Republic v Chief Magistrate, Mombasa & 3 others; Sega Ventures Limited & another (Interested Parties); Kirima (Exparte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEELC 180 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION 1 OF 2022

M SILA, J

JANUARY 24, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

CHIEF MAGISTRATE, MOMBASA ..... 1ST RESPONDENT

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

CHARO BOMBA MUZOKA ..... 3RD RESPONDENT

ELAINE MUKOYA OMULAMA (PRACTISING AS OMULAMA E.M & COMPANY ADVOCATES) ..... 4TH RESPONDENT

AND

SEGA VENTURES LIMITED ..... INTERESTED PARTY

JELANI APARTMENTS LIMITED ..... INTERESTED PARTY

AND

ESTHER GACERI KIRIMA ..... EXPARTE

JUDGMENT

(Judicial Review motion seeking to quash a judgment of the Magistrates' Court inter alia on the ground that the Magistrates' Court did not have jurisdiction to hear the dispute; the case before the Magistrates' Court being one for adverse possession filed by the 3rd respondent; argument of the applicant being that the Magistrates' Court had no substantive and pecuniary jurisdiction to hear the dispute; applicant contending that the value of the land was Kshs. 55 million beyond the Kshs. 20 million pecuniary limit of Magistrates' Courts; applicant further pleading that she was

never served with summons and that a provisional title was issued to the 3rd respondent without the requisite advertisements; upon obtaining judgment, 3rd respondent transferring the property to the interested parties; applicant now filing suit under Order 53 of the *Civil Procedure Rules* and the *Fair Administrative Action Act* to quash the judgment; contention of the 3rd & 4th respondents and interested parties that this suit is time barred having been filed beyond 6 months of the judgment and further that the decision of the Magistrates' Court is not subject to the *Fair Administrative Action Act*; Order 53 providing for 6 months period for filing a motion for certiorari to quash a judgment; suit therefore time barred in so far as it relates to Order 53; whether a Magistrates' decision can be subject to the *Fair Administrative Action Act*; decision of Magistrates' Courts are judicial decisions and not administrative decisions therefore not subject to the *Fair Administrative Action Act*; court however invoking its supervisory jurisdiction under Article 165 (6) of *the Constitution* to deal with the substance of the complaint of the ex parte applicant; circumstances when the court is at liberty to invoke its supervisory jurisdiction under *the Constitution*; court persuaded that the Magistrates' Court did not have the requisite pecuniary jurisdiction to deal with the suit for adverse possession; duty of Magistrates' Courts to ensure that they have the pecuniary jurisdiction before dealing with a suit; court also erred in not ensuring that its order for the summons to be served in two daily newspapers is followed; advertisement only made in one newspaper contrary to the orders of the court which required advertisement in two newspapers; advertisement also bearing the wrong name of the respondent in the suit; advise to courts on the particulars to be displayed when an order to serve by advertisement is made; cannot in those circumstances be considered that the respondent was served with summons and judgment set aside ex debito justitiae; issuance of provisional titles; requirement for advertisement as stipulated by law needs to be followed to the letter; in this instance, no advertisement placed in two daily newspapers as required; judgment and all consequential orders set aside; provisional title issued to 3rd respondent and titles of the interested parties cancelled)

A. Introduction And Pleadings

1. Through a ruling delivered on 25 January 2022, I granted leave to the ex parte applicant to commence judicial review proceedings in the nature of :-

    i. Certiorari to bring to this court and quash the proceedings, judgment and decree in Mombasa Chief Magistrate's Court Case No. CM/ELC 001 of 2020, Charo Bomba Muzoka vs Esther Gaceri Kirima.

    ii. Mandamus against the Registrar of Titles Mombasa to rectify the register in respect of the land parcel Subdivision No. 12713 (Original Number 1933/3) Section I, Mainland North (also described as LR No. 12713/I/MN) so as to restore it to the proprietorship of the ex parte applicant.

    iii. Certiorari for purposes of quashing Gazette Notice No. 9879 of 24 September 2021.

    The main motion was subsequently filed on 9 February 2022 and was amended on 20 June 2022.

2. The case of the ex parte applicant is that she is the registered owner of the land parcel LR No. 12713/I/MN (the suit land) registered as CR No. 37485/I, which land is located along Nyandarua Road, in Nyali, and measures 0.2077 Ha (just about ½ acre) and located at the corner of the road leading to Jumeirah Beach Hotel. That plot is not developed and is surrounded by a perimeter wall on three sides. The ex parte applicant avers that she lives about one kilometer away from the suit land. On 24 December 2021, her husband got a call from a neighbor, congratulating her for commencing construction of a perimeter wall. She was not developing the property and so her husband went to check on what was happening. He noticed a wall being put up and reported the matter, as one of

forcible detainer, to the Nyali Police Station. In the course of investigations, it was discovered that the suit land got registered in the name of the 3rd respondent, Charo Bomba Muzoka. The 3rd respondent had filed the suit Mombasa CM/ELC No. 001 of 2021 in the Chief Magistrate's Court at Mombasa, claiming to be entitled to the land by way of adverse possession. On 10 November 2020, the trial Magistrate granted him leave to serve the Originating Summons by way of an advertisement in the Daily Nation and Standard Newspapers. An advertisement was placed in The Standard newspaper of 16 November 2020 but none was placed in the Daily Nation. No appearance was entered, and the matter proceeded for hearing ex parte, with judgment being entered in his favour on 30 June 2021. The 3rd respondent then caused the title to be advertised for issuance of a provisional title. The same was advertised by the Registrar of Titles through Gazette Notice No. 9879 of 24 September 2021, and there being no objection, the provisional title was issued to the 3rd respondent. The 3rd respondent shortly thereafter transferred title to Sega Ventures Limited and Jelani Apartments Limited, the interested parties in this case.

3. The ex parte applicant raises a number of issues regarding the veracity of the claim for adverse possession, the identity of the 3rd respondent, the manner in which the suit was heard, and the jurisdiction of the Magistrates' Court to hear the adverse possession case. The ex parte applicant contends, firstly, that the suit before the Magistrate was an Originating Summons for adverse possession, yet the Magistrate's court has no jurisdiction to hear such a suit under Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010. Secondly, the ex parte applicant avers that the value of the land is way above the pecuniary limit of the Magistrate's Court, which is capped at Kshs. 20 million. She points out that the case was heard by a Magistrate, who was then Senior Principal Magistrate, with a pecuniary jurisdiction of Kshs. 15 million, and who, at the time of delivery of the judgment, had risen to the rank of Chief Magistrate with a pecuniary jurisdiction of Kshs. 20 million. The ex parte applicant contends that the land is valued at Kshs. 55 million, and she has attached a valuation report to that effect, and urges that the suit could not be heard by the Magistrate's Court (sued as 1st respondent herein) as it was beyond the pecuniary jurisdiction of the said court. She asserts that in order to establish that he had jurisdiction, the trial magistrate should have directed the 3rd respondent to produce a valuation report, and should not have assumed that he had jurisdiction, and that it was reckless and incompetent for the Magistrate to hear and determine the case without establishing that he had the pecuniary jurisdiction to do so. She contends that the respondents and the interested parties know, or ought to have known, that such a matter could not be heard by the Magistrate's Court and that the decree was therefore a nullity. She avers that by filing the Originating Summons in the Magistrate's Court, the 3rd and 4th respondents (3rd respondent being the plaintiff in the adverse possession suit and the 4th respondent being her advocate) must have known that a Judge would not allow the process of the court to be abused. It is further contended that the Originating Summons filed at the Magistrate's Court was based on a false affidavit drawn by the 4th respondent and sworn by her client, the 3rd respondent, and that judgment was based on perjured evidence. She avers that it was false for the 3rd respondent to allege that he had been in occupation of the suit land for over 12 years when he has never been in possession of the land. She states that she acquired the land in the year 2004 as vacant land and that the land is still vacant. She states that she has been going to the property at least 12 times every year, since she goes there every month, and has never seen any person on the land. She has pointed at the supporting affidavit to the Originating Summons, sworn by the 3rd respondent, which annexes a photograph showing banana plants, and states that there are no banana plants or cultivation on the suit property. She states that the suit property is pure coral, and is vacant, and the photograph showing some crops and shanties was not taken on the suit premises.

4. On the manner in which the proceedings were conducted, the applicant states that the court gave an order for substituted service by way of advertisement in the Daily Nation and Standard newspapers

when there was no application for such an order under Order 5 Rule 17 and the order was therefore null and void. It is claimed that there was no service in terms of this order, as no affidavit was annexed showing any advertisement in the Daily Nation, and that the notice was only placed in the Standard newspaper. The ex parte applicant states that she does not read the Standard newspaper where the advertisement was placed and that her husband only buys and brings home the Daily Nation newspaper. She also points out that the advertisement referred to Esther Gaceri Kirimi as the respondent while her name is Esther Gaceri Kirima. She adds that the notice referred to multiple plaintiffs and defendants yet there were only two parties to the Originating Summons. She states that the notice mentioned that a Plaint had been filed which statement is false since there was no plaint filed but an Originating Summons. She avers that the 1st respondent was required to be thoroughly satisfied that service had been effected in accordance with the orders it gave and that the decision to hear the case without evidence of service was procedurally unfair, irrational, unreasonable, and amounted to abuse of power. She believes that the 1st, 3rd and 4th respondents did not intend to notify her of the filing of the Originating Summons and that a fraudulent decree was planned and schemed long before the Originating Summons was filed.

5. On the identity of the 3rd respondent, the ex parte applicant states that he gave his ID number as xxxx. She contends that this identity card number belongs to a female named Margaret Wanjiru Ndungu, and that on googling this name, it showed that the person died five days before the Originating Summons was filed. She contends that the 3rd respondent could be a fictitious person created by the 4th respondent for purposes of defrauding her. She goes further to state that the 4th respondent could not have accepted instructions from a fictitious person or from a male adult passing himself as a female.

6. On the Gazette Notice advertising her title, she states that the Registrar of Titles, the 2nd respondent, falsely published that he had made efforts to compel her to produce the original title when he knew that he had not. She has given her address as P.O Box xxxx Mombasa and states that her husband has the key to this post office box and they never received any notice from the 2nd respondent concerning the title. She states that the 1st respondent ought to have realized that the Originating Summons was filed for a fraudulent purpose, as there was a prayer that the orders be effected without gazettement, and was thus asking the 1st respondent to deal with the issue secretly, so that she can be deprived of her property without her knowledge. She adds that the court directed that the notice for issue of a new title be published in the Kenya Gazette, and a similar notice be published in one daily newspaper of wide circulation preferably the Daily Nation or the Standard, and that no Gazette notice or any advertisement of such in the newspaper was put in the court file.

7. On the transfer of the land to the interested parties, she argues that they knew or ought to have known that the title of the 3rd respondent is null and void as it arose from proceedings that were null and void. She states that minimum due diligence ought to have led the interested parties to the conclusion that the decree by the 1st respondent was fraudulent and passed without jurisdiction and could not extinguish her interest in the suit land. She has pointed out that when the interested parties paid stamp duty, the value of the land was assessed at Kshs. 40 million.

8. Apart from the prerogative orders, the motion as filed also seeks various other orders being; a declaration that the respondents conspired to defraud the ex parte applicant of the suit premises; a declaration that the respondents and interested parties knew or ought to have known that the 1st respondent had no jurisdiction to hear the Originating Summons; a declaration that the respondents and interested parties know, or ought to have known, that the suit premises was valued at more than Kshs. 20,000,000/= and therefore the 1st respondent had no jurisdiction; a declaration that the 2nd respondent knew, or ought to have known, that the decree was a nullity as no Magistrate has jurisdiction to determine an Originating Summons under Section 38 of the *Limitation of Actions Act*

and Order 37 of the Civil Procedure Rules, 2010; a declaration that when the 2nd respondent published Gazette Notice No. 9879 of 24 September 2021, he did so fraudulently by falsely alleging in that Gazette Notice that he had made all effort to compel the ex parte application to surrender the title when he knew that he had not made any such efforts and had not issued any notice in writing to the ex parte applicant; a declaration that the Originating Summons before the Magistrate's Court was based upon a false affidavit drawn by the 4th respondent and sworn by her client, the 3rd respondent, and that the judgment arose from perjured evidence of the 3rd respondent, led into that perjury by the 4th respondent, and for that reason, the judgment was fraudulently procured and is null and void; an order to evict the 3rd respondent and the interested party from the suit land and for them to remove their gate and debris; an award of general, punitive and aggravated damages against the 2nd, 3rd and 4th respondents, and interest at court rates; and costs.

9. The Attorney General, on behalf of the 1st and 2nd respondents, filed Grounds in reply to the motion. It is stated inter alia that Magistrate's Courts are subject to pecuniary limits; that on 10 November 2020 the 4th respondent made an oral application to be granted leave to serve the pleadings by substituted service which application was allowed; that on 30 November 2020, the 4th respondent appeared in court and stated that she has served the pleadings but there is no appearance entered and sought a hearing date, and the matter was fixed for hearing on 10 February 2021; that the case proceeded on that date and judgment was subsequently delivered; that the court was not made aware that the suit land was worth Kshs. 55 million; that all through, the 1st respondent (the Magistrates' Court, Mombasa), acted in good faith; that the 2nd respondent (the Registrar of Titles) was never called to testify in the matter and acted in good faith in obedience of the court order after verifying that it was genuine and authentic.

10. The 4th respondent entered appearance in her own name and also filed appearance for the 3rd respondent. They raised a preliminary objection drawn as follows :-

    i. That the applicant is bereft of locus standi as the application before court is time barred.

    ii. That the application is not properly before court.

11. In addition, the 3rd and 4th respondents also swore separate replying affidavits. In his replying affidavit, the 3rd respondent annexed a copy of his identity card showing number xxxx. He has reiterated that the motion is time barred. He avers that the applicant has not exhausted all available remedies at his disposal before coming to this court for judicial review. He contends that he has lived and used the suit land adversely for 12 years, and that he instructed the 4th respondent to file a suit for adverse possession, which led to the filing of the Originating Summons before the Magistrate's Court. He believes that the trial Magistrate performed his judicial duties legally and procedurally until delivery of judgment. He states that upon receipt of the judgment and decree, the 2nd respondent verified the details before gazetting the decree for 60 days as required by law and that no objection was raised within the 60 days period. He was thereafter issued with title in his name on 26 November 2021. He then got an offer from the interested parties, and since he had not capacity to develop the property to the standards of the area, he accepted the offer. They entered into a sale agreement and the requisite statutory payments were made before the property was transferred to the interested parties. He was later called by an officer from Nyali Police Station on allegations that the property was acquired fraudulently. He went and recorded a statement. He has raised issue regarding the ex parte process whereupon the ex parte applicant obtained leave to file the main motion (which I find is overtaken by events as I had already granted leave, and I will therefore not go into these in detail). On the allegations regarding his identity, he denies that he

holds ID No. 4554073 and that the description in the Originating Summons that his ID is number 4654073 was a typographical error. He believes the pleadings were properly served pursuant to Order 5 Rule 17 and that there is nothing mandating that such application (for substituted service) be in writing. He argues that the ex parte applicant ought to have participated in the matter and raise any issue relating to jurisdiction. He thinks that this suit is a sham, frivolous and vexatious, and an abuse of the process of court.

12. On her part, the 4th respondent has acknowledged acting as counsel for the 3rd respondent in the suit before the Magistrate. She states that she sought leave to serve the ex parte applicant by substituted service, which was granted, and service was executed as ordered. She avers that the 1st respondent was satisfied with service and proceeded to give a hearing date and that the case was duly heard and judgment delivered. Before issuance of title to the 3rd respondent, she states that the 1st respondent required for there to be advertisement in a daily newspaper and in the Kenya Gazette, and she deposes that this was done. The 3rd respondent got offers for purchase of the property from the interested parties and they entered into a sale agreement. She contends that the allegations of fraud against her, and against the 1st, 2nd and 3rd respondents, are unfounded and raised to only mar the reputation of the professionals. On the difference in the identity card numbers of the 3rd respondent she deposes that it was merely a typing error. She has also raised issue that the suit is time barred.

13. The interested parties appointed M/s Ayuo & Company Advocates to act for them in this matter. The 1st interested party filed a replying affidavit sworn by Omar Ahmed Sheikh Booke a director. He deposes that the motion is time barred as it was filed six months after the impugned decision. He adds that the applicant has not exhausted the requisite lawful channels. He avers that the interested parties purchased the suit land bona fides without notice as it was pegged on a lawfully obtained decree. He contends that the ex parte applicant has not shown any element of fraudulent dealing attaching to the interested parties. On the mode of service of the Originating Summons, he has stated that it was done in accordance with Order 5 Rule 17. He asserts that the Magistrate's Court had jurisdiction to hear the case and the decision of the court extinguished the title of the ex parte applicant. He argues that the decision of the court was a judicial decision and not an administrative decision and this suit is an abuse of the court process.

14. The 2nd interested party filed a replying affidavit sworn by Abbas Mohamed Mohamed who has described himself as a manager with the 2nd interested party. His affidavit is more or less a replica of that of Mr. Booke which I have already set out above.

B. Submissions Of Counsel

15. All counsel filed written submissions.

i. Submissions of counsel for the ex parte applicant

16. Mr. Kinyua, learned counsel for the ex parte applicant, more or less rehashed his client's position in the matter. He did allege that the 4th respondent (Omulama E.M & Company Advocates) is also acting for the interested parties and pointed to the similarity in drafting of the pleadings of the 3rd and 4th respondent and the interested parties. On the contention raised by the 3rd and 4th respondents and interested parties, that this suit is time barred, he submitted that the impugned judgment was delivered on 30 June 2021, and leave (to file this suit) was sought within time, that is on 5 January 2022, because under Order 50 Rule 4 of the Civil Procedure Rules, the period between 21 December and 13 January is omitted, thus the time was extended to 13 January 2022. He added that the decree was issued on 9 July 2021; that the Gazette notice No. 9879 was published on 24 September 2021; that the provisional

title was issued on 26 November 2021; that transfer of the suit land was on 21 December 2021; and all these were done within the period of 6 months to the filing of the application for leave. He added that this suit is also brought under the *Fair Administrative Action Act*, Act No. 4 of 2015 for which there is no time bar, and that Order 53 (2) of the Civil Procedure Rules cannot override the *Fair Administrative Action Act*. He submitted that since the suit was concluded, and title issued, the ex parte applicant could not appear before the trial court to set aside the judgment and had to resort to alternative remedy, since title was already in the names of the interested parties who were not parties in the suit. He submitted that an advocate who uses her skills to assist a client commit fraud is a joint tort feasor. He did not think that the 1st respondent (the Magistrate) acted in good faith as he dealt with a property whose value far exceeded his pecuniary jurisdiction and heard the matter despite service not being effected through advertisement in the Daily Nation. He added that there was no formal application filed for substituted service. On the conduct of the Registrar of Titles (2nd respondent), he submitted that he should have rejected the decree because Magistrates have no jurisdiction under Section 38 of the *Limitation of Actions Act*, and Order 37 of the Civil Procedure Rules, to hear suits of adverse possession. He reiterated his client's position that the 2nd respondent did not take all efforts to ensure service of the decree upon the ex parte applicant before publishing the gazette notice and ought to have satisfied himself that a notice had also been placed in the Daily Nation or Standard as ordered in the decree. He did not think that he acted in good faith.

17. Against the 4th respondent, he contended that she lied on oath that she had served as directed by court when she knew that she had only served through the Standard newspaper. He submitted that in the Originating Summons, she also sought an order for the 3rd respondent to obtain title without gazettement so that the fraud is not discovered. He added that the 4th respondent forged the Notice of Appointment purporting that it was signed by M/s Ayuo & Company Advocates. He submitted that the 4th respondent had a duty to have the property valued to determine whether the Magistrate's Court had the pecuniary jurisdiction to hear it, which she failed to do and is assisting her client resist these proceedings. He submitted that she falsely claims to have followed all the procedures. He submitted that the sale of the interested parties shows that they purchased the land at Kshs. 10 million, and submitted that any person paying Kshs. 10 million for a property valued at Kshs. 55 million must be grossly negligent, or aware of the fraud. He has pointed out that the valuer placed a value of Kshs. 40 million for purposes of stamp duty which the interested parties paid.

ii. Submissions of the respondents and interested parties

18. For the 1st and 2nd respondents, Mr. Makuto, learned State Counsel, referred to the Grounds of Opposition and submitted that the 1st respondent (the Magistrate) was not made aware that the suit land was valued at Kshs. 55 million. He submitted that the 2nd respondent (Registrar of Titles) only complied with the court order and acted in good faith. He asked the court to decline the invitation to award the ex parte application damages as prayed.

19. For the 3rd respondent (Mr. Charo), and on her own behalf as 4th respondent, Ms. Mukoya, learned counsel, submitted that this suit is time barred given the definition of "month" in Order 53 Rule 2 of the Civil Procedure Rules and Section 2 of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya. She submitted that the ex parte applicant cannot rely on the period between 21 December and 13 January of the following year for relief. She relied on the case of Republic vs District Commissioner, Narok North District & 4 Others ex parte Jane Naserian Enelokula (2016) eKLR. She submitted that the Magistrate's Court had jurisdiction to hear the matter pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the Magistrates Court Act, 2015. On the value of the land, she submitted that the valuation was done when there were already

improvements on the land and that the valuer, did not attach her qualifications or practicing licence. On the issue that the suit land was sold at only Kshs. 10 million, counsel submitted that a land owner is at liberty to sell at whatever value he pleases. She saw nothing wrong in the order given to serve by advertisement. She submitted that these were grounds to set aside the proceedings and judgment of the 1st respondent, as opposed to judicial review. On advertisement for issuance of the provisional title, she submitted that it was done in both the Kenya Gazette and Standard of 18 July 2021. She did not believe that fraud nor bad faith have been proved. On her conduct, she submitted that counsel act on instructions of a client and there cannot be misconduct when one is executing the instructions given. She also raised issue over the manner in which the ex parte applicant obtained leave to file these proceedings.

20. For the interested parties, Mr. Otieno, learned counsel, submitted that the suit is time barred, since under Order 53 of the Civil Procedure Rules, the suit ought to have been filed within 6 months of the decision. Counsel relied on the case of National Social Security Limited vs Sokomania Limited (2021) eKLR. On computation of time, counsel referred to Order 50 Rule 1, which provides for time calculated in terms of months, to mean "calendar months", and therefore the ex parte applicant cannot benefit from the period between 21 December and 13 January of the year. Counsel referred me to the decision in the case of Republic vs District Commissioner, Narok North District & 4 Others ex parte Jane Naserian Enelokula (2016) eKLR. On whether the Magistrate had jurisdiction, counsel submitted that the court did have jurisdiction. On the pecuniary value, counsel submitted that it was a contestable issue of fact and cannot be said to be Kshs. 55 million when the suit was filed. Counsel submitted that the interested parties cannot be said to be guilty of a trespass of a property they purchased and refuted that there was any corrupt scheme.

iii. Rejoinder submissions of counsel for the ex parte applicant

21. Mr. Kinyua filed submissions in rejoinder. A lot of it covered what he had earlier submitted and I will only flesh out what I think is new. He submitted that the respondents and interested parties have not brought any valuation report to contest the valuation of Kshs. 55 million done by Mr. Maina Chege, and that of Kshs. 40 million by the Government Valuer when assessing stamp duty on the transfer to the interested party. On publication of the provisional title, he submitted that it required publication in two daily newspapers. On the issue of time bar, he submitted that there is no time bar under Articles 23, 25 (c), 47, 48 and 50 (1) of *the Constitution* and neither is there a 6 month time bar under Section 13 of the *Environment and Land Court Act* nor the *Fair Administrative Action Act*. He submitted that Rule 53 (2) of the Civil Procedure Rules cannot prevail over *the Constitution* and statute. He submitted that the 6 month rule only applies for certiorari but will not apply for orders of mandamus, declarations, injunctions, damages or orders of eviction. He submitted that even if the court holds that the order of certiorari is time barred, the rest of the remedies will remain unaffected. He thought that the decision in the case of Republic vs District Commissioner, Narok North District & 4 Others ex parte Jane Naserian Enelokula (supra) was per incuriam.

C. Evaluation And Disposition

22. I have considered the matter. Before I go to the substance of the matter, there are two preliminary issues which I think need first to be addressed. It has been raised by the 3rd and 4th respondents, and the interested parties, that this suit is time barred. The second issue raised by the interested parties (paragraph 13 of their respective replying affidavits) is that this suit is an abuse of the court process because the decision of the court was a judicial decision and not an administrative decision. If I accept these objections, then relief to the ex parte applicant, if any, will have to be based on other provisions of the law.

i. Whether the suit is time barred

23. The genesis of this suit is the application for leave dated 4 January 2022 and filed on 5 January 2022. That application was quoted to be premised "under Order 53 of the Civil Procedure Rules, 2010, and Section 9 of the *Fair Administrative Action Act*". We can therefore safely say, that in so far as procedure is concerned, this suit is brought pursuant to Order 53 of the Civil Procedure Rules and Section 9 of the *Fair Administrative Action Act*. This is despite various other provisions of the law being cited, which in my view go to the merits, and not the procedure employed to move the court.

24. Order 53 of the Civil Procedure Rules of course addresses the grant of the prerogative orders of certiorari, mandamus and prohibition. What I could pick out in the application for leave were three prerogative orders which I have already spelt out at the beginning of this judgment but which I reiterate for ease of reference. They are certiorari to quash the proceedings, judgment and decree in Mombasa Chief Magistrate's Court Case No. CM/ELC 001 of 2020, Charo Bomba Muzoka vs Esther Gaceri Kirima; Mandamus against the Registrar of Titles Mombasa to rectify the register in respect of the land parcel Subdivision No. 12713 (Original Number 1933/3) Section I, Mainland North (also described as LR No. 12713/I/MN) so as to restore it to the proprietorship of the ex parte applicant; and Certiorari for purposes of quashing Gazette Notice No. 9879 of 24 September 2021.

25. It has been raised that this suit is time barred given the provisions of Order 53 Rule 2 which provides as follows :-

> Time for applying for certiorari in certain cases
>
> 2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

26. Mr. Kinyua, learned counsel for the ex parte applicant, in his rejoinder submissions, did argue that the proceedings herein are also brought under Articles 10, 22, 23, 25 (c), 40, 47 and 50 (1) of *the Constitution* of Kenya (2010) and Sections 3, 4, 7, 8, 9 ,10, 11 and 12 of the *Fair Administrative Action Act*. He submitted that they are not brought under Sections 8 and 9 of the *Law Reform Act*, or Order 53 (1) and (2) of the Civil Procedure Rules. He submitted that these were cited only because there is no corresponding procedural rules or regulations made under the provisions of the *Fair Administrative Action Act*. He submitted that there is no time bar in Articles 23, 25 (c), 47, 48 and 50 (1) of *the Constitution* and that there is no time bar under Section 13 of the *Environment and Land Court Act*, nor any 6 month limitation under the *Fair Administrative Action Act*. He added that Order 53 Rule 2, which is subsidiary legislation, cannot supercede or override *the Constitution* and Statute.

27. I regret that I do not agree with the above submissions of Mr. Kinyua. If the suit herein were not one under Order 53 Rule 2, then there would have been no purpose in filing an application for leave to commence the proceedings. The very fact that an application for leave was filed means that the suit was one under Order 53 Rule 2. I have in fact already pointed out that the application for leave did specifically cite Order 53 of the Civil Procedure Rules. The main motion filed on 9 February 2022 also includes Order 53. The title of the suit itself is also telling, for it is registered as a Judicial Review matter. It is apparent that the ex parte applicant now wants to disown her own pleadings and claim that

they are not brought under Order 53 because the element of time has been raised. I am afraid that she cannot run away from the fact that the suit herein is one under Order 53. In fact, in so far as procedure is concerned, I am unable to consider this suit as one brought pursuant to Articles 10, 23, 25 (c), 40, 47, 48, & 50 (1) of *the Constitution* for the simple reason that this is not a constitutional petition. I am not by any stretch of imagination saying that one may not wish to rely on some of the provisions in *the Constitution* to buttress a legal right, but that is not the same as stating that procedurally, the suit is a constitutional petition. For example, one can file a plaint seeking a declaration of ownership to land. Within the plaint, he can argue that he has a right to property under Article 40 of *the Constitution*. The fact that he cites Article 40 does not now convert his plaint into a constitutional petition under Article 40 of *the Constitution*. Procedurally, it remains a plaint seeking a declaration of ownership to land. For our case, the mere fact that some provisions of *the constitution* have been inserted in the title of the case, or under the heading of the Notice of Motion, does not convert this judicial review suit into a constitutional petition. My decision on the point is that, procedurally, this suit is one brought pursuant to Order 53 of the Civil Procedure Rules and the *Fair Administrative Action Act*.

28. It cannot be escaped that Order 53 Rule 2 provides for a limitation period of 6 months. This limitation period is not only in Order 53 but is also in Section 9 (3) of the *Law Reform Act*. It is therefore not a limitation period that is restricted to the rules but is one that is in statute as well. Section 9 (3) of the *Law Reform Act* provides as follows :-

> 9 (3) In the case of an application for an order of certiorari to remove any judgment, order , decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law ; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

29. Section 9(3) above is self explanatory. Where it is a judgment in issue, the application for leave needs to be made no later than six months after the date of that judgment. In our case, the judgment was delivered on 30 June 2021. The application for leave thus needed to have been made within 6 months of this date. It means it ought to have been filed at the latest on 30 December 2021. The motion herein was filed on 5 January 2022. It was a few days out of time, but even one day out of time is still out of time. Mr. Kinyua argued that the time between 21st of December in the year and 13th of January in the following year is not computed relying on Order 50 Rule 4 which in full provides as follows :-

> 50 (4) Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act : Provided that this rule shall not apply to any application in respect of a temporary injunction.

I am afraid that this may not apply to time computed by calendar months and certainly cannot apply for time that is prescribed in statute.

30. What I am saying above is nothing new and has been the subject of various judicial decisions including the decision of the Court of Appeal in the case of Milka Nyambura Wanderi & another v Principal Magistrate's Court Murang'a & 4 others, Court of Appeal at Nyeri, Civil Appeal No. 44 of 2013 [2014] eKLR. In that case, an application for leave was filed on 19 July 2011 seeking to quash a decision

of the Principal Magistrate's Court Muranga that was made on 30 December 2010. The application for leave was rejected inter alia for being out of the 6 months period. This was affirmed by the Court of Appeal.

31. The Court of Appeal in the case of Maersk Kenya Limited vs Murabu Chaka Tsuma (2017) eKLR elaborated that the time fixed by statute cannot be expanded by the provisions of the Civil Procedure Rules. The court stated as follows :-

> In the case of the Republic vs. Public Procurement Administrative Review Board & another exparte Teachers Service Commission [2015] eKLR the High court cited the case of Mokombo Ole Simel & Others vs. County Council of Narok & Others Nairobi HCMA No. 361 of 1994 which concerned similar circumstances. There, the High Court considered whether order 49 rule 5 of the repealed Civil Procedure Rules was capable of enlarging time specified by section 9(2) and (3) of the *Law Reform Act*, and succinctly expressed itself thus;
>
> "If the limited time is prescribed under the Civil Procedure Rules or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the *Law Reform Act*. Order 49 rule 5 of the Civil Procedure Rules cannot be invoked to supersede the express provisions of the Act...Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament..."

We respectfully adopt those observations for the purposes of this case. Order 50 rule 4 makes it clear that the rule applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the court.

32. The time for filing a judicial review motion for certiorari is prescribed in statute. I am aware that this court granted the ex parte applicant leave to commence this suit. However, the fact that the ex parte applicant obtained leave to commence judicial proceedings under Order 53 does not mean that the respondents, at the hearing of the main motion, cannot raise the issue that leave ought not to have been granted for reason that the suit was out of time. Leave is ordinarily sought and granted ex parte before the respondents or interested parties come into the suit. Upon their entry into the case, they are at liberty to raise any issue, including whether the suit is time barred.

33. The subject of time is not a procedural technicality that can be cured by reference to Article 159 (2) (d) of *the Constitution*. If a suit is filed outside the time provided by statute, it goes without saying that such suit is incompetent and must be struck out. This suit, in so far as the order of certiorari under order 53 is concerned, has clearly been filed outside the 6 month period provided for under Section 9 (3) of the *Law Reform Act* and Order 53 Rule 2 of the *Civil Procedure Act*. Regretfully therefore, the order of certiorari under Order 53 of the Civil Procedure Rules, is not therefore available to the ex parte applicant. And since the ex parte applicant cannot get the order of certiorari under Order 53, I do not see how she can succeed in obtaining the orders of mandamus or prohibition, or indeed any other order under Order 53. The other orders sought under Order 53 are all premised upon her obtaining the order of certiorari quashing the judgment of the trial Magistrate.

34. My hands are tied on the issue of limitation of time. Owing to that, I have no option but to hold that this suit is not maintainable under Order 53 of the Civil Procedure Rules for being time barred, having been filed more than 6 months from the time of the judgment in Mombasa CMCC ELC No. E1 of 2020.

35. It will however be recalled that this suit is procedurally based both upon Order 53 and the *Fair Administrative Action Act*. I have found that the suit is not maintainable under Order 53. Can the suit be maintained under the *Fair Administrative Action Act* ?

ii. Whether the suit is maintainable under the *Fair Administrative Action Act* and whether a court decision may be subject of the *Fair Administrative Action Act*.

36. There is no limitation of time prescribed under the *Fair Administrative Action Act* (hereinafter the FAAA). In my opinion, it will therefore fall under the discretion of the court to consider whether a suit has been commenced within reasonable time. Section 9 of the FAAA does provide that a person may apply "without unreasonable delay." I think that if this suit was being considered purely as a suit under the FAAA, without consideration of the time limitation under Order 53, time would not be an issue, as the suit was filed a little more than 6 months after the judgment, and shortly after the applicant came to know of the judgment in Mombasa CMCC ELC No. E1 of 2020. However, the interested parties contend that the judgment cannot be challenged through this process since what was made was a judicial decision and not an administrative decision. I therefore need to assess whether this suit can be entertained under the FAAA given that what is in issue is a judgment of a court. I need to address myself on whether a judgment of a court can be challenged under the FAAA.

37. The starting point is to understand the background leading to the enactment of the FAAA. This is to be found in the preamble of the Act which provides that the FAAA is "An Act of Parliament to give effect to Article 47 of *the Constitution*, and for connected purposes." Article 47 of *the Constitution* is contained in Chapter 4 of *the Constitution* which comprises of the Bill of Rights. It provides as follows :-

> 47. Fair administrative action
>
> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> (b) promote efficient administration.

38. It is important to understand the context of Article 47 of *the Constitution*. Article 47 is contained in Chapter 4 of *the Constitution* which is titled "Bill of Rights." It is this chapter which outlines the rights of individuals that are protected by *the Constitution*. These include such rights as the right to life (Article 26); right to equality and freedom from discrimination (Article 27); freedom of association (Article 36); right to a clean and healthy environment (article 42); and Article 47 has the right to fair administrative action. Article 47, Clause 1, elaborates that every person has the right to administrative action that is expeditious, efficient , lawful, reasonable and procedurally fair. Clause 2, provides for the right for one to be given written reasons for the administrative action. Clause 3 is a dictate to Parliament to enact legislation to give effect to the right given in Article 47 (1). *The constitution* provides that such legislation is to provide for review of administrative action by a court or independent tribunal and

promote efficient administration. It is on the basis of Article 47 that the FAAA was enacted, and as I have pointed out, the preamble spells out that it is to give effect to Article 47 of *the Constitution*. In reality the FAA is an effectuation and a result of the constitutional command in Article 47 (3). Thus the purpose of the FAAA is to elaborate and give effect to the Constitutional right to administrative action.

39. By dint of *the Constitution*, one therefore has a right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. For brevity, I will simply refer to this right as the right to fair administrative action. But what is 'administrative action' ? *The constitution* does not give a definition of what 'administrative action' is. The FAAA itself does not also exhaustively define 'administrative action'. It only states at Section 2, what administrative action 'includes.' It provides that 'administrative action' includes :-

    i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

    ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

40. Section 2, defines an "administrator" as "a person who takes an administrative action or who makes an administrative decision." We have various institutions and authorities within our country. These institutions have managers or persons who are empowered to make decisions. Such decisions may be decisions such as to award or decline to grant a licence, to hire or fire personnel, or to take in and address complaints. For example, under the Environmental Management and Coordination Act (EMCA), Act No.8 of 1999, the National Environment Management Authority (NEMA), as a statutory body, has power to grant an Environmental Impact Assessment (EIA) licence. Within the ambit of the *Physical and Land Use Planning Act*, Act No.13 of 2019, County Governments have powers to grant development licences. Under the *Public Service Commission Act*, Act No. 10 of 2017, the Public Service Commission has power to interdict, suspend or dismiss certain categories of public officers from public service. These are administrative bodies exercising administrative functions. Administrative institutions are those bodies, persons, or authorities, that either take action or make decisions over matters falling within their management mandate. When they make decisions, they can also be categorized as quasi-judicial bodies.

41. An administrative action needs to be differentiated from a judicial act. The Black's Law Dictionary, 10th Edition, at page 30, defines a judicial act as "an act involving the exercise of judicial power." Judicial power is exercised by the judicial arm of Government; in Kenya, that would be the Judiciary. The Judiciary exercises judicial power through courts and tribunals. Judicial power is exercised by courts and tribunals making decisions out of disputes that have been presented before them for determination. When a court makes a decision arising out of a dispute filed for determination, what the court exercises is judicial authority, not administrative authority. Administrative authority within the Judiciary would encompass management decisions made within the Judiciary, such as a disciplinary decision of the Judicial Service Commission, or decisions made in managing a court station. However, decisions by courts from disputes where rights are determined and orders for execution made, are judicial decisions and not administrative decisions, for in such instance, the court is not acting as an administrator making a management or quasi-judicial decision, but as an arbiter resolving a case presented to it by a litigant, where orders are to be made for formal execution.

42. The purpose of the right to fair administrative action under Article 47 of *the Constitution* is to ensure that administrative bodies act in a certain way so that there is fairness before a decision is reached. It is that failure by an administrative body to act in the manner prescribed by *the Constitution* that permits one to approach the courts for redress so that the said decision can be subjected to review. The purpose

of the FAAA is to inter alia provide for the review mechanism of the administrative action. Section 7 of the FAAA provides that a person aggrieved by an administrative action or decision may apply for review to: -

a. a court in accordance with Section 8; or

b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Section 9 provides for the procedure for judicial review. It is drawn as follows :-

9. Procedure for judicial review

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

43. It will be observed from the manner of drafting of Section 7 and 9 above, that it is a person who is aggrieved by an administrative action that is allowed to apply for judicial review of the said action. Section 7 and 9 do not provide for one who is aggrieved by a decision of a court to apply for review of it as if it was an administrative action. I am aware that Section 3 of the FAAA does provide that the Act applies inter alia to a person preforming a judicial function. That section is drawn as follows :-

3. Application

(1) This Act applies to all state and non-state agencies, including any person-

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under *the Constitution* or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

44. Despite the mention that the FAAA applies to a person performing a judicial function, when you go through the Act, you will not find any Section of it, which touches on a judicial decision. I will quickly go through the Act in order to demonstrate this. Section 2, which defines an "administrative action" does not include a court decision as an administrative action. The definition of "administrator" does not also include a Magistrate or person exercising judicial authority. The definition of "decision" does not include any court decision, but is defined to mean "any administrative or quasi-judicial decision." Section 4 provides that an administrative action is to be taken expeditiously, efficiently and lawfully.I have already given the distinction between an administrative and a judicial decision. Section 5 provides for administrative action affecting the public. Section 6 deals with the right of a person adversely affected by an administrative decision to be supplied with information. Sections 7, 8 and 9 are what provide for the right of a person to approach court for redress arising out of an administrative decision. Section 10 makes provision for rules. Section 11 outlines the orders that may be made by a court when dealing with an application presented. Sections 13 through 14 are miscellaneous provisions regarding application of the common law, regulations for the better carrying out of the provisions in the Act, and transition. Thus, despite the mention in Section 3 that the FAAA applies also to a person performing a judicial function, it will be observed that there is actually no provision in the Act dealing with the exercise of judicial authority. The whole Act in fact only provides for administrative decisions.

45. I have serious doubts over the constitutionality of Section 3 in so far as it purports to state that the FAAA applies to a person performing a judicial function, because Article 47, upon which the FAAA is based, deals with fair administrative action, and has nothing to do with judicial decisions. Moreover, as I have taken the trouble to elaborate, the FAAA itself has no other provision within it to support the mention in Section 3 of a person performing a judicial function. In my humble view, the mention of a person undertaking a judicial function, in Section 3 (1 (b) is misplaced and has no support both in *the Constitution* and in the statute.

46. What I am trying to say is that I see no place for one who is aggrieved by a court decision, to approach the High Court or courts of equal status, for redress under the FAAA. A decision of a Magistrate, whether it be a judgment or order, is not an administrative decision so as to fall under the ambit of the FAAA. If we are to expand the FAAA to include judicial decisions then we will be going outside the intention of Article 47 of *the Constitution* whose purpose is to address persons and bodies performing administrative duties and quasi-judicial functions. In so far as exercise of judicial authority is concerned, *the Constitution* has Chapter 10 dedicated to the judiciary and the exercise of judicial authority. We have a legal system which provides for avenues of redress if one is aggrieved by a decision of a court. For decisions of Magistrates, one can appeal to the High Court or courts of equal status, depending on the subject matter, or one can apply for review before the Magistrate who made the decision. I am not persuaded that one is allowed to seek redress under the FAAA if one is aggrieved by a decision of a Magistrates' Court. My humble interpretation of the FAAA is that it is a statute whose purpose is to deal with administrative actions and decisions and not judicial decisions. I am not persuaded to expand the FAAA to also cover decisions made by judicial officers exercising their judicial authority.

47. The position I hold above was also held by Okong'o J, in the case of National Social Security Fund v Sokomania Ltd & another [2021] eKLR. In the case, the applicant was aggrieved by certain orders made by the Magistrates' Court and wished to have the same quashed by way of judicial review inter alia under the FAAA. The court had this to say on whether orders made by a court can be considered to be administrative decisions :-

> "I am in agreement with the 1st Respondent that the impugned orders of the 2nd Respondent are not within the purview of judicial review. The orders complained of by the Applicant were made by the 2nd Respondent in exercise of its judicial function conferred by law. While making the impugned orders, the 2nd Respondent was not acting as an administrative body but as a judicial body. The 2nd Respondent's decision was therefore judicial rather than administrative. I am of the view that orders made by a Magistrate's Court in exercise of its judicial function are not amenable to judicial review as administrative action."

48. It will be noted from the above that the court held that decisions made by a court are judicial, and not administrative, thus cannot be subject to review under the FAAA. It is the same opinion that I also hold as I have demonstrated above. In his submissions, Mr. Kinyua did state that the case is also based on other provisions of the law including various provisions of *the Constitution*. I have already addressed myself on that. I will reiterate that the mere mention of various articles of *the Constitution* does not help the ex parte applicant because the basis of the suit and the procedure employed remains to be Order 53 of the Civil Procedure Rules and the FAAA.

49. The suit is already time barred under Order 53 and I have taken quite some time to explain that the FAAA does not apply to judicial decisions. I am, in those circumstances, unable to allow this suit under Order 53 of the Civil Procedure Rules and the FAAA.

iii. Can the court offer other avenues of remedy ?

50. This court, being a court of justice, has a duty to ensure that justice is not only done but seen to be done. This court has supervisory jurisdiction under Article 165 (6) of *the Constitution* which is drawn as follows :-

> (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> The above provision of *the constitution* mentions the High Court, but this power must be deemed extended to the court of equal status, that is, the Environment and Land Court (ELC) and the Employment and Labour Relations Court (ELRC) for subject matter that fall within their jurisdiction. This is because pursuant to Article 165 (5) (b) of *the Constitution*, the High Court does not have jurisdiction over matters falling within the jurisdiction of the ELC and ELRC, and it cannot be that it was the intention of *the constitution* that subordinate courts, tribunals, and quasi-judicial bodies falling under the jurisdiction of the ELC and ELRC cannot be subjected to supervisory jurisdiction. Article 259 of *the constitution* provides the guideline in construing *the constitution*. It states at clause 3 (c) that :-

> "reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances."

51. Thus, Article 165 (5)(b) in my humble opinion also needs to be read in a manner that supervisory jurisdiction similarly applies to courts of equal status for subject matter that fall within their special jurisdiction.

(iv) Supervisory jurisdiction under Article 165 (6) of *the Constitution*

52. What then is supervisory jurisdiction and when can it be utilized by the superior courts? There is not much authority outlining the principles applicable under the supervisory jurisdiction in Article 165 (6), but from the decided cases this provision has been invoked in both criminal and civil jurisprudence. Within the criminal domain, an interesting scenario played out in the case of DPP vs Perry Mansukh Kansagara & 8 Others, High Court at Naivasha, Criminal Revision No. 4 of 2020, (2020) eKLR (ruling of Mwongo J of 9 April 2020). Some persons were charged before the Magistrates' Court at Naivasha, inter alia with manslaughter, after a dam burst in Solai area of Nakuru, leading to the death of several persons. At the hearing of the case, the DPP applied for adjournment, which was denied, and subsequently the accused were acquitted under Section 210 of the Criminal Procedure Code (CPC). An application for revision, premised under Sections 362-367 of the CPC, was filed, but later amended to add the provision of Article 165 of *the constitution*. Under Section 364 of the CPC one cannot apply for revision pursuant to an order of acquittal. The respondents before the High Court thus argued that the revision application was a non-starter and ought to be dismissed. In his judgment, Mwongo J, held that the revision jurisdiction under Section 364 of the CPC was different from the supervisory jurisdiction under Article 165 of *the constitution*. The judge stated as follows :-

> 143. What is clear from the foregoing analysis of the history and law and the present statutory provisions is that: statutory Revisional Jurisdiction concerns a narrow scope of review over criminal proceedings as set out in sections 362-367 of the CPC. On the other hand, constitutional Supervisory Jurisdiction confers on the High Court an extremely broad-based authority with which to call up proceedings of both civil and criminal matters from all subordinate courts, tribunals and authorities (except superior courts) without limitation. No limitations of timeframe or nature of the case are imposed on the High Court's jurisdiction; the authority may be exercised at any time; and given there are no limits as to who should invoke the power, presumably it may be invoked at the instance of either the Court or upon being moved by a party. (underlined emphasis mine).

53. On the facts of the case, the court found that given the provisions of Section 364 of the CPC it could not exercise its revision jurisdiction (as the Magistrate made an order of acquittal) but could exercise its supervisory jurisdiction under Article 165 of *the constitution*. In addressing what circumstances would move the court to exercise its supervisory jurisdiction under criminal law, the court stated as follows :-

> 150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:

a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;

b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;

c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.

d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice";

This list showing rationale for intervention is of course not exhaustive.

54. I associate myself fully with the reasoning of Mwongo J and I am in complete agreement with the above dictum. The decision, though made in a criminal matter, is apt in the exposition that supervisory jurisdiction is a distinct jurisdiction of the court.

55. In the case of Republic V Magistrates Court, Mombasa; Absin Synegy Limited (interested party), Judicial Review E033 of 2021 (2022) KEHC 10 (KLR), Mativo J (as he then was) stated as follows on the supervisory jurisdiction of the court: -

> 37. The power conferred to this court under Article 165 (6) of *the Constitution* is used sparingly only when the lower court or tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction which is the case here. However, the High Court under the guise of Article 165 (6) cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. For it to interfere, there must be a case of flagrant abuse of fundamental principles of law or it can interfere where the order has resulted in grave injustice. The fact that the learned Magistrate assumed jurisdiction not expressly conferred upon him by the law and in a blatant breach of section 14 of the CPA is itself a proper case for this court to exercise its supervisory jurisdiction to prevent grave injustice and abuse of the law.
>
> 38. Judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. In the instant case, the impugned decision is a judicial function, arrived at outside the confines of the jurisdiction conferred to the court by the law, which to me is amenable to both judicial review and supervisory jurisdiction.

56. Although in the above case, the judge appears to equate the supervisory jurisdiction under Article 165 to judicial review, on my part, I wouldn't equate judicial review to the supervisory jurisdiction of the court under Article 165. Judicial review is itself a distinct jurisdiction with its own rules and limited

to certain specified orders. It is not in my opinion the same as supervisory jurisdiction under Article 165 of *the constitution*. I however agree with the judge that supervisory jurisdiction is one that should be used sparingly, though I am not persuaded that it can only be invoked only in situations where the court "exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction." Mwongo J in the Kansagara case, indeed outlined some additional instances where this jurisdiction can be invoked although he did point out that it was in the criminal procedure domain.

57. In my opinion supervisory jurisdiction under Article 165 (6) of *the Constitution* will be invoked by the court where the court identifies serious misdirection or error by the subordinate court which leads to a gross injustice for which the superior court must intervene so that justice is done. There are situations that cry and groan out for justice and it will be remiss for the court to close its ears to such cries. The court must rise up and see to it that justice is done in such occasions. Such instances may include failure by the subordinate court to follow its own orders, or failure to follow substantial provisions of the law, which result in a gross violation of another person's right especially those contained in the Bill of Rights. I am also of the view that in order to invoke its supervisory jurisdiction the court can do so on its own motion or on being moved by any person including parties to the suit. However, the court ought to be slow to invoke its supervisory jurisdiction under Article 165 (6) of *the Constitution* where there are other specifically provided mechanisms for redress. In such an instance, the court ought to decline invitation to invoke its supervisory jurisdiction, and instead guide the parties to move the court within the provided mechanisms. As earlier stated, it is a jurisdiction that ought to be sparingly invoked, and this will not be the case if the court utilizes it for every infraction, even where there are provided mechanisms for redress.

58. The orders that the court can make when exercising its supervisory jurisdiction are outlined in Article 165 (7) which provides as follows :-

> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

59. The powers above are very wide ranging in nature. First, it will be seen that the superior court may call for the record of any proceedings before any subordinate court and the other institutions mentioned. That power to "call" buttresses the point that supervisory jurisdiction can be invoked by the court suo motu, upon being informed, or being aware, of a matter that demands invitation for the exercise of the court's supervisory jurisdiction. Secondly, the court may make any order or give any direction it considers appropriate to ensure the fair administration of justice. It will be observed that the court is not limited in the nature of order that it can make. What is important is that such order serves the administration of justice.

60. What has been presented before me is, in my opinion, one case that cries out for the intervention of this court under the supervisory jurisdiction outlined in Article 165 (6) of *the Constitution*, so that the administration of justice is not brought into disrepute or embarrassment, and so that the court process is not used to violate the applicant's right to property. I am persuaded to assess the substantial complaints that the ex parte applicant has outlined against the Magistrate's court and give such orders or directions as I deem fit for the case at hand. I am aware that the applicant herein did not specifically invoke this court's supervisory jurisdiction under Article 165 (6) of *the Constitution*, but as I have explained above, this court can suo motu, be moved to exercise that power, and I am so persuaded, given the circumstances of this case. Ordinarily, an application to set aside judgment would be made in the court which passed the judgment, in this instance, the Magistrate's Court. If

this was an ordinary case, I would straight away direct the parties to the Magistrates' Court for the court to determine whether this is a fit case for setting aside judgment. But as matters stand the issue is much more complicated. First, there is doubt whether the Magistrates' court has jurisdiction given the value of the subject matter. Secondly, the title of the suit land has already changed and is in the hands of persons who are not parties to the suit before the Magistrate. The Magistrates' Court, given the contention on the value of the subject matter, may not have the jurisdiction to cancel this title. Even if the judgment is set aside, the question of cancellation of title may be beyond the orders that the Magistrates' Court may make. I find that there are special circumstances that would entitle this court to invoke its supervisory jurisdiction. Moreover, this court has a duty to direct subordinate courts on how to conduct proceedings related to environment and land and intervene where justice so demands. I hope that the decision I make will not only benefit the parties at hand but also all subordinate courts dealing with matters related to environment and land. I see no prejudice to the respondents because they have also addressed themselves substantively on the issues raised by the applicant.

iv. Analysis of the proceedings before the Magistrates' Court and final orders

61. The first attack is that the court proceeded to deal with a matter which it had no substantive nor pecuniary jurisdiction. This is an important issue, because as emphasized in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, jurisdiction is everything, and without it, a court cannot make any step in the case. In the same case, the following passage, in Words and Phrases Legally defined – Volume 3: I – N Page 113, was cited and quoted with approval :-

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

62. I am also in agreement with the above quotation. As can be discerned, where a court's jurisdiction is limited, it is upon that court to ensure that the matters that limit its jurisdiction do not exist.

63. Mr. Kinyua did raise the issue that pursuant to Section 38 of the *Limitation of Actions Act*, Cap 22, and Order 37 of the Civil Procedure Rules, jurisdiction to hear adverse possession is only bestowed in the High Court. Section 38 (1) of the *Limitation of Actions Act*, provides as follows :-

> 38 (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

64. There could be substance in the contention that the jurisdiction to hear adverse possession suits is reserved to the superior courts. There is however the decision made in the case of Patrick Ndegwa

Munyua v Benjamin Kiiru Mwangi & another [2020] eKLR, by my brother, Ohungo J, which held that Magistrates in the new constitutional dispensation have jurisdiction to hear such suits. I opt not to dwell too much on this controversy but will restrict myself to the question of pecuniary jurisdiction of Magistrates' courts which I think is the more critical point raised in this case.

65. It must be appreciated by all magistrates that their jurisdiction in civil matters is not unlimited but is limited to the value of the subject matter. Each magistrate therefore needs to be satisfied that he/she is handling a case within his/her pecuniary limits. As partly stated in the quote above that I lifted from the Lillian S case, "If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction."

66. It is the duty of a court whose jurisdiction is limited, to first satisfy itself, that the limitation does not exist. In the case of Magistrates' courts, they must be satisfied, before proceeding with a civil suit, that the subject matter is within their pecuniary jurisdiction. The ideal scenario is to have the plaintiff annex a valuation report giving the value of the subject matter in which instance the court will stand well guided by the opinion of a professional. This is an ideal but I appreciate that it carries with it enormous costs, and at times this may not even be necessary. I think, however, that given that the Magistrates' Courts have pecuniary limitations, there is need for the plaintiff to provide a basis for filing the suit in the Magistrate's Court and invoking the jurisdiction of the Magistrates' Court, so that the court is guided on whether or not it has jurisdiction. My view is that, at the very least, a plaintiff must disclose what he deems to be the value of the subject matter in his plaint, Originating Summons, or such other pleading that initiates the suit. This, being a pleading, will not only guide the Magistrate's court, but can also be contested in the defence or reply of the defendant, who is at liberty to provide what he considers to be the proper value of the subject matter. If what the defendant raises is significant, in this instance meaning that it goes to oust the jurisdiction of the court, then the court will need to satisfy itself of what the correct value is before proceeding with the case, or outrightly advise the parties to apply to have the case moved to the superior court whose original jurisdiction has no pecuniary limitation. Of course any values disclosed in pleadings, though useful, do not bind the court. Any Magistrates' court is also at liberty to apply judicial notice of values of land, depending on size and site of the land, and question the parties on any value disclosed in the plaint, or if not disclosed, seek their opinion on the value. Where there is any doubt on the value, and where it will impact on the Magistrate having jurisdiction, then the Magistrate's court is at liberty to demand a valuation before proceeding with the suit. If there is non-compliance by the parties to avail a proper valuation report, the Magistrate's court will be within its powers to strike out the suit since there would be doubts as to the jurisdiction of the court.

67. In the case at hand, the Originating Summons filed before the Magistrate did not disclose the value and no valuation report was provided by the plaintiff. The magistrate was flying blind with regard to the value of the land. However, the land in issue is about ½ acre in a prime area of Nyali, which is an upmarket estate in Mombasa, and the value of land in such an area is expected to be high. I think this ought to have triggered the Magistrate into questioning the plaintiff on the exact value of the land before proceeding with the case. As it is, it has turned out that the value of the suit property is way beyond the Kshs. 20 million pecuniary limit placed on Magistrate's courts. The applicant has put the value at Kshs. 55 million. When the land was sold, the Government valuer placed the value for stamp duty purposes at Kshs. 40 million as at 20 December 2021. The respondents have not bothered to place any value to the land. In absence of any input from them on the value of the land, I am persuaded that the value of the subject matter was beyond the pecuniary jurisdiction of the Magistrate's court and the Magistrate who handled the case. When the case was commenced, the pecuniary jurisdiction of the Magistrate was Kshs. 15 million. In absence of any evidence, I do not see how the land would have

appreciated from Kshs. 15 million, to Kshs. 40 million within September 2020 when the Originating Summons was filed, and December 2021, when the Government did the valuation for stamp duty. This is more than a two fold increase within about a year, which in absence of any evidence, is improbable.

68. I am thus persuaded that the applicant has demonstrated to this court that the Magistrate's court did not have the requisite pecuniary jurisdiction to handle the case.

69. The second complaint is that the Magistrate erred in giving an order for substituted service without a formal application being made under Order 5 Rule 17. Order 5 Rule 17 provides as follows :-

> 17. Substituted service [Order 5, rule 17.]
>
> (1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.
>
> (2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
>
> (3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.
>
> (4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.
>
> There is no procedure outlined in the above law, and that being the case, fall back must be to Order 51 which provides as follows at Rule 1 :-
>
> "All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."

70. Unless specifically provided, applications to court are supposed to be by motion and are usually supported by an affidavit outlining the facts in support of the motion. For substituted service therefore, there needs to be a formal request made through application supported by an affidavit. The court will then assess the motion and either allow or disallow it. We could say that this is mere procedure and therefore no need to be too strict on it. That is a fair argument but I think that even where the court is persuaded to waive the formal procedure on seeking substituted service, and allows such application to be made orally, it must be given good reason why it should allow service by substituted means. It needs to be understood that substituted service is service outside the norm and the court must be persuaded by good reason that it should depart from the established modes of service that are set out in the law.

71. In the case at hand, there was no formal application for substituted service. What transpired in court is that on 10 November 2020, Ms. Mukoya appearing for the plaintiff, stated as follows :-

> " The mention is to confirm service. I pray for leave to file (sic) by way of advertisement."
>
> The court directed as follows :-
>
> "The pff (plaintiff) is granted leave to serve the pleadings upon the defendant by substituted service by way advertisement in Daily Nation and the Standard newspapers. Mention 30/11/2020 to confirm service."

72. It will be noted that what was made before court was an oral application for substituted service. No reason was given as to why the defendant needed to be served through substituted means. As I have mentioned above, it is not good practice to give the order for substituted service without reason being provided. The court needs to be given the reasons, and assess them, before making a decision on whether or not the reasons befit the grant of the order for substituted service. The subordinate court erred in not asking the plaintiff why the order for substituted service was being made.

73. Apart from the above, it will be observed that the court directed that advertisement be made in both the Daily Nation and Standard newspapers. There was no advertisement made in the Daily Nation newspaper. The magistrate must have had good reason why he thought that the case deserved advertisement in both newspapers. This order to serve in two newspapers was never varied and it was the duty of the court to see to it that the order was complied with. The failure to serve in accordance with the directions of the court was a clear violation of the order that allowed for substituted service. The court failed in its duty to ensure that service was done as it had directed. It also failed in its duty in allowing the case to proceed without service first being done as ordered by the court. No reason was ever given why the court permitted the case to proceed without service first being effected in accordance with the orders of the court.

74. Even then, the description of the plaintiff in the advertisement was erroneous as the name was misspelt. The name provided was Esther Gaceri Kirimi and not Esther Gaceri Kirima. Now, "Kirima" and "Kirimi" are two distinct names. If you call out "Kirimi" a person named "Kirima" may not bother to answer that call. When making the order for service by advertisement, the court needs to place itself in the shoes of the defendant. The intention is to see to it, as best as possible, that the person named as defendant is made aware that there is a suit where he has been sued. First, it goes without saying that the defendant must be described in all his names. If it is a case touching on title to land, the exact name as appears in the title needs to be used. Even one misplaced letter or coma, would vitiate service, because the defendant may think that this is somebody else being sued. But I would go further to say that it is advisable to put, in the advertisement, as much information about the person sued and the nature of the case, so as to dispel any doubts on who the person sued may be. For a case concerning land, I would encourage courts to insist that the land in dispute be sufficiently described, not just in the form of its title number, but also indicating where it is located. The nature of the dispute can also be briefly described. If the person's identity card number is discernible, even better to place it in the advertisement as well. This is to make clear to any person reading the advertisement who the exact defendant is, so that there is no doubt about who is being sued. The court has wide discretion on this issue and is at liberty to make orders on what needs to be disclosed in the advertisement. What is important is for the court to order for as much information as is available to be provided so as to dispel any doubt about the person being sued. For example, in a case such as the one that was in issue, it would have been prudent for the Magistrate to direct that the advertisement to include the nature of the suit and the title number in issue. Such advertisement could then take the following format or a format close to it :-

To Esther Gaceri Kirima of Post Office Box 88444 Mombasa :-

Take notice that an Originating Summons has been filed in the Chief Magistrates' Court at Mombasa being Civil Suit No. E1 of 2020 where you are named as respondent. The applicant has filed suit claiming to have acquired title to the land parcel No. 12713/I/MN located along Nyandarua Road near Jumeirah Beach Hotel which land is registered in your name. Service of the summons on you has been ordered by means of this advertisement. A copy of the summons and the Originating Summons maybe obtained from the court at Mombasa Magistrate's Court.

And further take notice that, unless you enter an appearance within 15 days the case will be heard in your absence."

75. As it has turned out, the advertisement placed was not in two newspapers as directed, and further, the name appearing in the one advertisement was not that of the applicant. It cannot be said that proper service was effected upon the applicant. This is the sort of judgment that would ordinarily be set aside ex debito justitiae. It will be a gross injustice for the applicant to lose her property when she was not served, and as a result of a judgment that is liable to be set aside ex debito justitiae. It will be a dereliction of duty for this court not to intervene in circumstances such as this.

76. The other issue raised by the applicant is that the provisional title issued to the 3rd respondent was issued illegally without following the rules on advertisement. I was pointed to Section 33 (3) of the *Land Registration Act*, 2012, which is drawn as follows :-

> (3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

77. It will be seen from the above that before a replacement title is issued there needs to be publication in the Kenya Gazette and in two local newspapers of nationwide circulation. I have come across some pleadings and/or applications which seek that replacement or a provisional title be issued without advertisement. Such prayers are against the letter and spirit of Section 33 (3) above and ought to be rejected. The antenna of the court should be raised when a litigant seeks such an order for it could be a means of concealing the fact that a replacement title is being sought. There is good reason why the law provides for advertisement of a lost title, and good reason why it demands that the advertisement not only be in the Kenya Gazette, but in two other newspapers of nationwide circulation. First, if title is to be replaced in favour of somebody else, say a successful litigant, advertisement is a means of informing the incumbent title holder that title may be issued to another person so that if he has any objection he can have opportunity to be heard. Secondly, it informs any other individual who may have interest in the land that there is a new title going to be issued and also allows them to raise any issue. It would be wrong to attempt to bypass these safeguards.

78. In the case at hand, there was never any advertisement of the lost title in any local newspaper, let alone two newspapers. The only advertisement displayed was in the Kenya Gazette. Failure to advertise in the local newspapers means that the applicant was denied another opportunity of being informed that her title was at risk of being issued to somebody else and denied her an opportunity to raise objection. Yet again, it would be a gross injustice for the applicant to be relinquished of title without adequate opportunity having been given to her to object to the issuance of a provisional title.

79. There are other things in this suit that have disturbed me. First, is the wrong description of the identity of the 3rd respondent in the Originating Summons. He gave the wrong ID number and I wonder

whether he was trying to hide his identity just in case the suit was defended. I am not persuaded by the explanation that it was a mere typographical error. I find it too much of a coincidence that his ID number misses a digit in the same way that the advertisement of the name of the applicant missed one letter. It seems to me that the strategy of the 3rd respondent was to deliberately cause minor misplacement of letters or numbers so as to hide true identities, or create confusion, which would ultimately be in his favour. Secondly, I am not persuaded as to the innocence of the interested parties in the transfer of the suit property to them. In as much as it is alleged that they are purchasers for value, neither the 3rd respondent nor the interested parties annexed any sale agreement. Neither has this court been shown any transfer of money to demonstrate an actual purchase of land that took place. It is difficult in those circumstances not to read collusion between the 3rd respondent and the interested parties. I am not by any shade persuaded that the interested parties are innocent purchasers. In fact, I read a fraudulent scheme between the 3rd respondent and the interested parties aimed at stealing the title of the applicant. The filing of the suit before the Magistrate's Court, and the purported transfer to the interested parties, was in my view, an attempt to sanitize that scheme.

80. This court ought not to fold its hands at such injustice. The conscience of this court does not allow it to stand by and see the applicant lose title based on a judgment made by a court with no jurisdiction, where she was never served with summons, where a provisional title was issued without her being made aware as required by law, and where there is an extremely suspicious transfer not backed up by any sale agreement or any evidence of transfer of funds to support a sale. Nobody should lose title in circumstances such as those that have played out in this case. This is a court of justice and justice must be served to the applicant. Justice can only be served by nullifying the entire proceedings of the case Mombasa CMCC E001 of 2021, quashing the judgment that ensued, cancelling the provisional title, and cancelling the purported transfer of title to the 3rd respondent and to the interested parties. If this court does not intervene the applicant will lose her land under unsavoury circumstances.

81. It is the duty of this court to protect the right to property as prescribed in Article 40 of *the Constitution*. The applicant's title must be restored and is hereby restored. That title is restored by the order, which is hereby made, of cancellation of the provisional title, cancellation of the transfer to the interested parties, and cancellation of all entries made pursuant to orders made in Mombasa CMCC E001 of 2020. This court declares that the only legal title to the land parcel 12731/I/MN is the original title held by the applicant which is still in her name.

82. Though it was asserted that the 1st, 2nd and 4th respondents were party to the fraudulent scheme, I do not have sufficient evidence to hold as much. I think that for the 1st and 2nd respondents, what panned out is that there was a dereliction of duty on their part to ensure that due process as provided by law is followed. I have no evidence of deliberate lapses on their part. As to the 4th respondent, I also have no evidence that she acted outside the scope of her duty as counsel. I therefore give benefit of doubt to the 1st, 2nd and 4th respondents on the allegation that they were also party to the fraudulent scheme.

83. If the 3rd respondent feels that he has a good suit for adverse possession over the suit land, he is at liberty to file suit before the superior Environment and Land Court, and his suit will be determined on merits. For the record, he has not been shut out from presenting his case for adverse possession before the proper forum. He however cannot benefit from a suit and judgment filed in a forum without jurisdiction and where there were lapses that led to an injustice to the applicant.

84. The result is that this suit succeeds upon intervention of this court pursuant to its supervisory jurisdiction under Article 165 of *the Constitution* and this court makes the following orders :-

i. That the proceedings in Mombasa CMCC E001 of 2020 and all consequential orders are hereby quashed.

ii. That there is hereby issued an order cancelling all entries made in the title to the land parcel LR No. 12731/I/MN pursuant to the judgment and decree in Mombasa CMCC E001 of 2020.

iii. That there is hereby issued an order of cancellation of the provisional title to the land parcel LR No.12731/I/MN issued to Charo Bomba Muzoka.

iv. That there is hereby issued an order of cancellation of the transfer of the provisional title to the land parcel LR No. 12731/I/MN to Sega Ventures Limited and Jelani Apartments Limited.

v. That there is hereby issued an order of cancellation of the title of Sega Ventures Limited and Jelani Apartments Limited to the land parcel LR No. 12731/I/MN.

vi. That it is hereby declared that the only valid title to the land parcel LR No. 12731/IMN is the original title held by Esther Gaceri Kirima.

vii. That an order is hereby issued that the interested parties to forthwith vacate the land parcel LR No. 12731/I/MN.

viii. That it is hereby declared that it is Esther Gaceri Kirima who is entitled to exercise proprietary rights over the land parcel LR No. 12731/I/MN subject only to any orders of court that may be issued in favour of a party claiming any rights over the said land.

85. The other issue left is costs. It is the 3rd respondent who filed suit in a court with no jurisdiction. He will bear the costs of the suit to the ex parte applicant. I make no orders as to costs in favour of or against any other party in the matter.

86. Lastly, I need to apologise to the parties for the delay in delivery of this judgment. I had originally scheduled the judgment for delivery on 19 October 2022. I could not be able to finalise the judgment before that day as I was fairly unsettled at work after being transferred from Mombasa to Kisii that month of October. On 19 October 2022, I adjourned delivery to 3 November 2022, but in that intervening period, I was called to a workshop to work on the Strategic Plan of the Environment and Land Court and it became impossible to have the opportunity to write the judgment given that task. Subsequently, in the month of November 2022, I took medical leave covering November and December 2022, and had to travel abroad to attend to some personal health challenges. I have more or less resumed work proper on 16 January this year after the December court recess. I trust that the parties will understand the cause of the delay.

87. Judgment accordingly.

DATED AND DELIVERED THIS 24 DAY OF JANUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

Mr. Kinyua present for the ex-parte applicant.

Mr. Makuto present for the 1st and 2nd respondents.

Ms. Mukoya present for the 3rd and 4th respondents.

Mr. Otieno present for the interested parties.

Court Assistant – Wilson Rabong'o