IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO.44 OF 2014

BETWEEN

MAKUPA TRANSIT SHADE LIMITED ....…… 1ST APPELLANT

MAT INTERNATIONAL LIMITED ……..……2ND APPELLANT

AND

KENYA PORTS AUTHORITY ……..…...…… 1ST RESPONDENT

MULTIPLE ICD (K) LIMITED ……...……. 2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Muriithi, J.) dated 11th August, 2014

in

Mombasa C.& J. Review Misc. C. App. No.77 of 2012)

****

JUDGMENT OF THE COURT

By an *exparte* Chamber Summons application dated 20th September, 2012 and filed in the high Court of Kenya at Mombasa, the appellants as applicants sought and obtained leave to commence Judicial Review proceedings against the 1st respondent in the nature of Prohibition and Mandamus. They also prayed that the grant of leave do operate as stay until the hearing and determination of the Judicial Review application.

Pursuant to the leave so obtained on 21st September 2012, the appellants filed the substantive Notice of motion expressed to be brought under Part VI of The Law Reform Act, order **53 Rules 1** and **3** of the Civil Procedure Rules, **section 3A** of the Civil Procedure Act and all other enabling provisions of the Law. They prayed *interalia*:-

> *"1. An order of Prohibition to prohibit the respondent from granting a lease or other interest in land to the parcel of land adjoining Mombasa/Block 437 and Mombasa/ Block 438 to any person or persons other than the 2nd applicant, or anyone (sic) of the applicants.*

2. an order of Mandamus to compel the respondent to grant a lease over the parcel of land adjoining Mombasa/Block 437 and Mombasa/Block 438 to the second applicant, or anyone (sic) of the applicants.

3. That costs of his application shall be costs in the cause"

These prayers for prohibition and mandamus against the 1st respondent were triggered by a circular issued by the 1st respondent in May, 2012. The circular indicated that their request for the construction of a bridge on the land "*plot*" adjoining parcel **Nos. Mombasa/Block 437** and **Mombasa/Block 1/438,** "*the plots"* was denied as similar permission had already been granted to multiple ICD (K) Ltd, the 2nd respondent. The appellants alleged that in May, 2012 the 1st respondent indicated its intention to grant a lease over the plot to the 2nd respondent which according to the Appellants went contrary to "*existing documented commitments*" to grant the same to 2nd appellant.

They grounded their claim on the alleged facts that an interest in the plot had vested in them via express representations by 1st respondent, also because the plot was adjacent to their plots in which they had invested heavily via extensive civil and other works. They also premised their claim upon three broad grounds summarised as follows:

- Constitutional: That the action by 1st respondent was ultra vires to **Articles 27, 40(1)(3)** and **47** of the Constitution as it failed to grant the lease of the subject property to the appellants and instead granted it to 2nd respondent. Further the decision to grant the lease to 2nd respondent was made by some of 1st respondent officials when its Board had already made a prior decision and this would portend future conflict contrary to **Article 47** of the Constitution. The decision to grant the lease was ultra vires **Sections 8 (2)(e)** and **12(2)(k)** of the Kenya Ports Authority Act and the proposed construction was contrary to its **section 11(d)** as the works had no approvals. Further the decision to grant the lease to a third party was ultra vires.

- Legitimate expectation:. That the appellants had legitimate expectation that they would be granted the lease pursuant to express representations by 1st respondent. Further, that their legitimate expectation was further buttressed by the fact that they were the immediate neighbours to the plot and had assisted in its clean up subject to a condition given to them in the year 2002.

  Bad Faith, Unreasonableness, Breach of Natural Justice and Procedural Impropriety. That the decision gave undue advantage to one party contrary to **sections 8(2)(e**) of the Kenya Ports Authority Act; was therefore improper, discriminatory and made *in bad faith*. The decision was capriciously made by the 1st respondent's officials and was unprocedural as it was made without any known criteria set in the Lands Act. The decision was contrary to the rules of natural justice and was biased as the most affected parties were the appellants who were never consulted nor accorded a hearing before it was made. That the 1st respondent abused its public power thereof.

The appellants' evidence was made up of a series of correspondences involving the parties, survey maps, circulars, Board Committee Meetings, Board of Directors Minutes and the site visit by the trial court. The appellants are sister companies. The 1st appellant conducts a Container Freight Station business on the plots at the Kilindini Port, whereas the 2nd appellant was the lessee of the plots, leased from the 1st respondent. They contended that in the year 2002 an interest in the plot vested in them when the 2nd appellant applied for a grant of lease over the plot measuring 1.2 Ha. adjacent to their plots in year 2002. The 1st respondent vide a letter dated 29th May, 2002 accepted this in principle subject to fulfillment of some conditions and on further consideration and final approval by its Board of Directors. The 1st appellant confirmed its acceptance of the conditions via letter dated 30th May, 2002. Subsequently, the 1st respondent land use and development Committee in addition to the said conditions offered, on a without prejudice basis, part of another plot No. MN/VI/3957 measuring about 2.5 Ha. via its letter dated 30th May, 2002 and requested 2nd appellant to give a written confirmation of acceptance. Thereafter 1st

respondent via a letter dated 26th August, 2002 indicated that it had reconsidered and approved 2nd appellant's application on conditions other than the previous ones and requested it to give it a written confirmation of the new conditions. The 2nd appellant wrote back requesting 1st respondent to approve the civil works to develop the suit property. The 1st respondent via a letter dated 30th September, 2004 accepted the request in principle subject to submission of engineering drawings to 1st respondent for approval. The appellants claim that 1st respondent informed them that formalisation of the agreement would await issuance of the property from the Government, the head-lessor. On 20th July, 2011, the TAL group, the appellants' mother company, made an application on their behalf for consolidation and extension of the leases of the plots and for the transfer of the same to the 1st appellant and for a wayleave. This request was declined via letter dated 19th January, 2012 but TAL was further requested to avail additional information so that the application would be resubmitted to the relevant committee. The additional information was relayed via letter dated 24th January, 2012 with TAL reminding 1st respondent that their original request was for consolidation and transfer of the leases and an approval for construction of a bridge to link their plots and the plot across Makupa Creek and to link Makupa Causeway. On 15th April, 2012 1st respondent wrote to approve extension and transfer of the leases for plots but declined construction of the bridge on the plot on the grounds that another firm had been granted permission to set up a similar facility in the area. On 2nd May, 2012 TAL wrote accepting the conditions set in the letter dated 15th April, 2012. However it wrote again on 7th May, 2012 to 1st respondent to remind it of the pre-existing grant of the plot to 2nd appellant and that it was aware that the title had since been issued and requested for the issuance of the lease. It further stated that recently in May 2012 the 1st respondent had signed an intention to grant a lease to the 2nd respondent which decision was unreasonable and contrary to existing documented commitments to grant the plot to the 2nd respondent. That they were aware of a board meeting of the 1st respondent which was in the offing that would proceed to grant such lease or execute. Those facts then informed the filing of the application for Judicial Review orders.

The 1st respondent filed an affidavit in reply and subsequently filed a further affidavit. It denied ever granting a lease or interest to the 2nd respondent. Instead what it had done was to grant a wayleave and a 'no-objection' permission for the construction with the rider that the 2nd respondent obtains all necessary approvals from the government and proceed under 1st respondent's supervision. It deponed that the request by the appellants to carry out the same works and construct a bridge was a mere proposal that was never approved. It annexed its Board of Directors minutes dated 4th December, 2008 approving the 2nd respondent's request and a letter dated 23rd December, 2008 by 1st respondent to the 2nd respondent accepting in principle, the proposed access road with the aforementioned condition. It also annexed a letter dated 20th September, 2012 by the 2nd respondent declining 1st respondent's offer to lease the plot which had been described by 1st respondent as having an unimproved site value of over Kshs.1,000,000/- and restated that their proposal was to *"solely construct a public road access from our facility to the port across Makupa Creek...."* and the same be considered as a wayleave and not a lease. It deponed further that the judicial review concerned itself with the decision making process and not the decision itself and cited the appellants' concerns as falling under the ambit of private law, in particular that of alleged breach of a contract and that they should have sought an order for specific performance for the alleged express representations. It denied making such representations as alleged and that neither in the correspondences nor board resolutions is there an undertaking not to grant the lease to the 2nd respondent. It urged that the appellants sought to invoke the Constitution on fair competition whilst on the other hand wished to flout the same by insisting on preferential treatment. It pointed out that over the years there had been a change of legal regime and it would not continue business as usual and the early discussions with the appellants were now water under the bridge. In particular it cited the Constitution and the Public Procurement and Disposal Act that ousted the enjoyment of or the continuation of the benefits by single entities. To the 1st respondent the appellants had been caught up with the Statute of Limitation in seeking to enforce representations made in year 2001 or 2002. It reiterated that the Minutes relied upon were confidential and the appellants had used the same in a bid to manipulate it contrary to the Official Secrets Act and the Public Officer Ethics Act and urged the Court not to rely upon illegal and irregularly obtained documents. It further beseeched the Court not to assume jurisdiction over its Board proceedings and

general operations as the appellants were urging. That as per custom and practice, Board Committee decision are not binding or enforceable until ratified by the full Board of Directors hence the Minutes relied upon would not be taken to be final decisions and that the appellant were being speculative of what decision the Board of Directors would make. It deponed further that as at the time of the initial discussions, the plot was 1.2 Ha. but increased to 6.4 Ha. due to further reclamation works it had undertaken. It took issue with the claim that the appellants had spent over Kshs.10,000,000/- in beautification and cleanup of the plot and contended that the said sum of money was not proved to have been used nor did the appellants seek its consent or concurrence before the undertaking and there was in any event no physical evidence of the work undertaken. The appellants too had failed to fulfill the conditions listed nor did they submit the engineering drawings as requested.

The 2nd respondent filed a 12 point notice of preliminary objection and a replying affidavit stating in brief that the court lacked jurisdiction as the matter before it was a land matter masquerading as constitutional and/or judicial review proceedings whilst seeking injunctive orders. That land matters are ousted from the jurisdiction of the High Court by **Article 165 (5)(b)** of the Constitution. It stated further that where the Constitution and statute provided a framework for resolution of disputes, then that procedure should be strictly followed. It was the 2nd respondent view that the Constitution and Judicial Review jurisdiction could only be invoked to protect/enforce vested rights and not to create /adjudicate disputed contracts or land claims. It further stated that the order sought to compel the 1st respondent to grant lease would be in violation of **section 27(1)** of the Public Procurement and Disposal Act, s**ection 45(2)(b)** of the Anti-Corruption & Economic Crimes Act and would in effect dispose the property belonging to a public entity outside the public tendering process. The order would in effect also force a public entity to enter a commercial agreement for a lease without negotiations thereon. It questioned whether or not the correspondences relied upon created an enforceable contract, whether its enforcement was time barred, the nature of the interest allegedly created ; was it freehold, lease or a license and the terms thereof and was the interest registered and/or registrable? It further stated that these proceedings were an abuse of court process as the appellants had also filed a constitutional **Petition No. 40 of 2012** and obtained an injunction against the 2nd respondent as well as H.C.C.C. No.200 of 2011 seeking prohibitory orders against the 2nd respondent. The 2nd respondent claimed that their interest was not in acquisition of the plot but a non-exclusive permission to construct a public road and bridge for the benefit of the public, and these proceedings were a clog in the progress thereof and was causing it heavy financial loss.

The Replying Affidavit filed by the 2nd respondent bore similar content to the preliminary objection – suffice to add that it was a competitor of the appellants and hence the appellants had employed litigation as a tactic to keep it at bay and was in fact causing it losses running into millions of shillings as this litigation had stopped its project. That in fact it did not seek a lease over the plot but had only a non-exclusive permission to build a public road and bridge. Finally it deponed that the judicial review proceedings were frivolous in nature.

The proceedings were then encumbered with other numerous applications including contempt of court, reconstruction of the court file and an application for a site visit. When it eventually came down to hearing the parties, written submissions were filed in which they reiterated their respective positions as captured in the applications, the various affidavits and the annextures thereto. They also backed up their positions by referring to several authorities. The Superior Court having weighed the evidence before it reached the conclusion that aggrieved the appellants to the point of this appeal. It dismissed the application and in so doing rendered itself thus:-

> "37. The first prayer was for an order of PROHIBITION to <u>prohibit the Respondent from granting a lease or other interest in land</u> to parcel of land adjoining Mombasa/Block 1/437 and Mombasa/Block 1/438 to any person or persons other than the second applicant, or any one of the applicants. Title to the suit plot herein was issued to the respondent, and whatever offer may have been made to the interested parties is no longer on the table.
>
> 38.This prayer is overtaken by events, and the applicants submit that "*this prayer has been*

compromised by the respondents and Interested parties new concession that KPA will not grant a lease or other exclusive interest to the interested party and the Interested Parties position that it does not require a lease or other interest in the land but merely a non exclusive right of way… KPA made a decision to grant a Lease to Multiple. That decision was not final as it required the acceptance of Multiple. It remained subject to challenge by prohibition. Multiple, rejected the Lease, and at that juncture the current proceedings were filed."

39. The respondent is a state corporation capable of owning property in its own name. As such it has exclusive right of proprietorship of the suit plot, and to restrict them in perpetuity from granting a lease over the suit plot to any person other than the applicant is to curtail its property rights under Article 40 of the Constitution.

40. The prayer for MANDAMUS seeks to compel the Respondent to grant a lease over the parcel of land adjoining Mombasa/Block 1/437 and Mombasa/Block 1/438 to the second applicant, or anyone of the applicants. The applicant in 2002 accepted a grant of lease conditional on it fulfilling a set of requirements, which have not been proved to have been met. Without this proof, it would not be possible to state with certainty that a legitimate expectation calling for an order of mandamus to compel the grant of a lease arose ….

43. There being no prayer for an order of certiorari to quash the decision of the respondent to grant a lease or no-objection to the interested party to construct an access road, an order of prohibition cannot issue to quash what has already been done. In addition, from the facts there is no intention to grant a lease to the interested party what has been sought by the letter of 20th September, 2012 is a way leave and not a lease. Even though the application for an order of prohibition was made before the 20th September, 2012, it would not be granted in the light of the facts as they exist on the date of the Judgment because it would be in vain as no intention to grant a lease exists.

44. With regard to Mandamus, the order must be directed to the performance of a public duty. None has been shown. There is no duty to grant a lease to the ex parte applicant or to any person. As a registered proprietor of the suit property, the respondent has power under section 12 of the KPA Act to dispose its assets by transfer or lease but there is no obligation to do so in any way or to any person. There may be an obligation in the civil court for specific performance, if a valid enforceable contract can be demonstrated but there is definitely no public duty to dispose of the suit property to any person or in any particular manner, be it a lease, way-leave or outright transfer. See also *Obadiah Nyatondo Ochilo vs KBC* HC Nairobi, Misc. Application No. 971 of 2000 and **Kadamas v. Municipality of Kisumu,** (1985) KLR 954."

The appellants premised their appeal on the 36 grounds which can be collapsed into 7 broad ones to wit:

- Disregard of statutory provisions
- Wrongful admission of affidavit evidence
- Misapprehending the essence of the Judicial review application
- Misappreciation of the doctrine of legitimate expectation
- Failure to evaluate the evidence on record properly
- Failure to appreciate the extent and scope of Judicial review orders of Prohibition and Mandamus and finally,
- Erred in finding that an order of Prohibition could not issue without an order of certiorari

At the hearing of the appeal, the parties filed written submissions which they subsequently highlighted. On grounds dealing with disregard of statutory provisions and affidavit evidence the appellants urged that

the High Court wrongly accepted the affidavits sworn by the 2 employees of the 1st respondents when there had been no evidence to show that they had been authorised by the Board to swear them. That **Mavuno Industries & Others v Keroche Industries Ltd High Court Civil Case No.122 of 2011 (U.R)** adopted by the court on competence of the respondent's affidavit was distinguishable as the parties therein were all private entities. That in the present case the 1st respondent was a public body governed by statute whose provisions are not lacking so as to warrant it being governed by the Civil Procedure Rules. Further, the case dealt with issues of Civil Procedure Rules yet judicial review proceedings were not civil proceedings and are thus not governed by those Rules. They in addition pointed out that in the case of **Republic v Registrar General & 13 Others [2005] eKLR**, also adopted by the court, it was held that a resolution of a Board of Directors of a company authorising deponing of its affidavit may be filed any time before the suit is fixed for hearing which was not done in the present case. Accordingly the High Court ought to have struck out those affidavits. That pursuant to **section 61(1)** of the Kenya Ports Authority Act "KPA *Act"* it was mandatory for 1st respondent to give express authority to its employees to swear an affidavit on its behalf and the court made a presumption that those employees were privy to the Board of Directors proceedings. They further contended that their further affidavit filed on 16th December, 2001 was wrongly expunged since by the consent recorded in court on 3rd December, the parties had agreed to proceed on the basis of the affidavits and written submissions. It was therefore properly before the court. They submitted that the court failed to exercise its discretion properly pursuant to **Order 53 Rule 4(2)** of the Civil Procedure Rules stating that justice should be administered without undue regard to technicalities as per **Article 159(2)(d) & (e)** of the Constitution.

They went on to submit that the High Court erred in finding that the decision under challenge was the one in year 2008 and not the one of year 2012. They submitted that the 2008 decision was a recommendation which was not final as it was subject to the 2nd respondent obtaining all necessary approvals. Further, in 2008 the 2nd respondent requested to construct a road linking 1st respondent to the Mombasa Highway and not a bridge over the plot linking 1st respondent to the appellants, but the 2012 decision permitted the construction of a bridge over the appellants' plots and the plot. They addressed due process claiming that this was not followed in awarding the 2nd respondent the interest over the plot due to the fact that they themselves were denied a lease over the same plot despite having made substantial developments on it and having the expectation that they would be granted the lease. Turning to procurement laws, the appellants urged that the court erred by failing to find that 1st respondent was under legal obligation to adhere to procurement laws and failed to consider whether or not the law was followed at the time of awarding a lease or wayleave or any other interest in the plot to the 2nd respondent. That a public entity is governed by the procurement laws and the Constitution in contracting for goods and services, and as 1st respondent had failed to stick to the law it was in breach of the law and the decision was therefore null and void. On legitimate expectation, the appellants urged that it can arise from an express promise given on behalf of a public entity to a person and the court is expected to protect this via judicial review mechanism. They relied on the case of **O'reilley v Mackman [1983] 2 AC 237** and maintained that the 1st respondent had expressly made presentations to them about granting them a lease over the plot and as they had adhered to the conditions imposed, they had a legitimate expectation that the lease would be granted to them. Further that the court erred in finding that the legitimate expectation was extinguished as the plot was different from that transacted in year 2002 due to the fact that the dimensions had changed yet evidence before the court and the earlier contempt proceedings indicate that the 2nd respondent had tilled the land despite a court order being in force restraining such move. They also faulted the court for failing to take into consideration how the dimensions had been changed. On the acreage of the plot, the appellants submitted that after the site visit by the court, the experts from all parties estimated the plot to be 2.0 acres and not 6.4 Ha which translated to the same acreage applied for in year 2002. The court relied on false allegations therefore in reaching its decision to the contrary. A wayleave had been granted to the 2nd respondent and since both the respondents confirmed that no lease or interest had been granted to the 2nd respondent, then the order for prohibition had not been over taken by events. That neither of the respondents produced any evidence that a Board of Directors decision had been passed to grant a wayleave to the 2nd respondent. That the court erred in finding that an order for *certiorari* had to be pursued together with that of prohibition yet there was an intention to grant such an interest or lease over the subject property to the 2nd respondent and the court had established that no interest or lease had yet

been granted to the 2nd respondent.

On behalf of the 1st respondent it was submitted that **section 61(2)** of the KPA Act does not require a person authorised by the 1st respondent to show evidence of a power of attorney. All such a person has to assert is that he has been duly authorised to swear the affidavit. It relied on the same authorities it had at trial, that is **Mavuno** case (*supra*) for the preposition that the authority giving an employee, who is conversant with the issues in dispute, the liberty to make an affidavit on behalf of the corporation need not be produced before or together with such an affidavit. It further submitted that the plot negotiated in year 2002 was 1.2 Ha and is part of the 6.4 Ha property now registered as plot. No.691 owned by the 1st respondent. It submitted further that no legal interest accrued to the appellants, and even if it had, it would not negate the 'no objection' to the construction of a public road and/or bridge landing. It added that the appellants' averments on the size of the plots were misleading. It was their contention that the prayer of prohibition was against the wrong decision as the 2008 decision had granted the permission and not the 2012 one and that 2008 decision was fairly made. Further, there was no proof that the appellants took part in the reclamation exercise of the plot nor is there proof that the civil works carried out in their plots was also carried out in the plot. On negotiation of a possible lease, the 1st respondent admitted that there was such a possibility but the appellants never fulfilled the conditions laid out then and no interest had been secured by the appellants over the plot. In any case they took about 7 years from year 2004 to 2011 to pursue the same and were guilty of latches. In support of this contention it referred to the decision in **David Njuguna v Florence Wanjiru Muthee & 4 Others [2006] eKLR. T**he appellants cannot be said to have had legitimate expectation of a stale request that had been overtaken by events and forcing it to award the lease would be in breach of the law and in particular the Public Procurement and Disposal Act, the Limitation of Actions Act and the Land Act. Legitimate expectation ought not to be given effect if it will cause a breach of the law. They also contended that the appellants' request to construct a bridge was never granted as it was considered a waste of resources as another party had been given a no-objection decision on the same. The 1st respondent relied on **W. Wade & C. Forsyth** in **Administrative law , 8th edition at page 610 , Halsbury's Laws of England 3rd Ed Vol 11,** and **Obadiah Nyatodo Ochilo v Kenya Broadcasting Corp. Misc Appl No. 971 of 2001 Nbi** for the proposition that mandamus could not issue to compel performance of duties arising from a contract or private law. With regard to the ineffectness of the order of prohibition the 1st respondent relied on the case of **Republic v University of Nairobi Civil [2002]2 EA 572** which postulated that an order of prohibition is pre-emptive in nature and is to be directed at preventing what has not been done, and in this case the permission had already been granted. They submitted that as there was no law faulting the process of granting a 'no objection' the 1st respondent acted within the law. The decision of 2012 did not address the subject cause of action, it referred to a '*strip of land adjacent to Kapenguria*' and as no lease was granted, **Article 40** of the Constitution, **sections 8(2)(e**) and **12(2)(k)** of the Kenya Ports Authority Act and **section 12(1)(2**) & **(7)** of the Lands Act could apply. In addition, if the lease was to be granted to the appellants then the Public Procurement and Disposal Act and the Lands Act would have to come into play first. The 1st respondent submitted that the 2nd respondent was not favoured as a result of being involved in helping acquire the title as the title came after the permission to build a bridge had been granted. In a nutshell there was no procedural impropriety, wrongful consideration or breach of natural justice to warrant the Judicial Review orders sought.

On the other hand the 2nd respondent submitted that the court, after a site visit and joint survey, established the fact that the plot was different from that which the parties transacted in year 2002 and urged this court not to depart from this finding of fact unless the High Court had made a palpable and overriding error in drawing it. It submitted that the appellants had transacted property different from that which the 'no objection' was granted. That it was admitted by the appellants that part of land which constituted the public road was reclaimed from the sea by the 1st respondent. Hence it submitted that the appellants should not be allowed to make a claim over the whole of that plot. It submitted further that the appellants misrepresented the facts as for example the 2012 decision did not grant any lease or interest to it. That their prayers were vague for reasons that they do not disclose the date or content of the decision challenged, the size of the land claimed, its location or terms of the proposed lease. The 2nd respondent further submitted that as the 2008 decision was unchallenged, the Court was bound make a determination

on that which was challenged as per **Order 53 (1)(2)** of the Civil Procedure Act. It countered all the appellants grounds of appeal adding that legitimate expectation should not be applied to unduly fetter and deny a public body the flexibility to change its policies to respond to situations. It relied on the Indian Supreme Court case **J.P Bansal v State of Rajasthan Civil App. No.5982 of 2001**. It also relied on the Supreme Court of Kenya case of **Communication Commission of Kenya v Royal Media Services Ltd & 5 Others [2014] eKLR** on the principles for the application of legitimate expectation. It added that an expectation of fair procedure without a corresponding legal right to the property cannot create legitimate expectation.

Before delving into the heat of the matter and arriving at our own conclusions by juxtaposing the evidence and the prayers sought via the Notice of Motion as against the established law, we ought to address the preliminary issues that were raised, primarily being whether or not some of the affidavits by 1st respondent and further affidavits by the appellants were competent. The appellants claimed that the 1st respondent had circumvented **section 61(1)** of the KPA Act which provides *interalia*:-

> *"1. The Board and the Managing Director may delegate to any person any of the powers vested in them under this Act and may grant to any person powers of attorney."*

That the affidavits sworn by the two employees of the 1st respondent were irregular since no evidence had been tendered to show that they had been authorized to swear them in terms aforesaid.

The trial court made a finding that such authority need not be filed with the affidavit. It can be filed later. In our view at no one time did it make a presumption that the deponents were privy to Board of Directors' meetings. We could go further and state that indeed there is no legal agreement that authority to swear an affidavit on behalf of a corporate need to be filed in court. We agree therefore with the finding of the trial court. If the aforestated provision of law was read wholesomely by the appellant it would certainly have appreciated it differently. It is clear that **section 61(1)** provides that powers of the Board and Managing Director can be delegated to any person. It further provides that the Board and Managing Director may grant to any person powers of attorney. This section does not provide that the person to whom the powers are delegated must be granted powers of attorney. Neither does its **sub-section (2)** which simply states, and without splitting any more hairs, that:

2. *Any act or decision, or notification thereof, of the Board or the Managing Director under this Act may be signified under the hand of an employee authorized for that purpose.*

In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that "*they were duly authorised*." It was then upto the appellants to demonstrate by evidence that they were not so authorised.

What about the further affidavit filed by the appellants which according to the respondents was filed without leave of court. Order 53 rule 4(2) of the Civil Procedure rules is in these terms:-

> *"The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such on further affidavits***"**

The order gives the Court wide discretion in allowing the filing of additional affidavits. However the discretion must of course not be injudiciously employed. The appellants filed the further affidavit after the pleadings had closed and directions given. How did they expect the respondents to react to them? In our view the High Court did not faulter on this in reaching its conclusion to reject the same. In any event there is a legal requirement that a party who wishes to file a further affidavit in Judicial review proceedings first to give notice of such intention, which in this case the appellants failed to do. It follows therefore that were the High Court to consider the further affidavit it would have prejudiced the

respondents who had not been accorded the opportunity to respond thereto. We are therefore in agreement with the High Court's findings on this, for a party must not be permitted to proceed with its case through ambush. It would violate the very essence of a fair trial.

We now wish to get into the substance of the appeal. The appellants claim that a beneficial interest over the plot vested in them by dint of the intention by the 1st respondent to issue it with a lease over the same. They also invoked the principle of accretion having allegedly reclaimed the land from sea. They also claim that they were neighbours to the plot and had helped to clean it up. A closer look at the 2002 correspondences shows that there were conditions that were to be fulfilled by the appellants as part of the intention to enter into a lease agreement. There is no proof that the conditions were fulfilled nor was there a formal lease agreement so as to gain recognition under the **section 3** of the Law of Contract Act as to give rise to a legal, beneficial or equitable interest. Though the appellants may have wished to demonstrate the intention by the 1st respondent to enter into a lease agreement so as to establish a vested interest, they would still have been caught up by the Statute of Limitation on contracts and found guilty of latches thereby failing to demonstrate a legally recognised interest. The appellants also relied on Board Committee Minutes to show that there was an intention to give an undertaking not to lease out the plot to other persons other than them. However, this position had not been approved by the Board of Directors of the 1st respondent so as to turn it into a final decision and neither was it ever communicated to the appellants nor did the appellants formally accept the same. Once again no legally recognised interest would arise therefrom.

The appellants claim that they had right to the plot by way of accretion and the fact that their plots were adjacent to it as proof of vested interest. There is however no proof that the accretion of all that parcel of land that was later registered as Plot No.691 and now measuring about 6.475 Ha. was as result of the undertaking by the appellants. Besides this, the conditions did not require the appellant to carry out such reclamation works. This notwithstanding, the High Court rightly held that all that parcel of land belonged to 1st respondent which had powers under section 12(2)(k) of the KPA Act, to deal with it in the manner it deemed fit. The principle of Accretion would therefore not apply in this case. In addition, the trial court did pay a visit to the site and made a finding that the area that the 2nd respondent was permitted to work on was not the same part of the plot destined for the appellants in 2002. This Court is bound by this finding of fact and should not interfere unless there are irrelevant facts considered or the relevant facts have been left out. See Peter v Sunday Post Ltd [1958] EA 424. This Court also had an opportunity to visit the site. However, it left there feeling that the exercise was futile and not worth the effort since there were deliberate efforts to mislead it by the parties. Each party and their advocates were out to hoodwink the court by stating and pointing out the landmass that supported their case. We would prefer to go by the position of the trial court since during the visit it was accompanied by professionals alongside the parties unlike us who had only the presence of the parties and their respective advocates.

Did the appellants have legitimate expectation over the plot so as to post a legally recognisable right? We propose to adopt the same definition of legitimate expectation the appellants relied on as enunciated in the case of **Abdulwaheed Sheikh & Anor v Commissioner of Lands & 3 Others [2012] eKLR** that:

> "*The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced.....An expectation could be based on an express promise or representation or by established past action or settled conduct.*"

The principles for the application of the principle were however enunciated in the case of **Communication Commission of Kenya v Royal Media Services Ltd & 5 Others [2014] eKLR** thus:-

> "*there must be clear and unambigous promise given by a public authority, the expectation must be clear, the representation must be one which it was competent and lawful for the decision maker to make and there cannot be a legitimate expectation against clear provisions of the law or the*

Constitution"

The appellants claimed that they had come to believe that they were entitled to an interest or lease to the plot as a result of: helping to clean it up having formerly been a dumpsite, the alleged civil and reclamation works they carried out thereon, the express representation that a lease would be granted to them, the alleged undertaking that it would not be granted to another party, the plot was adjacent to their plots and that, the principle of accretion operated in their favour. It is was however not demonstrated that the appellants fulfilled the conditions imposed in the alleged express representation, or that they had permission to carry out reclamation works leading to the increase in size of the plot nor is there proof of the undertaking. The initial site visit and subsequently ours revealed that the plot had increased in size due to reclamation works by the 1st respondent and that the part demarcated for a bridge landing was not the same as the portion negotiated in year 2002. The appellants are simply crying wolf. Besides, they had taken far too long to react on their perceived right based on the 2002 negotiations to declare that they had legitimate expectation. We would therefore agree with the finding of the High Court that legitimate expectation was not established. On the whole however, this was a Judicial Review application for orders of mandamus and prohibition. There are settled principles for the grant or refusal of such orders. We doubt whether legitimate expectation is one of them in this country. It may be so in other jurisdiction such as England where Judicial Review Proceedings have evolved over time. We are still steeped with Judicial Review proceedings of Yore and as understood in 1956 when the Law Reform Act came into force. The considerations then and now are that the decision sought to be impugned was made without or in excess of Jurisdiction, breach of rules of natural justice or the decision was blatantly illegal. Where is the room for legitimate expectation in all this? We certainly do not see any. Further and as correctly submitted by the respondents' legitimate expectation doctrine cannot be turned into a tool for perpetuating or justifying an illegality. Clearly granting the orders sought would have perpetuated the violation of other statutes.

The appellants' prayers were for orders of Prohibition and mandamus. This Court had occasion to make a pronouncement on the efficacy and scope of the orders of **mandamus , prohibition** and **certiorari** in ***Kenya National Examination Council v Republic*** *exparte* ***Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR*** *when it held in respect of prohibition thus:-*

> *"These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ."*

What then were the Appellants seeking to prevent from taking place? They sought prohibition to prohibit the granting of a lease or interest in the plot to any persons other than themselves based on the alleged intention by the 1st respondent to grant it to another party, the 2nd respondent. They apparently drew this intention from the 1st respondent's May 2012 Minutes of the Board meeting. Those minutes indicate that *"the strip of land adjacent to Kapenguria is not available as the same* **had been allocated** *to M/s Multiple ICD (Kenya) Ltd for the purpose of constructing a bridge/railway to the port."* and further one of the recommendation was that the *"Request for construction of bridge access linking the two plots was declined on grounds that another firm, M/s Multiple ICD* **had been granted permission** *to do a public road /bridge in the same area* (own emphasis). Evidence shows that the 2nd respondent was granted a 'no-objection' permission to construct a public bridge/road for the public and for its non-exclusive use on that strip of land. It is then obvious that some form of interest in the nature of a wayleave or non-exclusive easement in the plot had already been granted. An easement is defined under the Black's Law Dictionary 9th ed as "*an interest in land owned by another person , consisting in the right to use or control the land ….for a specific purpose...it does not give the holder the right to possess ...the land*." It would therefore be the case of spilt milk or water under the bridge to attempt to stop this. Prohibition cannot be invoked to stop that which has already been done. It is trite law that an order of prohibition looks to the future and it cannot be employed to prevent that which has already taken place. This statement receives support from

the case of Kenya National Examinations Council (supra) where it was again held:-

> *"….. prohibition looks to the future.... However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision."*

Again in the case of **Municipal Council of Mombasa v Republic & another [2002] eKLR** it was held that:

> *"by and large an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision- maker, or where the decision maker has evinced an intention to act contrary to law."*

It has been said that Prohibition can be granted to prevent the making of a contemplated decision see again ***Kenya National Examination Council v Republic* (supra).** However, the Minutes do not indicate that the 1st respondent was contemplating to grant a lease or interest to the 2nd respondent. That was already a done deal. We would then say that the appellants came to Court long after the horse had bolted.

The appellants did not seek an order for certiorari to quash the decision of granting the permission to the 2nd respondent to construct the bridge and/or road and if the High Court was to issue the prohibitory order sought, this initial decision would still remain. It is a principle of justice that a court will not issue orders in vain. It would be in vain to grant the prohibitory order in the circumstances when the other decision is left intact. That is why we agree with the High Court that in the absence of a prayer of certiorari to quash that decision, the Court would be engaging in a futile exercise in granting the orders of Prohibition and mandamus in the circumstances.

What of the Order for mandamus? The general rule is that the issuance of *mandamus is* limited to where there is specific legal right and there is no specific legal remedy for enforcing it or the alternative legal remedy is less convenient, beneficial and effectual. See **Halsbury Laws of England 4th ed. Vol 1. Para 89.** Its scope against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act. ***See Manyasi v Gicheru & 3 others, [2009] KLR 687***. However if the duty is discretionary as to its implementation, then mandamus cannot dictate the specific way the discretion will be exercised. See **Halsbury's Law Of England, 4th ed Vol. 1** in which it is stated that "*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***".** The 1st respondent had discretion to refuse or grant permission for the construction of the bridge or even to lease out the plot, this the court cannot dictate upon by issuing the orders sought. The applicant in addition has to show that it has a legal right to the performance of the legal duty by the party against whom it issues. Did the appellant have a specific right over the plot? As before stated, it was demonstrated that the plot grew in size and that the portion on which the bridge would land was not at the same place that the appellants had been utilizing. Further, they had not established a legally recognised interest and finally, their claim of legitimate expectation had not borne any fruit. It can be stated without doubt that the appellants had no specific right in the circumstances enforceable by orders of prohibition and mandamus. Did the 1st respondent have a public duty to grant the appellants a lease or interest over the plot? There is no public duty imposed on it by statute. If anything it is given discretionary powers under its **section 12(2)(k)** to deal with its property as it deems it fit. The Court cannot through judicial review remedies be used to dictate to a statutory body how to implement its discretion.

Did the 1st respondent act in excess of or without jurisdiction or *in violation of the rules of natural justice* in refusing to grant the appellants permission to construct a bridge?

Section 12 (2)(a) KPA Act gives the 1st respondent all powers

> "*necessary or advantageous and proper for the purposes of the Authority and in particular, without prejudice to the generality of the foregoing, shall include power" to construct any wharf, pier, landing stage, road, bridge, building or any other necessary or desirable works required for the purposes of the Authority.*"(*own emphasis*).

It therefore had jurisdiction to permit or refuse the construction of a bridge. Further, the Minutes of 2012 indicate that 1st respondent Board of Directors had recommended that the "*Request for construction of bridge ... was to be reviewed, if applicant was not satisfied as it was deemed to be a waste of resources." A*t the end of the Minutes at the heading "*Action Required*" it is indicated that "*The Board is requested to deliberate on the requests by TAL Group through its letter of 20th July, 2011, and if it deems it fit approve as recommended*." This was the opportunity to be heard though we believe the Appellants jumped the gun when they rushed to Court before being heard.

The appellants also complain that the decision made was tainted with procedural impropriety, bias and was against rules of natural justice. Further it was *ultra vires* the Constitution, and the law in particular the Public Procurement and Disposal Act and the Land Act. First and foremost the appellants were inviting the Court to make a finding on a decision made in year 2008 which was not the subject of the prayers sought. Secondly, the provisions of the Constitution, and the Land Act were not in force at the time of making that decision. Finally, though the Public Procurement and Disposal Act was in force in year 2008, they are indirectly inviting the court to consider the merits of the refusal decision yet judicial review only concerns itself with the process of reaching a decision and not its merits.

It should also be noted, that judicial review remedies cannot be used to assert private law, the very issues the appellants are attempting to do by trying to force a crystalisation of the 2002 negotiations into a formal lease agreement. In **Commissioner of Lands v Kunste Hotel Limite [1997] eKLR** this Court held that:

> "*But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected"*

Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and **order 53** of the Civil Procedure Rules. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under **Article 23** of the Constitution that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. One cannot come to Court vide Judicial review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.

We further take note of the final directions of the High Court when it stated:-

> "*The private nature of the transaction the subject of these proceedings takes away any justification for the grant of the public law remedies of Prohibition and Mandamus. See.* ***Mureithi and 2 Others. v. AG and 5 Others.*** *(2006)1 KLR 443. However, as a problem-solving court, consistent with Article 159 of the Constitution principle to do justice in every case before it, this court, having visited the locus on an application for contempt of court against the respondent, and having noted that the ex-parte applicant and the interested party have each constructed own road accesses obviously at considerable cost both poised to land on property-the respondent should consider granting the ex-parte applicant, upon terms to be agreed, a way-leave on the suit property in similar fashion as with the Interested Party."*

The court had sat in its Judicial Review Jurisdiction and the litigants came seeking specific prayers which

it rejected. It cannot therefore approbate and reprobate by issuing the aforementioned directions which are gratuitous in nature and incapable of enforcement anyway. These directions are therefore set aside.

It is for all these reasons that the appeal must fail. It is dismissed with costs to the respondents.

Dated and delivered Mombasa this 12th day of March, 2015.

H. M. OKWENGU

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR