REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 262 OF 2013

IN THE MATTER OF MILIMANI COMMERCIAL COURTS CHIEF MAGISTRATE'S

CIVIL SUIT NO. 2795 OF 2013

AND

NAIROBI HCCC COMMERCIAL DIVISION CASE NUMBER 911 OF 2009

REPUBLIC .....APPLICANT

-VS-

THE CHIEF MAGISTRATE

MILIMANI COMMERCIAL COURT.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE CHIEF KANGEMI LOCATION.....3RD RESPONDENT

AND

MECHAEL W MWANGI.....1ST INTERESTED PARTY

JEREMIAH KIARIE MUCHENDU.....2ND INTERESTED PARTY

MUSYOKA MUTISYA.....3RD INTERESTED PARTY

EDWARD KANGETHE.....4TH INTERESTED PARTY

EX-PARTE

VIOLET NDANU MUTINDA

JOEL KIEMA MUTINDA

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 24th July 2013 filed in this Court on 25th July, 2013, the *ex parte* applicants herein, **Violet Ndanu Mutinda** and **Joel Kiema Mutinda**, seek the following orders:

a. **An order of certiorari do issue to remove to this court and quash the 1st Respondent's decision and order dated 3rd July 2013 in its civil case number 2795 of 2013 and issued on 10th July 2013.**
b. **An order of prohibition do issue restraining the Respondents from taking any further proceedings, execution or enforcement of the 1st Respondent's decision and order dated 3rd July 2013 and issue don 10th July 2013**
c. **An order of mandamus do issue directing the 1st Respondent to make his file for civil case number 2795 of 2013 to the Applicants to enable them file their papers and claim as it would be appropriate**
d. **The Respondents and the Interested Parties do pay the costs of this suit.**

***Ex Parte* Applicant's Case**

2. The application was supported by a verifying affidavit sworn by **Violet Ndanu Mutinda**, the 1st applicant herein on 19th July, 2013.
3. According to the deponent, on 25th September 2009, the Applicants entered into an agreement with the 4th Interested Party in which the Applicants sold their house number 81 on L.R. Number 12948/266 (hereinafter referred to as 'the house') to the 4th interested party. However, the sale did not go through as the 4th Interested Party breached the agreement and when the applicants rescinded the contract the said party filed in this court's Commercial division civil case number 911 of 2009 during whose pendency the 4th Interested Party filed an application for eviction which was opposed by the applicants.
4. However, on 18th July, 2013, some administration police officers from the 3rd respondent's offices and the 2nd Interested Party came to the deponent's house at 7.00 am armed with a court order in the 1st respondent's civil case number 2795 of 2013 in which the applicants were shown as the defendants together with the 3rd Interested Party. On inquiring about the genesis of the order, the deponent was informed by the 2nd Respondent that the house had been brought from the owner and when he asked them which owner they told him to check from the court file. Being alarmed, the deponent then called his advocates to ask whether they had information about the sale of the house since it had not been sold to anyone but the said advocates informed him that they were not aware of any sale or orders of eviction.
5. Despite resisting the eviction the 2nd Interested Party and the administration police officers broke down the gate and made away with it and despite requesting for a copy of the order, they declined to give him any. Thereafter the deponent the visited the 3rd Respondent in his offices who gave him a copy of the order and armed therewith he went to national Social Security Fund who had sold the house to the applicants to find out whether they were aware of any sale but were informed me that they were not aware of the sale or an eviction order. The deponent then contacted the applicants' Advocates who applied to be given access to the court file to find out how the order of eviction was granted but the advocates informed him that the 1st Respondent's officers have claimed that they cannot trace their file even with the use of the movement register. According to him, the file is being deliberately withheld from his advocates in order to hide the truth of what transpired. He deposes that the applicants were not served with any document in the 1st respondent's case and it was unfair and against the rules of natural justice to condemn them unheard.
6. According to the deponent, since the 1st Respondent's suit was filed not later than April 2013, it is inconceivable how the same was heard and determined in two months whereas the 1st Respondent's diary for 2013 was closed in February 2013. He further deposed that from the

information gathered from the persons who attempted to evict him, the 4th Interested Party is behind the eviction order in order to circumvent the application coming for hearing on 29th July 2013. He deposed that he does not know the 1st or 3rd Interested parties and it is his constitutional rights to know his accusers and what he has been accused of which he is unable to know without the 1st Respondent's case file

7. To the deponent unless this application is heard urgently and orders granted, the applicants stand to suffer irreparable damages in addition to compromising their security. Based on his advocate's information, the deponent believes that the 1st Respondent's jurisdiction does not go beyond Kshs 8,000,000.00 and as such he had no jurisdiction to hear and determine matters touching on the house which is worth more than 16,000,000/=.
8. The applicants contended that if the decision they wish to quash is implemented, it will amount to perpetuating an illegality hence it should be stopped pending hearing and determination of the substance motion. They further averred that the Respondents have committed contempt of court as there is no order of injunction against the sale of the house until HCCC number 911 is heard and determined.

2nd Interested Party's Case

9. In opposition to the application, the 2nd interested party, **Jeremiah Kiarie Muchendu** filed a replying affidavit sworn on 12th August, 2013.
10. The gist of the said affidavit was that he received instructions from the 1st interested party pursuant to the orders issued in CMCC No. 2795 of 2013 which he acted by executing the same.
11. According to him, he was unaware of the allegations made by the applicant as he acted in accordance with the law.

4th Interested Party's Case

12. On behalf of the 4th interested party, a replying affidavit was filed sworn by the said interested party on 6th August 2013.
13. In his said affidavit, the 4th interested party denied the allegations that he was am behind the applicants' problems intending.
14. While admitting the existence of case pending at the Commercial Division of this Court being HCC No. 911 of 2009 between himself and the ex parte Applicants over ownership and occupation of property known as L.R. No. 12948/266 which case has been ongoing now for over 4 years, he deposed that during all that period, if he had any intention of unlawfully evicting the ex parte Applicants, he would have done it hence it is naive of the ex parte Applicants to allege that he would now try to do so yet he has a formal Application pending for determination in the matter aforesaid seeking for lawful vacant possession.
15. According to him, he is a stranger to the allegations made of an eviction order issued by a Court in a matter in which he is not a party or at all involved. To him, this is the work and machination of the ex parte Applicants who filed these review proceedings to challenge orders emanating from them in order only to scuttle HCCC No. 911 of 2009 from proceeding on the 20th July 2013 which they succeeded in doing on account of these proceedings.
16. It was the interested party's position that if the ex parte Applicants are challenging the Pecuniary Jurisdiction of the Chief Magistrate's Court, they could as well have filed an Appeal. He reiterated that the alleged eviction Order is a creation of the ex parte Applicants who knowing that his Application for vacant possession would succeed resulted in maliciously destroying the subject premises by creating another alleged third party with an interest that is unknown just to keep possession of the Premises through their proxies.
17. The 4th interested party therefore prayed that the Court either dismisses the Application or in the alternative orders that all parties in this case be restrained from entering or having possession and occupation of the suit Premises being L.R. No.12948/266 in order to have sanity and to avoid abuse of Court process by the ex parte Applicants in a spirited move to keep the premises at whatever costs.

Applicants' Submissions

18. On behalf of the applicants, it was submitted that the applicants were not afforded an opportunity of being heard before the orders of eviction were made and further that it is unusual for orders of eviction to be issued in interlocutory stages.
19. It was further submitted that the 1st Respondent had no jurisdiction to hear and determine the matter to which these proceedings relate since the value of the subject matter was more than 16,000,000.00.
20. It was submitted that the 1st Respondent had no jurisdiction to entertain matters which were pending before the High Court. To the applicants although the parties were different the property in issue was the same.
21. According to the applicants the fact that the court file was unavailable when the applicants sought the same while the same was available for the interested parties was an indication of bias and a hindrance to the applicants' constitutional rights and a contravention of the applicants' right to fair administrative action under Article 47 of the Constitution and an infringement of the applicants' constitutional rights to access to justice guaranteed under Article 50 of the Constitution.
22. Relying on **Republic vs. The County Council of Nakuru ex parte Genesis Reliable Equipment and Others Nakuru High Court Judicial Review Application No. 74 of 2010**, it was submitted that an order of certiorari will issue to quash a decision made by a Tribunal or body if the decision is made without or in excess of jurisdiction or where rules of natural justice have not been complied with.
23. It was further submitted based on **Eric Okongo Omogeni vs. Independent Electoral Boundary Commission and 2 Others Nairobi High Court Miscellaneous Civil Application Number 40 of 2013** that an order of prohibition is sought to prevent perpetration of actions which are injurious and which may result into injustice and that where a party has not been afforded an opportunity of being heard the process cannot be said to have been fair hence the High Court has jurisdiction to reverse the decision since that amounts to a defect in the process.
24. According to the applicants the 1st Respondent being a public officer whose actions and duties are central to administration of justice, it was his duty to provide information and opportunity to seekers of justice to have their day in court being a custodian of the files for the cases filed with him. According to the applicants the 1st Respondent failed to perform his public duty hence the applicants were unable to file their defences and know the allegations levelled against them hence the Court ought to compel the 1st Respondent to avail the court file in case number 2795 of 2013. Citing **Jotham Mulati Welamondi vs. ECK Bungoma Miscellaneous Application No. 81 of 2002** and **Gerald Wanjohi & Another vs. The District Forest Officer Koibatek District [2011] eKLR**, it was submitted that where a public body has failed to carry out its statutory or administrative function the court should compel it to do so especially where the rights of the applicants are being infringed.

2nd interested party's submissions

25. On behalf of the 2nd interested party, the contents of the replying affidavit sworn by the said party were reiterated and it was added that the issue of jurisdiction raised by the applicants can only be determined if the pleadings of the lower court are provided without which it would be difficult for the court to determine the issues in dispute.
26. It was further submitted that the issue was being raised after the deliverance of he judgement on 3rd July 2013 and there is no evidence that the said issue was raised.
27. It was submitted that the 2nd interested party had no other interest in the matter apart from the execution of the same.

4th Interested Party's Case

28. On behalf of the interested party it was submitted while reiterating he contents of the 4th interested party's replying affidavit that the orders sought herein have no effect on the 4th interested party.

Based on **Muruiki Kimondo vs. Maina [1976-80] 1 KLR 554**, it was submitted that the application is an abuse of the process of the court and should be dismissed.

Determinations

29. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivalling submissions, this is the view I form of the matter.
30. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

31. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

"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."

32. 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 4th Edition Vol (1)(1) Para 60.***
33. 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.
34. 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."

35. 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."**

36. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view 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.
37. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions.....This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law."

38. 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.
39. In this case it is contended that the Respondent in making its decision breached the rules of natural justice. In **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the High Court expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting

individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively. Depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…….. Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as top the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated because there is no particular safeguards provided under section 62 that deals with the removal of a Judge in instances where there is a complaint against him."

40. Similarly in **Msagha Vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553** the High Court expressed itself as follows:

"The Court observes firstly that the rules of natural justice "*audi alteram partem*" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision. Where suspension was made as a holding operation pending enquiries the rules of natural justice did not apply because the suspension was a matter of good administration. Suspension is merely expulsion *protanto*. Each is penal and each deprives the member concerned of the enjoyment of the rights of membership of offices. Accordingly in my judgement the rules of natural justice *prima facie* apply to any such process of suspension in the same way that they apply to

expulsion. Those words apply no doubt to suspensions which are inflicted by way of punishment as for instance a member of the Bar is suspended from practice for six months or when a solicitor is suspended from practice. But they did not apply to suspensions which are made as a holding operation pending inquiries. Very often irregularities are disclosed in a government department or in a business house and a man may be suspended on full pay pending inquiries. Suspicion may rest on him and he is, suspended until he is cleared of it. No one so far as I know, has ever questioned such a suspension on the ground that it would not be done unless he is given notice of the charge and opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicion, the others will not trust the man. In order to get back the proper work he be suspended. At that stage the rules of natural justice do not apply…….The principle of legitimate expectation lies in the proposition that where a person or a class of persons has previously enjoyed a benefit or advantage of procedure which, on reasonable grounds, seemed likely to be continued as a standard way or guide, with respect to the resolution or disposal or certain questions a claim of legitimate expectation may arise. Put differently, legitimate expectation is but one variant aspect of the duty to act fairly and natural justice is but a manifestation of a broader concept of fairness. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "act judicially". They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias (*nemojudex in sua causa*) and in respect of] the right to a fair hearing [*audi alteram partem*]."

41. In this case it is contended by the applicants that they were never served with the pleadings in CMCC No. 2795 in which the order of eviction given on 3rd July, 2013 was issued. The said order from a reading of the copy exhibited was issued in respect of an application presented by Auctioneers. The parties to those proceedings were the 1st interested party who was the plaintiff against the applicants herein as 1st and 2nd Defendants respectively and one **Joel Kiema Mutinda**. None of these of these parties have filed any affidavit in these proceedings to controvert the applicants' contention that they were never served with the pleadings leading to the issuance of the said order. It is therefore clear that the applicants'' contention that they were never served with the pleadings in the said case remains wholly uncontroverted. In the absence of any other version of the events this Court has no option but to find that the applicants' were never severed with the pleadings leading to drastic orders of eviction. In my view, this was a serious breach of the rules of natural justice.
42. The applicants contend that the said action was in contravention of Article 47 of the Constitution. However Article 47 strictly speaking applies to administrative actions as opposed to judicial actions. Nevertheless as was held in **Msagha Vs. Chief Justice & 7 Others Nairobi** (supra), the rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "act judicially". They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural

justice is therefore flexible and variable. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case.

43. Article 50(1) of the Constitution provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

44. In my view, a hearing cannot be said to have been fair when final orders are granted against a party without hearing the party and during the pendency of the suit.

45. It is however contended on behalf of the 4th interested party that since the proceedings giving rise to the impugned order are not exhibited this Court ought not to grant the orders sought. In granting the order of certiorari, the court calls the proceedings or decision sought to be quashed to the High Court and quashes the same. In this case, I did seek for the court file in respect of Milimani CMCC No. 2795 of 2013 but was informed that the said file went missing and has never been found and that the matter was reported to the police.

46. To accede to the 4th interested party's argument and decline to grant the orders sought herein would in effect drive the applicants from the seat of justice forever and as was held by the Court of Appeal in **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** a court of justice has no jurisdiction to do injustice. A somewhat similar position was experienced in the case of **Kaggwa & 16 Others vs. Kiwanuka & 2 Others Kampala HCCS No. 175 of 1993 [1994] VI KALR 128,** where the Court held:

"In view of the allegations and of accusations and counter accusations, which need to be probed and the contradictions in the affidavits, and also considering the fact that the court file went missing, it is only fair that there be a full hearing of the case in which witnesses may be called, examined and cross-examined and this is possible under Order 34 rule 10 of the Civil Procedure Rules."

47. Similarly **Kimaru, J** in **Emmanuel Waweru Lima Mathai vs. Housing Finance Co. of Kenya Ltd & 4 Others Nairobi (Milimani) HCCC No. 634 of 2008,** expressed himself as follows:

"It is apparent when the application was argued that an attempt was made to subvert the cause of justice. This is because the court file went missing at the critical point when the application for injunction by the plaintiff was scheduled to be heard *inter partes.* A day after the court file went missing, the premises on the suit property were demolished. According to the plaintiff, at the time, there existed a valid court order restraining the defendants from interfering with his peaceful possession and occupation of the suit property. The plaintiff made serious allegations which ought to be investigated. The hallmark of any judicial system is that court orders must be respected and obeyed and where it appears that an attempt is being made by a party to avoid compliance with a court order, the court is mandated to refrain from proceeding further with the hearing of the case on its merits until the court investigates and reaches a determination whether such a party to the suit has acted in breach of the orders of the court. The court would be acting in dereliction of its constitutional duty to administer justice to the parties who appeared before it if it ignores serious allegations in regard to compliance with orders of the court that may affect the administration of justice.....The court is of the view that a proper investigation must be conducted to establish whether there is a connection between the disappearance of the court file and the plaintiff's removal from the possession of the suit property a day after such disappearance and that issue can only be addressed in the pending application seeking to cite the said defendants for contempt of court. Since the plaintiff had been granted leave to prosecute the contempt of court proceedings, the 2nd to 5th defendants cannot avoid to give an answer to the charge brought against them that they were in contempt of court orders by filing an application to pre-empt the hearing of the contempt of court proceedings. The

court is of the view that the present application, whether justified or not, was filed by the 2nd to the 5th defendants with the sole aim of pre-empting the contempt of court proceedings. The issue as to whether the 2nd defendant is a purchaser for value without notice of any defect in the process leading up to the sale of the suit property will be addressed in the proper forum by the court hearing the pending application for injunction filed by the plaintiff. The court will not go into the merits of whether the 1st defendant properly exercised its statutory power of sale in the present application.... The court will not allow an application that appear to have been filed in furtherance of a scheme to subvert the course of justice. The court cannot countenance an act done by a party to a suit who thinks that he can benefit by orchestrating the disappearance of a court file and then rush to the same court to uphold the benefit that he has acquired pursuant to the said act done in apparent contempt of the orders of the court."

48. As was held in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited (supra),** 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.
49. It is therefore my view that based on the clear breach of the rules of natural justice as well as manifest injustice which is likely to be occasioned to the applicants if the prayers seeking certiorari and prohibition in this application are not allowed those prayers ought to succeed.
50. With respect to mandamus in **R (Regina) vs. Dudsheath**, ***ex parte*, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** held:-

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

51. In this case, it is contended that the court file cannot be traced. In my view, it would be more appropriate that the applicants apply for the construction of a skeleton file rather than to compel the 1st respondent to avail the court file an order which may well be in vain. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that 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. 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 the 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.**

Order

52. Accordingly, the orders which commend themselves to me and which I hereby grant are as follows:

1. **An order of certiorari is hereby issued removing into this court for the purposes of being**

quashed the 1st Respondent's decision and order dated 3rd July 2013 in its civil case number 2795 of 2013 and issued on 10th July 2013 which decision is hereby quashed.

2. **An order of prohibition is hereby issued restraining the Respondents from taking any further proceedings, execution or enforcement of the 1st Respondent's decision and order dated 3rd July 2013 and issued on 10th July 2013.**
3. **The 1st Interested Party does pay the costs of this application to the applicants, the 2nd and 4th interested parties.**

Dated at Nairobi this day 13th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Musyoki for the applicant: