IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: VISRAM, NAMBUYE & MUSINGA, JJ.A]

CIVIL APPEAL NO. 169 OF 2014

BETWEEN

KINGDOM KENYA 01 LIMITED.....APPLICANT

=VERSUS=

THE DISTRICT LAND REGISTRAR, NAROK.....1ST RESPONDENT

JOHN HARRISON KINYANJUI.....2ND RESPONDENT

THOMAS MUTISO MUTUNGA.....3RD RESPONDENT

STANLEY OLONANA NTUTU.....4TH RESPONDENT

LEMITA NTUTU.....5TH RESPONDENT

PARSINTEI NTUTU.....6TH RESPONDENT

STANLEY NTUTU.....7TH RESPONDENT

NGEREWA NTUTU.....8TH RESPONDENT

TETEE NTUTU.....9TH RESPONDENT

SIKONA NTUTU.....10TH RESPONDENT

TURANTA NTUTU.....11TH RESPONDENT

KOINATO NTUTU.....12TH RESPONDENT

LOOYIEYO NTUTU.....13TH RESPONDENT

NAINI NTUTU.....14TH RESPONDENT

NADUPOI NTUTU.....15TH RESPONDENT

SILANTOI NTUTU.....16TH RESPONDENT

(Being an appeal from the decision of (L. Waithaka, J.) dated 26th July, 2013 at Nakuru

In

JUDICIAL REVIEW NO. 46 OF 2010)

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JUDGMENT OF THE COURT

This appeal arises from the Judgment of **L. Waithaka, J.** dated 26th July, 2013, allowing the cross-appellants' application for Judicial Review for prerogative orders of Certiorari, Mandamus and Prohibition against the appellant, the 1st and 3rd respondents.

The background to the appeal is that, the 3rd respondent in his capacity as a co-administrator to the estate of the deceased, **Lerionka Ole Ntutu,** (the deceased) and to the exclusion of his co-administrator, the 2nd respondent, executed the impugned lease and caused it to be registered by the 1st respondent in favour of the appellant, Kingdom Kenya 01 Limited and over land parcel Number LR Narok Cismara/Olchoro Orowua/24 measuring approximately 40.5 hectares. The fourth to the sixteenth respondents in the Judicial Review proceedings and who are the cross appellants herein, being aggrieved with the above actions took out the Chamber Summons dated 30th July, 2012, seeking leave of the court to apply for Judicial Review. The requisite leave was granted on the 17th of August, 2012, pursuant to which the substantive Notice of Motion dated 28th August, 2012 was filed seeking orders as follows:-

> "***(1) That an order of Certiorari be issued to bring to this Court and quash the Certificate of Lease to, Kingdom Kenya 01 Limited in respect of Title No.*****Narok/Cismara/OlChoro Oirowua/24** ***registered in the name of Lerionka Ole Ntutu(now deceased),***
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> ***(2)That an order of Certiorari be issued to bring into this Honourable Court and quash entries No. 1 and 2 in part B-proprietorship section in the Register of Land Parcels known as L.R.No.*****Narok/Cismara/Olchoro/Olrowua/24*****entered on 2nd May, 2012.***
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> ***(3) That an order of Mandamus be issued to compel the respondent to cancel and or delete entries No. 1 and 2 in part B-Proprietorship Section of the Register of land parcel known as L.R. No.*** **Narok/Cismara/Olchoro-Olrowua/24** ***entered on 2nd May, 2012.***
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> ***(4) That an order of prohibition be issued to prohibit the respondents acting or purporting that Kingdom Kenya 01Limited is a lessee of Lerionka Ole Ntutu in respect of Land Parcel known as*** **Narok/ Cismara/O1choro-olrowua/24** ***for a term of 15 years from 1st of April, 2012.***

The Notice of Motion was brought under order LIII Rule 3(1) of the CPR. It was supported by the grounds on the body of the Chamber Summons, a statement and a verifying affidavit sworn by **Stanley Olonana Ntutu** on 30th July, 2012, and filed with the application for leave together with annextures thereto. In summary, the cross-appellants contended that the receipt and processing for registration of the impugned lease in favour of the appellant by the 1st respondent was not only irregular and illegal, but it was also unreasonable as it amounted to an abuse of the 1st respondents official power as he purported to bestow a benefit unto the appellant in the absence of a validly executed lease. It was also an affront to the principle of the rule of law as enshrined in Articles **10** and **47** of the Constitution of Kenya 2010.

The JR was supported by the 2nd respondent in a seventy three (73) paragraph replying affidavit in which, the 2nd respondent contended, *inter alia,* that the impugned lease was not only fraudulent but also illegal and unlawful as the 1st and the 3rd respondents blatantly flouted clear provisions of the law in the manner in which it was executed and processed for registration by the 1st respondent in favour of the appellant.

The JR was opposed by replying affidavits deposed by **Charles Wahinya,** on behalf of the appellant, **Thomas Mutunga**, the 3rd respondent, and **Philip Munyoki Mangi**, the District Land Registrar in charge of Narok North and South Districts, on behalf of the 1st respondent. In summary, the above deponents contended, *inter alia,* that the cross-appellants had no *locus standi* to pursue the JR proceedings; that the issues raised for determination in the JR proceedings were not justiciable under JR as they were civil in nature. Secondly, they had also been previously unsuccessfully litigated in Nairobi HCCC **No. 769 of 2005;** and were therefore *res judicata;* that the discretion to process and register the impugned lease was exercised procedurally, regularly and properly within the limits permitted for by the provision of the Registered Land Act (now repealed), under which the registration exercise was undertaken.

The JR was canvassed by way of written submissions at the conclusion of which the Judge assessed and analyzed the record in light of the rival submissions. First to be addressed were the two preliminary issues raised by the respondents against the JR proceedings. The first was on want of *locus standi* in the cross-appellants to pursue the JR proceedings, while the 2nd issue dealt with *res judicata*

On want of *locus standi*, the Judge construed the provisions of section 82 of the Law of Succession Act Cap 160 (the LSA) and arrived at the conclusion that it did not aid the cause of the cross-appellants as they were not legal representatives. The judge however, resolved the issue of alleged want of *locus standi* in the cross-appellants to pursue the JR proceedings by invoking the provisions of Article 159 (2) (d) of the Kenya Constitution 2010, and Rule 73 of the Probate and Administration Rules, for the reasons that the cross-appellants, as beneficiaries of the estate of the deceased, were persons with sufficient interest in the suit property. Secondly, no prejudice would be suffered by any party to the JR proceedings if the cross-appellants were allowed to pursue their rights through the said proceedings, and on that account, the judge rejected the first preliminary issue.

Turning to *res judicata*, the judge adopted the decision in **Welamondi -versus the Chairman, Electoral Commission of Kenya [2002] lKLR 486** and ruled that the issues raised by the cross-appellants in the JR proceedings fell within the realm of JR and on that account also rejected the 2nd preliminary issue.

The judge, being satisfied that she was properly seized of the JR proceedings proceeded to determine its merits. First to be considered was the construction of section **109** of the Registered Land Act pursuant to which the 1st respondent received, processed and registered the impugned lease in favour of the appellant. Considering that provision in light of the record, the Judge faulted the 1st respondent for dispensing with the 2nd respondent's execution of the impugned lease before registration. In the judge's view, there was nothing in the above mentioned provision that permitted the 1st respondent to dispense with the execution of an instrument registrable under the said provision, either by a transferee or a transferor. In the judge's view, the co-administrators were the transferors while the appellant was the transferee for purposes of the impugned lease. The judge opined that the said provision obligated the 1st respondent to ensure that both the transferor and transferees executed the impugned lease before passing it for registration. In the judge's view, the 1st respondent's failure to observe the requirements in section 109 of the Registered Land Act vitiated the impugned lease.

The judge next reviewed case law on the scope of JR namely, **Kenya National Examination Council -versus- Republic, Exparte Geoffrey Gathenji & 9 others [1997]** eKLR; **Aga Khan Educational Services Kenya -versus Ali Seif & 3 others CA No. 25 of 2003;** and **Prabhulal Gulabuch and Shah -versus- Attorney General & Erastus Gathoni Miano - Civil Appeal No. 24 of 1985,** and applying the distilled principles to the rival submissions before her, ruled that by dispensing with the 2nd respondent's execution of the impugned lease, the 1st respondent not only acted in excess of his powers under section 109 of the Registered Land Act but also flouted the same provision of the law under which he purported to undertake the execution of his statutory mandate and on that account, found the relief of certiorari well founded and granted the same as prayed.

On mandamus, the judge took into consideration the principles that guide the court in the exercise of its mandate to grant or withhold an order for mandamus as enunciated in the case of **Kenya National Examination Council** (supra), and considering those principles in light of both the record and of section **143** of the Registered Land Act, the judge ruled that the appellant knew of the interests and the rights of both the cross-appellants and the 2nd respondent in the suit property, but went ahead to contribute substantially to the unlawful processing, registration and issuance of the impugned lease in its favour. In the judge's view, the impugned lease was therefore tainted with illegality. The judge also took into consideration the case of **Prabhulal Gulabchand Shah –versus Attorney General &Erastus Gathoni Miano** (supra), and considering it in light of the record concluded as follows on the above issue:

> ***"There is no doubt that the respondent owes the applicants a legal duty to cancel or rectify the impugned entries as ordered to do so by this Court on the other hand, even though the applicants are not administrators of the estate herein, there is no doubt that as beneficiaries thereof, they have substantial interests therein to warrant the granting of orders sought"***

On account of the above conclusions, the judge granted the writ of mandamus.

Turning to the writ of prohibition, the judge also relied on the **Kenya National Examination** Council case and found the prayer for an order of prohibition well founded for the reasons given in the judgment and granted the order prohibiting the 1st respondent from recognizing the appellant was the legal, lawful and regular lessee of the suit property.

Being aggrieved, the appellant filed this appeal raising seven (7) grounds of appeal in a memorandum of appeal dated 26th June, 2014. These may be paraphrased as follows: That the learned Judge erred both in law and fact when:

> ***(1) She failed to hold that the cross-appellants had no locus standi to pursue the JR proceedings;***
>
> ***(2) She failed to hold that the issues raised in the JR proceedings were not justiciable under JR;***
>
> ***(3) She failed to hold that the issues raised in the JR proceedings were res judicata and therefore an abuse of the due process of the court;***
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> ***(4) She failed to appreciate that in the JR proceedings, the cross-appellants attacked the merits of the 1st respondent's decision to register the impugned lease and therefore erroneously sustained the JR application.***

The cross-appellants on the other hand filed a Notice of Cross-Appeal dated 14th August, 2014 under Rule 93 and 94 (5) of the Court of Appeal Rules. These may be condensed into the following two grounds namely:

> (1) The learned judge erred both in fact and in law when she failed to hold that the cross-appellants had *locus standi* to pursue the JR proceedings in their own rights.
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> (2) The learned judge properly appreciated both the facts and the law and arrived at the correct conclusion on the matter when she sustained the JR proceedings in favour of the cross-appellants.

The appeal and cross-appeal were canvassed by way of written submissions, save for those filed on behalf of the first respondent which were recalled and treated as abandoned on the date of the hearing of the appeal by learned counsel, **Mr. Eredi**, instructed by the office of the Attorney General. Those filed by the appellant are dated 22nd September, 2016 and were orally highlighted by learned counsel, **Mr. Chacha Odera** of **Oraro and Company Advocates**. Those filed by the 2nd respondent are dated 27th March, 2017, and were highlighted by the 2nd respondent who appeared in person. Those for the 3rd respondent were filed by learned counsel **Mr. Havi,** of **Chelanga & Company Advocates,** and adopted on his behalf by learned counsel **Mr. Chacha Odera**, while those of the cross-appellants dated 28th March, 2017 were adopted and highlighted by learned counsel **Mr. Kibe Mungai,** of **Kinoti Kibe** & **Company Advocates.**

Rising to support the appeal, learned counsel **Mr. Chacha Odera,** relied on the Supreme court's decision in **Mumo Matemu versus**

Trusted Society of Human Rights Alliance [2014] eKLR, and submitted that Article **159 (2) (d)** of the Kenya Constitution 2010, simply enjoins the courts to exercise judicial authority and administer justice without undue regard to procedural technicalities. It may also be invoked in instances where public interest litigation is involved. In counsels' view, what the trial Judge was faced with in the JR proceedings were not matters of procedural technicalities or public interest but a substantive issue of want of *locus standi* in the cross-appellants' application to pursue the JR proceedings, then before court.

Counsel also relied on the case of **Coast Bus Services Limited –versus Mbuvi Lai [1997] eKLR,** in support of their submissions that Rule 73 of the Probate and Administration Rules could not also be invoked to clothe the cross-appellants with *locus standi* as erroneously held by the judge. In counsel's view, section 97 of the Law of Succession Act under which the said rule was made provides specifically that the rules made there under are for purposes of the Act. Among those purposes are those provided for under section **82** of the Act, which vests *locus standi* with regard to protection of estate property only in personal representatives The cross-appellants were not such legal representatives to the deceased's estate. We were therefore urged to fault the judge for the failure to rule that the cross-appellants lacked *locus standi* to pursue the JR proceedings in the absence of any provision of law that permitted them to do so in their own right as beneficiaries of the suit property which undoubtedly formed part of the estate of the deceased.

Relying on the decision in **Commissioner of Lands versus Kunste Hotel Limited** [1997] eKLR, counsel submitted that the cross-appellants filed the JR proceedings against the 3rd respondent as a co-administrator and in their capacity as beneficiaries of the suit property. Those complaints in counsel's view were justiciable under the normal civil litigation process through the Succession proceedings in Nairobi Succession Cause number 1263/2000 and not JR as erroneously held by the judge. Counsel continued to submit that the appellant and the 3rd respondent had sufficiently demonstrated before the judge that all the issues raised by the cross-appellants in the JR proceedings had earlier been unsuccessfully litigated in **Nairobi HCCC No. 679 of 2005** with full participation of both the 2nd respondent and the cross-appellants. We were therefore on that account urged to fault the judge for the failure to uphold the appellant's and the 3rd respondent's objection that the JR proceedings were not only *res judicata* but also an abuse of the due process of the court as the issues litigated under the said proceedings were justiciable under a civil litigation process and not the more technical JR procedures.

Counsel also relied on the decision in **Kenya National Examination Council versus Republic, Exparte Gathenji Njoroge & 9 others** (supra), **Municipal Council of Mombasa –versus Republic & another [2002] eKLR,** and **Republic –versus- Kenya Revenue Authority, Exparte Yaya Towers Limited [2008] eKLR,** in support of their submissions that the issues raised in the JR proceedings by the cross-appellants attacked the merits of the 1st respondent's decision to receive, process and register the impugned lease and did not therefore fall for determination under JR. It was therefore erroneous for the Judge to sustain them.

The 3rd respondent supported the appeal arguing that the judge did not only misapprehend the facts but also misapplied the law to those facts when she invoked Article 159 (2) (d) of the Constitution of Kenya, 2010 and Rule 73 of the Probate and Administration Rules to clothe the cross-appellants with *locus standi* to pursue the JR proceedings.

Opposing the appeal, learned counsel **Mr. Eredi,** urged us to affirm the decision of the trial judge, as in his view, the judge's findings were well founded both on the facts and in the law.

The 2nd respondent on the other hand submitted that the decision of the judge is unassailable as it was necessary to remedy the unlawful and illegal actions of both the 1st and 3rd respondents of facilitating the execution and the registration of the impugned lease in contravention of the clear provisions of section 109 of the Registered Land Act (now repealed) and that the failure to do so would have amounted to the judge allowing the 1st and 3rd respondents to get away with their illegal actions and the appellant to benefit from an illegality, matters that should never be countenanced by a court of law.

Learned counsel **Mr. Kibe Mungai,** on the other hand submitted that the cross-appellants had beneficial interests in the suit property having acquired the same through transmission. They were therefore entitled to protect those interests in their own rights. They also had a legitimate expectation that both the 1st and 3rd respondents would not act contrary to the law in their dealings with the suit property to their detriment and since the 1st and 3rd respondents acted contrary to that legitimate expectation, the cross-appellants were entitled to move the court to protect their interests. It was also counsel's further submission that the JR proceedings fell within the public law domain, as these dealt with the question of the legality, reasonableness and procedural propriety of the action undertaken by the 1st respondent to register the impugned lease in favour of the appellant in his capacity as a public officer and in the discharge of his official functions. In counsel's view, the judge also properly appreciated the cross- appellants' grievances with regard to the manner the impugned lease was executed, processed and registered in favour of the appellant. The judge also properly appreciated the principles of law that guide the determination of Judicial Review proceedings and therefore arrived at the correct conclusion on the matter, which we should not disturb.

On the issue of the cross-appeal, counsel submitted that the cross-appellants having acquired the suit property through transmission, had *locus standi,* to pursue the JR proceedings in their own rights as beneficial owners of the suit property.

In reply to the respondents submissions and opposition to the cross-appeal, learned counsel **Mr. Chacha Odera**, submitted that illegality in the execution of the impugned lease did not arise as the dispute was basically between the cross-appellants as beneficial owners of an estate property and the 2nd and 3rd respondents in their capacity as co-administrators. The dispute was therefore not justiciable under JR but through the normal court litigation procedure.

The appeal before us is a first appeal; hence our duty is to re-analyze, re-assess and re-evaluate the record in light of the rival submissions set out above and reach our own findings and conclusions thereon. See **Selle Vs. Associated Motor Boat Company** [1968] E.A. 123 for the holding *inter alia*, that:

> ***"An appeal from the High Court is by way of a re -trial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the***

demeanor of a witness is inconsistent with the evidence generally as above."

We have applied the above threshold to the record. It is our finding that the issues that fall for our determination are as follows:-

(1) Whether the exparte applicants had locus standi to pursue the JR proceedings resulting in this appeal in their own rights.

(2) Whether the issues raised in the JR proceedings were justiciable under JR realm.

(3) If so, whether the trial court exercised its discretion judiciously when it allowed the cross-appellants' application for JR.

With regard to the first issue, and as already highlighted above, the judge invoked Article 159 (2) (d) of the Kenya Constitution, 2010 and Rule 73 of the Probate and Administration Rules to clothe the cross-appellants with *locus standi*, to pursue the JR proceedings in their own rights. Circumstances under which courts of law have recourse to Article **159(2) (d)** of the Kenya Constitution 2010 have now been delineated by case law. We find it prudent to highlight a few, albeit in a summary form. In the case of **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR,** the court held *inter alia* that:***"Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action".*** In **Raila Odinga and 5 others versus IEBC & 3 others [2013] eKLR**, the Supreme Court stated that the essence of Article **159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Aramat versus Harun Meitamei Lempaka & 2 others [2014] eKLR**, it was stated that the exercise of the jurisdiction under Article **159** of the Constitution is unfettered, especially where procedural technicalities pose an impediment to the administration of justice. Lastly, in **Patricia Cherotich Sawe versus IEBC & 4 others** [2015] eKLR, it was stated that Article **159 (2) (d)** of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.

We have considered the above principles in light of the rival submissions on this issue and find nothing in the above case law to support the judge's decision to invoke and apply Article 159 (2) (d) of the Kenya Constitution, 2010 as a basis for holding that the cross-appellants as beneficial owners of the suit property had locus *standi* to pursue the JR proceedings in their own rights to protect their interests in the said property.

Turning to rule 73 of the Probate and Administration Rules, our construction of this rule is that its applicability is limited to the purposes of the Law of Succession Act in terms of the provisions of section **97** thereof. Among these purposes are those provided for in section **82** of the Act and which, upon due construction of the same, the judge held, and rightly so in our view, that this provision did not operate to provide basis for her to rule that the cross-appellants had *locus standi* to pursue the JR proceedings in their own rights, not being legal representatives to the estate of the deceased.

From the record, the grant of representation to the estate of the deceased was confirmed on 21st September, 2000. Item 'G' of the said grant bestowed the suit property to all the beneficiaries of the estate of the deceased among them, the cross-appellants. It was further directed that the suit property was to be held in trust for all the beneficiaries of the estate of the deceased. Four Trustees among them, the 6 th Cross-Appellant, were appointed to take charge of the suit property for the benefit of all the beneficiaries of the estate. Section 83 (i) of the Law of Succession Act obligated the legal representatives of the deceased's estate to wind up the distribution of the estate and attendant administration issues within six months from the date of confirmation of the grant unless that period was extended by court.

Matters that the legal representative of the deceased's estate were enjoined by the above provision (section 83 (i)) to attend to and finalize before the expiry of the six (6) months include transfers of the estate property into the names of the respective beneficiaries. It is therefore our view, that the lapse of six months from the date of the confirmation of the grant of representation to the estate of the deceased crystalized the rights of the cross-appellants to the suit property as distributed to them and other beneficiaries. All that was left in our view was for the administrators to effect the transfer of the suit property into the names of the Trustees to hold in trust for the benefit of all the beneficiaries of the estate of the deceased. We find nothing in the said section 83 (i) to suggest that a beneficiary whose proprietary rights had crystalized in terms of the said provision could not move to court to protect those proprietary rights in his/her own right in the event of any threat arising with regard thereto.

In light of the above reasoning, it is our finding that since rights in the suit property crystalized in favour of the cross-appellants at the lapse of six months from the date of the confirmation of the grant on 21 st September, 2000, the cross-appellants were entitled to move the court in their own rights to seek protection of their proprietary rights in the suit property. We therefore find that in this regard, they had *locus standi to* pursue the JR proceedings.

Alternatively, since the 6th cross-appellant is one of the appointed Trustees, he had a right to pursue the JR proceedings on behalf of himself and the other beneficiaries in his own right as a Trustee of the suit property as a right and which, as pointed out above had already been crystalized in him jointly with the other Joint Trustees. It therefore mattered not that the suit property had not yet been transferred into the four names of the Trustees. The JR proceedings were therefore sustainable for the reasons given above. The failure to indicate that he had authority to act as a Trustee on his own behalf and on behalf of the Co-Trustees and on behalf of the rest of the beneficiaries, is a mere technicality which cannot be called into play to defeat, not only a legitimate claim but also a right to protect proprietary interests as crystalized by the confirmation of the grant of representation. We therefore reiterate our finding above that for the reasons given above in our reasoning; the cross-appellants had *locus standi* to pursue the JR proceedings in their own rights.

Having established that the cross-appellants had *locus standi* to pursue the JR proceedings in their own right, we now proceed to determine the issue as to whether issues raised therein were justiciable under JR proceedings. From the record, it is our observation that although the JR proceedings were triggered by the 3rd respondent's sole execution of the impugned lease in favour of the appellant to the exclusion of the 2 nd respondent as a co-administrator, and allegedly in the absence of sanctioning by seventy five percent (75%) of the beneficiaries of the estate of the deceased; no reliefs were sought either against the 3rd respondent in his capacity as a co- administrator, nor the other beneficiaries of

the estate of the deceased for sanctioning the 3rd respondent's action. All the reliefs as already set out above were directed against the 1st respondent in the manner he received, processed and executed the registration of the impugned lease in favour of the appellant. It is therefore our finding that, in light of the above reasoning, the JR proceedings were properly laid before the judge and were justiciable as such.

The above finding now leads us to determine the last issue as to whether the judge exercised her discretion judiciously when she allowed the JR proceedings in favour of the cross-appellants. It is not disputed that from the record, the cross-appellants had brought their substantive JR Notice of Motion under section **8 (2)** of the Law Reform Act, Cap 26 and Order **53,** rule **3 (1)** CPR. The principles that guide the court in the exercise of its jurisdiction under the above provisions have now been crystallized by case law. We find it prudent to highlight aspects of those relevant to the determination of this appeal, albeit in a summary form, as follows; when the High Court exercises jurisdiction under order LIII of the Civil Procedure Rules, it is neither civil nor criminal but a special jurisdiction donated by section 8 and 9 of the Law Reform Act Cap.26 Law of Succession Act. Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the **Commissioner of Lands –versus Hotel Kunste** (supra). The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. See **Lord Halsham of St. MaryLebone** in **Chief Constable of the North Wales Police –versus Evans** (Supra). JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See **David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR)**. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with condour or virtue and temperance. See **Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR.** JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See **Zakayo Michubu Kibwange** case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking an order of mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantial personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See **Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR).** Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See **Child Welfare Society of Kenya –versus-Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR**

Considering the above principles in light of the record, it is our finding that the jurisdiction the judge exercised in the determination of the JR proceedings was a discretionary jurisdiction. Our mandate when determining as to whether the trial judge exercised her discretion judiciously or otherwise when she granted Judicial Review remedies in favour of the cross-appellant were set out in **United India Insurance Company Limited –versus East**

African Underwriters Kenya Ltd [1985] KLR 898 which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the judge misdirected herself in law, misapprehended the facts, took account of considerations which she should not have taken into account, failed to take into account a consideration of which she should have taken into account, or that her decision, albeit a discretionary one, is plainly wrong.

Applying the above threshold to the rival submissions on this issue, it is our finding, and as per our earlier reasoning that although the JR proceedings were triggered by the 3rd respondent's sole execution of the impugned lease in favour of the appellant in the manner complained of as above, the judge's decision on the JR did not turn on that issue. It was confined solely to the prayers raised by the cross-appellants in the JR proceedings. We also find that the judge properly appreciated the facts and the law that guides the exercise of jurisdiction in JR proceedings especially the construction and the application of section **109** of the Registered Land Act (now repealed) to the rival pleadings and submissions canvased by the parties before her.

We have on our own construed and applied that provision to the record. We find no error in the Judge's finding that the said provision did not permit the 1st respondent to dispense with the execution of the impugned lease by the co-administrator. Want of execution of the said impugned lease by the co-administrator in favour of the appellant rendered the resulting lease invalid and therefore incapable of registration in terms of the said provision. It therefore follows that the 1st respondent's action stood vitiated and since the same had been executed by the 1st respondent in the discharge of a public duty, it was amenable to judicial review. Further, it is also our finding that the 1st respondent, as a public officer, owed the cross-appellants a public duty to act prudently and within the law when dealing with the suit property. The cross appellants also had a legitimate expectation that the 1st respondent would not flout the law to their detriment when dealing with transactions affecting their proprietary rights in the suit property while in the discharge of his official functions. Since he failed to exercise due diligence, prudence and good faith in the discharge of his official mandate, and as subsequently conceded by himself on appeal, and correctly so in our view, his actions were amenable to correction or reversal through JR and were correctly reversed by the trial judge upon finding them contrary to the law.

The upshot of all the above reasoning is that the appeal has no merit. It is accordingly dismissed with costs. The cross-appeal is on the other hand allowed with costs to the appellant

Dated and Delivered at Nairobi this 23rd day of November, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR