATING TWO SEPARATE PORTIONS AND IN THE MATTER OF NECESSITY FOR AN  
OVERPASS BRIDGE TO PROVIDE A LINK BETWEEN THE TWO SEPARATE PORTIONS  
AND ACCESS FOR THE UNIVERSITY FRATERNITY AND FOR BETTER LAND USE,  
DEVELOPMENT AND SECURITY**

**AND**

**IN THE MATTER OF AGREEMENT AND REPRESENTATION BY**

**MINISTRY OF TRANSPORT AND INFRASTRUCTURE, KENYA**

**URBAN ROADS AUTHORITY AND OTHER CONCERNED ENTITIES TO PROVIDE AN  
ACCESS BRIDGE ON UNITED STATES INTERNATIONAL UNIVERSITY LAND TO  
CONNECT THE TWO PORTIONS OF THEIR LAND**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**THE CS, MINISTRY OF**

TRANSPORT AND INFRASTRUCTURE.....1<sup>ST</sup> RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT

NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT

AND

CHANIA ROADS & BRIDGE

CORPORATION.....INTERESTED PARTY

**EX-PARTE:** UNITED STATES INTERNATIONAL UNIVERSITY

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 22<sup>nd</sup> April, 2014, the *ex parte* applicant herein, **United States International University**, seeks the following orders:

1) That this honourable court be pleased to grant to the *Ex parte* Applicant an order of Mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acting in partnership with the Interested Party (or any other designated contractor) to provide and or construct an overpass bridge on Land Reference Number 25302 registered in the name of the *Ex parte* Applicant to provide access for human and vehicular traffic of the *Ex parte* Applicant's fraternity for ingress and egress on to the two divides occasioned by the construction of the Northern by-pass over the said land reference number 25302.

2) That in the alternative the honourable court be pleased to grant the *ex parte* Applicant an order of mandamus to compel to Respondents to honour and effect the agreed and necessary land exchange with the *Ex parte* Applicant to the ends that the portion of public land on which the current bridge constructed proximate to the *Ex parte* Applicant's land is granted to the *ex parte* Applicant with the facility of the bridge and connections thereto for exclusive use and linkage to its separated land and in exchange the *ex parte* Applicant grants to the 3<sup>rd</sup> Respondent an equivalent portion of land to be excised from LR Number 25302, for public use.

3) That costs of the application be provided for.

### Ex Parte Applicant's Case

2. The same application was supported by a verifying affidavit sworn by **Freida Brown**, the *ex parte* Applicant's Vice Chancellor sworn on 22<sup>nd</sup> April, 2014.

3. According to the deponent, one of the requirements upon the grant of a charter to institution of higher learning is the aspect of land acquisition for expansion and development. In this regard the university purchased the portion of land under the title reference number 25302 which is approximately 40.48 Hectares part of which stands part of the administration block and other amenities but on another there remains a large portion of undeveloped land on which the university is at an advance stage of setting up an ultra-modern referral hospital, amongst other upcoming developments.

4. According to the deponent, on or about 2009 the Government of Kenya initiated the noble project of the construction of the northern By Pass (amongst other) under the docket the then ministry of roads and it so transpired that the northern By-Pass would traverse through the university land in effect apportioning

it into two parcels. Although initially government through the 1<sup>st</sup> respondent intended to appropriate part of the university land, the university successfully lodged a claim for compensation under the **Land Acquisition Act** and that a total of four (4) acre of land was affected by the road construction.

5. It was disclosed that in the discussions leading to the acquisition of the university land for the said road the university entered into talks and agreed with the 1<sup>st</sup> and 2<sup>nd</sup> respondents and interested party that it was imperative that an over pass bridge be constructed on the university land to link the two divides occasioned by the road to take care of security, access and linkage for development purposes. The deponent explained that indeed the construction of a bridge at the general location where the university property is situate was never part of the initial plan but was included at the request by the university considering the necessity of the same to the institution. However, inspite of prior discussions and consensus between the stakeholders that the overpass bridge was incorporated into the plan for the exclusive use by the university the 1<sup>st</sup>, 2<sup>nd</sup> respondents and the interested party in a clear departure from the agreement placed the bridge at a location far removed from the university land making the same lose its initial purpose. According to the deponent, the coordinates of the bridge is about two hundred meters (200M) from the position proposed by the university for its construction.

6. It was further deposed by the deponent that as early as the year 2010 she wrote to the permanent secretary ministry of works protesting the intended location of the bridge as it was on land other than the university's and pleaded for its relocation so that it could serve original purpose of offering access to the university community. She reiterated that it was never in doubt that the need for a bridge was raised by the university and the officials of the 1<sup>st</sup> respondent appreciated and confirmed this fact throughout their engagements as evidence by the minutes of a stakeholders meeting held on the 28<sup>th</sup> June 2010 at the university board room.

7. It was averred that the northern by pass road at the point it dissects the university land comprises a gentle slope and naturally a high speed section which would be practically impossible for the university fraternity to cross without obvious danger. Yet there is no direct connection between the university main campus to the opposite campus across the road.

8. According to the deponent, on the 5<sup>th</sup> February 2014 she personally went to the site and established that the interested party was still on site working on an access road to the bridge but on the opposite side of the bypass meant for the general public. During that visit she directed the university's official photographer to take snapshots of the general area, photographs of which were exhibited. However, her attempt to mitigate the problem by seeking approval of the 2<sup>nd</sup> respondent to provide access roads by way of acceleration lanes to the bypass proved.

9. The university, it was averred had has invested immensely in land for expansion and was in the process of commissioning a construction of an ultra-modern referral hospital whose location was across the traversing bypass and whose direct connection from the main campus could not be achieved without an overpass at the point proposed by the university. Despite attempts by the University to obtain ownership of the land where the current bridge is situate through a land exchange arrangement with the then owner, a **Mr. Mwangi**, the latter declined. However later the university learnt that the said **Mr. Mwangi** sold the land to the government and the same is now public land. Though the University raised the matter with the then minister for roads **Hon. Franklin Bett**, there was no action forthcoming.

10. According to the deponent, though eventually a taskforce comprising representatives of stakeholder was set up to look into the issue of the bridge, the committee failed to agree on the way forward and the 2<sup>nd</sup> respondent unilaterally came up with a draft report which departed and negated from the original consensus of the need for an exclusive bridge for the university, instead making unworkable optional recommendations. In a subsequent follow up of this issue, the deponent, accompanied by legal counsel **Mr. Paul Ndungu** visited the permanent secretary ministry of roads and laid bare the university's position on the need for the overpass, citing the historical development of the matter and at this meeting that it was agreed that the university would identify a portion of its land for exchange with the government so that the university would be granted the land where the bridge is presently built. However, in a move further

complicating matters, the 1<sup>st</sup> and 2<sup>nd</sup> respondents subsequently disclaimed authority over the matter instead taking the view that the issue would henceforth be under the jurisdiction of the 3<sup>rd</sup> and 4<sup>th</sup> respondent.

11. The ex-parte applicant was therefore aggrieved by the action of the respondents reneging on the agreement to construct an overpass bridge on the university land to connect their campuses for the reasons that before the ministry undertook the construction of the northern bypass the university owned the land known as L.R Number 25302 as a single unit; the northern bypass as designed and actually built, split the university's land into two with the main campus being on the one side comprising the location of the upcoming hospital; the applicant pointed out the need for an overpass bridge on the university land to cater for the community and access as it would be dangerous to cross a fast-speed road; that appreciating the practical difficulty by the road, the ministry agreed to construct a bridge as requested; that however, rather than build the bridge on the university's land, the same was constructed on land the ministry had previously acquired from an individual known as **Mwangi**, away from the position proposed by the university; that the bridge is now on public land and not for the exclusive use by the university an act which opens up the two university campuses to perennial security problems, a situation brought about by the bypass and the bridge; and that the 1<sup>st</sup> respondent, in spite of agreeing to hand over the bridge to the university through a land exchange arrangement, has subsequently reneged on the same.

12. It was further deposed that the challenges raised by the 2<sup>nd</sup> respondent were very surprising, because when the project first began, they had reached a general understanding that the university was in dire need of a bridge since the northern By-Pass was traversing right in the middle of the university. It was added that the draft report referred to by the 2<sup>nd</sup> respondent completely negated from the discussions held by the 2<sup>nd</sup> respondent and ex-parte applicant to have a bridge for the exclusive use of the university and contained recommendations that had not been agreed on by the parties.

13. It was averred that at time when the 2<sup>nd</sup> respondent and the ex-parte applicant were carrying out discussions, the issues of economic and logistic challenges were not a barrier considering that the bridge was a necessity that had to be dealt with for the safety and accessibility of the university by the school community and that both parties had indeed seen the need to provide some sort of linkage to the school to take care of security and access to the university. Accordingly, there was never an issue with regard to the terrain, soil type and ground clearance factors and they only became issues once the 2<sup>nd</sup> respondent and the interested party began construction on the land. Prior to that, the land was level and perfect for the construction of the bridge.

14. According to the deponent, the *Ex-parte* Applicant was willing to part with a portion of its land in exchange for the land on which the existing bridge stands so as to get exclusive use of the bridge.

15. While acknowledging that the 2<sup>nd</sup> respondent's mandate of bridge construction is discretionary and not mandatory, it was the applicant's position that it was the 2<sup>nd</sup> respondent's mandate to oversee management of traffic and ensure road safety which can be done through construction of a bridge hence the ex-parte applicant is entitled to an order of mandamus to compel the respondent to erect an overpass bridge to connect the two parcels of land.

16. It was on the basis of the foregoing that the applicant prayed for the orders sought herein.

17. It was submitted on behalf of the applicant that the applicant's legitimate expectations have been frustrated and not met. To the applicant, the process of dealing with the ex parte applicant's acknowledged right to an access bridge over the by-pass was a duty in law which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ought to have fulfilled to the applicant's legitimate expectation so as to place the applicant in the position it was before the disruption of the enjoyment of the property hence there is no reason why the Respondents cannot fulfil their mandate. To arrive at a different decision, it was submitted, means the applicant is left without a remedy yet the law provides for a duty on the part of the ministry and the Kenya Urban Roads Authority (hereafter "KURA") to provide bridges and necessary infrastructure on the

roads for safety purposes.

18. It was contended that a claim for legitimate expectation may raise from an express promise given by a public authority or from the existence of regular practice or a policy approach which the applicant can reasonably expect to continue which was the case in this matter. In support of this submission the applicant relied on **R vs. Commissioner for Higher Education ex-parte Peter Soita Shitanda [2013] eKLR** and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA 743 of 2006 [2007] KLR 20.**

19. It was further submitted that the process by which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ended up locating a bridge off the ex parte Applicant's land was informed by unreasonableness and bad faith and reliance was placed on **Associated Provincial Picture House Limited vs. Wednesbury Corporation [1948] 1 KB 223.** Further reliance was placed on **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR .**

20. According to the applicant though statutory power must be exercised fairly and in fairness both for substantive and procedural standards, the ex parte applicant was not accorded fair treatment by both the minister and KURA and that their decision was both irrational and grossly unreasonable.

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

21. The 2<sup>nd</sup> Respondent opposed the application vide a replying affidavit sworn by **Eng. Justus Morara Onyikwa**, the 2<sup>nd</sup> Respondents Manager on 6<sup>th</sup> May, 2014.

22. According to the deponent, it is correct that the subject bridge had been mooted and robustly discussed as chronicled in the substantive motion under reply, but the same could not be implemented as conceptualized as it stood frustrated by logistical, economic, technical and legal challenges which challenges were well known to the ex-parte applicant and are even elaborately set out and explained in the annexures to the verifying affidavit of the ex-parte applicant's vice chancellor. He elaborated that the said economic & logistical challenges arose from the fact that the bridge was an addition to the main works not initially factored into the project's costing and a consideration for general public use of the same; in the end result whereof the most optimal was paramount.

23. According to him, the technical challenges similarly dictated the bridge's placement as there emerged issues of the terrain, soil type and ground clearance factors that heavily favoured erection of the bridge at its current location. On legal challenges the attempted land swap deal came a cropper upon the coming into force of the ***Land Act***, 2012 which reposed such functions solely within the competency of the national lands commission.

24. It was therefore contended that building a second bridge for exclusive use by the ex-parte applicant is neither practicable nor economically feasible and that the ex-parte applicant is not barred from using the completed bridge alongside the rest of the public, and that the distressing issue of [in]security is to be taken up with the relevant department of government. In any event the ex-parte applicant has always been at liberty to consider expending even just portions of the compensatory award of Kshs 40,300,000/= given to it after the compulsory acquisition of its 1.4 acres to pave way for the road, in any manner it deems fit and proper so as to assuage or mitigate its safety, security and connectivity concerns.

25. In his view, based of legal advice, the prerogative order to mandamus sought is not available and cannot in the circumstances issue to compel the construction of a second bridge as demanded by ex-parte applicant as the 2<sup>nd</sup> respondent's mandate of bridge construction is discretionary and not ministerial/mandatory. He therefore averred that the prerogative order of mandamus is not available and therefore cannot in the circumstances issue to compel a land-swap contrary to express provisions of law and that the decision whether to swap land or not is not a matter for the courts but the appropriate institutions established under law.

26. The 2<sup>nd</sup> Respondent's case was therefore that the substantive motion is without basis in law and fact, and is hence incurably defective, incompetent and an abuse of the due process of law and should be struck out in *lemine* or dismissed with costs.

27. It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the construction of the bridge was not originally part of the project and had not been factored therein but was done out of necessity and request by the applicant to the 2<sup>nd</sup> Respondent. However contrary to the understanding the applicant wanted to have the bridge constructed exclusively for its own use to the exclusion of the public. After considering various factors the 2<sup>nd</sup> Respondent decided to compulsorily acquire the parcel belonging to Tonini Holdings upon which the bridge was built based on the topographical study. It was therefore submitted that the decision cannot be said to have been unfair, unjust or unreasonable.

28. On legitimate expectation it was submitted that the applicant's legitimate expectation should not override that of the general public which the bridge serves as well. In support of this submission reliance was placed on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

29. It was submitted that the order of mandamus should not be granted because the respondents had done all they could in building the much needed bridge to serve both the ex parte applicant and the general public and the location of the bridge was dictated by technical factors which could not allow the same to be constructed at the place desired by the applicant. It would therefore be inappropriate to compel the respondents to perform their duty in any specific way to the satisfaction of the ex parte applicant. The Court was further urged to weigh the issues and see whether or not the remedy sought is the most efficacious in the circumstances obtaining. In support of these submissions the said Respondents relied on **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra); *Halsbury's Laws of England* 4<sup>th</sup> Edn. Vol. II page 805 para 1508 and **Republic vs. Judicial Service Commission ex parte Pareno [200] 1 KLR 203-209.**

30. It was averred that whereas the respondents have been given the responsibility of developing infrastructure including building roads and bridges, they are given a discretion which they exercise in accordance with the law.

### **Determinations**

31. Having considered the application, the affidavits in support of and in opposition thereto as well as the submissions filed in support of the parties' respective cases and the authorities cited this is the view in form of the matter.

32. The prayer sought in this application is the judicial review remedy of mandamus. Therefore it is important to revisit the circumstances under which that remedy can issue. As appreciated by both parties, the scope of judicial review remedy of mandamus was the subject of **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) in which case the Court of Appeal held *inter alia* that:

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right 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* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. 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.”

33. The first issue for determination is therefore whether there is a legal duty imposed upon the Respondents to construct the subject bridge. Apart from the contention that the Respondents led the Applicant to believe that the Respondent would construct the said bridge at the place convenient to the Applicant and the students, it has not been alleged that there was any duty imposed on the Respondent either by statute or common law to construct the said bridge at the place sought by the Applicant. As to whether the Respondents made the Applicant to believe that the said bridge would be constructed as suggested by the Applicant in order to give rise to the doctrine of legitimate expectation is a matter which I shall deal with presently.

34. In Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240 it was held that:

“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.....Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.....”  
[Emphasis mine].

35. Similarly in De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6<sup>th</sup> Edn. Sweet & Maxwell page 609 it is stated that:

“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”

36. Similarly in Rank vs. East Cambridgeshire District Council EWHC 2081 Admin, it was held:

“One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process...But it is also important for the purpose of securing public confidence in the operation of the development control system....The potential relevance arises because consistency is desirable and inconsistency may occur if the authority fails to have regard to a previous decision.”

37. Hence in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR**, it was held:

**“Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires.”**

38. However it was held in **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** that:

**“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”**

See also **Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67]**.

39. It is conceded by the Respondents that the subject bridge had been mooted and robustly discussed as chronicled in the substantive motion under reply, but the same could not be implemented as conceptualized as it stood frustrated by logistical, economic, technical and legal challenges which challenges were well known to the ex-parte applicant. It was elaborated that the said economic & logistical challenges arose from the fact that the bridge was an addition to the main works not initially factored into the project’s costing and a consideration for general public use of the same; in the end result whereof the most optimal was paramount. The technical challenges, it was contended similarly dictated the bridge’s placement as there emerged issues of the terrain, soil type and ground clearance factors that heavily favoured erection of the bridge at its current location. On legal challenges the attempted land swap deal came a cropper upon the coming into force of the ***Land Act, 2012*** which reposed such functions solely within the competency of the National Lands Commission.

40. It was therefore contended that building a second bridge for exclusive use by the ex-parte applicant was neither practicable nor economically feasible.

41. That the decision where to place a bridge is an exercise of discretion on the part of the Respondents is conceded by the Applicant. In such cases the general rule is that stated in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** to the effect that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. The purpose of the remedy of Judicial Review is therefore to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285** and ***Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

42. As was held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra), where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. Clearly therefore where the discretion is given to the Respondent to decide where to construct the bridge this Court cannot compel the Respondent by an order of *mandamus* to perform that duty in a certain way. In other words the Court cannot compel

the Respondent to construct the bridge in a particular place unless the conditions for interference with an exercise of discretion exist. These conditions have been recognised as (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

43. I have considered the reasons advanced by the Respondent for not exercising their discretion in the manner expected by the Applicant. Whereas the said reasons may in some quotas be found to lack merits, it is not for this Court in these kinds of proceedings to deal with the merits of the decisions made by a body or authority. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

44. Considering the reasons advanced by the Respondent for not constructing the bridge in accordance with the wishes of the Applicant I am not ready to hold that the decision arrived at which decision according to the Respondent not only took into account the interest of the applicant but the interest of the public as well, was so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Neither am I satisfied that the said decision is in defiance of logic and acceptable moral standards. In other words I am not convinced that the said decision was irrational. As was held in **R vs. North and East Devon Health Authority ex p Coughlan [2001] QB 213 at [57(c)]:**

**“once the legitimacy of the expectation is established, the court will have the task of weighing the requirement of fairness against any overriding interest relied upon for the change of policy.”**

45. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra), legitimate expectation may be lost where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case the Respondents have explained the reasons why the Applicant’s expectations could not be met. One of the reasons advanced is that as a result of the advent of the ***Land Act, 2012***, the attempted land swap deal came a cropper as the said legislation reposed such functions solely within the competency of the National Lands Commission. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D.** In other words the doctrine of legitimate expectation based on considerations of fairness, even where benefit claimed is not procedural, should not be invoked to confer an unmerited or improper benefit. **See R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241.**

46. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012:**

**“...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against**

**the express letter of the law.”**

47. Although it may be that at the time of the consultations and negotiations there was no hindrance to the swapping of the land parcels in question, if the enactment of the **Land Act 2012** rendered that course a mirage, such intervening factor would render the Applicant’s legitimate expectation a mirage as well. If the Respondent no longer have the power to effect the swapping of the subject parcels of lands, it cannot be said that there exists a legal duty imposed on the Respondents to swap the said parcels of lands and that the Respondents have failed to perform the same. In other words the Court cannot by an order of mandamus compel a body to undertake an action which it is not authorised by the law to undertake.

48. The three basic questions were identified in **R (Bibi) vs. Newham London Borough Council** (supra) at [19] as follows:

**“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”**

49. It was further held in **R vs. Jockey Club ex p RAM Racecourses [1993] 2 All ER 225, 236h-237b** that the basic hallmarks of an unqualified representation are:

**“(1) A clear and unambiguous representation..(2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more...(3) That it did so rely upon it.(4) That it did so to its detriment...(5) That there is no overriding interest arising from [the defendant’s] duties and responsibilities.”**

50. In my view public interest may on occasions be considered in determining whether or not there exist an overriding interest justifying a departure from what has been previously promised.

51. I have considered the totality of the matters raised in this application and I am not convinced that this is a proper case in which the Court ought to exercise its undoubted discretionary jurisdiction and grant the order of mandamus in the manner sought.

52. In the premises I dismiss the Notice of Motion dated 22<sup>nd</sup> April, 2014 but with no order as to costs.

53. It is so ordered.

**Dated at Nairobi this 16<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

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

***Mr Njage for the Applicant***

***Cc Miron***