REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 158 of 2005

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

IN THE MATTER OF THE REPORT OF THE COMMISSION OF INQUIRY INTO THE ILLEGAL/IREGULAR ALLOCATION OF PUBLIC LAND (OTHERWISE KNOWN AS THE NDUNG'U REPORT)

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP.284, LAWS OF KENYA

AND

IN THE MATTER OF TRUST LANDS ACT, CAP. 288, LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300, LAWS OF KENYA

AND

IN THE MATTER OF THE 2577 ACRES UNLAWFULLY ACQUIRED BY THE CATHOLIC ACHDIOCESE OF NYERI FROM THE MBARI-YA-MURATHIMI CLAN AND REGISTERED AS LAND PARCEL NOS. 1356, 9464 AND 4166 NYERI MUNICIPALITY

IN THE MATTER OF AN APPLICATION FOR MANDAMUS SEEKING ORDERS THAT THE MINISTER FOR LANDS DO IMPLEMENT THE RECOMMENDATIONS OF THE REPORT OF THE COMMISSION OF INQUIRY IN THE ILLEGAL/IRREGULAR ALLOCATION OF THE PUBLIC LAND (OTHERWISE KNOWN AS NDUNG'U REPORT) IN SO FAR AS THE SAME TOUCHED ON THE SAID AND LAWFULLY ACQUIRED LAND

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS SEEKING ORDERS THAT THE MINISTER FOR LANDS SETTLEMENT, THE COMMISSIONER FOR LANDS AND DISTRICT LAND REGISTRAR, NYERI DISTRICT DO CANCEL THE TITLE DOCUMENTS TO LAND PARCEL NOS. L.R. 1356, 9464 AND 4166 NYERI MUNICIPALITY AND HAVE THE SAME CONSOLIDATED

AND REGISTERED AND IN THE NAME OF MBARI-YA-MURATHIMI CLAN

AND

IN THE MATTER OF AN APPLICATION FOR PROHIBITION AGAINST THE CATHOLIC ARCH-DIOCESE OF NYERI AND THE ARCHBISHOP OF THE CATHOLIC ARCH-DIOCESE OF NYERI JOINTLY AND SEVERALLY BY THEMSELVES, AGENTS, SERVANTS, EMPLOYEES AND ASSIGNEES RESTRAINING THEM FROM REMAINING ON, TRESPASSING UPON, BUILDING UPON AND/OR IN ANY MANNER WHATSOEVER FROM TAMPERING WITH LAND PARCELS NO. 1356, 9464 AND 4166, NYERI MUNICIPALITY

BETWEEN

JOHN PETER MUREITHI

SHADRACK MUTERU GITONGA

JAMES NDUNGU THEURI .... ALL SUING FOR AND ON BEHALF OF MBARI-YA-MURATHIMI CLAN

VERSUS

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

THE HON. THE MINISTER FOR LANDS & SETTLEMENT ..... 2ND RESPONDENT

THE COMMISSIONER FOR LANDS ..... 3RD RESPONDENT

THE DISTRICT LAND REGISTRAR, NYERI DISTRICT…….4TH RESPONDENT

THE CATHOLIC ARCHDIOCESE OF NYERI

(THRO' ITS REGISTERED TRUSTEES) ..... 5TH RESPONDENT

THE ARCHBISHOP OF THE CATHOLIC ARCHDIOCESE OF NYERI ..... 6TH RESPONDENT

JUDGMENT

The applicants have brought Judicial Review Proceedings against the 1st , 2nd, 3rd 4th, 5th and 6th respondents on behalf of the Mbari-ya-Murathimi clan "the clan" for orders of:

(a) Mandamus against the 1st, 2nd, 3rd, 4th, respondents to implement the Recommendations of the Ndung'u Report in so far as the same touches on Land Parcels LR 1356, 9464, and 4166 Nyeri Municipality unlawfully acquired by the 5th and 6th respondents and

(b) Prohibition against the 5th and 6th respondents jointly and severally by themselves, servants, agents, employees and/or anybody else claiming or working under their direction and control prohibiting and restraining them from remaining or trespassing upon building upon and/or in any manner whatsoever tampering with land parcels No 1356, 9464 and 4166 Nyeri Municipality.

The applicants' case is pegged on the following portion of the Ndungu Report:

"The Commissioners received a complaint from the area residents to the effect that their ancestral land in Mathari Sub-location had been grabbed by the Catholic Church Consolata Mission. They acknowledged that the Church purchased 1054 Acres of land from their ancestors in 1912. The residents have no quarrel with this particular purchase. But they complained that the Church went ahead to acquire 2577 more acres from them. The Church acquired part of this land during the emergency period when the residents had been moved to emergency villages in 1955. This parcel is now registered as LR 9464 and comprises 1089 Acres. The rest of the land was obtained by the Church in 1965 and registered as two titles namely LR 1356 comprising 584 and LR4166 comprising 904 Acres. All this land (Being Trust land) belonged to the residents and their ancestors before the Emergency. They requested the Commission to recommend that the three parcels with a total of 2577 Acres be restored to them by carrying Land Adjudication in the area."

In the words of the applicants their claim stated simply is that the 2nd to 6th respondents unlawfully and fraudulently conspired and connived to have the 5th respondent registered as proprietor of an extra 2577 Acres from the land belonging to the applicants and had the same registered as land parcels Nos. 1356, 9464 and 4166 Nyeri Municipality. The applicants further contend that the said registration was false, fraudulent and unlawful as the said land parcels were Trust Land and the clan never gave its consent to the conveyance. There was no vendor neither were there the usual elements of contract, offer, acceptance and consideration. The relevant consent were neither sought nor obtained and even if they were (which is denied) the proper person to consent would be the clan as represented by the applicants.

It is for the above reasons that the applicants have sought an order of Mandamus to compel respondents 1 to 4 to implement the Ndung'u report and in particular the portion of the report quoted above.

They contend that their claim lies in the area of public law and not private law.

They further contend that since under the Kikuyu customary law the land belonged to the clan they have the necessary standing or locus standi.

The respondents on the other hand have filed grounds of opposition and also filed written submissions with lists of authorities all of which I have considered in preparing this judgment. The main and common thread in the grounds of opposition are:

1) The applicants have no locus standi

2) The applicants remedy if any lies in private law and not public law

3) The applicants' claims are barred by limitation and that there has been undue delay of upto 40 years.

4) The applicants ought not to have come to court because they have not exhibited any demand letter and refusal from the respondents.

5) Judicial review remedies are discretionary and since there were alternative remedies available to the applicant the judicial review remedies ought to be denied. Mandamus and prohibition cannot legally issue in the circumstances.

6) Under the Constitution the said land ceased to be Trust Land upon registration and transfer to 5th and 6th respondent and that the effect of registration was to confer on the 5th and 6th respondents absolute and indefeasible ownership which can only be challenged on grounds of fraud and misrepresentation to which it is proved the respondents were party to

LOCUS STANDI OR STANDING

Purpose of Loci Standi Principles

The principles of locus standi or standing determine who is entitled to bring a particular dispute before the court.

Functions of Standing

I wish to borrow from the Academia, and in particular, Cane in his book ***An Introduction to Administrative Law*** (1996) pages 59-60, where the learned author has explained that the function of standing rules include:

1. to restrict access to judicial review

2. to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this

3. to prevent the conduct of government business being unduly hampered and delayed by excessive litigation

4. to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong

5. to ration scarce judicial resources

6. to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together)

7. to ensure that people do not meddle paternalistically in affairs of others.

Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law.

The other reason is that although initially it was feared that the relaxation of standing would open the floodgates of litigation and overwhelm the courts this has not in fact happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the supporting jurisprudence on the issue of standing reveals a well trodden path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue.

Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus is that of a person aggrieved. After 1977 the test is whether the applicant has a sufficient interest in the matter to which the application relates. Thus in the case of ***ARSENAL FOOTBALL CLUB LTD v ENDE (1979) AC*** **I** the statutory phrase "person aggrieved" was **treated as a question of fact – "grievances are not to be measured in pounds and pence".**

Although under statute law our test is not that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organized and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think the courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. Even if one were to be conservative and restrictive and literally stick to the phrase aggrieved party the inspiration to be liberal is still inescapable, see the case of ***A.G. (GAMBIA) v NJIE 1961 1 ALL ER 540*** where Lord Denning held:

"The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busy body who is interfering in things that do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

For the public spirited citizen NOLAN LJ had this to say in the case of ***R v LEGAL AID BOARD ex.p. BATTEMAN [1992] I WLR 711:***

"I fully accept the desirability of the courts recognizing in appropriate cases the right of responsible citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members."

To illustrate the great swing in the standing pendulum in ***R v SECRETARY OF STATE FOR THE ENVIROMNENT exp ROSE THEATRE TRUST CO. 1990 I QB 504***. Stiemann J held that a direct financial or legal interest is not required in the test of sufficient interest.

In the case of ***R v COMMISSIONER OF LANDS ex p LAKE FLOWERS LTD*** HC Misc 1235 of 1998 (unreported), I addressed the issue of judicial review interventions and standing as follows at pages 6 and 9:

"In my view our courts must strongly resist the pressure and the temptation to try and contain judicial review in a straight jacket."

.....

Yes, even on the important principle of establishing standing for the purpose of Judicial Review the courts must resist being rigidly chained to past defined situations of standing and look at the matter before them. In the recent case of Ex-parte JACKSON MWALULU (supra) when

the application for leave came before me as a single Judge I did address the issue of standing and found that although the applicants were public spirited activists with no direct personal rights infringed as such it was quite apparent to the court that the Attorney General who was supposed to be the chief defender of the public interest and the rule of law was on the opposite side and a relator action by him was not possible and he was clearly in a deep slumber when the individuals concerned and the court awoke him up. The considerable public interest in the matter was the major factor in obtaining standing in the matter and to a certain extent legitimate expectation in the special circumstances of the Goldenberg Affair."

.....

Although all this is a digression and a lengthy obiter which has nothing to do with the points raised in this matter it is my hope that it has gone along way in demonstrating the need for the courts to endevour to look at the wider picture. Judicial review is a tool of justice which could be made to serve the needs of a growing society on a case to case basis as expounded in the House of Lords case *CCSU v MINISTER OF CIVIL SERVICE* [1985] AC 374."

Turning to the facts in this case the applicants are members of a Kikuyu clan which contends that during the Mau Mau War (Colonial Emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of 0 53 they are "persons directly affected." I find no basis for giving those words a different meaning to that set out in the case law above. The court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allegedwas clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.

IS REMEDY IN PRIVATE OR PUBLIC LAW

Order 53 is the exclusive order for the judicial orders of certiorari mandamus and prohibition. These are the only available judicial review remedies in Kenya for the time being (although this area is at the moment crying out for reforms). In the case before the court the applicants are in fact contesting the ownership of the land in question and their remedy if any or at all is in the private law, under the constitutional realm, for full compensation in lieu, under the Trust land provisions of the Constitution or for damages under the Registration of Titles Act under which the titles are registered. They cannot be right in their wanting to have remedies which predominately lie in private law in judicial review, and the court fully endorses the finding of Lord Diplock in the earth shaking decision of ***O'REILLY v MACKMAN [1983] 2 AC 237 274 H*** where he found:

"It would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

The converse is also correct, a party cannot seek judicial review remedies where the institution of

an action or a constitutional application is the prescribed procedure. Thus an ownership claim could be instituted against the 5th and 6th respondents in an ordinary suit or as a taking away under S 75 of the Constitution or the Trust Land provisions of the Constitution, as the 5th and 6th respondents are juristic persons capable of being so sued. For this reason I find that the application is an abuse of the court process and I would dismiss it on this ground. In addition I would also dismiss the application on the ground that the 5th and 6th respondents are not public authorities as far as ownership of the land is concerned since their ownership is derived from either from adjudication and registration under the Land Adjudication Act or the setting apart under the Constitution. The applicant has offered no evidence of the process followed before the issue of the Certificate or Grants. Both methods result in the extinguishment of the clan or tribal rights. In other words the applicant's private law rights dominate the proceedings and they should not have instituted judicial review proceedings.

For the same reason the judicial order of prohibition cannot lie against 5th and 6th respondents.

Firstly the conveyances to them were effected as follows:

(a) LR 4166 - 1st March 1965

(b) LR 9464 - 1st March 1958

(c) LR 1356 - 1st November, 1965

And prohibition cannot issue as the act complained of has been completed. Prohibition prevents an incomplete and unlawful act. Only the judicial order of prohibition has been sought against the two.

Secondly, prohibition as sought is in effect an injunction which can only at the moment lie in the private law realm.

Thirdly under S 23(1) of the Registration of Titles Act Cap 281 certificates of title can only be challenged on the grounds of fraud or misrepresentation to which the respondents are proved to be parties. There is no proof of this and none has been disclosed in the pleadings, and the pleaded claims can only be beneficially articulated in private law or under the Act under which the three parcels are registered or under the Constitution as indicated above.

NDUNG'U REPORT AND THE LAW

The relevant portion of the report which has been relied on reads:

"The Commission received a complaint from the area residents ... they requested the commission to recommend that the three (3) parcels with a total of 2577 acres be restored to them by carrying out land adjudication in the area."

It is a request by the residents and not necessarily by the applicant clan. Moreover no specific recommendation was made to vest the ownership in the clan or the residents. Ndung'u Report aonits own cannot constitute a cause of action and evidence has to be adduced on a case to case basis.

However for greater clarity, the general recommendations in (IV) of the Ndung'u Report states:

1. "All allocations of Trust lands to individuals and companies contrary to the provisions of the Constitution, Trust Land Act and the Land Adjudication Act should be revoked. In particular,

the cases highlighted in the foregoing section (to the extent to which they are no longer pending in courts) should be revisited by the Ministry of Lands and Settlement with a view to being nullified

2. All allocations of trust lands set apart under S 117 of the Constitution for public purpose to private individuals and companies should be revoked. The lands in question should revert to their original purpose

3. The Ministries of Lands and Settlement and Local Government should compile a complete and comprehensive Register of Trust Lands that have been set apart for public purposes

4. The entire management structure of Trust land should be re-examined and reformed. The Ministry of Local Government should be more vigilant in the supervision and monitoring Trust land."

In order to discover what the Ndung'u Commission was intended to do and its spirit I would like to reproduce the Preamble to the Terms of Reference:

"WHEREAS it appears that lands vested in the Republic or dedicated or reserved for public purposes may have been allocated, by corrupt or fraudulent practices or other unlawful means to private persons and that such lands continue to be occupied contrary to the good title of the Republic or in a manner inconsistent with the purposes for which such lands were respectively dedicated or reserved ..."

To my mind this claim is incompetently brought for the following reasons:

1) The Constitution itself gave the right to prompt and full compensation as a result of the registration see S 117(4) of the Constitution

2) Claim for damages under the Acts under which the parcels are registered could have been instituted

3) The applicants claim is predicated on the Ndung'u Report itself and at page 52 of the Report the Report itself demolishes the applicants claim in these words:

"The only ways in which trust land can be legally removed from the communal ownership of the people is through adjudication and registration or Setting Apart. Adjudication and registration removes the particular lands from the purview of community ownership and places them under individual ownership. Setting apart removes the trust lands from the dominion of community ownership and places them under the dominion of public ownership."

It is therefore quite apparent that if for example the 1958 title, was issued following adjudication and registration their claim was extinguished because that process could result in private ownership of the land by the 5th and 6th respondents. Alternatively as regards the other parcels if this was done by setting apart this could only have transferred the land to public ownership. It is arguable whether church purposes are in the realm of public benefit. For the clan to succeed they must with, evidence fault, which-ever method was followed. They have not done so and have only relied on legal coclusions of the Ndung'u Report.

The power to appoint a Commission of the nature of the Ndung'u Commission is set out in section 3

of the Commissions of Inquiry Act Cap 102 of the Laws of Kenya which reads (relevant parts):

"The President, whenever he considers it advisable so to do may issue a commission under the Act to inquire into ... any matter into which an inquiry would, be in the opinion of the President be in the public interest."

Under S 7 of the Act the Commissioners have a duty to report in writing to the President the result concerning the directions contained in the commission and the reasons for the conclusions arrived at and when required by the President to furnish to the President a full record of the proceedings of the Commission.

From the above provisions it is clear that once the President is presented with a report he has a complete discretion on what to do with it. The court has no doubt that the President has before him great policy choices to make concerning the Report which has been availed to him, but it is not the province of the Court to interfere with Policy considerations. There is no statutory requirement that upon receipt of any report, he has to act in a particular way!

From this it is apparent that no orders have been sought against the President nor was he made a party to the proceedings. Under the Commission of Inquiry Act neither the President nor the respondents joined are under any statutory duty to act in a particular manner concerning the report. Mandamus compels the performance of statutory duties

Moreover it is clear to the court neither the recommendations nor the findings of the Ndung'u Report can override the Constitution. The court has no hesitation in observing that the recommendations would have to be implemented with the constitutional provisions in view including any other written law. For example the recommendation on the establishment of Land Titles Tribunals would be unconstitutional in view of the provisions of S 60 and 65(2) and S 84 of the Constitution. Land matters are civil and any limitations or restrictions of the High Court original jurisdiction fly in the face of these provisions. Respondents 1, 2, 3, 4, 5, and 6 have no statutory role concerning the report whatsoever and therefore the mandamus orders sought against them cannot in law lie against them since the recommendations do not constitute any statutory duty under the Commissioners of Inquiry Act and there is therefore no statutory duty which they have refused to perform. Indeed a request as outlined above can never be the subject matter of the judicial order of mandamus. The source of the power or duty challenged for non-performance must be a statute for the judicial review remedy of mandamus to lie. The Ndung'u Report recommendations have not yet assumed any statutory form.

A mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary. Here no such duty has been placed by statute on the respondents at all. To deal with this point it is perhaps relevant to restate the scope and the interventionary role of an order for mandamus. HALSBURYS LAWS OF ENGLAND 4TH Edition Vol 1 at 111 from paragraph 89 states:

"The order of mandamus is of a most extensive remedial nature, and is, in form, of Justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual."

The efficacy of mandamus is also restricted as stated in paragraph 90 of the above citation in the

Halsburys as follows:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

On the order of prohibition the Court of Appeal in the case cited hereinbelow in full stated:

"What does an Order of Prohibition do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings see HALSBURYS LAWS OF ENGLAND (4 ed) Vol 1 at 37 para 128.

.....

That is why it is said prohibition looks to the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However where a decision has been made ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision.:

There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of mandamus, prohibition or certiorari are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act.

There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.

The above principles received the endorsement of the Court of Appeal for Kenya in the case of ***KENYA EXAMINATION COUNCIL v GATHENJI & OTHERS 1996 KLR 483 (CAK)***. The court is therefore entitled to pose the following questions:

1) Do the applicants have a specific legal right that has no specific remedy

2) Would the orders lie or not and for what reasons in the circumstances of this case"

Firstly as analysed above the applicant clan has no legal right by virtue of the Ndung'u Report. The Report has and does not confer any known legal right on the clan. Secondly even if for the purposes of

argument the applicant clan has any such right the Act under which the claimed parcels of land are registered do provide specific legal remedies which are not in the view of the court less convenient, beneficial and effectual. Thus S 24 of the Registration of Titles Act Cap 281 under which the titles are registered provide as under:

"Any person deprived of land or of any interest in the land in consequence of fraud or through the bringing of the land under the operation of this Act, or by Registration of any other person as proprietor of the land or interest or inconsequence of any error or misdescription in any grant or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act or the erroneous registration was made or who acquired title to the interest through the fraud error or misdescription."

In addition S 61(1) of the RTA Cap 281 provides that if a Grant or Certificate of Title was fraudulently or wrongfully obtained the Registrar has the power to summon the proprietor to deliver it up for the purpose of being corrected.

Again under S 62 of RTA the applicants could have written to the Registrar questioning the grants and thereafter apply for a mandamus pursuant to the provisions of that particular section. There is no proof that a demand was made before the parties moved to court.

Mandamus ought therefore to be refused because there were other statutory remedies which were not less convenient, beneficial and effectual such as an action for full compensation under the Constitution and actions under the relevant registration Act ie RTA and recovery through the Registrar as outlined above. In this regard see this court's findings in the case of ***R v LAND REGISTRAR KAJIADO, DIRECOR OF SURVEYS KAJIADO & KIRSEK INVESTMENT Ex parte*** HC Misc 1183/2004 (unreported pages 12 to 13) where judicial review remedies were denied because the Registered Land Act provided remedies which were not less convenient, beneficial or effectual.

As stated herein it is a requirement of the rule of law that law must be certain and predictable. In the same way a respectable and reliable land tenure system must have the same traits of certainty, predictability and in addition stability. Thus the advantages of upsetting these ingredients at the altar of individual claims no matter how meritorious are heavily outweighed by the advantages of certainty predictability and stability. More so in a situation such as Kenya where cultural, social and economic fabric is firmly rooted in land. Any shortsighted reforms could shake the foundation in an adverse manner. In my view I would not see any need to upset this because any meritorious individual cases could be fully compensated in monetary terms under the provisions of the Constitution especially as regards Trust land or claims under the Land Registration Acts. Should the applicable law be found to be deficient in providing for suitable remedies the passing of appropriate laws entrenching a Compensation Fund as an alternative to unraveling a registration system that traces its roots to the turn of the last century would be a better approach. I make this observation while acutely aware that colonialism and its laws did introduce unjust alienation of our land and an unequal society, including the squatter problem and thereafter the decade of the 80's and 90's compounded the problem through reckless grabbing of public land and other resources.

The Constitution as outlined herein and the individual land registration laws, do provide a satisfactory legal framework for articulation of claims and giving of relief especially where the alienation was not done for a public benefit or purpose. Thus, where there was fraud or misrepresentation in the obtaining of a grant or certificate of title the title or certificate can be nullified. Outside the two challenges the way out is to have Constitutional amendments to provide for targeted takeover of land for public

purposes in cases where public land was grabbed and where there is substantial element of third innocent parties provide for compensation. This is perhaps the way out of the mess of grabbing, grabiosis, greed and irresponsible land acquisitions of the past decades. A Compensation Fund would have to be established by law. Whether or not a new Constitution can sufficiently address this recommendation will depend on whether the hurdle of retroactivity can be legally feasible.

UNDUE DELAY

The applicants claim would also not succeed on the ground that it has taken them over 40 years to come to court. Judicial review orders are discretionary and one of the factors this court has to take into account is the effect of unraveling over 40 years of history, possession, occupation and the legitimate expectation by the 5th and 6th respondents that they would continue to own and utilize the land. It should also not be forgotten that the targeted respondents have registered titles and are missionaries who run public institutions such as schools, hospitals and churches among other community based functions, as opposed to individual owners who derive a direct individual interest from the use of land. Although the Constitution does not define a public body, a church could as well answer the description of a public body under the Interpretation and General Provisions Act – which in turn cannot be used to interpret the Constitution. The extent to which this aspect might be relevant cannot be gone into because the applicants challenge is not under the Constitution. While still on this point the issue of the public interest in the country safeguarding and maintaining a reliable, credible predictable and stable land tenure would in my view militate against an intervention after nearly 40 years. Any unraveling of the past without considerable thought, planning and vision on behalf of individuals or a group of individuals could inflict greater harm, to the element of public interest than the benefits which would accrue to the individual or the groups concerned. This view is of course not a determination in the absence of any constitutional challenge. I believe one of the pillars of the rule of law which the court should always uphold is the predictability of law so that individuals and other juristic persons can plan their lives and affairs on the basis of certainty of the applicable law. On this ground also I would not exercise my discretion to grant the relief sought even if it was properly sought and properly grounded because the delay even by the known judicial review standards is inordinate.

Limitation in judicial review actions is that of a reasonable time (except as regards certiorari orders and proceedings set out in Order 53 rule 2, which is six months). Reasonable time will in my view vary depending on the reasons for the delay. Where the decision being impugned has been implemented and third parties have come onto the scene the court should not intervene because speed and promptness are the hallmarks of judicial review. Hardship to third parties should keep the court away.

LIMITATION OF ACTIONS ACT, JUDICIAL REVIEW AND THE CONSTITUTION

The respondents have contended that this matter is time barred under the Limitation of Actions Act Cap 22. However the Act does not apply to Judicial Review which is sui generis. Suit" as defined in S 2 of the Civil Procedure Act means "all civil proceedings commenced in any manner, prescribed" "Action" under the Interpretation and General Provisions Act Cap 2 means "all civil proceedings in a court and includes any suit as defined in S 2 of the Civil Procedure Act." Since the actions set out in Part II of the Limitation of Actions Act Cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters. In this connection, as indicated above, under the topic "Undue delay" judicial review matters have to be filed promptly and heard with expedition once filed – and certainly a delay of 40 years is hopelessly outside any reasonable limit even for mandamus and prohibition.

Turning to the Constitution except where the Constitution itself has set out the limits there are no general stipulated time limits. Under the fundamental rights and freedoms provisions provided a matter is brought within a reasonable time and there is a good reason for the delay S 70 does not impose for any time limits. Although the three judges, in the case of ***DOMINIC ARONY AMOLLO v THE ATTORNEY GENERAL H.C.*** **mc 494/2003 (unreported)** did not state it expressly they did approve the ruling of Hon Justice Hayanga (retired) in the same matter where he overruled a preliminary objection concerning the application of the Limitation of Actions Act to Constitutional matters by saying that constitutional matters were not actions as such. The position is now reinforced by the outline above on the meaning of the words "suit" and "action."

In the TRINIDAD & TOBAGO case of ***MILLS v THE COMMISSIONER OF POLICE & ANOTHER*** covered by the Commonwealth Human Rights Law Digest 1996 I CHRD where an applicant claimed damages under the Constitution for illegal seizure of a vehicle on the ground that he was entitled to a declaration that the seizure and retention by the army and police parties contravened his constitutional right of enjoyment of property and to equal protection of law the Court held inter-alia:

"(1) A liberal interpretation must be given to any time limit under the Constitution especially where the delay could be reasonably explained. Looking at the circumstances and facts of the case, including that enquiries and representations were made for the return of the vehicle the court was satisfied that good reasons existed for the delay."

In this case the submission that the matter was filed after more than the statutory one year period following the alleged seizure was no bar to the constitutional claim. For constitutional claims I find great merit in the holding in the MILLS case and for the same reasons disallow the application of the Limitation of Actions Act to judicial review matters or constitutional applications.

CONSTITUTIONAL BASIS OF THE CLAIM

The applicants contend that parcels in question used to belong to the clan or trust land held on their behalf and that neither the Colonial Governor nor Kenya's Presidents had the power to alienate it to the 5th and 6th respondents. Surprisingly, the claimants did not base their claim on the Trustland provisions of the Constitution nor on S 75 of the constitution. However, a careful examination of the constitutional provisions and the evidence (if any) does not necessarily support the applicant's contention, and the following analysis is not intended to be a constitutional adjudication of this matter under the Constitution but only as an attempt to address the Presidential powers concerning land, a point directly raised by the applicants.

1) Under Chapter IX of the Constitution, Trust Land is defined in terms of S 114 of the Constitution

2) Under S 115 all trust land vested in the county council within whose area of jurisdiction it is situated and the county Councils in turn held in trust the land vested in it for the benefit of the persons ordinarily resident on that land and the councils were empowered to give effect of such rights, interests or other benefits in respect of the land as may, under the African Customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual. There is however a proviso to the effect that no right, interest or other benefit under African customary law, shall have effect for the purposes of the subsection so far as it is repugnant to any written law.

Section S 116 of the Constitution allows registration of individual titles to Trust land where a county Council pursuant to any prescribed law requests that the law applies to any trust land area. The laws which may be applied are the Land Consolidation Act, Land Adjudication Act or any other law permitting

the registration of individual titles in respect of Trust Land. When a title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust Land. From this constitutional provisions it is clear to my mind that the applicants' interest if any to the three parcels could have been extinguished by the Constitution which is the supreme law of the land if (subject to evidence) that the proper procedure was pursued for example the application of the Land Adjudication Act to the disputed parcels. Individual titles could have been validly issued pursuant to S 116. It is also clear to the court that the parcels in question now form part of the Nyeri Municipality area and therefore ceased to the trust land upon registration of titles in question under the Registration of Titles Act pursuant to S 117 (2) assuming the respondents are public bodies after the setting apart by any law providing for prompt payment of full compensation under S 117(4) of the Constitution. Again under S 117(2) of the Constitution where a County Council has set apart an area of land in pursuance of the section any rights interests or other benefits in respect of that land that were provisionally vested in a tribe, group, family or individual under the African customary law are automatically extinguished but any affected or aggrieved person or claimant has the right to prompt and full compensation under S 117(4) pursuant to the law allowing the setting apart. Since the claim has not been grounded on the Constitution I cannot authoritatively adjudicate on this. S 117(5) of the Constitution provides that no right interest or other benefit under African Customary law shall have effect for the purpose of subsection 4 so far it is repugnant to any written law. If the claim were brought under the relevant registration Act, would such a claim be held to be repugnant" I cannot deal with speculative claims in this judgment, in the absence of evidence on what actually happened and what provisions were invoked. Thus, what law was used in setting apart, and did it make provision for prompt and full compensation" Under the relevant constitutional provision the setting apart cannot have effect unless provision is made for compensation. Did the claimant make any such claim before Registration" All these questions depend on evidence.

While still on this issue of setting apart Trust land and because the applicants have challenged the power of the colonial Governor and also the powers of the country's Presidents after the independence on 12th December, 1963, as regards Trust land, the Constitution provides that the President may request a County Council in writing to set apart land for use and occupation for public purposes under S 118 of the Constitution. The public purposes are set out as follows under S 118(2):

(a) the purposes of Government of Kenya

(b) the purposes of a body corporate established for public purposes by an Act of Parliament

(c) the purposes of a Company registered under the law relating to companies in which shares are held by or on behalf of the government of Kenya

(d) the purpose of the prospecting for or the extraction of minerals or mineral oils.

It is important to note that neither the President nor County Councils have powers to dish out trust land for any other purposes except for public purposes as set out in the Constitution (except under S 116 by adjudication and registration) because trust land is held in trust for the residents and the people of Kenya. Where land is set apart for the public purposes as set out above, which land includes that set apart under S 117 of the Constitution as described above, Section 75 of the Constitution on compensation would apply to such land including the Land Acquisition Act and compensation must be paid to those affected should the need to acquire such land arise and such acquisition must be for public purposes.

Again even under this category of setting apart at the request of the President compensation is claimable by the dispossessed under the Constitution as stated above.

Where there is no proof that the Presidents followed the constitutional provisions and the law in having Trust Land set apart, or that the setting apart was for the purposes other than for public purpose the alienation is challengeable under the Constitution. Thus, both the President and the County Councils had no power to alienate land for private use or ownership e.g. forests falling under the Trust land as defined in the Constitution, Wetlands, Islands, public purpose land set aside for hospitals, and cemeteries etc. The only private ownership recognized by the Constitution is alienation to the local residents under the Trust land provisions of the Constitution after adjudication and registration under S 116 of the Constitution. Thus, even where such setting apart is done and the public purpose for which it was meant ceases such land vests back in the County Councils as trust land under S 119 of the Constitution. Except for the challenge on the Presidential powers to allocate the alleged clan land, the applicants have not directly based their claim on the trust land provisions in the Constitution and have not produced any evidence that the Constitutional procedures were not followed and in any event any such claim or action could only have been competently brought under the Constitution and not, under the Judicial review jurisdiction. Under the judicial review jurisdiction which is statutory no compensation is payable. However it is my view that one cannot address fully the scope of the Presidential powers without considering the position of the doctrine of public trust under the Constitution.

The President has power to alienate land by way of lease under the Government Lands Act which came into force on 18th May 1915. His powers relate to Government Land as defined in S 2 of the same Act, this includes the land described in the Kenya Independence Order in Council 1963 by section 204 and 205 of the Constitution (see schedule 2 of the order) and section 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Thus, under S 3 of the Act, the President, in addition to, but without limiting any other right, power or authority vested in law under the Act, may subject to any other written law, make grants or disposition of any estates, interests or rights in or over unalienated Government land. The Presidents powers under this section were delegated to the Commissioner in some cases for example in respect of land for religious, charitable, educational or sports purposes and for general purposes of the Government. Unalienated Government land means Government land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment – see S 3 of the Act.

The President has powers under S 12 to grant leases of town plots to individual and companies. Under S 19 he has power to alienate land available for agricultural purposes to be surveyed and subdivided into farms. He can direct the Commissioner in this regard. He can grant leases of farms under S 20. His powers under S 3 except as provided, S 12, 20 are not delegable to the Commissioner. Since Kenya is a democracy, pursuant to S 1 and 1A of the Constitution the doctrine of public trust does also apply to public land except where it is excluded by the Constitution because alienating public land is not a practice which is necessary in any democratic state.

Under S 2(2) of the Land Consolidation Act, land set apart under section 115, 116, 117 and 118 of the Constitution can by Order of the Minister be brought under the provisions of the Land Consolidation Act which came into force in July 1959.

It is therefore also clear to the court that the applicants had an opportunity of claiming compensation under the Constitution at the point where the land was being registered under the RTA and they could also have brought a claim under the RTA pursuant to the provision outlined.

Under S 3 of the Land Adjudication Act (latter version) which came into force in June 1968 where the County Council in whom the land is vested so requests the Minister, may by order apply the Act to any area of Trust land where the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered and where the Land Consolidation does not apply to the

area.

Under the Registration of Titles Act under which the three parcels are registered and which came into force in 1920, the President had powers to apply it to any area by a notice in the Gazette.

The importance of going into the above history of the relevant Acts is that in all the Acts the Presidents powers to alienate are defined and in any event after adjudication and consolidation in the former special areas the effect of registration was to extinguish any clan or tribal interest in the land.

The President through the Commissioner does have powers to allocate Government land for the purposes set out in S 3 of the Government Land Act which are principally public purposes. To me the doctrine of public trust is implied in the relevant Acts and ought to apply in respect of Government Land except the Town plots which can be alienated as leases after public advertisement. Reference to the doctrine of public interest as defined in the Ndung'u Report later in this judgment seems to me to convey the same meaning as the doctrine of public trust.

THE DOCTRIE OF PUBLIC TRUST AND THE PUBLIC INTEREST

In the unreported case of ***KENYA GUARDS ALLIED WORKERS UNION v SECURITY GUARDS SERVICES & 38 OTHERS & AOTHER (IP) H.C. MISC 1159*** OF 2003, I made the following observations in the ruling delivered on 19th November, 2003 in defending the autonomy of the Industrial Court on the ground of public interest:

"Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability."

At the end of the day, we must remember those famous words of a famous jurist – Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts ... Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests".

How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title. Are the courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins."

At page 49 the Ndung'u Report, addresses the public interest as follows:

"The phrase "public interest" is used throughout this Report as the doctrinal basis for legally faulting allocations of Public land. It is a widely used doctrine by jurists and political scientists

to describe the corporate interest of a society. Although the doctrine does not lend itself to very precise definition to refer to interests that are inherent in members of the public as such. These interests cut across the socio, political and economic landscape of the nation. The doctrine is not specifically defined in the constitution but its salient elements for the purposes of this inquiry are approved in S 75."

It is clear from the above constitutional provisions that the doctrine of public trust is recognized and provided for by the superior law of the land i.e. the Constitution and applies in a very explicit way as regards Trust land.

The doctrine is however not only confined to Trust lands and covers all common properties and resources as is clear from the Ndung'u Report pages 43-46 (although they do not say so expressly) it applies to public land. Although the doctrine had origins in Roman law it is now a common heritage in all countries who adopted the English common law. To many African communities land was owned by the communities or possessed by their community. The doctrine has deep roots in African communities and is certainly not inherited from the Romans. Forests and other common resources have never been individually owned. Its basis was the belief that certain common properties such as rivers, the seashore, forests and the air were held by the state in trust for the general public. Under the English common law ownership of common properties vested in the sovereign and the sovereign could not grant ownership in them to private owners if the effect of such grant was to interfere with the public interest because such resources were held in trust by the sovereign for the benefit of the public, such property may not be sold or converted to other kinds of use.

In the Kenyan case of ***COMMISSIONER OF LANDS v COASTAL AQUACULTURE LTD Civil Appeal No 252 of 1996*** the Commissioner of Lands gave an intention to acquire land which belonged to Coastal Aquacultere Ltd land for what he termed "Tana River Delta Wetlands." A date was set for an inquiry into the compensation claims. The respondent objected to the notice on the basis that, among other things, it did not state either the public body for which the acquisition was being made or the public purpose to be served by the acquisition. The evidence at the inquiry showed that the land had been acquired for Tana and Athi Rivers Development Authority. The Court of Appeal held that the notice should have specified that the Tana and Athi Rivers Development Authority was the public body for which the land was being acquired. Simply stating in the public notice that the Government intended to acquire the land for "Tana and Athi River Development Wetlands and which gave the impression that it was a public body is not good enough, being neither a public body nor a public benefit. Of course, the doctrine was not explained in the case but the case turned on the construction of the notice. But any alienation contrary to the principle is void. In addition any alienation made contrary to the Constitution would be void. Evidence would obviously be required to prove the contravention under the Constitution or the Land Registration Acts. Recommendation 1 to 4, set out above in the Ndung'u Report will most likely provide a land litigation mine field, with considerable pressure on the Land registration systems as a result. The proposed Land Titles Tribunals would in my view not be competent to handle constitutional cases unless they are established under the Constitution, in view of S 60(1) of the Constitution and S 65(1) and S 84 of the Constitution. The other good illustration of the application of the doctrine and which I had occasion to consider in a recent forest related dispute is the Indian case of ***M.C. MEHTA v KAMAL NATH & OTHERS*** where the respected Supreme Court of India, in a manner without precedent acted without a formal suit or action before it but on the basis of a news item which had appeared in the Indian Express stating that a private company in which the family of Kamal Nath (former Minister of Environment and Forests) had a direct link, had built a club on the banks of a river encroaching land including substantial forest land which was later regularized when Kamal Nath was the Minister. It was stated that earth movers and bull dozers were used to turn the course of the river in an effort to create a new channel by diverting the river flow, and save the club from future floods. The Supreme Court took

notice of the news item because the facts disclosed therein, if true, would be a severe act of environmental degradation! The court went on to make the following observations:

"The Public Trust doctrine rested on the principle that certain resources, like air, sea, waters and the forests have such great importance to the public as a whole that it would be wholly unjustified to make them a subject of private ownership. The doctrine enjoined the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. The court held that the Government committed a breach of public trust by leasing the ecologically fragile land to the company and it cancelled the lease and ordered the restoration of the land to its original condition."

The clearest application of the doctrine of public trust is in the case cited here below. In ***NIAZ MOHAMMED AN MOHAMMED v COMMISSIONER OF LANDS & OTHERS HCCC No 423 of 1996.*** The plaintiff was the proprietor of land in Kisauni/Nyali area within Mombasa Municipality. During the construction of the New Nyali Bridge in 1979, a new access road to Kisaumi and Nyali was constructed. This traversed certain plots of lands, among them the plaintiffs. The commissioner of Lands therefore compulsorily acquired the lands under the provisions of the Land Acquisition Act. The plaintiff thereafter enjoyed a road frontage and direct access to that road until November 1995 when the Commissioner of Lands created a new leasehold title from a portion which remained uncovered by the tarmac road and allocated this to the third to fifth defendants. The plaintiff protested against this as an interference with his easement rights of access to the new road and its road reserve, and an unlawful alienation of public land to private developers. He filed suit seeking orders for a declaration that the allocation was null and void and that the land in issue should remain a road reserve. He also sought temporary injunction restraining orders against the third to fifth defendants.

The plaintiff's case was that he had private rights to protect which were intertwined with public rights. His private rights arose from his position as a frontager. The portion of his land which was acquired was not acquired for any other purpose but for construction of a road. If not all of it was used, any remaining portions comprised the remaining road and its road reserve. Under the Local Government Act such areas were under the control of the local authority which exercised trusteeship rights had no right of alienation in breach of that trust.

The Court held that there was no right of compulsory acquisition of any land by the Government for purposes other those provided for in the Constitution. If it were not so, a loophole would be created for any Government which did not mean well for its citizens. It could compulsorily acquire land on the pretext of public good, compensate the owners of the property acquired with taxpayers money and then allocate the land to those it wished. The law required that subsequent to the acquisition, the land must be used only for the purpose for which it was acquired. In this instance the land had been acquired for the construction of a public road. Unutilized portions are road reserve. If it was found that it was unnecessary to have acquired those portions for the expressed purpose, equity required that the portions be surrendered back to the persons from whom the land had been compulsorily acquired. Further the road and its reserves were vested in the local authority to hold in trust for the public. Therefore neither the Government nor the local authority could alienate it under the Government Lands Act.

INDEFEASIBILITY OF TITLE

It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and S1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot

plead the principle of indefeasibility which is a statutory concept.

WHAT IS NECESSARY OR PRACTICED IN DEMOCTRATIC SOCIETIES

In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in "a democratic society." This phrase also appears in most of the fundamental rights and freedoms provisions in Chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency. Thus, the management of natural resources such as forests, lakes and wetlands to give a few examples have to be in accordance with some International Environmental Conventions some of which have been ratified by most of the countries and since ratification even without the follow-up of domestication, entail state undertakings and responsibilities. On Governance, accountability and transparency the rest of the world has every right to be alarmed over the depletion of resources and their management in any member state. The recent regional development of the peer system developed by New Partnership for Development for Africa, (NEPAD) where peer nations review say Governance issues of member states and file a report with the AU is a good illustration. It is unlikely that a Country that denies its citizen public resources by allocating public land to individuals and fails to adhere to any applicable Environmental International Conventions for example, it has ratified, would satisfy the democratic standards and such a country is unlikely to be given a clean bill by the peer nations. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of S 1 and S 1A of the Constitution in my view.

The **REFERENDUM CASE OR THE YELLOW MOVEMENT/JUDGMENT** given last year by a Constitutional Court of three judges, stated that S 1 and S 1A of the Constitution expressed the democratic foundations of this nation and inter-alia that the people cannot be prevented from giving birth to a new Constitution because these sections were designed by the framers to secure and preserve avenues for political change and the people could not, in a democracy, be restrained from bringing that change by way of a new Constitution. Any undemocratic practice is therefore challengeable under these provisions

DISCRETION

Under the judicial review jurisdiction the grant of judicial orders is at the end of the day discretionary and watertight reasons for the grant of orders after 40 years would be mandatory, because as stated above promptness is the hallmark of judicial review proceedings. In addition in exercising that discretion I would have to take into account the needs of a stable system of land registration. To unravel a system of registration going back almost a hundred years one must reflect on the hardships and prejudice to third innocent parties. In such situations the virtues of certainty, predictability and stability of the land registration system, do in my view heavily out-weigh the short term individual gains since a Compensation Fund as recommended above could do the trick in rectifying some of the injustices of the past. The policy makers would have to have regard to the principle of proportionality. Whereas the objective or aim may be legitimate, the means of attaining the objectives must be necessary, reasonable and proportionate. Finally, as is apparent from the facts in this case no evidence has been offered on the method used in the alienation of the three parcels. Each case would have to turn on the evidence offered or not offered and the exercise of discretion has to be on the basis of evidence since discretion

cannot be exercised in a vacuum.

The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “kayas” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land. It is gratifying to note that the Ndung’u Report has embraced it under the banner of public interest.

The Ndung’u Report at page 45 defines “public land” in these terms:

“all that land which is vested in the public or held under public tenure. It means all the land in which every Kenyan has an interest by virtue of being a member of the public. ... All unalienated Government land as defined above is Public land, in that it is vested in the Government of Kenya. The Government belongs to the people of Kenya. Therefore the Government holds or administers such land in trust for the people of Kenya.”

At page 44 the Ndungu Report has defined Trust Land as:

“the land that is declared to be Trust Land and defined in section 114 of the constitution of Kenya. Under both the Constitution and the Trust Land Act (Cap 288 of the Laws of Kenya) trust lands are neither owned by the Government nor by the County Council. The County Councils simply hold lands on behalf of the local inhabitants of the area. For as long as trust land remains un-adjudicated and unregistered, it belongs to the local communities, groups, families and individuals in the area in accordance with the applicable African Customary Law. Once registered under any of the land registration statutes trust land is transformed into private land. It then becomes the sole property of the Individual or group in favour of whom it is registered.”

Private land is defined by the Report as:

“land, the title to which is registered in accordance with the laws that provide for registration of titles”

It is therefore clear that even on the basis of the report and its legal conclusions, the parcels in question did cease to be trust land and the claim cannot succeed under the judicial review jurisdiction.

THE BIG UNASWERED QUESTIONS RAISED IN THIS CASE AND THE NDUNG’U REPORT

1. How far back should the country and the courts go in dealing with past injustices pertaining to land"

2. Is it practicable to proceed from the premise that it is necessary or possible to repair all the wrongs, to cure all the wrongs or to mend all breaches and to heal all wounds, or is there part of the past that must remain dead in the public interest and societal cohesion and because there is a future that stretches out beyond the horizon for our management and of which we must make every minute live!

3. In respect of the recommendations that shall withstand the constitutional challenge and the law, do we implement them in one big leap or should the implementation be staggered or be done on a case to case basis"

4. In respect of the grabbed public land and other resources, is there a strong case for putting in

place immediate steps towards reclaiming them given the inescapable fact that the state bureaucracy is the custodian of the records used to attain the grabbing.

In this judgment I have no ready answers to the questions, but the policy makers and the courts have in my view a great responsibility to come up with possible answers now and in the future.

The questions have been framed because the applicants had asked the court to order the implementation of the Ndung'u Report as it affects them and the court has declined to do so for the reasons detailed in this judgment including the fact that it is not the function of the court to formulate and implement policy matters this being the province of the Executive and Parliament.

CONCLUSION

It is clear from the above analysis that the claim has failed on all the grounds raised except on the ground of loci standi or standing.

The claimants claim cannot succeed under the doctrine of public trust, inter alia, firstly because the applicants claim is based on clan ownership and the claim is not grounded in the public interest or on constitutional provisions, and secondly a claim based in public law cannot lie against as individual entities because the parcels of land as per the Ndung'u report are now private land and prohibition would not be against them as private entities and also it does not lie for past acts, and fourthly under the Constitution their interest if any in the land was extinguished by registration and a right of full compensation given therein and that compensation (if any) is not claimable under the judicial review jurisdiction. Fifthly, the applicant claim has not been brought under the Acts and as stipulated in the law under which the titles were issued as analysed above nor brought under the Constitution and applicants cannot invoke the Judicial Review jurisdiction to seek constitutional reliefs, and in particular the judicial review orders of mandamus and prohibition which are the only orders sought cannot legally issue for the reasons outlined. For the above reasons the application though raising weighty issues and well intentioned is both incompetent and an abuse of the court process and must fail on this ground as well.

The upshot is that the application is dismissed but in view of the public law points raised, and the public interest elements, considered, in in the exercise of my discretion I make no order as to costs, and parties are to bear their respective costs.

DATED and delivered at Nairobi this 2nd of June 2006.

J.G. NYAMU

JUDGE