Republic v Chief Land Registrar, Nairobi & another; Criticos & another (Exparte Applicants) (Judicial Review Miscellaneous Application E011 of 2023) [2024] KEELC 1705 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1705 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E011 OF 2023

JO MBOYA, J

MARCH 7, 2024

IN THE MATTER OF: AN APPLICATION BY HON. BASIL CRITICOS AND H.E. MAMA NGINA KENYATTA FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: ARTICLES 47 AND 60 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF: SECTIONS 9, 26 AND 30 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF: ISSUANCE BY THE LAND REGISTRAR OF THE ORIGINAL CERTIFICATE OF TITLE TO LAND REFERENCE NUMBER 10287/7

BETWEEN

BETWEEN

REPUBLIC ..... APPLICANT

AND

CHIEF LAND REGISTRAR, NAIROBI ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

HON BASIL CRITICOS ..... EXPARTE APPLICANT

HE MAMA NGINA KENYATTA ..... EXPARTE APPLICANT

JUDGMENT

INTRODUCTION AND BACKGROUND:

1. The Ex-parte Applicants, namely, Hon. Basil Criticos and H.E. Mama Ngina Kenyatta, respectively, have approached the Honorable Court vide the Notice of Motion Application dated 23rd of December 2023 [hereinafter referred to as the substantive Application] and in respect of which same have sought for the following reliefs:-

    i. An order of Mandamus compelling the 1st Respondent to issue and release to the Ex-parte Applicants the original Certificate of title to LR No. 10287/7 as the registered proprietors thereof in the performance of his statutory duties and obligations under the provisions of Sections 26 and 30 of the *Land Registration Act*, 2012.

    ii. Costs to be awarded to the Ex-parte Applicants.

2. The instant Notice of Motion Application is premised and anchored on inter-alia, the Statement of facts dated the 6th December 2023; the affidavit in verification of the statement of facts sworn on even date and the grounds contained at the foot of the Notice of Motion.

3. Suffice to point out that the Application herein was duly served upon the Respondents, who thereafter proceeded to and filed Grounds of opposition thereto. For coherence, the Respondents contended inter-alia that the Application beforehand is incompetent; and in any event, that the suit property, in respect of which the Ex-parte Applicants seek the orders of mandamus, was surrendered to the Government.

4. Be that as it may, the Application beforehand came up for hearing on the 8th of February, 2024, whereupon the Advocates for the Parties covenanted to canvass and dispose of the Application by way of oral submissions.

5. Pursuant to and in accordance with the agreement by the respective Advocates, the instant application [substantive application] was indeed heard and canvassed vide oral submissions.

Parties Submissions:

a. Ex-Parte Applicants' Submissions:

6. The Ex-parte Applicants adopted and reiterated the contents of the statement of facts dated the 6th of December, 2023; the averments at the foot of the affidavit in verification of facts, and the grounds at the foot of the substantive application.

7. Furthermore, Learned Counsel for the Ex-parte Applicants thereafter proceeded to and highlighted five [5] salient issues for consideration and determination by the Honourable court.

8. Firstly, Learned counsel for the Ex-parte Applicants submitted that the Ex-parte Applicants herein, were the registered and lawful owners of the mother title, namely, LR No. 10287/2 [hereinafter referred to as the original property] which title was surrendered to the 1st Respondent for purposes of sub-divisions and eventual issuance of the resultant titles.

9. Furthermore, Learned counsel submitted that upon the sub-divisions of the mother title, three [3] portions were created inter-alia LR No. 10287/7, which is the suit property herein. However, Learned counsel added that despite the creation of the various sub-divisions, the 1st Respondent proceeded to and issued the Certificate of titles in respect of the other sub-divisions, but failed to issue the Certificate of title in respect of the suit property.

10. Be that as it may, Learned counsel for the Ex-parte Applicant ventured forwarded and pointed out that the 1st Respondent nevertheless prepared a Certificate of title over and in respect of the suit property, a copy of which was annexed to the affidavit in verification of the statement of facts as annexure BC2.

11. Secondly, Learned counsel for the Ex-parte Applicant has submitted that even though the 1st Respondent has since processed, executed and engrossed the Certificate of title in respect of the suit property, same has failed and/or declined to release the original certificate of title to and in favour of the Ex-parte Applicants, albeit without any lawful reason or at all.

12. Thirdly, Learned counsel for the Ex-parte Applicant has submitted that the failure by the 1st Respondent to release the original Certificate of title to and in favour of the Ex-parte Applicants, is informed by impunity and disregard of the Due process of the Law.

13. In any event, Learned counsel for the Ex-parte Applicant has contended that the 1st Respondent as a state officer, is obligated to comply with and/or abide by the, inter-alia the provisions of Article 47 of *the Constitution* 2010; as well as the provisions of the Fair Administrative Actions Act, 2015.

14. Fourthly, Learned counsel for the Ex-parte Applicant has submitted that the contents of the affidavit in verification of the statement of facts, which constitutes evidence on oath, have neither been controverted nor challenged by the Respondents herein, who have merely filed Grounds of opposition.

15. Furthermore, Learned counsel for the Ex-parte Applicant has submitted that grounds of law ordinarily raise and canvass issues of law and not issues of facts. Consequently and in this regard, Learned counsel for the Ex-parte Applicants has therefore invited the Honourable court to find and hold that the factual deposition by and on behalf of the Ex-parte Applicants have not been controverted or at all.

16. In support of the foregoing submissions, Learned counsel for the Ex-apart Applicant[s] has cited and relied on the holding in the case of Daniel Kibet Mutai & 9 others Vs the Attorney General 2019, eKLR, where the Court of Appeal underscored the position of grounds of opposition.

17. Finally, Learned counsel for the Ex-parte Applicants has invited the Honourable court to find and hold that Judicial Review is intended to check the excess exercise of statutory power and/or the failure to do so, by persons who are chargeable with such powers, inter-alia, the 1st Respondent.

18. Premised on the foregoing, Learned counsel for the Ex-prate Applicants has therefore invited the Honourable court to find and hold that the Ex-parte Applicants, have placed before the Honorable court sufficient material and/or evidence to warrant the finding that same are entitled to the writ of mandamus.

b. Respondents' Submissions:

19. The Respondents herein adopted the grounds of opposition dated the 6th of February 2024 and thereafter highlighted five [5] salient and pertinent issues for consideration by the Honourable Court.

20. Firstly and foremost, Learned counsel for the Respondents has submitted that the Application beforehand, which is brought pursuant to the provisions of inter-alia, Order 53 Rule 3 of the Civil Procedure Rules, 2010, is incompetent and thus ought to be stuck out.

21. In particular, Learned counsel for the Respondents has submitted that the application seeks to invite the Honourable court to compel the 1st Respondent to issue and release the certificate of title, but the provisions of the law, which have been cited, are contrary to the reliefs being sought by and on behalf of the Ex-parte Applicants.

22. Secondly, Learned counsel for the Respondents has also submitted that the instant Application is also incompetent because only one Ex-pate Applicant has sworn an affidavit, albeit without the authority of the Co-Ex-parte Applicant.

23. Consequently and in view of the foregoing, Learned counsel for the Respondents has thus contended that the Application beforehand, is therefore misconceived and thus legally untenable.

24. Thirdly, Learned counsel for the Respondents has submitted that the portion of land which is the subject of the instant proceedings, has been referred to as the remainder and hence it is evident that the said portion of land, was being surrendered and not otherwise.

25. Furthermore, Learned counsel for the Respondents has invited the court to take cognizance of the annexure BC1 and in particular, entry number 40 thereof, which was made on the 21st of September, 2017.

26. Fourthly, Learned counsel for the Respondents has submitted that the orders that are being sought for are neither efficacious nor effective and thus the court ought to desist the invitation to issue and grant orders, which are incapable of implementation and/ or enforcement.

27. To this end, Learned counsel for the Respondents has invited the Honourable court to take cognizance of the decision in the case of Sanghani Investments Limited Vs Officer in Charge Nairobi Prisons (2001) EA and Republic Vs Moi University ex-parte Benjamin Magare (2019) eKLR.

28. Based on the foregoing submissions, Learned counsel for the Respondents has invited the court to find and hold that the Application beforehand, is not only premature and misconceived; but same is also devoid of merits and thus courts dismissal.

Issues for Determination:

29. Having reviewed the Application and the Response thereto; and upon taking into consideration the submissions that were rendered by and on behalf of the respective Parties, the following issues do emerge [arise] and are thus worthy of determination.

    i. Whether the instant Application is incompetent for want of the supporting affidavit by the Co-Ex-parte Applicant; or for invocation of (sic) incorrect statutory provisions under the *Land Registration Act*, 2012.

    ii. Whether the Ex-parte Applicants herein have placed before the Court sufficient evidence and/ or material to warrant the grant of the orders of Mandamus or otherwise.

Analysis and Determination:

Issue Number 1

Whether the instant Application is incompetent for want of the supporting affidavit by the Co-Ex-parte Applicant; or for invocation of (sic) in correct statutory provisions under the *Land Registration Act*, 2012.

30. Learned counsel for the Respondents has contended that the subject Application is incompetent on two [2] accounts. Firstly, counsel has contended that the Ex-parte Applicants have invoked and/or cited the provisions of Section 26 and 30 of the *Land Registration Act*, with a view to procuring an order of mandamus.

31. However, Learned counsel has ventured forward and stated that the impugned Sections, which have been cited and highlighted by the Ex-parte Applicants, do not support the reliefs, which are being sought for by and on behalf of the Ex-parte Applicants.

32. Secondly, Learned counsel for the Respondents has contended that the subject Application is incompetent to the extent that same is only supported by the affidavit of one of the Ex-parte Applicants, yet there are two [2] Ex-parte Applicants. Consequently and in this regard, Learned counsel for the Respondents has invited the Honourable court to find and hold that in the absence of the affidavit by the Co-ex-parte Applicant, the entire Application beforehand is vitiated and thus a nullity.

33. Having reviewed the submissions by Learned counsel for the Respondents on the two-pointed issues, it is my finding and holding that the invocation and reliance on the provisions of Sections 26 and 30 of the *Land Registration Act*, 2012; by the Ex-parte Applicants herein, does not by itself invalidate the application beforehand.

34. Furthermore, I hold the firm view that the failure to implead the correct provisions of the law, which is being deployed and in pursuit of the orders/reliefs sought, does not per se, negate, vitiate and/or render the application incompetent or at all. For coherence, such failure, if at all, is a technical point and is thus waived by virtue of the provision[s] of Article 159[2] [d] of *the Constitution*, 2010.

35. To this end, it is sufficient to adopt, restate and reiterate the dictum of the Supreme Court of Kenya [the apex Court] in the case of Moses Mwicigi and others Vs Independent Electoral and Boundaries Commission & others 2016 eKLR, where the court stated and held thus;

> "(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
>
> (66) Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of *the Constitution*, which proclaims that, "... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all

situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.

(67) As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of Article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter.

(68) We are therefore not inclined to invalidate the appeal on ground only that it does not stand on all fours with Rule 33 of this Court's Rules. An invalidation, indeed, would deprive the Court of an opportunity to pronounce itself on substantial questions of law raised by the submissions of counsel for all the parties."

36. Arising from the foregoing holding, [whose import and tenor is explicit], it is my finding and holding that the mere invocation, citation and reliance on a wrong provisions of the law, which does not anchor the reliefs sought, does not invalidate the proceedings beforehand.

37. Furthermore, it is not lost on this court that there are certain objections, like the one beforehand, which are technical and procedural in nature and thus same ought not to be elevated to a fetish or to criminal level, so much so that where there is a technical breach or violation of a rule, then such a violation must deprive a party of a right to have his/her suit determined on merit. [See the provisions of Order 51 Rule 10 of the Civil Procedure Rules, 2010]

38. Simply put, I am not persuaded that the invocation and citation of Section 26 and 30 of the *Land Registration Act*, 2012; have the net effect of defeating the legitimacy of the claim beforehand.

39. As pertains to the second limb of the objection, namely, that the supporting affidavit has only been sworn by one of the Ex-parte Applicants and that the absence of the supporting affidavit by the Co-Ex-parte Applicant, renders the entire Application incompetent, I wish to adopt a two-pronged approach;

40. To start with, the proceedings beforehand are Judicial Review proceedings and hence same are premised and anchored on two critical, albeit essential documents/pleadings, namely, the Statement of Facts and the Verifying affidavit [affidavit in verification of facts].

41. In this respect, it suffices to take cognizance of the holding of the Court of Appeal in the case of Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki t/a Marenga Filling Station [2001] eKLR, where the Court of Appeal held and stated as hereunder;

> " We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:
>
> "The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see R. v. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of

> the applicant, the relief sought, and the grounds on which it is sought. I t is not correct to lodge a statement of all the facts, verified by an affidavit."

At page 283 of the report of the case of R. V. Wandsworth Justices, Viscount Caldecote C.J. said:

> " The Court has listened to argument on the proper procedure or remedy i n the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction."

42. From the holding of the Court of Appeal decision [supra], it is imperative to underscore that the statement of facts and the affidavit in verification of the statement of facts are the critical ingredients and/or documents that underpin an Application for Judicial Review, which is brought pursuant to the provision[s] of Order 53 of the Civil Procedure Rules, 2010.

43. Further and in addition, it is worthy to note that in respect of the instant matter, the 1st Ex-parte Applicant, has sworn a verifying affidavit adverting to the facts of this matter, which same clearly states are within his knowledge.

44. On the hand, there is also no gainsaying that the suit property, which underpins the Judicial Review proceedings is registered in the Joint name[s] of the two Applicants in terms of a copy of the certificate of title, which has been annexed and marked as annexure BC2. Consequently and in this regard, it then means that either of the Applicants can swear an affidavit on behalf of the other and that the facts alluded thereto, would suffice.

45. Thirdly, it is also important to underscore that to the extent that the matter beforehand concerns Judicial Review proceedings, which is underpinned essentially on the basis of Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya; and the provisions of Section 9 of the Fair Administrative Actions Act, 2015; same are therefore not impacted upon and/or inflicted by the provisions of Order 1, Rule 13 of the Civil Procedure rules 2010, which would have required the filing of an authority in writing.

46. Arising from the foregoing, my answer to issue number one [1] is to the effect that the contentions by and on behalf of the Hon. Attorney General, through the Principal Litigation Counsel, that the subject Application is incompetent, are thus misconceived and otherwise legally untenable.

47. Put differently, I come to the conclusion that the application beforehand, [which essentially seeks orders of mandamus], is competent and thus worthy of being interrogated and disposed of on the basis of merits.

Issue Number 2

Whether the Ex-parte Applicants herein have placed before the court sufficient evidence and/or material to warrant the grant of the orders of Mandamus or otherwise

48. Having disposed of the preliminary issues which essentially touched on the competence or otherwise of the Application beforehand, it is now appropriate and mete to venture forward and to determine the merits of the Application.

49. To start with, there is no dispute that the Ex-parte Applicants herein were the lawful and registered proprietors of LR No. 10287/2 [which is the mother title] and which was the subject of sub-division culminating into inter-alia LR No. 10287/7, which is the subject of the dispute herein.

50. Secondly, to the extent that the Ex-parte Applicant[s] were the registered owners of the mother title, [precursor to the current Title], same therefore were entitled to seek for and obtain sub-divisions thereof subject to the requisite approval[s].

51. Furthermore, having subjected the mother title to sub-division, it was expected that the Ex-parte Applicants would be entitled to be issued with all the certificates of title, pertaining to and arising from the sub-division[s] of the mother title, unless there be a lawful basis to the contrary.

52. Further and in addition, if the Ex-pate Applicants herein, had sought to surrender any portion of the mother title, to the Government of the Republic of Kenya, for whatever purpose, including [sic] resettlement of the squatters, then the Ex-parte Applicants herein would have executed a surrender instrument in accordance with the provisions of the law.

53. Suffice it to point out that where the registered owner of land, in this case, the Ex-parte Applicants were desirous to surrender land for whatever purpose, then the surrender instrument would have to stipulate the purpose for surrender and same would have to be executed by the Ex-parte Applicants. Instructively, surrender of land, if at all, can only be discerned from the duly executed surrender instrument and not otherwise.

54. To this end, it suffices to reiterate the holding of the Supreme Court of Kenya [the apex Court] in the case of Fanikiwa Limited v Sirikwa Squatters Group & 20 others (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 58 (KLR) (16 June 2023) (Ruling)

> [109] It is notable that Section 2 of the RTA did not define the term "surrender".
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> However, the concept of surrender is one of long lineage and wide usage in land law.
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> The Black's Law Dictionary (7th edition) at page 1458 defines "surrender" as follows:
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> > "...3. The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate... 5. A tenant's relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated."
>
> [110] Lord Millett at the House of Lords in Barrett v. Morgan, [2000] 2 AC 264, aptly noted thus on the nature of 'surrender of leases':
>
> > "A surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration. If a tenant surrenders his tenancy to an immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's conversion and is extinguished by operation of law. A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the fullest sense of the term." [Emphasis added]

[111] The "consensual" nature of a surrender is emphasized in Robert Megarry & William Wade, The Law of Real Property (Sweet & Maxwell; 2012, 8th ed.) Page 851 as follows: "surrender is a consensual transaction between the landlord and the tenant, and therefore dependent for its effectiveness on the consent of both parties" [Emphasis added]. Similarly, Martin Dixon, Principles of Land Law, (Cavendish Publishing; 2002, 4th ed.) at page 237 notes that: "a surrender, being a consensual act between landlord and tenant." [Emphasis added]

(112) We are persuaded by the foregoing propositions that the "consensual" nature of a surrender is the cardinal ingredient of a surrender of lease. Indeed, this is the essence of the proviso in Section 44 of RTA that: "and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof". This raises the question as to what was the "consensual arrangement" or "agreement" between Lonrho Agribusiness and the Government of Kenya, being the lessee and lessor respectively, that underpinned the contested surrender.

55. In respect of the instant matter, though there was contention that the suit property had been surrendered to the Government, which contention was neither supported by any evidence or at all, it is imperative to underscore that such contention would ipso facto not translate into surrender, either as known to law or at all.

56. Nevertheless, it is also important to observe that even if there was the question of surrender, which has neither been established nor demonstrated, the 1st Respondent herein would be called upon to supply and avail to the Ex-parte Applicants the reason for not processing and/or issuing the certificate of title in favour of the ex-parte Applicants. [See the provisions of Sections 4, 5 and 9 of the *Fair Administrative Action Act*, 2015]

57. Sadly, the 1st Respondent, who is chargeable with the registration of various instruments and thereafter the issuance of the requisite certificate of title like the other beforehand, has refused to generate and/or supply any reason[s] and/or explanation[s] to the Ex-parte Applicant.

58. To my mind, the 1st Respondent herein, as a state officer is bound by the provisions of *the Constitution* inter-alia, Articles 10 (1), (2); Article 27 (1) and (2); Article 47 and 50 of *the Constitution* 2010. Furthermore, the 1st Respondents herein is also bound by the provisions of Article 232 of *the Constitution*, 2010, which delineates the values and principles of public service.

59. Surely, the 1st Respondent cannot operate as if same is above *the Constitution* and by extension the law. Notably and for good measure, the 1st Respondent must be reminded that same holds the designated office on trust for the people of the Republic of Kenya; not to lord it over Kenyans, the Ex-pate Applicants not excepted.

60. To the contrary, the office held by the 1st Respondent, is meant to serve Kenyans, the Ex-pate Applicants not excepted, and hence when the Ex-pate Applicants surrendered the original/mother title for sub-divisions, same are entitled to be issued with the certificates of title relating to all the resultant sub-divisions and not otherwise.

61. In any event, where there is an issue pertaining to a delay and/or failure to generate and issue the requisite certificate of title, the Ex-parte Applicants herein would be entitled to prompt and timeous communication, pertaining to the reason belying the failure and/or delay, in the manner envisaged vide

Section 4 of the Fair Administrative Actions Act, 2015; as read together with the provisions of Article 47 of *the Constitution* 2010.

62. Unfortunately, the 1st Respondent herein has treated the Ex-parte Applicants with gross impunity and thus rendered the Ex-parte Applicants to be beggars, pertaining to and in respect of a matter touching on ownership of land, which clearly belongs to and is registered in their name.

63. In my humble view, the manner in which the 1st Respondent has conducted himself and his office, falls short of the constitutional imperatives underpinned by the provisions of Articles 10, 73, 74 and 232 of *the Constitution*, 2010; which provisions bind all state organs, officers, bodies and persons in the course of discharge and/or execution of their Public duties.

64. Arising from the foregoing, any conscientious and law abiding Kenyan, let alone a conscientious court cannot sanction and/or countenance the kind of conduct and/or behavior, being displayed and/or exhibited by the 1st Respondent and connived at by the office of the Attorney General, who by dint of Article 156 of *the Constitution*, 2010, ought to offer the requisite legal advice to the Government including the 1st Respondent herein.

65. Without belaboring the point, I come to the conclusion that the 1st Respondent herein, is guilty of dereliction of statutory duty and thus an order of mandamus suffices to take care of the situation attendant to and arising from the impugned failure by the 1s Respondent.

66. As pertains to the circumstances where an order of mandamus would and does issue, it suffices to reiterate the elaboration by the Court of Appeal in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, where the court stated and held thus:

> " The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from Paragraph 89. That learned treatise says:-
>
> > "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 and 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."
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> At paragraph 90 headed "the mandate" it is stated:
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> > "The order must command no more than the party against whom the application is made 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."

67. Additionally, the legal principles that belie the grant of an order of mandamus were also highlighted and amplified in the case of Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543; where Goudie, J expressed himself, inter alia, as follows:

> " Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy.
>
> The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment."

68. From the foregoing exposition, there is no gainsaying that the 1st Respondent herein is amenable to Judicial Review process and in particular, to an order of mandamus, to compel same to process and release the original certificate of title in respect of LR No. 10287/7, to and in favour of the Ex-parte Applicants.

69. In a nutshell, my answer to issue number two [2] is to the effect that the Ex-parte Applicants, have established and demonstrated that same are entitled to the writ of mandamus.

Final Disposition:

70. Having analyzed thematic issues which were enumerated in the body of the Judgement herein, it must have become crystal clear that the Ex-parte Applicants, have truly established and placed before the court plausible, cogent and satisfactory material to warrant the grant of the orders sought.

71. Consequently and in the premises, the Notice of Motion Application dated the 23rd of December 2023; be and is hereby allowed. For coherence, an order of Mandamus be and is hereby granted as prayed in terms of prayer (a).

72. Furthermore, the 1st Respondent herein be and is hereby ordered and directed to process, execute and engross the certificates of title in respect of the suit property and thereafter to release same to the Ex-parte Applicants within thirty (30) days from the date hereof, without fail.

73. Finally, the costs of the suit shall be borne by the 1st Respondent herein.

74. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7th DAY OF MARCH, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Gregory Otieno h/b for Mr. Greg Karungo for the Ex-parte Applicants.

Mr. Allan Kamau [Principal Litigation Counsel] for the Respondents.