



**REPUBLIC OF KENYA**

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

**JR ELC MISCELLANEOUS CIVIL SUIT NO. 2 OF 2009**

**IN THE MATTER OF AN APPLICATION FOR THE ORDERS OF CERTIORARI AND PROHIBITION PURSUANT TO ORDER LIII RULE 1 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF DEMAND NOTICES BY KENYA RAILWAYS CORPORATION FOR LAND RENT OVER PROPERTIES L.R. NO. 209/1253 & L.R NO. 209/1254**

**REPUBLIC .....APPLICANT**

**VERSUS**

**KENYA RAILWAY CORPORATION..... RESPONDENT**

**EX-PARTE**

**SHEETS AND HARDWARE LIMITED**

**Kirit Patel**

**JUDGEMENT**

1. By an amended Notice of Motion dated 31<sup>st</sup> January, 2012, the ex parte applicants herein, **Sheets and Hardware Limited** and **Kirit Patel** seek the following orders:
1. **THAT this Honourable Court be pleased to grant to issue an order of Certiorari to bring into the High Court and quash the Respondent's demand notices for payment of land rent over the Properties known as L.R. No.209/1253 and L.R. No.209/1254 issued to the 2<sup>nd</sup> ex**

- parte Applicant.
2. **THAT this Honourable Court be pleased to issue an order of Prohibition to restrain the Respondent's from enforcing the demand notice dated 23<sup>rd</sup> July 2008 or issuing any further demand notices for land rent over the Properties known as L.R. No.209/1253 and L.R. No.209/1254.**
  3. **THAT the Costs of this application be provided for.**

**EX PARTE APPLICANT'S CASE**

2. The application is based on the following grounds:
    1. **The Applicant is the registered proprietor of all the parcels of land known as L.R. no.209/1253 and L.R. No.209/1254.**
    2. **The 1<sup>st</sup> Applicant is the registered proprietor of all that property known as L.R. No.209/1253 while the 2<sup>nd</sup> Applicant is the registered proprietor of all that property known as L.R. No.209/1254.**
    3. **Both the Respondent and the Commissioner of lands have been demanding land rent from the 2<sup>nd</sup> Applicant with respect to the said parcels of land.**
    4. **The 2<sup>nd</sup> Applicant sought clarification from the Commissioner of Lands as to which party was rightfully entitled to collect he said land rent.**
  5. **The Commissioner of Lands clarified in no uncertain terms, that the land rent was payable directly to the Commissioner of Land's office.**
  6. **Despite the 2<sup>nd</sup> Applicant bringing the aforesaid directive to the attention of the Respondent has continued to demand land rent from the 2<sup>nd</sup> Applicant.**
  7. **The said demands are ultra vires the powers and functions of the Respondent and are aimed at unjustifiably enriching the Respondent.**
  8. **The Respondent's continued demands for land rent are unreasonable within the Wednesbury's principle of unreasonableness.**
  9. **The Respondent's demands were issued without justification or reason whatsoever.**
  10. **The Respondent's agent has threatened to auction the Applicants property if it they fail to pay the sum claimed.**
  11. **This Honourable Court has the duty to quash the impugned demand notices and to order the Respondent to desist from issuing any more demands to the 2<sup>nd</sup> Applicant in future.**
  12. **The demands are misconceived, having been issued on the basis of wrong assumptions.**
3. The application was supported by a verifying affidavit sworn by **Kirit Patel**, who described himself as a director of the applicant herein on 19<sup>th</sup> January, 2008.
  4. According to the deponent, sometime in or about 1998, the Applicant received a demand for payment of land rent from the Respondent. Soon thereafter on 19<sup>th</sup> January 1999, the Applicant also received a demand for payment of land rent from the Commissioner of Lands and being naturally confused, the Applicant sought clarification from the Commissioner of Lands. By letter dated 18<sup>th</sup> March 2004, the Respondent informed the Applicant that the land in issue was its property, hence all rent pertaining to it was payable to the Respondent and not the Commissioner of Lands. However, in his response by letter dated 4<sup>th</sup> May 1999, the Commissioner advised the Applicant to pay land rent with respect to the suit properties directly to his office.
  5. On 7<sup>th</sup> May 1999, the Respondent sent another letter to the Applicant reiterating its position that land rent was payable to itself and not the Commissioner of Lands. In the circumstances the Applicant decided to pay the land rent to the Commissioner of Lands. Despite that, the Respondent has however continued to demand payment of land rent from the Applicant and despite the deponent instructing its advocates to demand that the Respondent to cease sending the demand notices to the Applicant, the Respondent, was adamant that the rent was due and payable

- to it. This prompted that applicant through its advocates to write a letter dated 11<sup>th</sup> November 2005, seeking clarification from the Ministry of Lands. The said advocates obtained from the lands office a copy of the minutes of the consultative meeting held on 19<sup>th</sup> November 1997 and a letter dated 21<sup>st</sup> March 1994 from which it is evident that although the Respondent had been appointed an agent for the collection of land rent on behalf of the Commissioner, the agency relationship was terminated and the collection responsibility reverted to the Commissioner's office hence the Respondent has no authority to continue demanding payment of land rent from the Applicant. It is therefore contended that the demands are therefore ultra vires its authority.
6. In spite of this on 23<sup>rd</sup> July 2008, the Respondent's agent threatened to attach the Applicant's property if the Applicant did not make payment. To the deponent it is quite clear that the Respondent's demand notices are illegal and unreasonable and the Applicant is apprehensive that if the said demand notices are not quashed and the Applicant restrained from issuing any more demands, it risks having its property auctioned. In the deponent's view, the Respondent's actions amount to a blatant abuse of its authority and power and this Honourable Court should not countenance the same. In view of the imminent that of enforcement and/or execution of the demand notices, this matter is extremely urgent and should be disposed of immediately. On the other hand, the Respondent will not suffer any prejudice if this application is allowed.
  7. It was further deposed that the Applicant is the registered proprietor of all that property known as Land Reference Number 209/1253 while the deponent is the registered proprietor of all that property known as Land Reference Number 209/1254 (hereinafter collectively referred to as "the Properties"). However at all materials times to this matter, all the correspondence in respect to the properties were addressed to the deponent and this was the case on all issues with respect to the land rent for the Properties. Once, however, the Respondent began demanding for the payment of the land rent with respect to the Properties, the notices would be received at the Applicant's premises. In addition, the auctioneer appointed by the Respondent visited the Applicant's premises and threatened to attach the Applicant's assets in purported recovery of the allegedly outstanding land rent. In the premises therefore, the proceedings herein were instituted in a hurry so as to protect the Applicant's assets. When the applicant's advocates attended this Honourable Court on 17<sup>th</sup> May, 2011, it is deposed that the Court pointed out the fact that the impugned demand notice dated 23<sup>rd</sup> July, 2008 is addressed to the deponent and based on the applicants' advice it is deposed that in the disclosed circumstances, it is necessary for the deponent to be enjoined (sic) as a party to this proceedings.

### **RESPONDENT'S CASE**

8. On behalf of the Respondent, a replying affidavit was filed sworn by **Victoria Mulwa**, the Respondent's Senior Legal Officer on 19<sup>th</sup> November 2012.
9. According to the deponent, the Application herein arises from the efforts made by the Kenya Railways Corporation to recover monies owned to it by the Ex-parte Applicants in respect to land rent payment for its properties leased to the Applicants. It was deposed that the Respondent, Kenya Railways Corporation owned various properties within the City of Nairobi which properties formed part of its Nairobi Station Godown Area and comprised among other parcels of land, Land Reference No.209/1254 and 1253. The Respondent Corporation developed the said parcels of land with godowns for its use but later elected to lease the same to some of its customers. sometimes in the year 1913 and/or thereabouts, the Corporation leased its said parcel of land, Land Reference No.209/1254 to a Ugandan Company known as **Muljibhai Madhavani & Company Limited** (the Lessee) for a period of 99 years commencing 1.6.1913 and ending 1.6.2012 at a revisable annual rent of Kshs.105/=. The said Lessee then with the Respondent Corporation's consent, sub-leased (sic) the said property sometimes in the year 1965 and/or thereabouts to a company by the name **Rhamba & Company Ltd.** Sometimes in the year 1913 and/or thereabouts, the Corporation leased its other parcel of land, Land Reference No.209/1253 to a Company known as **Haljee Hirjee Estates Limited** (The Lessee) for a period of 99 years commencing 1.6.1913 and ending 1.6.2012 at a revisable annual rent of Kshs.100/=. The said Lessee then with the Respondent Corporation's consent, similarly sub-leased (sic) the said property sometimes in the year 1957 and/or thereabouts to a company by the name **Rhambai &**

- Company Ltd.** The Corporation is, however, aware that with time, the original Lessees' of these properties sold out the remainder of their lease interests to Third Parties by the consent of the Corporation which remainder of the lease interest has therefore been transferred to various third parties including the ex-parte Applicants herein save that the Corporation has never sold and/or disposed of its proprietary rights over the properties and the Corporation is in the process of repossessing the same since the original lease has expired.
10. It was averred by the deponent that the Corporation still remains the lawful proprietor (sic) of the Land Reference No.209/1254 and 1253 which proprietorship has never been challenged and the Corporation has neither surrendered the properties to the Government for allocation nor has it transferred the same to a Third Party. The above explains why the ex-parte Applicants have continuously paid rent to the Corporation without any delay since the year 1913 to-date. The corporation controls the use of the said premises to-date hence it is misleading for the ex-parte Applicants to allege that they are lawful proprietors of the said premises. According to the deponent, the Respondent Corporation has learnt with great shock and surprise that the ex-parte Applicants herein have attempted to irregularly and fraudulently purport to acquire public properties belonging to the Corporation herein without the Corporation's knowledge and/or authority. According to the deponent, the copies of the titles attached to the ex-parte Applicants Application herein are all fraudulent and cannot lawfully bestow any proprietorship and/or ownership of the said properties since the Corporation has never surrendered the parcels of Land herein and that explains why the ex-parte applicants have continued to remit rents to the corporation even after their fraudulent acquisition of the attached title herein in the year 1997.
  11. In the deponent's view, the properties are leased out to the ex-parte applicant herein by the Corporation and they cannot convert the same irregularly to themselves and purport to use this Honourable Court to sanction the fraud by prohibiting the Kenya Railways Corporation from seeking for its legitimate rent arrears. The rents due herein arises from the ex-parte Applicants' occupation of the Corporation's properties, which properties were only leased to the ex-parte Applicants' on the basis that rent would be payable annually. To him, the ex-parte Applicants have always known that it leased the properties of the Respondent Corporation for a particular annual rent and that explains why the Applicants have continued to pay the rent to the Respondent for over 50 years now hence the applicants' are stopped from claiming that the ground rent herein is payable to the Commissioner of Lands. Since the Applicants leased the subject properties from the Corporation which properties they have applied to generate revenues, this Honourable Court cannot lawfully allow the Applicants' to continue benefitting from the properties of the Corporation without meeting its obligation to pay the annual rents thereto and the Corporation as the Lessor of the properties in issue is lawfully entitled to the rents and has the right to distress for the same should the Applicants decline to settle rent arrears.
  12. It was contended that it is not true that the Applicants are the registered proprietors of the parcels of land known as Land Reference No. 209/1254 and 1253 herein as the same belongs to the Respondent Corporation and the Applicants' only acquired the remainder of the leasehold interest which has since expired in June 2012. It was therefore the deponent's view that this Honourable Court lacks the jurisdiction to grant the orders as sought herein as the same will be tantamount to validating the Applicants fraud perpetrated against the Corporation yet the right to property and ownership cannot be determined by way of judicial review process as sought by the Applicant herein as the same is a civil matter that requires evidence to be tendered on how the Applicants purported to acquire the properties herein in 1997 despite the fact that there was a subsisting lease given by the Corporation. It was further deposed that the orders sought herein cannot issue in law and in the circumstances of his case as the properties in issue are land owned by the Respondent Corporation as part of its godowns which lands have been leased to the Applicants upon the request by the Applicants predecessors in occupation. He reiterated that the Applicants have always paid the rent to the Respondent Corporation and they cannot at this stage run away from the same on the misconceived allegation that the rents herein are only payable to the Commissioner of Lands.
  13. It was averred that this Honourable Court does not have the requisite jurisdiction to transfer the Corporation's property to the Applicants as sought herein and that the Applicants misled this Honourable Court to issue ex-parte orders allowing them to stop paying rent to the Corporation, which orders the applicants have enjoyed from January 2009 to-date a period of over 4 years not.

By lodging the proceedings herein the Applicants mischievously, irregularly and unlawfully intends to continue exploiting the Kenya Railways Corporation and deprive it of its lawful revenue arising from the utilization of its assets by refusing and/or defeating its obligations under the lease Agreements. The Applicant must be stopped from using this Honourable Court and the Court process to perpetrate an illegality. The grounds 1 – 11 of the Applicants substantive motion as set out in the filed Statement of facts herein are all misconceived and premised on the fraudulent view that the Applicants could lawfully acquire public property entrusted to the Corporation as Godowns and convert the same for their private individual use without the Corporation's knowledge.

14. According to the deponent, it was incumbent upon the ex-parte Applicant to make full and fair disclosure of all the material facts relating to the matter herein and the Application herein is a blatant attempt by the Applicant to unlawfully and irregularly avoid payment of rents to the Corporation. In his view, the ex-parte interim orders granted herein were issued as a result of the Applicants deliberate non disclosure of material facts and the same should be set aside since the import of the orders applied for herein if the same were to issue is that the Applicant will have unlimited, unregulated and unlawful possession and use of the Kenya Railways Corporation assets to the detriment of the Corporation. Further, the said orders as sought herein are oppressive and prejudicial to the Kenya Railways Corporation which lawfully leased out its properties to the Applicants predecessors inconsideration of payment of ground rents which the Applicants now wants to avoid and defeat. It was further his view that the Applicant's Application herein is grossly incompetent and fundamentally defective and should be struck out forthwith as the issues herein are purely those of right to ownership of land and the entitlement to rents therein which matters are civil in nature and can only be determined in a civil suit and not through a judicial review process. The Applicants must be stopped from abusing the due process of this Honourable Court. In the result, this Honourable court ought to safeguard its integrity and the due process by dismissing the application herein with costs to the Respondent.

#### **APPLICANT'S SUBMISSIONS**

15. On behalf of the ex parte applicant it was submitted the demand notices issued by the Respondent were an illegality because the issuance thereof had no force of law, the Respondent was not empowered to issue the demand notices and the Respondent exceeded its power in issuing the demand notices. Whereas the Respondent issued the demand notices ostensibly on the fact that the properties belonged to it, the titles issued with respect thereof clearly demonstrated that the Lessor is the Government of Kenya and the relevant law, the ***Registration of Titles Act***, Chapter 281 of the Laws of Kenya is clear that the proper entity for the purposes of the collection of land rent is the office of the Commissioner of Lands. It was therefore submitted that the continued issuance of demand notices by the Respondent had no force of law since the Respondent issued the same without considering the provisions of the applicable law and failed to take cognisance of the fact that in issuing the same, it was encroaching on the mandate of the Office of the Commissioner of Lands and in the process was hell-bent on penalising the ex parte applicant to pay land rent twice. It was therefore submitted that the demand notices were illegal and a nullity. Based on **R vs. Returning Officer Kamkunji Constituency, Nairobi & Another ex parte Simon Ng'ang'a Mbugua HCMisc. Appl. No. 13 of 2008**, **Republic vs. Judicial Commissioner of Inquiry into the Goldenberg Affair & 3 Others ex parte Mwalulu & 3 Others HCMisc. Appl. No. 1279 of 2004** and **R vs. City Council of Nairobi & Another HCMISC No. 1406 of 2004**, it was submitted that the decision with no legal basis is an illegality and a nullity and the High Court has powers to deal with illegalities and nullify and quash the same. According to the applicants as the Respondent was not empowered to issue the demand notices, the said decision was *ultra vires* as the Respondent encroached on the powers vested on the Commissioner of Lands.
16. Since the effect of the said demand notices was to surcharge the ex parte applicant twice, the decision was unreasonable. Relying on **Council of Civil Service Unions and Others vs. Minister for the Civil Service [1984] 3 All ER 935** and **Associated Provincial Picture Houses Limited vs. Wednesbury Corporation [1947] 2 All ER 680**, it was submitted that a public body or person may be said to have acted unreasonably if it/he conducts itself/himself beyond the responses open to the public and where its action is so outrageous and in defiance of logic or accepted moral

standards that no sensible person who had applied his mind to the question to be decided.

## **RESPONDENT'S SUBMISSIONS**

17. On behalf of the Respondent, it was submitted that the Applicant has all along been remitting rents to the Respondent until sometime in 2008 when they began defaulting in rent payment. By so doing, it was submitted that the applicant confirmed that indeed there was in existence a Landlord-Tenant relationship between the applicant and the Corporation. It was submitted that this Court is expressly precluded by section 26(1)(b) of the ***Land Registration Act*** No. 3 of 2012 from recognising the applicants as the purported proprietors of the subject properties for the reasons that the alleged titles were all acquired illegally, unprocedurally and through corrupt scheme hence the Corporation is entitled to the rents.
18. According to the Respondent jurisdiction of judicial review is not concerned with actions which are private in nature regardless whether or not the same are carried out by statutory bodies and reliance was placed on ***Halsbury's Laws of England, 4<sup>th</sup> Edition 2001 Reissue page 122.***
19. In this case, it is submitted that the demand was made in respect of Landlord-Tenant relationship hence the same does not command public law element whatsoever as they were not carried out pursuant to an administrative action arising from statutory power hence judicial review remedy is not available to quash and/or prohibit such actions. It was submitted that the court therefore lacks the requisite jurisdiction to determine the matter herein. It was further submitted that since the parties herein were engaged in commercial activity hence the applicants remedy based on **Republic vs. Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology ex parte Cicilia Mwathi & Another [2008] eKLR** lies in damages. Since the applicants are calling upon the Court to determine that there does not exist a relationship of Tenant and Landlord between the parties while the Respondent contend the opposite, such determination cannot be made in judicial review proceedings and the Respondent relies on **Law vs. National Greyhound Racing Club Ltd [1983] 3 All ER 300.**
20. It was further submitted that the Respondent has not made any decision to demand rents from the applicants since the duty to do so arises from the applicant's terms of occupation of the railway godowns an obligation which the applicants have always met until sometimes in 2007. It was submitted that there is no decision capable of being quashed as sought. In the Respondent's view, the Court cannot quash the demand notices without determining proprietary rights of the parties herein. In the Respondent's view, whereas it is trite law that an order in the nature of certiorari or prohibition would only issue where there exists want of or excess of jurisdiction, an error of law on the face of the record, failure to comply with the rules of natural justice and/or the Wednesbury principle, none of these grounds have been proved by the applicants.
21. It was further submitted, based on ***Halsbury's Laws of England Fourth Edition 2001 Reissue, Vol. 1 paragraph 12,*** that the jurisdiction to grant the orders of prohibition is discretionary and the Court is obliged to consider the circumstances of each case prior to exercising the discretion and in deciding whether or not to grant the same, the Court must consider whether the grant of such orders are unnecessary and/or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the respondent would result from the order and whether the form of the order is incapable of practical fulfilment.

## **DETERMINATIONS**

22. I have considered the foregoing. The first issue for determination is whether the application is competent. It is alleged by the Respondent that there is no decision which has been made which is capable of being quashed. It is true that under Order 53 rule 7 of the Civil Procedure Rules the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the decision to alienate land or to allocate 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. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.
23. Accordingly, whereas in this case, there may not be in existence a formal decision, that alone would not deprive the Court of the jurisdiction to call up and quash whatever decision is said to be unlawful or which constitutes an error of law.
24. Before I deal with the merits of the application, it is important to note that these proceedings were commenced by Chamber Summons dated 19<sup>th</sup> January 2009 filed on 22<sup>nd</sup> January, 2009. According to the said application the applicant was **Sheets and Hardware Limited** and leave was sought to allow the said applicant apply for judicial review orders of prohibition and certiorari. According to the Statement filed together with the same application, the applicant was expressly stated as **Sheets and Hardware Limited** and it was stated that it was the said applicant who was the registered proprietor of the two land parcels Nos. LR 209/1253 and 209/1254. On 23<sup>rd</sup> January 2009, this Court granted leave to the **applicant** to apply for the said orders. The applicant however applied after leave had been granted and the substantive Motion filed vide an application dated 5<sup>th</sup> September 2011, for leave to amend its said Motion which application was allowed on 23<sup>rd</sup> January 2012. One of the effect of the said amendment was that a second party was introduced into these proceedings being **Kirit Patel**.
25. In my view, the mere fact that a Court has allowed an application for amendment does not validate the claim. Even where parties are joined to ordinary civil proceedings, the Court may at the end of the day disallow the claim of the party who was joined despite having allowed such joinder.
26. Order 53 rule 1(1) and (2) of the **Civil Procedure Rules** provides:

***(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***

***(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.***

27. It is therefore clear that for an applicant to apply for judicial review the applicant is enjoined to apply for leave to do so. In my view, without leave having been sought and obtained the Court has no jurisdiction to grant judicial review orders under sections 8 and 9 of the **Law Reform Act** as read with Order 53 of the **Civil Procedure Rules**. In this case the only person who sought leave and to whom the said leave was granted was **Sheets and Hardware Limited** and not **Kirit Patel**. It follows that even without going into the merits of the application the application in so far as it seeks orders in favour of the said **Kirit Patel** is incompetent and the claim by the said person is struck out.
28. It is important to consider the circumstances under which judicial review remedies do issue. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

**“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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body**

which can only do what is authorised by the statute creating it and in the manner authorised by statute.””

29. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held 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. It is important to remember in every case that the purpose of the remedy of judicial review is 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 *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.*
30. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**
31. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **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** and 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.”**

32. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. 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.”

33. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.
34. In this case, it is the ex parte applicants’ case that the Respondent has no legal authority to demand for rents from the ex parte applicants since the power to do so lies with the Commissioner for Lands, an obligation which the ex parte applicants are adhering to. According to the ex parte applicant, it is the registered proprietor of land parcels known as LR Nos. 209/1253 and 209/1254. In support of this contention the applicant has exhibited copies of a grant issued to **Kiritkumar Rambhai Patel** by the Government with effect from 1<sup>st</sup> May 1997 for a period of fifty years and **Sheets and Hardware Limited** for a similar period with effect from 1<sup>st</sup> June 1997. Based on these documents, the applicant contends that the Respondent’s demand for payment of rents to it is unlawful and *ultra vires* the Respondent’s powers. Having found that the claim by **Kirit Patel** is incompetent, it would follow that as it is clear that LR No. 209/1254 is not the property of **Sheets and Hardware Limited**, the judicial review orders in so far as they relate to the said property are similarly incompetent.
35. It is not contended that assuming the said titles are genuine the Respondent would be entitled to demand for rents from the applicant. In my view, LR No. 209/1253, which is the remaining subject of this application if properly and legally leased to Sheets and Hardware Limited (hereinafter referred to as the applicant), there would be no basis for the Respondent to demand for rent from the applicant and any such demand would in my view be illegal since it has no legal basis and irrational since no reasonable person would be expected to demand rents from a property in which he has no interest and unreasonable for the same reason. The Respondent however contends that it is the lawful owners of the said properties and that the registration of the same in the name of the applicant was procured by fraud.
36. According to the Respondent, the Respondent which owned the suit parcels developed the same and decided to lease the same to some of its customers who with time transferred the remainder of their terms to the applicant. However, the Respondent has never sold and/or disposed of its proprietary rights over the properties and is in the process of repossessing the same since the original lease has expired.
37. It is trite law that this Court in exercise of its judicial review jurisdiction does not deal with the merits of the challenged decision but only by its process. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determine the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the

**evidence is found in the affidavits filed in support of the application.”**

38. In **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.
39. Therefore this is not the right forum and this Court has no jurisdiction in these proceedings to make a finding as between the Respondent and the Government of Kenya who is the right lessor of the suit property. That is a matter which can only be determined by ordinary civil suits.
40. It is now trite that the registration of land in the name of a person is only prima facie evidence of ownership thereof. The registration of a leasehold title therefore confers an interest in the subject parcel of land. Article 40 of the Constitution of Kenya protects the right to property. However, under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The crucial words under Article 40(6) are “***found to have been unlawfully acquired***”. Therefore for the protection conferred under Article 40 to be lost there must be a finding that the property in question was unlawfully acquired. In this case the Respondent has intimated that it is in the process of repossessing the same. Since the applicants have *prima facie* acquired interest in the suit parcels, that process of repossession will have to be legal if it is not to impinge on Article 47 of the Constitution.
41. Since the Respondent’s intended legal process for recovery of possession is yet to be commenced, heard and determined, it would be unjust to deny the applicant a remedy which all things being equal it would be entitled to.

## **ORDER**

42. According to the orders that commend themselves to me are:

1. **An order of certiorari is hereby issued bringing into this Court for the purposes of being quashed the Respondent’s demand notices for payment of land rent over the Property known as L.R. No.209/1253 from Sheets and Hardware Limited which notices are hereby quashed.**
2. **An order of prohibition is hereby issued restraining the Respondent from enforcing the demand notice dated 23<sup>rd</sup> July 2008 or issuing any further demand notices for land rent over L.R. No.209/1253 unless otherwise ordered by a Court of competent jurisdiction.**
3. **With respect to costs, from the documents on record, it would seem that the applicants recognised the Respondent as wielding some power over the suit parcels of land in one form or another hence created an impression that they were in one way or another answerable to the Respondent. In the premises there will be no order as to costs.**

**Dated at Nairobi this 3<sup>rd</sup> day of February 2014**

**G V ODUNGA**

**JUDGE**

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

***Ms Ndeti for Ms Mate for the Applicant***

***Mr Agwara for the Respondent***