



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISC. APPLICATION NO. 10 OF 2013**

**IN THE MATTER OF AN APPLICATION BY JOHN NGUGI GATHUMBI FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE  
PRINCIPAL REGISTRAR OF GOVERNMENT LANDS**

**AND**

**IN THE MATTER OF GOVERNMENT LANDS ACT, CHAPTER 280 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL REGISTRAR OF GOVERNMENT LANDS.1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JOHN NGUGI GATHUMBI.....EX PARTE APPLICANT**

**JUDGEMENT**

1. By a Notice of Motion dated 5<sup>th</sup> February, 2013 filed on 7<sup>th</sup> February, 2013, the *ex parte* applicant herein, **John Ngugi Gathumbi**, seeks the following orders:
  1. An order of certiorari pursuant to the leave granted on the 16<sup>th</sup> January 2013 to bring to this Honourable court to quash the decision of the 1<sup>st</sup> Respondent contained in a copy of the cancelled title deed certified on the 9<sup>th</sup> October 2008 and purporting to cancel and expunge entries from the Register of Government Lands relating to land belonging to the Applicant

- known as L.R. No. 209/73/6.
2. An order of prohibition pursuant to the leave granted on the 16<sup>th</sup> January 2013 directed at the 1<sup>st</sup> Respondent, by himself, his servants, agents, and/or officers from expunging, cancelling and/or interfering with any entry in the Register of Government Lands relating to Land known as L.R. No. 209/73/6.
  3. An order of mandamus pursuant to the leave granted on the 16<sup>th</sup> January 2013 to compel the 1<sup>st</sup> Respondent to restore in the Register of Government Lands entries relating to the application's ownership of land known as L.R. No. 209/73/6.
  4. That costs of and incidental to this application be provided for.
  5. Such further reliefs that this Honourable Court may deem fit and expedient to grant.

#### EX PARTE APPLICANT'S CASE

2. The application is supported by a supporting affidavit sworn by the applicant herein on 16<sup>th</sup> January, 2013.
3. According to the applicant, he is the registered legal owner of Land Reference Number 209/73/6 situated at Chiromo Road within Nairobi County. He averred that he is Kenyan citizen who has suffered oppression by some officers of the Ministry of Lands in corroboration with some known Asians to dispossess him of his aforementioned property. According to him, the history of his said ownership dates back in the years 1980s when he was working for one **Mr. Abdul Raof Sheikh** now deceased. On the 21<sup>st</sup> day of January 1981 while in employment and being employed by the deceased as a shamba boy the applicant got involved in a traffic road accident along Juja road and being paraplegic, he has since been confined to a wheel chair.
4. On the 25<sup>th</sup> January 1982 vide a letter dated the same date the deceased in compensation of the applicant's incapacitation and out of sheer goodwill gave/transferred to the applicant one of his Land Parcel Number 209/73/6 (hereinafter referred to as the suit land) situated at Chiromo Road in Nairobi County and on the 3<sup>rd</sup> August 2008 this Honourable court declared in HCCC Civil Suit No.3812 of 2000 between **John Ngugi Gathumbi Vs Abdul Waheed Sheikh & 3 others** that the applicant is the rightful owner of the suit land which entry was entered in the register and has always remained so.
5. Upon expiry of the applicant's lease on or about March 2002 he applied for extension of lease and the same was granted and it was at this point that it was alleged that he had uttered a false document before the Land Registrar by one **Mr. Thuita** who despite recording his statement was never called to testify.
6. According to the applicant, he has always possession of the suit property to date and that the land rent demand notices always reflected him as the legal and registered owner and that he has paid land rent. According to him he later learnt that this gesture of good faith by the deceased did not augur well with some of the deceased's relatives and some members of the Asian Community and in an attempt to dispossess the applicant of the suit property one **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh** and some land officials caused him to be charged in a court of law in Criminal Case No. 275 of 2005 **R -vs- John Ngugi Gathumbi** on allegations of forgery but this the court in Criminal Appeal No.311 of 2009 **John Ngugi Gathumbi -vs- Republic** quashed his conviction and set aside my sentence.
7. However, on the 9<sup>th</sup> October 2008 during the pendency of the Criminal trial some known Land Officers fraudulently/and or without authority proceeded to cancel his said title and attempted to issue one to **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh**. According to the applicant, the names of the said **Mr. Abdul Waheed Sheikh** and **Abdul Hameed Sheikh** were not entered in the register hence he is still the registered owner even though they took away his original title document and cancelled it physically.
8. Subsequent to the applicant's release, he has severally visited the 1<sup>st</sup> Respondent's offices to demand for reissue his my title in vain and a cross check by my counsel reflected that even though his title deed was cancelled the register still reflects that he is the registered owner and there is no entry of the title purportedly issued to **Abdul Waheed Sheikh** and **Abdul Wameed Sheikh**. In his view, there is a lot of mischief behind the cancellation of his title document and the same deed plan number 246422 which was allegedly forged by him was re-issued to **Mr. Abdul Waheed**

- Sheikh** and **Abdul Hameed Sheik** using the same Deed plan number 246422.
9. It was therefore the applicant's contention that the said purported unilateral cancellation is in the face of law, irregular, illegal and without merit and that the action by those involved was unlawful and infringed on his constitutional right to own property and protection of private property and unless the court compels them to re-issue him with his title deed they will not do it on their own violation because some of the land officers in cahoots with the aforementioned Asians have always eyed the suit property as it stands in a suitable commercial position and has received threats from anonymous callers to surrender the said property or lose his life.

### **RESPONDENT'S CASE**

10. On behalf of the Respondent the following grounds of opposition were filed:

1. **THAT the prayer for certiorari is time barred in contravention of the Law Reform Act as well as provisions of Order 53 of the civil Procedure Rules.**
2. **THAT prayer for prohibition cannot issue as it regards past actions.**
3. **THAT the issues raised are not amenable to judicial review as they regard ownership of land which is not within the purview of this honourable court.**
4. **THAT the application is bad in law, incompetent and abuse of the court process.**

### **APPLICANT'S SUBMISSIONS**

11. On behalf of the applicant it was submitted that the applicant was never called upon before the decision to cancel his title was made hence the action by the 1<sup>st</sup> Respondent was clearly excessive, unfair and outrightly unlawful hence the applicant is entitled to the orders sought.

### **RESPONDENT'S SUBMISSIONS**

12. On behalf of the Respondent it was submitted that the order of certiorari cannot issue against the 1<sup>st</sup> respondent because it is time barred under Order 53 rule 2 of the ***Civil Procedure Rules*** the decision to cancel the title having been made on 9<sup>th</sup> October 2008 yet these proceedings were instituted on 5<sup>th</sup> February, 2013 outside the six months allowed by the rules.
13. With respect to the order of prohibition, it was submitted that the same relief can only be issued prospectively and that the Court cannot direct the 1<sup>st</sup> Respondent on the performance of his statutory and discretionary function unless he acts in bad faith or his action is substantially or procedurally ultra vires yet there is no such evidence. In support of the submissions the case of **Kenya National Examinations Council vs. Republic ex parte Gathenji Civil Appeal No. 266 of 1996** was cited.
14. According to the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent has not acted without or in excess of jurisdiction by cancelling the applicant's title since section 121 of the ***Government Lands Act*** provides for such function.
15. It was further submitted that the applicant has failed to pursue alternative remedy with respect to ownership of the land hence the application ought not to be allowed.

### **DETERMINATIONS**

16. I have considered the application, the affidavit on record as well as the grounds of opposition and the submissions filed.
17. The first issue for determination is whether the application for the remedy of certiorari is time barred. This determination is crucial to the determination whether or not the other two remedies of prohibition and mandamus would lie. In **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroje & Others Civil Appeal No. 266 of 1996 eKLR** the Court

of Appeal 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.....an order of prohibition.....cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made.”**

18. In this case it is contended that the application for *certiorari* is time barred. Section 9 of the *Law Reform Act* provides;

**9. (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—**

**(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of *mandamus*, prohibition or *certiorari* is sought;**

**(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;**

**(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.**

**(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of *mandamus*, prohibition or *certiorari* shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.**

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

19. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** and **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and therefore a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under

- Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.
20. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318**, the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.
21. I am of the view that a Court of law ought not to drive a litigant from the seat of justice unless the law is clear that the cause of action is time bared under the relevant limitation statute. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199**, in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
22. The decision complained of herein similarly was a decision alienating land which the applicant contends was unlawful. It is therefore my view and I so hold that the six months’ time bar does not apply to these proceedings.
23. In this case the applicant has exhibited a copy of a decree by which he was declared to be the rightful owner of the suit property. According to that decree, **Abdul Waheed Sheikh** and **Abdul Ghafur Sheikh** and **Abdul Majid Sheikh** were directed to transfer the suit land to the applicant. There is also a copy of the grant issued to the applicant. The Respondent on the other hand has not disputed the factual averments made by the applicant that he is the registered owner of the suit land and that an attempt was made by the said **Abdul Waheed Sheikh** and **Abdul Hameed Sheik** in collaboration with some officials in the land registry to deprive the applicant of the suit parcel of land. Article 40(3) of the Constitution provides:

***The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***

***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***

***(i) requires prompt payment in full, of just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

24. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

25. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution.

25. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

26. In my view the decision of the Respondent to deprive the applicant of his interest in the suit property without being afforded an opportunity of being heard was not only made in excess of jurisdiction by the applicant as no finding had been made that the suit property was unlawfully acquired by the applicant, but was also tainted with irrationality, illegality and procedural impropriety since it was made in breach of the rules of natural justice. It has been held that where the manner in which the proceedings were conducted were appalling as all elementary rules of procedure were flouted, no court worth its salt can allow orders obtained in this manner to stand regardless of the magnitude of the allegations made against any of the litigants. See **Kamlesh Mansukhlal Damji Pattni vs. Nasir Ibrahim Ali & 2 Others Civil Application No. Nai. 5 of 1999.**
27. This Court must vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context of our socio-cultural environment, and avoid paying undue attention to abstract technical strictures and procedural snares for the sake of technicality which may have the effect of restricting access to justice which is itself a constitutional right that cannot be abrogated or abridged by brazen or subtle schemes and manoeuvres. See **Ruturi & Another vs. Minister of Finance & Another [2001] 1 EA 253.**
28. This case is one where Article 47 of the Constitution was flouted brazenly by the Respondent hence the Court cannot be expected to legalise an illegal transaction by standing aside and folding its arms while letting an illegal action pass by to the benefit of a collaborator or instigator of the said illegality.

## **ORDER**

18. Consequently, the applicant's 5<sup>th</sup> February, 2013 filed on 7<sup>th</sup> February, 2013, is allowed with the result that:
1. **An order of certiorari is hereby issued calling into this Court the decision of the 1<sup>st</sup> Respondent contained in a copy of the cancelled title deed certified on the 9<sup>th</sup> October 2008 and purporting to cancel and expunge entries from the Register of Government Lands relating to land belonging to the Applicant known as L.R. No. 209/73/6 for the purposes of being quashed and the same is hereby quashed.**
  2. **An order of prohibition is hereby issued prohibiting the 1<sup>st</sup> Respondent, by himself, his servants, agents, and/or officers from expunging, cancelling and/or interfering with any entry in the Register of Government Lands relating to Land known as L.R. No.209/73/6.**
  3. **An order of mandamus is hereby issued compelling the 1<sup>st</sup> Respondent to restore in the Register of Government Lands entries relating to the application's ownership of land known as L.R. No.209/73/6.**

**4. The applicant is awarded the costs of this application.**

**Dated at Nairobi this 7<sup>th</sup> day of February 2014**

**G V ODUNGA**

**JUDGE**

*Delivered in the presence of Ms Kwamboka for the applicant*