IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KOOME & MWERA, JJ.A.

CIVIL APPEAL NO. 216 OF 2009

BETWEEN

RANSA COMPANY LTD.....APPELLANT

AND

MANCA FRANCESCO.……..…….…...……1ST RESPONDENT

THE REGISTRAR OF TITLES, MOMBASA…….…..……2ND RESPONDENT

THE COMMISSIONER OF LANDS…….…….3RD RESPONDENT

(An appeal from the Ruling/Order of the High Court of Kenya at Nairobi (Wendoh, J) delivered on 23rd September 2008

in

H. C. Misc. Appl. No. 7 of 2007)

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JUDGMENT OF KARANJA, JA.

The parties in this appeal namely Ransa **Company Ltd** (appellant) and **Manca Francesco** (1st respondent), **Registrar of Titles, Mombasa**, (2nd respondent) and **The Commissioner of Lands** (3rd respondent) were engaged in litigation in several matters before the High Court sitting in Mombasa and Malindi. Such litigation included Malindi HCCC No. 36 of 2004, Malindi HCCC No. 10 of 2005, and HC Misc. Application No. 924 of 2006.

All these matters revolved around **Land ParcelNo. 671 Watamu CR No. 23596/1**, and **Plot No. Kilifi/Jimba/439.**

I hold the position that for purposes of this judgment, it will not be necessary for me to go into the details of the said litigation except as the same may impact on HC Misc. Application No. 924 of 2006, which is the subject of this appeal. It is important to clarify at this early stage that Misc. Application No. 924 of 2006, was originally filed in Malindi but later transferred to Nairobi where it was renamed HC Misc. Application No. 7 of 2007. I shall therefore use that application as my starting point for judgment.

The said application was a Judicial Review Notice of Motion filed under **Order LIII Rules 1, 2,** and **3 of the Civil Procedure Rules** and **Sections 8** and **9 of the Law Reform Act**. In the application, Manca Francesco (1st respondent) who was the ex-parte applicant sought orders of mandamus and prohibition directed against the 2nd and 3rd respondents herein in respect of the land parcels mentioned earlier on.

The application was dated 4th October, 2006. From the record of appeal, the application was on 12th October 2006 fixed for hearing on 19th October, 2006 with an order that the usual hearing notices would issue. On 19th October 2006, the record shows that the application was stood over to 8thNovember,2006 on the application of one Mr. Mutungi who appeared for the respondent.

The same record shows that on 31st October 2006, the firm of Kalama Katana & Co. Advocates representing the exparte applicant, and Martin Mutungi appearing for the respondent, recorded a consent which was sent to the Deputy Registrar High Court of Kenya, Mombasa for endorsement in the Court file in the usual manner.

I replicate here the terms of the said consent:-

"BY CONSENT

The notice of Motion Application dated 19th October 2006 be and is hereby allowed in

the following terms:-

(a)THAT orders of mandamusdo issue directing the respondents eitherby themselves, their servants and/or agents to revoke and cancel all

entries and record relating to grant No. CR. No. 23596/1 in respect of Plot NO. 671 Watamu.

(b) THAT an Order of Prohibition do issue prohibiting the respondents, their servants and/or agents from henceforth registering any dealings whatsoever in connection with Plot No. 671 Watamu CR No. 23596/1 which could in any manner prejudice the applicant's proprietorship right to Plot No. Kilifi/Jimba/439.

(c) THAT there be no orders as to costs."

The said consent was presented to Court and was duly recorded as part of the proceedings. The same was adopted later on 8th November, 2006 before Maraga J *(as hethen was*) in the presence of counsel for the appellant, the respondent and the interested party respectively.

I do not wish to delve into the contents of the consent now being impugned,for reasons that will come out clearly later in this judgment. The effect of the said consent appears to have determined ownership of the parcels of land in question and consequently had serious ramifications on the other matters that were still pending in court.

Aggrieved by the said "consent" order and the subsequent orders emanating therefrom, the appellant herein, who was the interested party in JR Misc. Application No. 924 of 2006 filed the notice of motion dated 13th November, 2006 under what was pronounced to be *"the inherent jurisdiction of the Honourable Court"*.

There were no specific provisions of law cited to give an indication as to where "inherent jurisdiction" was being drawn from. The application was nonetheless filed in Misc. Application No. 924 of 2006 which was later transferred to Nairobi and christened Nairobi Misc. Application No. 7 of 2007. This is the

application that was heard by Wendo J who rendered the ruling dated 23rd September, 2008 which is now challenged before this Court.

Before Wendo J, Mr. Sumba who appeared for the applicant challenged the validity of the consent order which had been applied to determine JR No. 924 of 2006. His argument was that the same was not a consent order as his client, the appellant herein, was not involved in the 'consent' yet his proprietary rights had been affected.

As would be expected, there were counter arguments by counsel for the exparte applicant and the respondent who maintained that the appellant herein was represented by counsel when the consent was adopted by the court and no objections had been raised.

After hearing the parties the learned Judge declined to determine the merits of the matter. She found, and rightly so in my view, that the remedy sought from the Court was one for review or setting aside of the "consent order", on grounds *inter alia* of fraud and misrepresentation.

After analyzing the relevant case law and statutes, the Judge came to the conclusion that a court sitting on Judicial Review had no jurisdiction to either review or set aside that consent order. She therefore, ruled that her hands were tied and advised the appellant to move to this Court on appeal against the order of the Court (Maraga, J) adopting the award in question. Instead of going on appeal as advised, the appellant opted to challenge that decision before this Court by way of this appeal.

I take the view that the learned Judge was right in her decision. Jurisdiction in Judicial Review matters is like a straight jacket. It has very limited scope and application. It is not amenable to expansion. It is a *sui generis* jurisdiction, which, unlike civil or even criminal jurisdiction, does not accord a Judge discretion to invoke inherent jurisdiction. That, in my view, is exactly what the learned Judge was saying. The appellant had an opportunity to appeal the Ruling adopting the impugned consent order. He chose not to do so. He also chose to ignore the magnanimous advice of the Court.

Section 8(3) and **5 of the Law Reform Act** is clear and bears no repeating. I hold firstly, that a court sitting on Judicial Review is dispossessed of inherent jurisdiction and must operate within the confines of **Section 8** and **9 of the Law Reform Act** and the then **Order 53 of the Civil Procedure Rules.**

Second, as this Court has held in a litany of cases, judicial review basically deals with the process used to arrive at a decision and not with the merits of the impugned decision.

In this case, the appellant's grievance was that the consent was fraudulent. The law on proving fraud is clear. Particulars of the fraud would need to be pleaded and proved. How was this going to be possible in a Judicial Review proceeding where no *viva voce* evidence would be taken?

Third, as rightly observed by the learned Judge, orders of judicial review come into play when the order sought to be quashed is made by a public officer acting in that capacity. The said consent order was entered into by the parties *qua parties* through their respective advocates.

An order of certiorari cannot therefore be used to quash it. It needed to be set aside by a court of competent jurisdiction after fraud was proved.

I am not in the least saying that the appellant did not have a valid complaint. On the contrary, he had a valid complaint but he should have ventilated it before a court with unfettered jurisdiction to hear him and determine the matter on its merit.

I hold the view, that this is not an issue of procedural technicality which is easily curable. Nay, it is, in my view a jurisdictional issue which cannot be wished away. Holding otherwise would in my view amount to diverting from the well charted course that stipulates that particulars of fraud must be pleaded and proved. It would also amount to imposing a purely public law remedy to the realm of private law. I need not say more, except that I do not fault the learned Judge for her findings and decision to dismiss the application.

I would therefore dismiss this appeal with no order as to costs as the respondents, in spite of having been duly served, failed to attend Court.

As Mwera JA agrees, this appeal is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 11th day of December, 2015.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

DISSENTING JUDGMENT OF KOOME JA.

In September, 2006, the *exparte* applicant Manca Francesco (hereinafter referred to as Manca) filed suit by way of Judicial Review in Misc. Civil Application No. 924 of 2006 in the High Court, Mombasa. The aforesaid application was seeking an order of mandamus directed to the Registrar of titles Mombasa, the Commissioner of Lands and Ransa Company Ltd (appellant) was named as an interested party. The order sought specifically was directing the two respondents in the application to revoke and cancel all entries and records relating to Plot No. 671 Watamu and an order prohibiting the appellant from registering any dealings in connection with Plot No. 671 Watamu which would otherwise prejudice Manca's property rights to Plot No. Kilifi/Jimba/439.

For avoidance of doubt, Plot No. 671 Watamu was registered in the name of the Ransa Company ltd (the interested party in the Judicial Review Suit). Manca Francisco is the registered proprietor of Plot No. Kilifi/Jimba/439 which on the ground appeared to exists on the same piece of land as plot No. 671 Watamu registered in the name of appellant. It is evident from the record that there was a long standing dispute over this parcel of land as the appellant filed another suit being HCCC No. 36 of 2004, in Malindi against the *ex parte* applicant. The appellant was seeking a declaratory order that plot No. 671 Watamu was its property and the developments and bill boards placed by **Manca** be removed among other prayers for damages and costs. That suit was consolidated with Malindi HCCC No. 10 of 2005.

While the aforesaid suit was still pending in the High Court, Malindi over the same subject suit property involving the ownership dispute between Ransa and Manca, Manca filed another suit before the High Court in Mombasa by way of Judicial Review. He claimed that he was the registered owner of Plot No. Kilifi/Jimba/429 comprising of 1.6 hectares with effect from 19th August, 2003, which he bought from Habibu Abdalla Juma for Kshs. 700,000/=. He exhibited the transfer executed by Habibu Abdalla Juma on 19th August 2003 the title given to him by the District Land Registrar, Malindi on 19th August 2003 among other documents.

c. Manca, further disclosed that the appellant had a grant of lease from the Government for plot No. 671 Watamu which was allegedly overlapping and co-existing on his plot Kilifi/Jimba/439. He claimed that the Registrar of Titles and the Commissioner of Lands had confirmed that the piece of land registered in the name of the appellant did not exist on the ground and that it was created by fraudulent and erroneous registration. Marco exhibited a grant of lease from the Government in the name of Ransa Company Ltd over Plot No. 671 Watamu comprising of 3.784 hectares for a period of 99 years from 1st November 1991. Manca also annexed various correspondences to show the status of Plot No. Watamu 671. There was a letter from J.M. Okungu for Commissioner

of Lands dated 2nd October, 2004 to the effect that Plot No. 671 Watamu should not have been registered at Mombasa registry; that it was not surveyed and that there were no surveyors records over it. There is another letter dated 8th September, 2006 from Chivatsi J.N. Provincial Surveyor Coast Province that stated plot No. Watamu/671 did not exist.

d. Luigi Ghislotti, a director of the appellant filed a replying affidavit in which he contested all the above allegations; in particular he denied the authenticity of the alleged letters that were from the lands office. He contended that the Registrarof title Mombasa, the Chief Land Registrar, the Land Registrar, Kilifi, the Land Registrar, Mombasa and the Settlement Trustee wrongfully and unlawfully excised a section of the appellant's plot No. 671 Watamu and a title thereto named as Kilifi/Jimba/439 measuring 1.21 hectares was issued; that Kilifi/Jimba/439 does not exist on the ground as the same was created and superimposed on plot No. 671 Watamu. He claimed that some of the letters relied on by Manca from Lands Ministry Officers are forgeries. He singled out in particular, a letter dated 6th October 2006, by JM Okungu, the Commissioner of Lands in which she stated that her letter of 12th October 2004, annexed to the pleadings by Manca was a forgery and confirming that the appellant's title was valid.

The appellant further alluded to two cases that were at the time pending before the High Court Malindi, being HCC NO 10 0F 2005 and HCC NO 36 OF 2004 which were consolidated. The appellant further asserted that those two suits which were subsequently consolidated, the claim was for the same parcel of land No 671 Watamu and title no Kilifi/ Jimba 439 that was allegedly hived from plot no 671 Watamu. Pending the hearing and determination of those suits there was an interim order of injunction issued on 24th September 2004, in favour of the appellant, restraining the respondents or their agents from interfering with the appellant's ownership of plot no 671 Watamu until the suits were heard and determined.

It is against the above background that a Judicial Review application was filed in a different court, the appellant who was the interested party had filed its replying affidavit opposing the same. That notwithstanding, a consent letter dated 31st October 2006, signed by M/S Kalama Katana & Co. Advocates for Manca and Martin Mutungi – litigation counsel for the Attorney General representing the two respondents was filed in court. The said consent letter was not signed by the advocate for the appellant or the appellant. The consent was to the effect that orders of mandamus and prohibition be granted as stated in the letter. This is the extracted order of consent;-

"31/10/2006

Upon reading the letter dated 31st October 2006 from M/S Galama Gatana & Co. Advocate for Exparte application and Martin Mutungi counsel for the respondent it is hereby ordered by consent:

That notice of motion application dated 19th October 2006 be allowed

d. **That orders of mandamus do issue directing the respondents either by themselves their servants and/or agents to invoke and cancel all entries and records relating to grants No. 23596/1 in respect to plot No. 671 Watamu.**

e. **That an order prohibition do issue prohibiting the respondents and their servants and/or agents from henceforth registering any dealings whatever in connection with Plot No. 671 Watamu CR No. 23596/1 which could in any manner prejudice the applicants proprietorship right to plot No. Kilifi/Jimba/439.** 5

c. **That there be no orders as to costs.**

SIGNED

DEPUTY REGISTRAR."

This consent order was issued on 31st October, 2006 by the Deputy Registrar. However, the extracted order does not show the name of the judge who granted it on that day. The extracted order bears a signature of a Deputy Registrar but it does not also indicate the name of the said Deputy Registrar who recorded it. On 13th November, 2006, the appellant filed an application in the High Court seeking inter alia, review and or setting aside of the consent order between Manca and the respondent issued on 31st October 2006. The application was supported by the grounds stated in the body thereto and elaborated in greater detail by the matters deposed to in the supporting affidavits by Luingi Ghisloti, Kinyua Kamundi, and Josephine Musembi. Briefly summarized, it was the appellant's contention that the consent order was fraudulently recorded to deny it a defence to the judicial review application. It was further alleged that the Advocates for Manca acted in collusion with the state counsel from the Attorney General's office to perpetrate the fraud against the appellant; the application seeking for leave to file a judicial review application was also faulted as it was not filed in accordance with the provisions of Order LIII Rules 1(3) of the Civil Procedure Rules.

The aforesaid application by the appellant fell for hearing before Wendo, J and by a ruling delivered on 23rd September 2008, that application was dismissed on the grounds that the judge had no jurisdiction to review the consent order. This is what the learned judge stated in a pertinent part of her ruling;-

> **"In this case, my brother Justice Maraga accepted the consent filed by the applicant and respondent in the presence of the counsel for interested party. It is an order of that Court. If this Court were to review the order, it would be sitting on appeal on the judge's order. The Judicial Review Jurisdiction is supervisory in nature not appellate and this Court cannot supervise another judge whose jurisdiction is concurrent. The interested party is aggrieved by the order of the High Court and his redress lies with the Court of**
>
> **Appeal."**

In reaching that decision, the learned judge relied heavily on the case of **Kuria Mbae v. The Land Adjudication Officer Chuka** HC Misc. Appl. No. 257 of

1987 where Mbito and Mango JJ held:-

> **"In our view, therefore, it would appear that this Court has no jurisdiction to say, recall review or set aside or quash an order of *certiorari* once it has been made…."**

Aggrieved by that ruling, the appellant filed a Notice of Appeal and an application for stay of execution under **Rules (5) (2) (b)** of this Court Rules. The application under **Rule 5 (2) (b)** was granted by a Bench of this Court differently constituted in the following terms:

> **"However, in the exercise of our inherent jurisdiction under Rule 1 (2) of the Court of Appeal Rules, we order that the *status quo* in respect of the register of Plot No. 671 Watamu prevailing before the orders of mandamus and prohibition were given on 31st October, 2008 should be preserved and that no alteration of the register of the suit land shall be made until the hearing and determination of the intended appeal."**

The instant appeal was filed on 22nd September, 2009. It is predicated on some 14 grounds of appeal which were argued together by Mr. Nicholas Sumba learned counsel for the appellant. The respondents, namely Manca Francesco, the Registrar of Titles Mombasa and Commissioner of Lands did not attend Court during the hearing of the appeal, despite the fact that they were duly served with a hearing notice. Mr. Sumba submitted that the learned judge erred by concluding that she had no jurisdiction to review the consent order despite the glaring irregularity in the manner in which the order was recorded that clearly pointed to fraud and collision on the part of counsel for **Mansa** and the state counsel. Moreover, the consent was invalid as it was not signed by counsel for the appellant. The appellant was an interested party in the said Judicial Review application being the registered proprietor of plot No. 671 Watamu.

Further counsel argued that the effect of the consent order was revocation of the appellant's title before he was heard; the judge failed to consider the substantive injustice and prejudice the consent caused the appellant. The judge also failed to take into consideration the fact that there were two other suits pending before the High Court in Malindi before the Judicial Review matter was filed in a different court in an attempt by the respondents to steal a match against the appellant. The suits before the High court in Malindi were between the same parties over the same subject matter that is, Plot No. Watamu 671 and Kilifi/Jimba 439. The suit was finally heard and determined in favour of the appellant. According to counsel for the appellant, the judge had a duty to review and set aside the consent order which was obtained irregularly through fraud and collusion. A court of law cannot down its tools on the face of injustice. There was a glaring fraud committed: the extracted order was also not adopted by a judge but by the Deputy Registrar, therefore the learned judge erred when she held that she could not set aside the orders of Maraga, J. (as he then was) which was not born from the records. Counsel urged us to allow the appeal

As stated above, this appeal was not opposed; the three respondents did not attend court despite having been served with the hearing notice. With the background information as summarized herein before, I can now briefly deal with the issues in dispute which I have distilled as follows;-

1. Can a consent order entered by counsel for an ex *parte* applicant and a state counsel representing respondents in a judicial review matter, without the interested party be a valid court order?

2. Did the Deputy Registrar have jurisdiction to enter a formal consent that settled a judicial Review matter which resulted in the issuance of orders of mandamus and prohibition?

3. Does the court have jurisdiction to grant orders of mandamus and prohibition by consent?

It is common ground that the consent was entered into by Kalama Katana Advocate acting for the *ex parte* applicant, **Manca** and Martin Mutungi state counsel representing the respondents. The orders were to the effect that the title in respect of plot No. 671 Watamu be revoked. It is also common ground that the appellant was not only the registered proprietor of the said plot but was also in its possession. That consent order thus affected the appellant and it was entered into without his knowledge and participation. It is a fundamental right for a party with a dispute before court to be heard before orders that affect him or her made. This Court observed in the case of; - **Richard Ncharpi Leiyagu V. Independent Electoral and Boundaries Commission and 20 others** CA No. 18 of 2013 at Nyeri:

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

In my view, it was un procedural, irregular and unlawful to exclude the appellant who was named as an interested party in the Judicial Review proceedings as a party to the consent. The appellant had filed a lengthy replying affidavit in opposition of the orders sought by the *ex parte* applicant. The judge overlooked the fact that no consent can possibly be entered into by a claimant as happened in the instant case which purports to take away the rights of a defendant without his knowledge, concurrence or hearing. The consent order had the effect of revoking the appellants' title and ownership of the property the subject matter of the litigation without giving the parties a hearing or without first obtaining the express authority of the appellant or that of his advocate. See the case of **Kasmit Wesonga Ongoma & Another Vs. Wanga** [**1987] eKLR ,** this Court differently constituted said:-

> **"A consent judgment is a judgment the terms of which settled and agreed to by the parties to the action."**

In the premises, the consent order did not include the appellant, and in my view the whole process of how it was entered smacks of collusion or fraud which distinguishes this case from that of;- **Flora Wasike vs.**

Desmond Wambeolla

[1980] I KAR where it was held:-

> **"A consent judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out."**

The appellant was not a party to the consent despite the fact that he was a party to the suit. The judge also failed to consider the orders of prohibition and mandamus are within the public law realm directed to an inferior tribunal or a public body as the case may be, and in my view they cannot be issued by consent of parties; least of all without the consent of the interested party against whom they are directed. As I understand these orders, an order of prohibition is an order by the High Court directed at an inferior tribunal, public authority forbidding that body from acting in excess of its jurisdiction or contrary to law; whereas an order of mandamus is an order in form of a command directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty. See **HALBURY's LAW OF ENGLAND 4TH EDITION VOL. 1 paragraph 119.** By the very nature of these orders they cannot issue by consent.

The next issue is whether the Deputy Registrar had jurisdiction to enter a consent order that determined a Judicial Review matter and granted substantive orders of mandamus and prohibition. First of all, as posited hereinbefore, Judicial Review proceedings are proceedings *sui generis*, the actual litigants is the *ex parte* applicant and the interested party. The role of the Attorney-General is formal as he represents the Republic which lends its name to a litigant who wants to force a public body to perform a function mandated by law. Although parties are encouraged to resolve matters outside the court, I am afraid in so doing, the principles of law and the procedures that guide the court, such as jurisdiction, fair hearing among others must be brought to bear. If the Deputy Registrar was exercising powers under Order 49 of the Civil Procedure Rules by recording a consent by the parties, he or she had a duty to ensure the interested party who was named in the judicial review matter that was being settled by the consent order was first made aware of the consent order before adopting it as a court order.

Apart from the fact that there was no participation of the interested party and there was no judicial determination of the dispute, the orders were directed to Government Officers to cancel title and to prohibit them from registering any dealings in connection with plot No. 671 Watamu which could in any manner prejudice the proprietorship of plot No. Kilifi/Jimba/439. These are clearly orders directed against not only the appellant but also Government Officers. Order 49 (4) of the Civil procedure Rules provides that;-

> **"Notwithstanding anything contained in rule 2, in any proceedings against the Government no judgment for the plaintiff shall be entered in default of appearance or pleading without the leave of the court, and any application for such leave shall be served by notice of motion served not less than seven days before the return day"**

I have gone through the records herein and did not see any defence or pleading filed on behalf of the Government which was the respondent. This therefore fortifies my conclusion that, the state counsel could not enter into consent order that became a judgment or order of court binding upon the Government Officials without first obtaining the leave of the court.

The learned judge declined to review the consent order when she stated asfollows:-

> **"In this case, my brother Justice Maraga accepted the consent filed by the applicant and respondent in the presence of counsel for the interested party. It is an order of that court. If this court were to review that order, it would be sitting on appeal of that judge's order. The Judicial Review Jurisdiction is supervisory in nature not appellate and this court cannot supervise another judge whose jurisdiction is concurrent."**

I recognize the application that was before the learned judge was not elegantly drawn. It was brought under the inherent jurisdiction of the court. However the underlying issue was that the learned judge misapprehended the fact that the application was not seeking to review the decision making authority or jurisdiction of a judge in a judicial review matter. A judicial review process was hijacked by an illegal process that terminated it, culminating with an illegal consent. Had the learned judge appreciated that, there was no judicial determination of the judicial review application as **Maraga J** did not determine the issues that were in dispute, perhaps the judge would have come to a different conclusion as I have, that in law, there is no wrong without a remedy and equity follows the law. Moreover, under the overriding objective as stipulated under Section 1 (A) and (B) of the Civil Procedure Act, pendulums swung in that courts have shifted to focus on substantive justice and are no longer beholden to matters of procedural technicalities. The overriding objective principle confers upon courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (See the case of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs.**

Orient Commercial Bank Ltd. Civil Application No. Nai 302 of 2008 (UR 199/2008). The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it.

The application before the judge was simply seeking a review to correct the record where a null and void consent order amounting to an illegality existed. The record of proceedings show the consent order was recorded on 31st October 2006, by the Deputy Registrar. This is the verbatim record of proceedings:

> **"19/10/2006**
>
> **Coram: Before Justice Sergon, J.**
>
> **Akanga holding brief for Galama for Application Mutungi for respondent**
>
> **CC Kazungu**
>
> **MUTUNGI**
>
> **We pray for the matter to be adjourned for a mention on 8/11/2006**
>
> **AKANGA**
>
> **That is okay**
>
> **COURT**
>
> **Mention on 8/11/2006**
>
> **J.K. SERGON**
>
> **JUDGE**
>
> **8/11/2006**
>
> **Coram: Before Hon. Justice Maraga, J Akanga holding brief Kalama for applicant Umara for Mutungi for respondent Musembi for Ole Kina for interested party Court Clerk Mitoto**
>
> **COURT**
>
> **By consent orders in terms of the letter of consent dated 31/10/2006.**

MARAGA

JUDGE."

It is necessary to point out that there was no court order that is dated 8th November, 2006 that could have emanated from Maraga J., when he handled the matter. The consent order that is on record is the one recorded by the Deputy Registrar on 31st October 2006. As aforesaid, I am not also persuaded that a Deputy Registrar has jurisdiction to enter a consent order settling a suit by way of judicial review, much the same way that parties cannot determine judicial review matters by consent. The jurisdiction to determine judicial review is the preserve of the High Court. See **Section 8 (2)** of the law Reform Act which provides:

"8 (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or *certiorari* the High Court shall have power to make a like order."

The issue of whether the consent orders were issued by the Deputy Registrar or by the judge were also considered by this Court in its ruling of 19th December 2008, on an application for stay of execution under **Rule 5 (2)(b)** by stating as follows;-

> "**It is apparent that the orders in the consent letter dated 31st October, 2008 were recorded by the Deputy Registrar on the same day. That is what the extracted orders show. The ruling of the superior court show that the respective counsel for the parties appeared before Maraga J. on 8th November, 2008. It seems, however, that the appearance before Maraga J. was subsequent to the recording and granting for consent orders of mandamus and prohibition by the Deputy registrar. But even assuming that the consent orders were recorded by Maraga J, did he have jurisdiction to grant orders of mandamus and prohibition by consent? And if the orders of mandamus and prohibition were not made after a judicial determination but by consent, are they a nullity, and if so, was the decision of the court had no jurisdiction to review and set aside the orders correct? The factual and legal issues that the applicant intends to raise in the appeal, are indeed weighty and merit consideration by the court."**

I think I have said enough to demonstrate this appeal has merit. I would allow the appeal which I hereby do with the result that the order of consent issued on 31st October 2006 is hereby set aside. That leaves the Judicial Review matter that was purportedly settled by the consent pending. As the respondents did not attend court, there will be no orders to costs. As Karanja and Mwera JJ.A have arrived at a majority decision that the appeal be dismissed, the orders formulated by Karanja, JA shall carry the day as the orders of the Court.

Dated and delivered at Nairobi this 11th day of December, 2015.

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF MWERA, J.A.

I have had the honour and advantage of reading the draft judgments of my senior sisters ***Karanja, Koome, JJA***, who have set out the history and facts giving rise to this appeal. Therefore, I do not repeat by reproducing them here save to note that the High Court's (***Wendoh, J.***) ruling delivered on 23rd September, 2008 after hearing the notice of mention dated 13th November, 2006, gave rise to this appeal. It was an application for judicial review said to have been brought:

"Under the inherent jurisdiction of the Honourable Court," by one ***Luigi Ghislotti***, who, though stated as the plaintiff in the motion, described himself in the "*supporting affidavit*", sworn on 13th November, 2006 as a director of the interested party in the application, Ransa Company Ltd. The application sought judicial review orders of *mandamus* and *prohibition* as provided for under the then ***Order LIII rr.1, 2, 3, 4 of Civil Procedure Rules***

and ***sections 8, 9 of the Law Reform Act (Cap.26) Laws of Kenya***. The subject matter revolved around parcels of land KILIFI/JIMBA/439 and PLOT No.671 WATAMU.

The main prayers in the motion stated:

> ***"(c) That the Honourable Court be pleased to review and set aside the consent order between the ex parte applicant and the Respondent issued on the 31st of October 2006.***
>
> e. ***The Ex parte applicants' Notice of Motion as well as the application for leave be struck out***
>
> f. ***The costs of and incidental to this application be provided for."***

It was stated in the grounds in the body of the motion, *inter alia*, that the interested party/appellant had a good defence to the said applicant's notice of motion, a judicial review application dated 4th October, 2006 which, to the interested party, was incurably defective. It was added in the grounds that the consent orders sought to be reviewed was a fraud as against the interested party/appellant, therefore a nullity. Thus unless the orders sought were granted, the appellant's title to the property in dispute, stood to be cancelled to its loss and damage because the consent letter dated 31st October, 2006 which was the basis of the consent orders was:

> ***"…an abuse of the process of the Honourable Court. The***
>
> ***Honourable Court can only salvage its own reputation by reviewing or setting aside the consent orders between the ex parte applicant and the respondent…"*** (underlining supplied.)

So the High Court was then asked to consider that:

> ***"9. It is in the interest of justice that the said orders are reviewed and set aside."*** (underlining supplied)

As stated earlier and as can be gleaned from the draft judgments of my learned sisters, ***Luigi Ghislotti*** swore the supporting affidavit giving the history of the dispute in full, while the contents of the impugned consent orders were also set out in full. I do not have to reproduce them here because they are not necessary.

If I may stop here for a moment, may it be noted that the notice of motion heard by ***Wendoh J*** for judicial review orders of *mandamus* and *prohibition*, does not appear to have been preceded by a chamber application for leave to seek such orders (r.1) or whether such leave was ever granted. Also not easily traced on the file is the requisite statement of facts or verifying affidavit filed by the appellant (rr.2, 4), except for the said supporting affidavit.

Perhaps in a hurry to do justice to the cause and parties before her, the learned judge overlooked these procedural requirements. However, since that oversight was not argued in these proceedings or by way of cross-appeal as to whether the notice of motion in question was defective or not, not much needs be said in that regard.

Mr. Sumba, learned counsel for the appellant, argued the fourteen grounds in the memorandum as has been amply captured and analyzed by my learned sister – judges, to which there was no reply, the respondents having not appeared to oppose the appeal. The learned counsel concluded by praying for orders:

> ***"(a) That the Ruling/Order of the superior court delivered on 23rd September, 2008 be vacated and/or set aside.***
>
> ***That prayers (c), (d) and (f) in the Notice of Motion application dated 13th November, 2008 by the appellant in the superior court for setting aside the consent order made on 31st October, 2006 adopted in court on 8thNovember, 2006 be allowed."***

Of course the appellant asked for any other justifiable order to satisfy the ends of justice, plus costs for the appeal and the application dated 21st October, 2006.

The arguments backing the aforementioned prayers were chiefly on the basis that ***Wendoh, J.*** fell in error to find and rule that she had no jurisdiction to entertain a review application within the judicial review proceedings which were, seemingly, concluded by way of filing consent orders. That instead she should have reviewed and set aside those orders which had been recorded in judicial review application dated 4th October, 2006. For various reasons advanced, the appellant considered that those orders were a fraud, illegal, null and void, in the manner they were recorded and the parties thereto.

Wendoh, J. did not agree with the appellant's arguments to review and/or set aside the consent orders impugned. In that regard she delivered herself thus:

> ***"The question is whether this court can review or set aside that consent order. The order of 8th November, 2006 is a final order of the High Court in the Judicial Review application that was before it. Section 8 of the Law Reform***
>
> ***Act Cap 26 Laws of Kenya which donates jurisdiction to Order 53 Civil Procedure Rules to grant orders of judicial review provides at section 8(3) and (5) that any person aggrieved by an order made in the exercise of civil or criminal jurisdiction of the High Court may appeal to the***
>
> ***Court of Appeal. Rule 3 specifically bars a return to any such order and a return in my view would include a review."***

The learned judge then proceeded to set out the provisions of ***section 8(3), (5)*** aforestated and stated that since ***Maraga, J.*** accepted the consent orders in question in the proceedings before him, that became a final orders of that court and, she added:

> ***"If this court were to review that order, it could be sitting on appeal of that judge's order. The judicial review jurisdiction is supervisory in nature not appellate and this court cannot supervise another judge whose jurisdiction is concurrent. The interested party is aggrieved by the order of the High***
>
> ***Court and his redress lies with the Court of Appeal."***

And with that ***Wendoh, J*** ruled that she had no jurisdiction to deal with the issues raised in the motion before her. She proceeded to cite several cases in which jurisdiction was declined in a similar manner or it was stated that judicial review orders were final as made by the High Court, and any aggrieved party

could only appeal to the Court of Appeal. The cases cited included ***Misc.***

App. No.1338/1998 – R vs Commissioner of Lands Ex Parte Jemimah

Mbugua, ***Kenya Farmers Association Ltd vs Minister for Cooperative***

Development – Misc App. No.284/2003, ***Kuria Mbae vs Land Adjudication***

Officer (Chuka), Misc. app.257/1987 and ***J. B. Maina & Company Ltd vs Grain Bulk Company Ltd C.A. 246/2003***.

Having confined myself to the aspects of this appeal as I have done, my conclusion is that ***Wendoh, J*** could not be faulted for declining to entertain the review application placed before her for lack of jurisdiction. The nature of the appellant's notice of motion before her was brought under the statutory provisions ***(s.8)*** and the ***Civil Procedure Rules*** (***O53***) which are complete, sufficient and operating as a straightjacket. Only final orders of *certiorari*, *mandamus* and *prohibition*, if warranted, can be issued by the High Court under those provisions. And those final orders, whichever the case, can only be subject of appeal to this Court. There is no avenue of review or otherwise in any manner to revisit them in that regard. And the learned judge said as much when she commented that:

> ***"Though, I sympathize with the situation the interested party finds himself and though he may have a good case and taking into account that the order challenged relates to land, this Court's hands are tied on account of jurisdiction and for all the above reasons, I do find that the applicant should move to the proper court by way of appeal as review is not available to him and there is none envisaged under the Law***
>
> ***Reform Act and Order 53 Civil Procedure Rules."***

I could not have put it any better. The learned judge made an observation, gratuitous as it was, which the appellant should have considered to activate, if it felt it was worth it. To me, that was a wise and considered observation in the circumstances. The procedural misstep taken by the appellant was, to me, fundamental and not one to be overlooked, in order to do justice to the case.

Even the "*oxygen rule*" could not salvage the situation.

In the result, I agree with ***Karanja, J.A.*** and also dismiss this appeal with no orders as to costs.

Dated and delivered at Nairobi this 11th day of December, 2015.

J. W. MWERA

…….....

JUDGE OF APPEA