IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 172 OF 2006

BETWEEN

JOSEPH KAMAU MUSA

JAMES KARIUKI MUCHIRI

DAVID MUCHIRI

RUIGU NJURIRI

JOSEPH NJEHU BORO & OTHERS.....APPLICANTS

AND

IRERI COMPANY LTD

GIKONYO NDIRANGU

RUIGU KABUCHO

DR. GEORGE KAMAU GIKINGA.....RESPONDENTS

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbito, J.) dated 19th November, 1997

in

HCCC NO. 3746 OF 1998

Consolidated with

HCCC NO. 3200 OF 1990)

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JUDGMENT OF THE COURT

These consolidated appeals emanate from two judgments of the High Court involving Ireri Company Limited (the Company). The first appeal **No. 172 of 2006** challenges the decision of **Mbito, J.** rendered on 19th November 1997. It was in respect of two suits namely HCCC No. 3746 of 1988 and HCCC No. 32000 of 1990 which were consolidated. The first suit filed by some 3 shareholders against the company and some nine persons described in the plaint as its "*servants and or agents*", sought in the main, orders injuncting the company from advocating, distributing, transferring or disposing of some two pieces of land LR 8022/R and LR 8022/1 Longonot. It also sought a declaration that the only lawful *bona fide* members of the company were those contained in the register filed with the Registrar of Companies on 10th May 1983.

The second suit, **HCCC No. 3200 of 1990**, was by some three members or shareholders of the company. They sued the same defendants as

in the first suit describing the 2nd to 10th as the company's directors and seeking, *inter alia*, an injunction restraining its said directors from selling, leasing, allocating, charging or sub-dividing the company's land. Other prayers included an order restraining the directors from operating any of its bank accounts, the calling of a general meeting, and holding of elections of directors and the appointment of a caretaker committee to run the company's affairs.

Mbito, J. after hearing evidence called in the consolidated suits decided, on the age-old principle propounded in ***FOSS vs. HARBOTTLE*** **[1943] 67 ER 189** that as a company is separate and distinction from its shareholders, its assets do not belong to them and it only can give in its own for any injury done to it or to its assets. The plaintiffs therefore had no rights recognized in law to bring action against the company as its shareholders and the learned Judge accordingly dismissed both suits.

Civil Appeal **No. 21 of 2014** emanates from a decision of **H. Omondi, J.** made on 6th December 2014 dismissing Judicial Review Case **No. 76 of 2011** by which the company sought *Certiorari* to quash what it called a decision of the Chief Land Registrar contained in a letter dated **15th June 2011** that declared title deeds issued for land allegedly excised from LR. 8622 in Longonot; L.R. No. 7255/1 and L.R. 10712 situate in Nanyuki; and *Mandamus* to compel the respondents therein the Commissioner of Lands, Chief Land Registrar and Land Registrars of Naivasha and Nanyuki to cancel the said title deeds.

In arriving at that decision Omondi, J. was of the view that the letter in question was not a decision capable of being quashed by *Certiorari* and that the respondents did not have a public duty to cancel titles, a matter not within their jurisdiction.

The appellants in 172 of 2006 who number 36 are aggrieved, as expressed in their memorandum of appeal, that the learned Judge Mbito erred by; holding that they had no *locus* to file suit; in holding that it was not clear the respondents' directors had acted contrary to the wishes of the company as it had previously authorized subdivision of its land, and allocation to its members; not holding that the directors acted wrongly and without authority, for reasons stated, in increasing the company's nominal share capital; holding that the suit was overtaken by events titles having been issued; and for dismissing the suit against the weight of evidence. They therefore prayed that the judgment be set aside and they be given judgment as they prayed on the two consolidated suits.

In Civil Appeal No. 21 of 2014 the company lists over a score grounds of complaint against the learned Judge Omondi who it says erred if we may summarize, by;

- ***"Purporting to validate" title deeds that were issued either irregularly, in contempt of court or whilst the mother title was in the appellant's name.***
- ***Arriving at a decision contradictory to and inconsistent with her own and other judges' earlier decisions based on similar facts thus disregarding stare decisis.***
- ***Conducting herself with "impartiality" (sic) unconstitutionality and unfairness evincing a predisposition favourable to the interested party.***
- ***Failing to address herself to the fact that the company still had the original title documents to the suit land and there were also court orders that militated against issuance of titles to other parties under the Registered Land Act (repealed).***
- ***Failing to hold that in view of section 32 of the Registration of Titles Act the interested parties could not hold valid titles.***
- ***Failing to hold that only the respondents had a duty to recall title documents irregularly and fraudulently issued.***
- ***Failing to find that it is the J.K. Wanjau for the Chief Land Registrar who purported to literally validate the said titles contrary to decision of Emukule, J. in HCCC 220 OF 2010.***
- ***Failing to hold that the letter dated 15th June 2011 amounted to a decision liable to be quashed by certiorari.***
- ***Failing to find that the company's case was uncontroverted, irrefutable and unrebutted."***

When these appeals came up for hearing on 15th December 2015, the Court, differently constituted, was notified that numerous people had purchased portions of the disputed land and would definitely be affected by the outcome of the same yet they were likely entirely oblivious of the existence of the proceedings. The Court consequently ordered the appellants to cause advertisements to be carried in two national newspapers within ***21 days***. This was done with the result that some 155 persons who described themselves as the original shareholders of the Company appeared and applied to be joined to protect their interests in the company's properties. They are represented by M/s JA Guserwa & Company Advocate.

Also seeking to be joined was Cornerstone Preparatory Association (Cornerstone) on the basis that it had purchased some of the company's property specifically Longonot/Kijabe Block 1/17 for valuable consideration whereafter it was registered as proprietor thereof. Finally, Stephen, Stanley and Solomon, sons of the late Kairu Kimana an original member in the company holding 10 shares of the original L.R. 8622, which translated to his ownership of L.R Longonot/Kijabe Block 1/93 applied to protect their interest on that property by transmission.

These applications were canvassed before Azangalala, Sichale and Kantai**,** JJ.A who, by their ruling dated 24th March 2017 allowed them.

The additional parties together with the previous ones filed written submissions which counsel highlighted during the plenary hearing of the appeals before us.

For the company, learned counsel **Mr. Kinuthia** complained that in dismissing the company's suit on the basis of ***FOSS vs. HARBOTTLE***, (supra) Mbito, J. recognized that it had suffered injury but was amiss in not ordering compensation. He asserted that the company "*had been run like a Kangaroo Court*" with the sued directors increasing the share capital without notice to members, and without filing returns to show that increase. Meetings were presided over by the Chief of Longonot Location without the names of the shareholders in attendance being recorded while others including the appellants in 172 of 2006, were chased away by the Chief. He accused the directors of having fraudulently subdivided the company's land to persons who were not shareholders and not entitled whom he termed "*land grabbers*." He pointed out that the original titles to the company's properties were still in its possession and had not been surrendered so that the new titles issued under the Registered Land Act were void. Moreover, the Chief Land Registrar had written several times to the Land Registrars at Nakuru, Laikipia and Nanyuki advising them to stop issuance of the new titles as there were extant court orders prohibiting the same.

Mr. Kinuthia submitted that as the company was in the business of land buying, its directors could not lawfully bring the new shareholders with the effect of reducing the individual entitlements of the original shareholders. To him, where fraudulent directors are in charge of a company, an individual shareholder can bring a suit to protect it since those rogue directors would not do so. His only comments on Civil Appeal **No. 21 of 2014** was that the letter dated 21st June 2011 was a decision and therefore amenable to being quashed by way of *Certiorari*. In so far as the learned Judge failed to do so, that appeal should likewise succeed.

Submitting on behalf of the company, learned counsel **Mr. R. Macharia** intimated that the company was conceding Civil Appeal No. 172. He submitted that the rule in ***FOSS vs. HARBOTTLE*** (supra) has exceptions which the learned Judge ought to have considered, but improperly failed to. Turning to Civil Appeal No. 21 of 2012, Mr. Macharia contended that the land in question belonged to the Company and is still registered in its name. Any other purported titles thereto are invalid as it is not possible for two different titles under two different registration regimes to exist contemporaneously over the same land. In support of that proposition he cited ***GITWANY INVESTMENT LTD vs. TAJMAL LTD & 3 OTHERS [2006] eKLR*** and ***VEKARIA INVESTMENT LTD vs. KENYA AIRPORTS AUTHORITY & 2 OTHERS [2014] eKLR*** and asserted that the company's titles were protected and indefeasible under **section 23** of the **Registration of Titles Act**.

Moreover, the titles issued later remained invalid, the mother titles not having been surrendered, and their having been existing court orders barring their issuance.

Also supporting the appeal was **Ms. Guserwa** learned counsel for the group 105 of original shareholders of the company who were joined to the appeal upon application. She contended that Mbito, J. erred in disallowing the action when the plaintiffs therein had a right to bring the suit. As for Civil Appeal 21 of 2014 she submitted that Omondi, J. erred in validating titles issued on a mother title that had inhibitions in the nature of court orders registered on it.

For the Hon. Attorney General, learned state counsel **Mr. Nguyo Wachira** pointed out that even though they were not parties to Civil Appeal No. 172, they nevertheless had filed submissions and were in support of the appeal principally because Mbito, J. wrongly ignored the evidence of the main witness. Regarding Civil Appeal No. 21, counsel submitted that the Cap 300 titles were issued before the unsurveyed land was processed and that the registrar had made a decision that those titles were valid yet the conversion from Cap 281 to Cap 300 was incomplete, which was quashable. He supported the appeal adding that the interested parties' remedies lay against those who sold them the land but whom they did not sue.

Appearing for the 11th to 14th Interested Parties, learned Senior Counsel **Prof. Ojienda** opposed both appeals. Starting with No. 172, he expressed skepticism about the position taken by the company in conceding that appeal. He pointed out that it was a strange thing that the company should now purport to concede an appeal against a judgment that was in its favour, an about turn he attributed to the change of directorships in the interim so that some of the current directors may be the very ones who initially litigated against the company. On the merits, senior counsel defended the judgment of Mbito, J. which he arrived at after a full trial in which the issue and impact of any injunctions against issuance of titles was fully ventilated. To him, Mbito, J. was perfectly correct in upholding the directors' authority to allocate land to the company's 288-plus members. He referred to the Judge's categorical finding that as at the year 1992, some of the members had already received their titles and that there was no fraud in the issuance thereof.

Prof. Ojienda submitted further that the plaintiffs before Mbito, J. were minority shareholders and ought to have sought payment of money as their claim was based on their not having been compensated for such of their shares that were not converted to land. He was of the view that no case had been made out for this Court to interfere with Mbito, J's decision on compensation and defended the Judge's finding that those plaintiffs had no ***locus standi*** to bring the suit. Since they did not raise the question of alleged existence of any previous court orders in other proceedings, this Court should not unsettle Mbito. J's findings that titles under **Cap 300** had been issued. Ultimately, in counsel's submission, as only the company could sue to protect its interests by resolution of the directors as held in ***FOSS vs. HARBOTTLE*** (supra), the plaintiffs before Mbito, J. were unsuited as they should have filed a derivative suit which they did not. He urged dismissal of that appeal.

Turning to Civil Appeal **No. 21 of 2014**, Prof Ojienda saw it as revolving around the question whether the letter from the Chief Registrar was a decision or a mere communication. His view was that it was the latter. He proceeded to wonder how the Hon. Attorney General could, "*without embarrassment,*" propound before this Court a position diametrically opposite to the one he had urged before the High Court. Counsel's view was that all the Chief Registrar did was express an opinion on a legal position, not make a decision. He cited ***R vs. THE COMMISSION OF ADMINISTRATIVE JUSTICE & ANOR EX PARTE JOHN ANDIRANGU KARIUKI*** **[2013] eKLR**, a decision of Odunga, J. He added that the question of indefeasibility of titles under **section 27**, **28** of the **Registered Land Act Cap 300**, (repealed), as well as conversion of titles under **section 2** thereof are matters of law and the Chief Registrar merely confirmed the need to complete the conversion as the company had at some point surrendered the mother titles. Some of the titles that had been issued in the 1990's pursuant to such conversion were indeed annexed and formed part of the record at pages 245 to 327 as well as the supplementary record of appeal filed by Njengo & Co. Advocates at pages 9 to 148.

Senior counsel concluded with the contention that this appeal, too, is for rejection as it is fraudulent for later directors of the company to purport to claim that which their predecessors had properly surrendered, and that it is that context that the concession of the appeal is to be viewed as a subterfuge to get back land which long ago passed on to other parties who had developed and settled on it.

Learned counsel **Mr. Njengo** represents the 6th respondent group who are purchasers of **Cap 300** titles for valuable consideration and are equally opposed to the two appeals. He asserted that the letter that was challenged before Omondi, J. was not a decision within the meaning of **order 53** of the Civil Procedure Rules and that the learned Judge did not validate any titles as all she did was to refuse to question the letter. According to Mr. Njengo, what the appellants should have done, but failed to do, was go to the land court to sue the holders of new titles instead of filing judicial review proceedings. Moreover, the challenged titles could not be quashed without a hearing being afforded to their holders. Further, Judicial Review is not concerned with the merits of acquisition of titles. He too launched a broadside at the Attorney General for purporting to support the appeal, yet before Omondi, J. he had supported Prof. Ojienda's submissions.

Regarding Civil Appeal No. 172, Mr. Njengo's view was that titles having been issued, sub-division done and the resultant portions occupied, the appeal was overtaken by events as the land no longer exists in the form it had been. Whatever interim orders had been previously issued having been subsequently discharged, the Chief Land Registrar was entitled to proceed as he did and the appeal should therefore the dismissed.

Also opposing the appeals was **Mr. Thuo**, learned counsel for the 2nd respondents group, also purchasers. He invited us to pages 67 to 71 of the record in Civil Appeal 172 whereat is an affidavit by a director of the company one **Peter Wokabi Kirutho** sworn on 7th October, 1988 which, according to counsel "*extensively addressed the issue raised by Mr. Mwicigi,"* complete with minutes of meetings and a Report "*that absolved the directors of any hanky panky*" so that there was ample material upon which Mbito, J, properly found that there was neither illegality nor fraud. Indeed, a letter from the Registrar of Companies office signed by one **Omondi Mbago** referred to allegations made as having been serious but that they were not proved. There was nothing illegal about the resolution raising the share capital. Counsel submitted that Mbito, J. was correct to uphold the rule in ***FOSS vs. HARBOTTLE*** and strike out the suit in which many shareholders had sued the company's nine directors.

Returning to Civil Appeal 21, Mr. Thuo submitted that the High Court was bereft of jurisdiction to deal with land matters and that the cancellation of titles the *ex parte* applicants sought through mandamus ought to have been sued for in the proper court. The Attorney-General's about-turn was therefore unacceptable and the appeals should be dismissed.

Mr. Mwicigi's rejoinder was a reiteration that the company had stopped any further sales, anything subsequent was fraudulent and that any shareholder could file suit. He conceded that the Judge did order monetary compensation.

We have gone into considerable detail is setting out the case that was before Mbito, J. cognizant of our duty as a first appellate court to subject the whole evidence to a fresh and exhaustive re-appraisal with a view to drawing independent inferences of fact as required by **Rule 29(1) (a)** of the Court of Appeal Rules. We do so aware that we are limited to the cold letter of the record not having had the advantage of hearing and seeing the five witnesses as they testified. As the trial Judge did have that advantage, we pay due deference to his findings of fact especially if they are based on credibility of witnesses and we are slow to disturb them, doing so only if they are based on no evidence, portray a misapprehension of the evidence or are on the whole erroneous and unsupportable. See ***SELLE & ANOTHER vs. ASSOCIATED MOTOR BOAT CO. LTD*** ***[1968] EA 123***; ***SUSAN MUNYI vs. KESHAR SHIANI*** ***[2013] eKLR***.

As regards Civil Appeal No. 21, we proceed from the understanding that what we are being asked to do is interfere with the discretion of Omondi, J. as the issuance or denial of judicial review orders lies in the discretion of the first instance Judge. It has long been the practice of this Court to be slow to interfere with a Judge's exercise of discretion, doing so only within narrow strictures of misdirection, misapplication of principle, perversity or clear error as have been expressed in many cases including the oft-cited ***MBOGO vs. SHAH*** ***[1968] EA 93*** where Sir Charles Newbold President of the former Court, put it thus at P96;

> ***"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

Having thoroughly perused the records of appeal and carefully considered the rival submissions made and the authorities cited, we think that the only issues we need to decide in the two appeals are as follows;

> **(1) For Civil Appeal No. 172 whether Mbito, J. erred in dismissing 'the appellant's consolidated suits for having been brought by shareholders who had no *locus standi* to do so.**
>
> **(2) For Civil Appeal 21(a) whether Omondi, J. erred in holding that the letter by the Chief Land Registrar dated 15th June 2011 did not constitute a decision capable of being quashed.**
>
> **(3) Whether the learned Judge erred in declining to issue an order of mandamus to compel cancellation of the RLA titles.**

Starting with Civil Appeal No. 172, the record shows that in arriving at his decision Mbito, J. reasoned as follows;

> ***"As can be seen the plaintiffs are shareholders of the 1st defendant, which is a limited liability company. It is thus a body corporate and the other defendants are but its directors. It is also common ground that it is a land buying company whose intentions were to acquire lands for allocation to its members and had since acquired the suit premises herein on which it had allocated plots to its members and by the time the suit was filed it was in the process of giving titles to its members. It is however contended that the distribution was not being done properly and as such the court should intervene in the issue on behalf of the members of the company. The main issue is therefore whether the court has jurisdiction to entertain this matter at the instance of the plaintiffs and, if so, whether the plaintiffs are entitled to the orders sought in the current suit.***
>
> ***...***
>
> ***In the case of Foss vs. Harbottle [1843] 2 Here 461, 67 ER 189, it was held that shareholders have no right to sue for injury committed to the company's assets by its directors.***
>
> ***...***
>
> ***Keeping in view the above principle, it is observed that the plaintiffs complaint is that the defendants had wrongfully dealt with the assets of the 1st defendant and that they should be restrained. As the first defendant is a body corporate it is the one that should be complained. The plaintiffs have no rights recognized in law to bring the current suit against the company as stated by Wigram V.C. in the aforesaid case of Foss vs. Harbottle. Shields, J. and Dugdale, J. have already said so in refusing injunctions herein. I see no reason to differ from them. I therefore hold that plaintiffs had no locus standi to bring the current suit."***

That reasoning and conclusion disposed of the consolidated suits before Mbito, J. and the appellants herein contend that the learned Judge misdirected himself while the respondents and those parties opposing the appeal hold the view that he showed fidelity to the law.

At the heart of the determination of this matter is the truism or basic principle expressed and upheld since ***SALOMON vs. SALOMON & CO. LTD [1897] AC 22*** that a company is a juristic person with an existence separate and distinct from its directors and shareholders, even where the directors are its sole shareholders. Precisely because of that distinction, it is fallacious for shareholders of a company to equate its property as their own when in actual fact they have no proprietary rights thereto apart from the shares they own. Likewise, since the company is a person in the eyes of the law, it has the capacity to sue and be sued in its own name so that it alone, through its directors as its recognized agents, indeed its *alter ego*, can file suit to protect its proprietary interests and to enforce its rights. See ***OMONDI & ANOR vs. NATIONAL BANK OF KENYA LTD & 2 OTHERS [2001] KLR 579***. Now, a look at the plaint in High Court Civil Case No. 3746, one of the suits before Mbito, J. reveals that it proceeded from a fundamental misapprehension of that distinction between shareholders and the company and the erroneous presumption that its property is theirs. They sought to injunct the company and its directors from *"allocating, transferring, or disposing of any part or the whole of that piece of property known as LR 8622/R and LR 8622/1 Longonot."* The basis for that prayer was pleaded at paragraph 5 to be this;

> ***"The 1st defendant [the Company] has at all material times held title on behalf of its members and shareholders to that particular piece of land known as L.R. No. 8822/R and 8822/1 Longonot."***

We think that the suit as presented was a non-starter for going against the principle in ***FOSS vs. HARBOTTLE***. The rule therein is a logical consequence of the juristic personality of a corporation with capacity for self-regulation. Had the suits before Mbito, J. been presented as derivative suits as exception to the ***FOSS vs. HARBOTTLE*** principle, it would have been another matter but they were not. In the result, we are unable to accept that the learned Judge was wrong to arrive at the conclusion that he did.

Indeed, in many cases suits brought as were the one before the learned Judge are resisted on competency and jurisdictional grounds by way of preliminary objections which are upheld as in ***OMONDI & ANOR vs. NATIONAL BANK OF KENYA LTD*** (supra) in which the onus would be on a shareholder to demonstrate that the company is put to loss and damage through the illegal actions of its directors and is unable to seek relief in its own name which would then entitle him to bring a derivative suit seeking relief for the company itself whereby all its shareholders would benefit . See ***DADANI vs. MANJI & 3 OTHERS [2004] 1 KLR 95***, a decision of Mwera, J. (as he then was).

On the facts that were before Mbito, J. the suits was wrongly brought. It did not pretend or attempt to be a derivative suit, and the learned Judge was justified to dismiss them. Had Mbito, J. dealt with the jurisdictional issue alone, the proper order would have been striking out of the suits as incompetent but he went into the merits, leading to a dismissal order. Whereas we think that our finding that he was right on the issue of competency would be dispositive of the appeal, we choose, though we need not, to go further, albeit briefly.

We think that on the merits as well Mbito, J. was correct to dismiss the suits before him for a trio of reasons. First, the learned Judge found for a fact, and we too have ascertained from the record, that the complaint in the suit, repeated in this appeal, that the directors of the company irregularly or illegally increased the shareholding in the company is unbacked by evidence. Rather, there was a resolution passed at a general meeting of the company held on 26th May 1985 that increased that shareholding to 6000. There were returns filed with the Registrar of Companies to that effect and a letter from the Registrar dated 6th October 1988 produced in evidence did show that to be the number of shares.

Second, it was evident from the record that following the increase in shares other people bought into the company leading to an increase in the number of shareholders. The lands in dispute were thereafter subdivided and the shareholders allotted their respective portions in 1988 and titles were issued in 1990. By the time the matter was being determined at the High Court respective owners had already been in occupation for a number of years hence the learned Judge's finding that some prayers in the plaint had been overtaken by events. We, too, think so and the criticism levelled against the learned Judge on that score is unsustainable.

The upshot is that there is no merit in Civil Appeal No. 172 of 2006 and it is for dismissal.

Turning now to Civil Appeal No. 21 of 2014. As we have already stated, the appeal challenges Omondi, J.'s exercise of discretion in dismissing the application for judicial review. The first issue is whether the letter of the Chief Registrar was a decision capable of being quashed and we think that this presents little difficulty. A perusal of the said letter dated 11th June 2011 shows that it was concerned with the surrender of head titles to the subject land. The author indicated that the said titles, which had been earlier surrendered to the office of the Chief Lands Registrar to facilitate registration of surrenders with the aim of converting the titles into RLA, had been released on 25th August 1994 to one **James Kariuki Muchiri** who represented himself as the company secretary. The release to him was therefore procured by false pretences and deemed unprocedural. The letter requested the urgent surrender of those mother titles "*to enable the office to complete the exercise of conversion it had commenced*." It concluded with the words;

> ***"Any members/party still interested with nullification of the already issued title deeds under RLA should seek redress from the court. On receipt of valid court orders, the issued title deeds will be cancelled but in the meantime they remain as valid as issued."***

It is those words that the appellants contend amounted to a decision validating the titles deeds issued under RLA and which they sought to quash by way of an order of *certiorari*. Omondi, J. did not think so, and expressed herself thus;

> ***"The letter explained that the surrender was so as to enable him complete his job. It was not a decision validating the titles, and it is misplaced for the applicants to state that the letter declared validity of Title Deeds for the parcels under reference. Indeed as submitted by Mr. Njengo, the letter merely pointed out that the head titles were released in an unprocedural manner and called upon the applicants simply to confirm whether they were ready. It further indicated the steps to be taken in the event that the applicants did not have the titles and advised any aggrieved party to seek legal redress.***
>
> ***Surely the applicants would not be seeking redress over advise which they had choice to either accept or reject. They would only seek redress if what was being communicated to them was a decision adversely affecting them."***

Try as we might, we are unable to see any deficiency in the reasoning and conclusions of the learned Judge on this aspect of the case. Beyond requesting for a surrender of the mother titles and explaining the reason for such surrender and going further to state that the RLA titles already issued remained valid as issued unless and until successfully challenged in court, we are unable to discern what determination she made, comparable to a judgment, order, decree, conviction or decision as contemplated under **order 53 Rule 2** of the Civil Procedure, that could attract an order of *certiorari* for its quashing. We do not see in the letter, any decision affecting the rights or interests of the appellants and shown to have been arrived at by a process that was unfair to them or otherwise tainted by illegality, irrationality, abuse of process or want of jurisdiction. We think the situation the learned Judge faced was not in principle dissimilar to, but it in reality probably even weaker than, the one faced by Odunga, J. in ***REPUBLIC vs. THE COMMISSION OF ADMINISTRATIVE JUSTICE & ANOR Ex parte JOHN NDIRANGU KARIUKI [2013] eKRL*** where he reasoned as follows, with which we concur;

> ***"However in Njoya & 6 Others vs. Attorney General & Another [2004] 1 KLR 232 it was held that as regards the justifiability, recommendations or report of any other commission (whether established by an Act of Parliament or administratively) are of not justifiable for it is a long standing principle of administrative law that only decisions impacting on the rights of individuals (and not recommendations) are amenable to judicial review if they do not confer or take away anyone's rights. Dealing with the issue Warsame, J (as he then was) in Paul Kiplagat Birgen & 25 Others vs. Interim Independent Electoral Commission & 2 Others (supra) expressed himself as follows:***
>
> *„It is clear that the letter dated 12th July 2011 was written by the 1st respondent in its statutory capacity. It is also clear the letter as rightly pointed out by the applicants was requesting or recommending the revocation of the nomination of the applicants and others not before court. It is therefore my decision that there is no decision capable of being challenged and which is amenable to judicial review that was made by the 1st respondent against the applicants herein."*

See also ***PASTOLI vs. KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008]2 EA 300; ZACHARIAH WAGUNZA & ANOR vs. OFFICE OF THE REGISTRAR ACADEMIC KENYATTA UNIVERSITY & 2 OTHERS [2013] eKRL***.

We do not think, upon a proper consideration of this matter, that the learned Judge in any way erred in declining the prayer for *certiorari* in exercise of her discretion. There was no decision to quash or uproot by way of *certiorari*, considering that such order is designed to restore an applicant, if successful, to *the status quo ante*, taking him back to the position that immediately preceded the impugned decision. (See ***JOSEPH MBALU MUTAVA vs. ATTORNEY GENERAL & ANOR [2014] eKLR***). It was wholly inapplicable as the Chief Registrar's expressed opinion, whether taken or not, and whether quashed or not, could not at all affect the position of the ex-parte applicants. In fact, we are persuaded that it would have been an exercise in futility for *certiorari* to issue in the circumstances of the case and it was therefore properly declined. Courts should never act gratuitously or in vain and the learned Judge was alive to this in the face of the fact that the process of conversion of RTA to RLA was greatly advanced, and title deeds under the latter statute had issued to third parties some of whom were not parties before her.

What of the learned Judge's denial of the prayer for *mandamus* to compel the four named respondents to recall, revoke and cancel the already issued RLA titles? The appellants contend that such denial was erroneous and contrary to law. Starting with the basic, an order of mandamus is an order, otherwise referred to as a *prerogative order*, that issues from the High Court to compel an official who has failed, to perform a public duty imposed on him by statute or by the common law or, we dare add, though it ought to come first, the Constitution, so as to give effect to the rights of the applicant to whom no other appropriate remedy exists. See ***SHAH vs. ATTORNEY GENERAL*** **(No.3) [1970] EA**

543. It essentially issues to correct and put an end, by compulsive force, to the dereliction of duty on the part of the officer or public authority to whom it is directed. Precisely because it issues to compel.

It cannot however issue to command the performance of what is essentially discretionary or optional. The duty must, moreover, be one required by law to be performed by the particular officer or authority to perform a specific duty and cannot issue regarding a duty that lies with a different officer or authority. See ***NGURAGWA & OTHERS vs. REGISTRAR OF THE INDUSTRIAL COURT OF TANZANIA & OTHERS*** *[1999] 2 EA 245;* ***COMMISSIONER OF LANDS & ANOR vs. KITHINJI MURUGU M'AGERE*** *[2014] eKLR.*

We are satisfied upon our perusal of the impugned ruling that the learned Judge had those principles in view and she fully appreciated them before arriving at her decision. On the question whether the named respondents bore a public duty to cancel titles as the *Mandamus* sought was hoped to compel, the learned Judge first found that the lands having been sub-divided and conversion titles issued under RLA, it was not possible for the register to be rectified to defeat the titles of third party purchasers for value who were in possession without knowledge or notice of any omission, fraud or mistake founding the basis for the sought rectification. The Judge found, correctly so in our view, that far from being complicit in any wrongdoing, the said third party purchasers, named as Interested Parties before her, in actual fact had sale agreements after due diligence and were properly registered as proprietors without being in any way encumbered. The titles held evidencing their interest were statutorily protected and were absolute under **Sections 27** and **28** of the RLA. Nothing in that statute imposed a duty upon the respondents to cancel titles and we think that the learned Judge's findings at the end of the ruling was in the circumstances of the case logical, indeed inevitable;

> ***"I am persuaded that orders the court is being asked to compel the respondents to perform are outside their jurisdiction. In consequence of this, my finding is that the orders sought cannot issue and the application is dismissed."***

It is clear that the learned Judge approached the issue in a pragmatic manner and evinced fidelity to the principles that govern the issuance or denial of judicial review remedies. She exercised her discretion in a judicious manner and nothing placed or stated before us gives us reason or basis for interference with her decision.

In the result, this appeal as well is devoid of merit and our final orders are that the consolidated appeals before us are dismissed with costs.

Dated and delivered at Nairobi this 9th day of November, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR