REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 10 OF 2009

IN THE MATTER OF: THE KENYA RAILWAYS CORPORATION ACT, CHAPTER 397 LAWS OF KENYA.

IN THE MATTER OF: THE STATE CORPORAION ACT, CHAPTER 446 LAWS OF KENYA

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS AGAINST THE KENYA RAILWAYS CORPORATION AND THE MINISTER OF TRANSPORT AND THE HON. ATTORNEY GENERAL OF KENYA FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC .....……..……..……...…APPLICANT

AND

KENYA RAILWAYS .....…….....……1ST RESPONDENT

THE HON. ATTORNEY GENERALOF KENYA.....2ND RESPONDENT

EXPARTE

INVIOLATTE WACIKE SIBOE

JUDGEMENT

1. By her Notice of Motion dated 20th January, 2009 filed in this Court on 20th January, 2009 the same day, the *ex parte* applicant herein, **Inviolatte Wacike Siboe**, seeks the following orders:

1. **THAT this application be certified urgent and heard expeditiously owing to its urgency.**
2. **THAT the herein Applicant Inviolattte Wacike Siboe be granted a judicial review order by way of certiorari quashing the decision of the respondent and the respondent's notice to terminate the occupancy of the applicants relating to L.R NO 209/6445 House number W. K 14 on it.**
3. **THAT the herein Applicant Inviolatte Wacike Siboe be granted a judicial review order by way of Prohibition restraining and /or prohibiting the respondents from terminating the occupancy of the applicants relating to L.R. No.209/6445 House number W.K 14 on it.**

4. **THAT the herein Applicant Inviolatte Wacike Siboe be granted a judicial review order compelling the respondents to act upon the board's approval to sell the houses in occupation of the applicant particularly in relation to L.R. NO 209/6445 House number W.K 14 on it.**
5. **THAT there be and shall be a stay of decision of the respondents to terminate and a stay of the notice to terminate the occupancy of the applicant relating to L.R. No.209/6445 particularly House number W.K 14 on it without following the decisions and deliberations of the board of directors made on the 7th of November 2006 to give the applicant priority to buy the said premises as former employee of Kenya Railways and procedure laid down in Kenya Railways Act cap 379 Laws of Kenya and state corporations Act Cap 446 laws of Kenya and other relevant laws and procedures and principles of natural justice and the respondents be barred from instituting any other eviction proceedings in respect of the same premises occupied by the applicant in respect of the same prevailing facts.**
6. **THAT the costs of this application be awarded to the applicant.**

2. The Motion is supported by a verifying affidavit sworn by the applicant on 9th January, 2009.
3. According to the applicant, she used to be an employee of the Respondent first as draughtsman and upon being retrenched towards the end of the year 2006, she continued being a tenant in the Respondent's residential houses. According to her, the Respondent is the duly registered owner of all the parcels of Land known as L.R. No. 209/6444 Nairobi and L.R. No. 209/6445 Nairobi both situated at Kileleshwa area in Nairobi and the owner of the structures and buildings erected on the said parcels of land and in particular house number WK 14. She further deposed that she was at first allocated a residential house situated at L.R. No.3734/839 in Mzima Springs Road Nairobi and subsequently was allocated number WK 14 situated at L.R No.209/6444 in Kileleshwa Nairobi.
4. On 7th November 2006, during her employment with the Respondent, the Respondents Board of Directors approved a proposal to sell some residential houses that the Respondent owned to its staff which approval was subsequently ratified by the Ministry of Transport for implementation. To her, the Houses earmarked for sale were to be sold to the Respondent's staff at a subsidized price of 40% of the prevailing market value. This was meant to benefit the Respondent's staff that faced eminent retrenchment due to the concessioning of some of the Respondent's business to Rift Valley Railways. The proposal to sell the said houses at 40% of the prevailing market rates was based on the realization that the Respondent's staff had over the years suffered various disadvantages in their working life with the Respondent and were unable to make any meaningful savings for self development due to low salary levels over a long time without any upward revision coupled with the Respondent's failure to remit deductions made in its employees salaries to Reli Sacco, the employees savings and credit organization. The Respondent's employees were also made un-creditworthy and could not obtain credit from financial and lending institutions due to persistent liquidity problems that the Respondent faced over many years.
5. Sometimes in 2007, the Ministry of Transport constituted an Inter-Ministerial Committee to inter-alia establish the value of the properties that had been earmarked for sale as proposed by the Respondent's Board of Directors which committee completed its work and submitted its report to the Respondent and among the Houses earmarked for sale were those erected on L.R no.209/6444 Nairobi and L.R No.209/6445 Nairobi which houses were at the time of the proposal approved by the Respondent's Board of Directors, being occupied by the applicant by virtue of the employment contract with the Respondent. According to her, the proposed eligibility and allocation criteria/modalities for the earmarked houses was that current serving staff of the Respondent (as at 30th October, 2006) that occupied the earmarked houses were to be given first priority to purchase the houses they occupied provided they met the grading criteria to occupy such houses. Although she was previously told the house she was staying in Lavington Mzima Springs Road was for the corporation, the same was sold to another person. According to the applicant, she met the grading criteria to occupy the houses erected on L.R. No.209/6445 Nairobi and in fact was in occupation of the houses erected in these premises which she occupied and is still in occupation of being house number WK 14 situated at L.R No.209/6445 in Kilelelshwa Nairobi.
6. On the 30th December 2006, the applicant was retrenched from employment and pending the implementation of the proposed house purchase scheme she was offered yearly lease to the house

that she hitherto occupied by virtue of being an employee of the respondent and as per the tenancy agreement, the house was leased to her at an agreed rent of Kshs.30,000.00 per month with rent escalating at the rate of 5% upon renewal of the tenancy agreement and/or as mutually agreed between the parties. Although the tenancy agreement was executed on 1st August 2007 the effective date for rent payment was postponed to 1st September 2007. However, sometimes in March 2008, the Respondent by itself its servants and/or agents purported to unilaterally increase the agreed monthly rent from Kshs.30,000.00 to Kshs.45,000.00 in blatant breach of the covenants contained in the tenancy agreement that had been executed by the applicants as particularly described above under the threat to terminate the tenancies that subsisted between the applicants and the Respondent if they defaulted in payment of the newly increased rent. Subsequently, on the 6th of January 2009, the Respondent through its servant and/or agent visited the Applicant's premises herein requiring her to vacate number WK 14 situated at L.R No. 209/6444 on or before 10th January 2009.

7. It is the applicant's position that the Respondent's actions and/or the actions of its servants and/or agents have been malicious and fraudulently intended to harass her and/or calculated at evicting her and/or forcing her into vacating the houses that she currently occupies thus depriving her of her eligibility to purchase the said houses.

1ST RESPONDENT'S CASE

8. In opposition to the application, the Respondent filed a replying affidavit sworn by **Stanley Gitari**, the Respondent's legal officer on 11th December 2009.
9. According to the deponent, the application herein does not disclose any prima facie case with any iota of success and both the grounds captured in the subject Notice of Motion and the affidavit in support thereto fall far short of establishing any irreparable damage to the petitioner/applicant so as to warrant the grant of any review orders as sought or at all. According to him, the Applicant did not serve upon the Defendant's Managing Director the mandatory one month written notice prior to the institution of this suit as required under Section 87, of the ***Kenya Railways Corporation Act*** (Chapter 397 Laws of Kenya), and therefore the Applicant's said application is thus incompetent and that the same should be struck out with costs.
10. According to the deponent, the Respondent's board of directors indeed at one time floated a proposal to dispose off some of the respondent corporation's non strategic assets including but not limited to the suit properties and that the said proposal was muted in pure consideration of economic factors and prudent management of the respondent corporation and the same had no relation, whatsoever, to the applicants' employment with the respondent. However, the said proposal did not obtain the necessary approval of the Treasury as required under section 12 of the ***Kenya Railways Corporation Act***, Chapter 397 of the Laws of Kenya thereby resulting to its shelving as is evidence by the letter dated 23rd April, 2008, form the Permanent Secretary, Ministry of Finance/Treasury and addressed to the Permanent Secretary, Ministry of Transport.
11. In any event, he deposed that the respective tenancy agreement annexed to the affidavit sworn by the Applicant, confirmed that the same are independent of and do not make any reference to any contract of employment between eh applicants and the Respondent. In his view, the documents annexed to the affidavit sown by the Applicant, merely demonstrate the consultations that preceded the rejection by the Treasury of the 1st Respondent's aforementioned proposal. To him, the applicant herein has never at any one time entered into any or any valid agreement for sale of any of the suit properties herein with the 1st Respondent and, as such, her claim for option to purchase the suit properties is outlandish, mischievous and unfounded and their pleas for the conversion of the rent lawfully paid by them to the 1st Respondent in respect of the respective tenancy agreements into deposits towards the purported purchase of the suit properties is contrary to the principle of freedom of contract and flies on the face of the right to ownership of property jealously guarded under section 75 of the Constitution of Kenya.
12. It was further deposed that the averments contained in the said the supporting affidavit, in so far as the same relate to complaints relating to the respective tenancy agreement between the Applicant and the 1st Respondent, are irrelevant, misplaced and do not disclose any breach of any of the fundamental rights provided for under section 70 to 83 (inclusive) of the Constitution of Kenya

and, as such, are frivolous and ought to be struck out. The Applicants claim as set out in the pleadings herein are, according to him, purely commercial in nature and the Applicant has also not demonstrated any public and or statutory duty that the Respondent has failed to perform that would call for the exercise of the Court's jurisdiction for Judicial review.

2ND RESPONDENT'S CASE

13. On behalf the 2nd Respondent, the following grounds of opposition were filed:

> **1. That the ex-parte applicant has not demonstrated any cause of action against the 2nd Respondent.**
>
> **2. That the issues for determination are contractual and commercial in nature and hence fall under the realms of private law as against administrative law.**
>
> **3. That the application is premature incompetent and fatally defective for lack of issuance of statutory notice as contemplated under section 87 of the Kenya Railway Corporation Act cap 397 laws of Kenya.**
>
> **4. That the statement of facts, grounds, and the verifying affidavit as brought out do not demonstrate any public or statutory duty as to warrant issuance of the prerogative orders sought.**

EX PARTE APPLICANT'S SUBMISIONS

14. In submissions filed on her behalf, the applicant contended that the Respondent is estopped from departing from representations made to the applicant if it would be unjust and inequitable to allow the Respondent to resile therefrom and reliance was placed on **Central London Property Trust Limited vs. High Trees House Ltd [1956] 1 All ER 256**. It was submitted that the recommendation to give priority to occupants of the suit properties was approved by the 1st Respondent's Board and the applicant relied thereon.
15. It was further submitted that based on legitimate expectation, there is a norm of judicial control which derives from the need to secure certainty and predictability in executive actions hence it seeks to enforce a promise(s) or representations given by or on behalf of an authority to an individual to the end that lawful bargains are not thwarted and reliance was placed on **Council Of Civil Service Unions and Others vs. Minister For Civil Service [1984] 3 ALL ER 935; Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] eKLR and R vs. Newham London Borough Council ex parte Begum and Another [2002] 2 All ER 72.**
16. It was submitted that the applicant relied upon the promise of the 1st Respondent and legitimately and reasonably expected that in the event that there was any change in the said promise, she would have been informed of the same and given an opportunity to comment thereon prior to adverse changes being made.
17. It was further submitted that all persons engaging in actions or activities that affect the rights or liberties of the individuals must act in good faith and hence based on **R vs. Commissioner of Cooperatives ex parte Kirinyaga Tea Growers Cooperative Savings Society [1999] 1 EA 245**, a decision that results from an exercise of power in bad faith is unfair and lends itself to being quashed by certiorari.
18. Further by arbitrarily changing the rent payable without informing the applicant in sufficient time and thereby causing anxiety and uncertainty on the actual rent of the suit property, the 1st Respondent's action was malicious hence the application ought to be allowed.

1ST RESPONDENT'S SUBMISIONS

19. On behalf of the 1st Respondent, it was submitted that as the applicant failed to adhere to the mandatory provisions of section 87(a) of the ***Kenya Railways Corporation Act*** which required that

a notice a statutory notice must be served upon the General Manager of the 1st Respondent, the failure to comply thereto is fatal as there are no exceptions to the said provisions and reliance was placed on **Wambugu & 8 Others vs. Kenya Railways Corporation [2005] eKLR**; **Everrose Chemtai Obwaka vs. Kenya Railways Corporation HCCC No. 82 of 2008** and **James Mbatia Thuo and 2 Others vs. Kenya Railways Corporation HCCC No. 518 of 2008**.

20. It was therefore submitted that this Court lacks jurisdiction to exempt the applicant from complying with the said provision.
21. According to the 1st Respondent there was no link between the Tenancy Agreement and the employment and hence the two issues should be treated as distinct and separate. Since the Tenancy provided for a Notice to vacate during the pendency of the tenancy period and as by July 2008 the tenancy has expired a Notice to Terminate was no longer valid.
22. It was further submitted that even though the Board of Directors for the 1st Respondent may have approved the sale of the subject houses, the final approval had to be sought and given by the Government which approval was not granted based on fair and reasonable grounds. In this respect, the 1st Respondent relied on **Republic vs. Coffee Board of Kenya ex parte Sparta Holdings High Court Judicial Review Misc. Application No. 109 of 2009** and submitted that the application ought to be disallowed.

2ND RESPONDENT'S SUBMISIONS

23. On behalf of the 2nd Respondent, it was submitted that since the 2nd Respondent's role in the impugned decision as well as reliefs sought against the 2nd Respondent have not been sought the 2nd Respondent has been wrongly sued in this matter.
24. It was further submitted that as the applicant is nolonger an employee of the 1st respondent, the relationship between them is commercial hence contractual in nature and therefore the issues herein clearly fall under the realms of private rights which ought to be adjudicated under private law.
25. It was further submitted that the application is incompetent for failure to adhere to the provisions of section 87 of the ***Kenya Railways Corporation Act*** (hereinafter referred to as the Act) and the application ought to be dismissed.

DETERMINATIONS

26. I have considered the application, the affidavits both in support of and in opposition to the application, the grounds of opposition filed as well as the various submissions filed on behalf of the parties herein and this is the view I form of the matter.
27. The first issue for determination is whether it was necessary to give a notice under section 87 of the Act. That section provides as follows:

Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the managing director by the plaintiff or his agent; and

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof. [Underlining mine].

28. It is therefore clear that the action must be "***for any act done in pursuance or execution, or***

intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority." Obviously there is no allegation that the applicant's complaints are not in respect of acts done in pursuance or execution or intended execution of the Act. Therefore the next question is whether the acts complained of are of a public duty or authority. Even from the Respondents' own point of view, this argument cannot avail the Respondents who contend that the applicant's complaint is in the nature of a contract. I am highly doubtful however, that the applicant bases her case on a duty of public nature. In interpreting the said section, the High Court in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989,** was of the view, which view I subscribe to, that section 87 only protects the Corporation in relation to claims brought against it for breach of its statutory duties or those committed in the course of its statutory duties. The statutory duties imposed upon the Corporation are those relating to the running of trains and steamers in Lake Victoria and not the renting of houses to its employees or the selling of houses to its staff or former staff or even to third parties. These are actions which in my view are outside the statutory duties of the Corporation and are not duties which the Corporation owe to the public.

29. I further associate myself with the decision in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996** to the effect that:

"Judicial review matters are commenced by a notice to the Registrar under Order 53 rule 1(3) of the Rules. This is a Notice which the Registrar is supposed to and ought to be dispatching to the Attorney General or the intended Respondent to come and oppose the application for leave if he or it so wish and that is the only Notice required to be given on account of intended Judicial Review applications..... Section 109 of the Kenya Posts & Telecommunications Act Cap. 411 has no application to judicial review as the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application..... Judicial Review aims at providing justice at minimum delays and therefore a multitude of Notices to be given before an application for judicial review is made is contrary to that spirit of judicial review..... Public institutions cannot afford luxuries of bad manners."

30. The requirement of notice to sue before commencement of legal proceedings has been the subject of litigation in this country. In **Pradhan vs. Attorney General & Another [2002] 1 KLR 1,** the Court was of the opinion that provisions of ***Government Proceedings Act***, Cap 40 [which require that the Government be served with a notice before institution of a suit] did not override the then section 3 of the Constitution which provided that the provisions of the Constitution shall prevail over all other provisions of the law all over the Republic. No requirement of any notice was required under section 84 of the Constitution and in any case the Court was prepared to find that the Attorney General had been given adequate notice by the Applicant that the Applicant was intending to take legal action against the Government.
31. Accordingly, it is my view and I so hold that section 87 of the Act is inapplicable to the present case.
32. It has been submitted that the doctrine of equitable estoppel applies to these proceedings. The application of the doctrine was elucidated in the case of **Ralph C De Souza vs. V R Mandavia and Another Nairobi HCCC No. 492 of 1963 [1964] EA 682** in which **Central London Property Trust Ltd vs. High Trees House Ltd [1947] KB 130; [1956] 1 ALL ER 256** was cited as follows:

"In general, where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the party who gave the promise or the assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration. A final formulation must await further judicial decision and discussion. Meanwhile the following propositions are offered: (a) If a promise is given by one party to a contract not to insist

upon his rights under that contract and there is no consideration for that promise the promisee cannot sue upon it. (b) If the promissor breaks his promise and sues on the original contract, the promisee may use the promise by way of a defence. (c) To succeed in this defence the promisee must satisfy the court that it is inequitable to allow the promissor to sue on the original contract; and this he will normally be able to do if he has acted or omitted to act in reliance upon the promise. (d) If the promise was intended solely to suspend and not to abrogate the legal rights of the promissor, the promise will continue to operate until reasonable notice has been given by the promissor that he proposes to resume those rights."

33. First and foremost and as was held in **Mulji Jetha Ltd Vs. Commissioner of Income Tax Nairobi HCCC No. 594 of 1966 [1967] EA 50:**

Equitable estoppel is not a principle to be applied by the court in an arbitrary or mechanical way without regard to the factors which normally influence the exercise of its inherent discretion in the granting of equitable relief, and even if there were no other relevant consideration, the company has been guilty of laches to such an extent as would render it inequitable to grant the relief which it seeks..... Although it is said that to succeed in the defence of equitable estoppel the promisee must satisfy the court that it is inequitable to allow the promissor to sue on the original contract, extension of the principle to matters not connected with the contract has been recognised. If a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it. Looking at the matter objectively it is not easy to see why the exercise of contractual rights should alone be amenable to restraint at the instance of equitable estoppel and the defendant would not be entitled to succeed on this ground..... Whereas equitable estoppel cannot be invoked to afford protection against the performance of a statutory duty, in the instant case the defendant should not be permitted to say that the agreement was made in excess of authority and, for that reason, that there is no room for the application of the principle of equitable estoppel..... It is well settled that the principle of equitable estoppel cannot be used as a means of founding a cause of action. Admittedly it would be an over-simplification to say that equitable estoppel can be used only by a defendant and not by a plaintiff..... In the present case the plaintiff is seeking, not to protect a legal right conferred upon him, but to defend himself against the exercise of a right conferred by law upon the defendant. If the agreement, by importing the element of consideration or otherwise, had conferred legal rights upon the company the present action would have been so framed as affirmatively to assert those rights and there would have been no need to rely upon estoppel. It is therefore correct that the company is endeavouring to use the principle as a sword rather than as a shield and, for this reason, its claim must fail."

34. From the proceedings herein apart from all else it is clear that the applicant is invoking the doctrine of equitable estoppel as a sword rather than as a shield. I accordingly find that the doctrine is inapplicable in these circumstances.
35. In **Republic vs. Kenya National Examinations Council *ex parte* Gathenji & Others Civil Appeal No. 266 of 1996** the Court of Appeal expressed itself as follows:

"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." [Underlining mine].

36. It is clear that what the applicant relies upon is a recommendation. It has not been alleged that there was a legal duty imposed upon the 1st respondent to do what the applicant seeks the Court to compel the 1st respondent to perform. Therefore strictly speaking, mandamus would not be available to the applicant.
37. It is further contended that what the applicant seeks is the enforcement of contractual obligations. Ordinarily issues of landlord and tenant fall under the ordinary civil disputes resolution jurisdiction other than judicial review. However it is not in every case where there is a relationship of landlord and tenant that judicial review remedies are excluded. In **Madhwa and Others vs. City Council of Nairobi Nairobi HCCC No. 1208 of 1967 [1968] EA 406** it was held that:

"...in the case of a statutory body, unless it be invested with leasing powers it cannot lawfully grant leases and if it be so invested it can grant leases only to the extent and for the purpose authorised by those powers. These considerations apply generally to the exercise of leasing powers by the limited owners and statutory bodies and, no doubt, in each case a power to grant leases includes by implication a power to terminate them for such a power is inherent in the relationship so created but the exercise of that power consequent upon the granting of a lease under statutory or other special authority cannot properly be divorced from that authority and regarded as arising merely from the law of landlord and tenant. Being itself a creature of statute such a body can have no existence apart from the statutory provision which creates it, and it can lawfully execute no act and perform no function save such as it is empowered by law to execute and perform. Thus, if in the course of its operation, it should buy or sell goods, employ labour, or lease its premises, it no doubt brings itself within the purview of the law relating to the sale of goods, master and servant, and landlord and tenant respectively, but this extension of its juridical activities in no way takes it outside the operation of the field of law to which, as a creature of statute, it is inherently subject."

38. Again it is my view that if, as a result of the contractual relationship created between the applicant and the respondent, a statutory obligation is thereby created compelling one of the parties to carry out a certain mandate or duty, the mere fact that the duty originated from a contractual relationship ought not to bar the applicant from reliefs under judicial review.
39. Apart from that whereas I have found that the general rule is that where there is no legal duty placed upon the respondent to act in a particular manner mandamus may not issue, it has now been recognised that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions and that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis. See **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998**; **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**; and **Re Bivac International SA (Bureau Veritas)**

[2005] 2 EA 43.

40. Similarly, as was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....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.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

41. Therefore the principle of legitimate expectation may properly invoked where circumstances for its invocation exist to meet the ends of justice. As was held in **Ex Parte Unilever [996] STC 681**, categories of unfairness are not closed and precedent should act as a guide not a cage thus the principle behind the said principle is that once a public body makes a promise, it effectively amounts to a contract and to go back on it is a breach and unfair for a public authority to do so.
42. However, as was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240,** 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. In this case, as rightly submitted on behalf of the applicant, the recommendation to give priority to occupants of the suit properties was approved by the 1st Respondent's Board and the applicant relied thereon. The 1st respondent similarly contends that there was a recommendation by the said Board but the said recommendation was as was legally enjoined, not approved by the treasury. The question that arises is whether a recommendation which is subject to further approval by a different body may be subject to judicial review remedies when such approval is not forthcoming.
43. Legitimate expectation, it has been held, arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases the Courts have held that the expectation ought not to be summarily disappointed. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he had legitimately expected to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn. A legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. See **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280.**
44. In this case, the 1st Respondent contends and this contention is not seriously disputed that the ultimate decision did not rest with the 1st Respondent and that its view was a mere recommendation which was subject to the ultimate decision of the treasury.
45. It is trite that the claim for legitimate expectation must be made within the confines of the law. In

other words, a public body cannot make a promise or representation that is against the law or that which is not within its power to perform. For a Court to compel a body to do that which is not within its powers to perform would amount to compelling an illegality.

46. Therefore taking into account the fact that the 1st respondent's "decision" was a mere recommendation subject to approval by the Treasury which approval was not forthcoming to grant the orders sought would be in vain. As was held in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

47. Having considered the application herein it is my view and I so hold that in the exercise of the Court's discretion, the orders sought herein by the applicant ought not to be granted.

ORDER

48. In the result the Notice of Motion dated 20th January, 2009 is disallowed but with no order as to costs.

Dated at Nairobi this day 11th of February 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Murithi for the applicant

Mr Okello for the Respondent