



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA DISTRICT REGISTRY**

**MISCELLANEOUS CIVIL APPLICATION NO. 63 OF 2012**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REGISTRAR OF TILES MOMBASA.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**MINISTER OF LANDS.....3<sup>RD</sup> RESPONDENT**

**AND**

**NATIONAL WATER CONSERVATION**

**& PIPELINE CORPORATION.....1<sup>ST</sup> INTERESTED PARTY**

**COAST WATER SERVICES BOARD.....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE: A.K. ABDULGANI LIMITED**

**JUDGMENT**

1. The applicant A.K. ABDULGANI LIMITED moved the court by way of a Notice of Motion dated 27<sup>th</sup> August, 2012 supported by a verifying affidavit by one Sikander Pastsa who is its director who averred that on 13<sup>th</sup> July, 1995 the 2<sup>nd</sup> respondent by a grant No. C.R 27434 leased a parcel of land L.R No. MN/VI/3832 for a term of ninety-nine years with effective from 1<sup>st</sup> May 1995 whose Grant the Registrar of Titles registered at Mombasa District Land Registry on 14<sup>th</sup> July, 1995 upon payment of Ksh 390,000/-. The Ex-parte Applicant has paid Land rates. The land was unalienated but was later allotted to Juma Swaleh by a letter of allotment dated 6<sup>th</sup> April, 1995 who sold it to the applicant at a consideration of Ksh 4,800,000/=. The applicant has been in possession of the suit land. Some time in March, 2011 the applicant engaged a contractor to rebuild a section of the perimeter wall that had collapsed however the 1<sup>st</sup> interested party demolished it. The applicant filed a suit at the High Court in Mombasa whereby an injunction was granted restraining the 2<sup>nd</sup> Interested Party from interfering with the construction of the perimeter wall pending the hearing and determination of the suit.

2. The 1<sup>st</sup> Respondent published a Gazette Notice No. 9058 in the Kenya Gazette on 6<sup>th</sup> and 20<sup>th</sup> of July, 2012 purporting to revoke the applicant's parcel of land on the ground that it had been allotted to private developers illegally and that the said parcel had been reserved for the Ministry of Water (Changamwe Water Reservoirs). It was their contention that the respondents had no power to revoke the title over the said parcel of land without following the procedure set out in the National Land Commission Act, 2012 and the Constitution and further that the decision by the 1<sup>st</sup> respondent was *ultra vires*.

**The Application**

3. The applicant sought for the following orders:

I. An Order of Certiorari to remove into this Honorable Court for the purpose of being quashed the decision of the Registrar of Titles, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein contained in the Gazette dated 20<sup>th</sup> July, 2012 revoking the Applicants Title to parcel of Land known as L.R No.MN/V1/3832.

II. An Order of Prohibition prohibiting the Registrar of Titles Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein, their servants, agents and/or their successors in title from alienating, allocating, handing over possession of or vesting the Title of the parcel of land known as L.R No. MN/VI/3832 to any other person and from having any other dealing with the said property or taking any further proceeding or action in relation thereto.

III. An order of Mandamus directed at the Registrar of Titles, Mombasa, the Commissioner of Lands and the Minister of Land and/or their successors in title compelling them to reinstate the Applicant's Title over the parcel of land known L.R No. MN/VI/3832 by inter alia reinstating the Applicants name in the register of the said property as the proprietor of the leasehold interest therein and to invoke and/or cancel any dealing with the said title and any entry in the register of the said property made pursuant to the revocation of the Applicant's said title.

IV. The costs of and incidental to this application.

4. The 1<sup>st</sup> Interested Party filed a replying affidavit on 18<sup>th</sup> March, 2014 through the Managing Director Eng. Petronilla Apiyo Ogut. She averred that she had custody and control of documents of the title of all properties. The land parcel no. L.R. No. MN /V1/3832 was available for allocation as at 13<sup>th</sup> July, 1995 which was a property of the 1<sup>st</sup> Interested Party under title No. MN/V1/978. This was acquired from the Ministry of Water and Irrigation and later handed over to Coast Water Services Board under the Legal Notice No. 101 of the Water Act No. 8 of 2002 the Water plan of transfer of water services. There had been developments on the original parcel of land MN/V1/978 whose subdivision was done without the knowledge or consent of the owner of the original title who was the 1<sup>st</sup> Interested Party.

5. In addition to the above she averred that the parcel was still unalienated Government land and thus the transfer of land to Juma Swaleh was illegal and improper. The Registrar of Titles was under no obligation to have the applicant explain how they had acquired the said parcel of land, which had been set-aside for the entire population of Mombasa County. The original title of the parcel of land MN/V1/978 has not been surrendered thus the subdivision was irregular. It was her prayer that the ex-parte applicant's application be dismissed with costs.

6. The 2<sup>nd</sup> Interested Party filed its replying affidavit on 11<sup>th</sup> February through the Chief Executive Officer Eng. James Wasi Thubu stating that it is a water and service provider and a holder of the Governments assets. He averred that the alleged property known as L.R No. MN/V1/3832 was originally known as L.R No. MN/V1/978 that belonged to the Ministry of Water & Irrigation whose assets were later transferred to the 1<sup>st</sup> Interested Party who later transferred the same to the 2<sup>nd</sup> Interested Party. The original property houses staff Quarters for the 2<sup>nd</sup> interested party employees, a water reservoir, treatment plant and open space for future development. The Commissioner of Lands fraudulently issued an allotment letter allocating the original property to Juma Swaleh a proxy of the then influential Minister Shariff Nassir (a copy of the allotment letter was annexed for the courts records). This was an illegal, unlawful and irregular grant by the Commissioner of Lands thus the title was null and void.

7. The original property was subdivided into two: one is the applicants parcel L.R No. MN/V1/3832 and L.R. No. MN/V1/978R, which still houses the staff quarters, a water reservoir, treatment plant and open space for future development. The respondents had previously issued letters to the applicant notifying them of the illegality justifying the reason for the Gazette Notice No. 9058. It was their reply that this instant application to challenge an administrative action had a potential to invalidate a title to public land that was obtained through dubious means. The said application is frivolous and amounts to an abuse of the court process. It was his prayer that the said application filed on 29<sup>th</sup> August 2012 be dismissed with costs.

8. The 3<sup>rd</sup> Interested Party Mombasa Water Supply & Sanitation Company Limited sought leave to be enjoined as an interested party. They filed a replying affidavit through the Managing Director Alome Achayo. She averred that the Commissioner of Lands had no authority to allocate land to the applicant since it was not free Government land for alienation and neither could he authorize a transfer of an allotment letter from an allottee to a buyer. The applicant's allegation that they do pay for the rates cannot be proof of proprietorship. She cited the following particulars of fraud involving the applicant, Commissioner of Lands and Juma Swaleh as follows:

- I. The Commissioner allocated land already alienated without the consent and approval of either the President or the proprietor
- II. Purporting to allocate property within a Township without following the due process of the law as envisaged in the Government Land Act, (Now repealed).
- III. Purporting to enforce a letter of allotment whose terms and conditions had been breached and violated by the allottee.
- IV. Purporting to approve a transfer of allotment without legal authority and where the said allotment was deemed withdrawn by breach thereof.
- V. Colluding to deny the Government its right to collect revenue by falsely and fraudulently declaring an under value on the unlawful transfer.

9. It has been in possession of the said suit land since early 70's through various predecessors. The applicant knew the acquisition of land from Juma Swaleh was fraudulent since the 3<sup>rd</sup> Interested Party is the beneficial proprietor. It was their prayer that the court cancels the subject title.

10. The respondent did not file a response to the suit choosing to rely on the case set out by the 1 - 3 Interested Parties.

## **SUBMISSIONS**

## **The Ex-parte Applicant's Submissions**

11. It was their submission that the law in respect of Judicial Review with regard to illegal revocation of title to land is well established. The court has to consider the following:

I. Whether the authority in question (the respondent) had the power or jurisdiction to revoke the Ex-parte Applicant's title to the suit property under any law and in the manner that it did.

II. Whether the respondent breached the rules of natural justice and the applicant's right to fair administrative action while arriving at the decision to revoke the applicant's title to the suit property.

12. The respondents did not have power in law to revoke the titles. The revocation was made when the suit property was subject of High Court proceedings HCCC NO.98 of 2011 **A.K Abdulgani Limited v. Coast Water Services Board** where the applicant was issued with interim orders. The Gazette Notice No. 9058 dated 6<sup>th</sup> July, 2012 was issued pursuant to the Constitution 2010, the Government Lands Act, Cap 280, Laws of Kenya (now repealed) and the Trust Land Act cap 288. It is settled law that persons registered as land owners under section 23(1) of the Registration of Titles Act (Cap 281) acquired an indefeasible title to land which could only be challenged on grounds of fraud and misrepresentation to which the owner has to be proved as a party. The respondents were still to follow the procedure in part VIII of the Land Act, 2012.

13. Article 40 of the Constitution of Kenya 2010 prohibits deprivation of property by the state through arbitrary means. The power to revoke title has been vested on the National Land Commission as established by Article 67 of the Constitution. Further, there is no provision in the Government Lands Act, Cap 280 laws of Kenya that allows the respondents to unilaterally revoke title to property already allocated to an individual. It is the Commissioner of Lands or some person appointed by him in writing who may enter suit in any court of competent jurisdiction to recover possession of unalienated Government land as provided by section 130 of the Government Lands Act. The suit property in question was not a Trust land and therefore the Trust Land Act Cap 288 did not apply and it does not give the respondents authority to revoke the title.

14. The decision to revoke land was contrary to the rules of natural justice. The applicant was not afforded an opportunity to be heard as provided by Section 60 and 61 of the Registration of Titles Act (now repealed) to show cause why his title should not be revoked. The respondents did not file a response in court to show that a lawful procedure was followed. The counsel relied on a Court of Appeal decision in **Commissioner of Land v. Kunste Hotel Limited**, [1994-1998] 1 E.A, 1 (CAK) where the Court held as follows:

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

Upholding any decision contrary to this shall be encouraging the respondents to act unconstitutionally and unconscionably in matters similar to this.

15. Further, they urged the court to find that the respondents acted outside their jurisdiction to revoke the title, and the action was in breach of the rules of natural justice and the applicant's constitutional rights to fair administrative action as provided under Article 47(1) of the Constitution 2010 rendering the said revocation unconstitutional. In addition to this the respondents have not answered the grounds raised by the applicant but have only dealt on the merits of their allegations which are irrelevant in considering an application for Judicial Review. They urged the court to allow the application entirely with costs.

## **The 1<sup>st</sup> Interested Party's Submissions**

16. It was their submission that the 1<sup>st</sup> Interested Party acquired land parcel number LR. No. MN/V1/978 from the Ministry of Water and Irrigation which property was subsequently handed over to Coast Water Service Board pursuant to Legal Notice No. 101 of the Water Act 2002 the transfer plan of the Water Act 2002. The land in question was subdivided from the original title MN/VI/978 which land belonged to Ministry of Water and Irrigation which had handed over the land to National Water Conservation and Pipeline Conservation then to Coast Water Services Board. The houses of the staff, water reservoirs, treatment works has all been built on this land. The Ministry of Water and Irrigation and its affiliate parastatals have all along used this property. In the year 1995 the applicant was issued with an allocation letter and later issued with a title document but the original title was never surrendered.

17. The law restricts the registrar of titles from revoking titles, however, the same can be made where there is an allegation of fraud. The land could not be available for allocation as alleged by the Ex-parte Applicant. The registrar's action was justified since the title was acquired through violation of the law.

18. In addition, the land holds the entire treatment works for the water supplied to the residents of Mombasa. They urge the court to consider this and disallow the ex parte applicant's application. They also urged the court to rely on Eng. Petronilla Apiyo's replying affidavit.

## **The 2<sup>nd</sup> Interested Party's Submissions**

19. It was their submission that the Senior Registrar of Titles Mombasa Mr. G.G Gachathi wrote to Juma Swaleh that the National Water Conservation & Pipeline Corporation asking him to surrender the title, which he never responded to, surveyed the subdivision erroneously. The title was granted to him by the then Commissioner of Lands illegally, unlawfully and irregularly. They relied on the maxim *ex turpi causa non oritur action* (out of an illegality no cause of action arises). The applicant should not be aided for a wrongdoing. The applicant cannot say that there was an infringement of rules of natural justice, particularly the alleged denial of opportunity to be heard.

20. The land was not available for allocation. In **M'mukanya v. M'mbijwe** [1984] KLR 761 the facts were similar to this suit whereby it was held,

*“What of the appellants? The plot they were granted was not available for allocation since 1967 when it was granted to the respondents. The Council had no plot No. 58 at Nkubu marked to allocate and it could not allocate what it did not have.”*

The allocation of the present suit land in favor of the applicant was null and void as it was already alienated. Can an irregular process confer upon the applicant the right to seek legal protection? In **Macfoy v. United Africa Company Limited** [1967] 3 ALL ER 1169 Lord Denning held that if an act is void then it is in law a nullity. It is not only bad but also incurably bad. There is no need for the court to set it aside, and every proceeding that is founded on it is also bad. The allocation of the applicants land was illegal and the court cannot be used to enforce illegalities through the back door. Also similar sentiments were echoed by the Court of Appeal in **Standard Chartered Bank Kenya v. Intercom Services Limited**, Civil Appeal No. 37 of 2003 when it quoted the case of **Holman v. Johnson** [1775-1802] ALL-ER where **Lord Mansfield, CJ** said

*“The principle of public policy is the Ex dolo malo no oritar action. No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of the Country, there the court goes not for the sake of the defendant but because they will not lend their aid to such plaintiff.”*

21. They urged the court to further rely on **Scott v. Brown Doering, McNab & Company** (3) (1892) 2QB 742 where **Lindsey LJ** stated that no court ought to enforce illegal contracts or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if duly brought to the notice of the court. If the person invoking the aid of the court is himself implicated in the illegality. In **Exparte Emfil Limited v. The Registrar of Titles, Mombasa & 2 others** [Mombasa HC Misc. Appl. (JR) No. 84 of 2011] the respondents successfully resisted an application seeking to quash the administrative action of the Registrar of Titles by way of an order of Certiorari. This was because their was change in user from the original purpose of allocation which was for agricultural purpose of growing sugar cane to residential purposes and the transfer was fraudulent since the directors were the same as the new buyers.

22. The counsel further urged the court to rely on the order issued by **Tuiyott, J.** who had observed that maintenance of the status quo would be the best order to grant in view of the claim of illegality and fraud. This was because the original title was still in the name of National Water Conservation & Pipeline Corporation, which is a public body. Counsel urged the court to dismiss the ex parte applicant's Notice of Motion.

### **The 3<sup>rd</sup> Interested Party Submissions**

23. They urged the court to dismiss the application stating that the applicant's title over the suit property was unlawful and void having obtained it through fraud. Urging that they occupied and were in use of the land. The land was not un-alienated therefore it could not be free Government land as alleged by the applicant. The land had been alienated to the County Council of Mombasa and it could not be allocated by the Commissioner of Lands as purported by the Letter of allotment dated 6<sup>th</sup> April, 1995. They further submitted that there was no law that allowed the Government to allocate County Council's property on its behalf without its authority. If at all the land was allotted to Juma Swaleh he was to pay Ksh 483,550/= to the Commissioner of Lands which receipt was never produced by the applicant. The allottee Juma Swaleh right to the allotment expired on 6<sup>th</sup> May 1995 when he failed to pay the required premium thus he could not have effected the transfer to the applicant on 24<sup>th</sup> May, 1995.

24. Further there was no law under the now repealed Chapters 280, 281 and 300 that permits the Commissioner of Lands to consent to a transfer of an allotment letter. The agreement dated 24<sup>th</sup> May, 1995 shows a consideration of Ksh 4,800,000/= while the consent by the Commissioner shows Ksh 2,500,000/=. This could not be referring to the same property. This showed issuance of the title to the property was irregular, illegal and void. In addition to this the subject property was part of L.R NO. MN/VI/978, which had already been alienated to the Ministry of Water and Irrigation, which is in occupation, by the 3<sup>rd</sup> Interested Party. Allotment is subject to the rights of the persons in occupation as at the time of allotment.

### **Issues for determination**

25. The following issues arise for determination:

- I. Whether the 1<sup>st</sup> respondent has the power to revoke the title of land.
- II. Whether the Ex-Parte Applicant is entitled to the reliefs sought in this case.

26. The primary issue in contention here is that the 1<sup>st</sup> respondent revoked the title that had been acquired by the *Ex parte* Applicant. The applicant had been granted a lease of parcel no. L.R No. MN/VI/ 3832 for a period of 99 years by the 2<sup>nd</sup> respondent. The same suit property was allotted to one Juma Swaleh who sold it to the applicant herein at a consideration of Ksh 4.800.000/=. Article 40 provides for the protection of right to property. Article 40(1) provides that, *“subject to Article 65 every person has the right to either individually or in association with others to acquire and own property of any description and in any part of Kenya.”*

### **Determination**

27. Article 40(2) of the Constitution provides, that

*“Parliament shall enact a law that permits the state or any person to arbitrarily deprive a person of property of any description or any interest in, or right over any property. Further 40(3) provides that “the state shall not deprive a person of property of any description or any interest in, or right over, property of any description unless the deprivation-*

*a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter Five; or*

*b. is of public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament.”*

28. It is on the above clause that the applicant urges the court to allow the judicial review application whereas on the other hand the interested parties oppose the same. The 3<sup>rd</sup> interested party urges that the land is used as a water treatment plant which serves the entire County and the court should consider the public interest. When is public interest put into motion? In the case of ***East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board And Another*** [2007] eKLR the Court of Appeal indicated situations where public interest should take precedence in the following words:-

***“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”***

29. The 3<sup>rd</sup> interested party Mombasa Water supply & Sanitation Company Limited averred that they have installed on the suit premises 6 water reservoirs of total capacity of 295,000 cubic meters of water for supply to both domestic and commercial interests within Mombasa County. It also houses 50 of their employees’ families and the Water Resources Management (WARMA) has its offices on the said suit. Counsel submitted that they shall be grossly be affected if this application is allowed. It is the courts view that this shall not be the case since the orders sought are to the extent of the power of the Registrar to revoke a title. The case whether the suit land belongs to the applicant or the interested party that is a question to be determined in the Mombasa High Court Civil Case No. 98 of 2011. The suit property in question is an empty space, which is not being utilized by either interested party or the applicant. The public interest in the provision of water for the residents of Mombasa County is not affected as the suit does not concern this portion of land. In the 2<sup>nd</sup> Interested Party’s submission it was stated that subdivision resulted into two parcels namely; MN/VI/3832 and L.R No. MN/VI/978R. It is the latter that houses the 3<sup>rd</sup> interested employees.

30. Section 26 of the Land Registration Act provides that, *“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, 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”*. The 3<sup>rd</sup> Interested Party alleges that since the land in question was illegally acquire this section allows an individual to challenge the ownership as they submitted in their submissions. That is true but in the instant case the applicant seeks for judicial review, which is not the appropriate procedure for determination of disputed facts which require the calling of evidence with cross-examination of witnesses and production of relevant documents.

31. The 1<sup>st</sup> interested party stated that the original title MN/VI/978 belonged to Ministry of Water and Irrigation. The 2<sup>nd</sup> interested party (Coast Water Services ) also referred to this original title but none of these parties have annexed a copy of the title for the court’s reference. If the same title has never been surrendered as alleged by Eng. Petronilla Apiyo Ogut the Managing Director of the 1<sup>st</sup> interested party why could the same not be annexed. The applicants title MN/VI/3832 emanated from the subdivision of the original, how then could the original title not be surrendered for subdivision. The applicant was granted a lease for 99 years. The same land was allotted to one Juma Swaleh who sold it to the applicant. The question that the court must ask is how the original title remains unsurrendered yet subdivision took place and new title issued. The 3<sup>rd</sup> Interested Party is at liberty to seek other avenues to settle the issue on the rightful ownership of the land.

32. The applicant sought for an order of mandamus. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in ***Kenya National Examinations Council v. Republic Ex parte Geoffrey Gathenji Njoroge & Others***, Civil Appeal No. 266 of 1996 [1997] eKLR in which the said Court held *inter alia* as follows:

***“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein 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 or 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 order must command no more than the party against whom the application 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...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of***

*mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.” A similar position was adopted in *Shah vs. Attorney General* (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, *inter alia*, as follows:

“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfillment. With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. *Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...”

33. The 2<sup>nd</sup> Interested Party urged that the court cannot be used to sanitize that which is wrong. They relied in *Holman v. Johnson* [1775-1802] ALL-ER whereby the court should not aid a person who is involved in an illegal act. The applicant herein was initially granted lease vide Grant No. C.R 27434 by the 2<sup>nd</sup> respondent for a period of 99 years on the 13<sup>th</sup> July, 1995. The copy of lease was annexed and the court has referred to it. The 2<sup>nd</sup> respondent again allotted the same parcel of land to Juma Swaleh who sold it to the applicant.

34. The interested parties and the respondents allege that the titles were acquired fraudulently. What was the right procedure to follow in asserting the respondent’s and interested parties’ interest in the suit land? Surely, not by ultra vires action of revocation of grant of title but by suitable judicial proceedings in that behalf. In a recent decision, *Franns Investments Limited v. The Registrar of Titles, Mombasa & 2 Ors.*, Mombasa Petition No. 63 of 2012 this Court has ruled on the issue as follows:

18. “It is clear that it is now settled that Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land. In the case of *Republic v. Land Registrar Taita Taveta District & another* [2015] eKLR, I made this observation and gave the way forward in the event that the Government through its agencies wished to challenge the title to land considered to have been unlawfully obtained, as follows:

34. “The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

35. Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised, acquire the suit property for the purposes of use by the public school, the Interested Party herein.”

19. Such proceedings for the determination of the title to the suit property in this case already exist and are pending determination before the Environment and Land Court. The revocation of the titles while these suits were pending, apart from being done without jurisdiction would be a usurpation of the mandate of the Court and a contempt of court if it were shown that the Registrar was aware of the proceedings before the Court. This aspect of the matter was, however, not fully canvassed before the Court although counsel for the petitioner submitted that the Registrar was by revoking the tiles to the suit properties *stealing a march* on the petition.

20. Whether this court should make an order restraining the petitioner from dealing with the suit property pending the determination

of the dispute as to ownership in the Environmental Court. I respectfully note the position taken by Odunga J. in *ex parte Wairimu Waiyaki* supra, and by Majanja J. in *Satima*, supra, both which on account of pending litigation on the question of title to the suit property withheld judicial review orders in former, and in the latter made further orders restraining the petitioner from dealing with the suit property in the meantime despite declaring the revocation of title by the Registrar to be null and void.

21. For my part, I take the view that once declare null and void the Registrar's Gazette Notice on revocation of title, the registered proprietor remains the absolute owner thereof until his title is defeated in accordance with the due process of the law by the Registrar or by a decree of Court. The question of public interest urged by 1<sup>st</sup> Interested Party is resolved by reference to the public interest to observance to the Rule of Law. This is the effect of the Court of Appeal decision in **Emfill Limited v. The Registrar of Titles and 2 Ors.**, Court of Appeal at Mombasa Civil Appeal No. 312 of 2012, which is binding on this Court that -:

"22. Thus it was not disputed that the appellant had titles to the suit properties, which the 1<sup>st</sup> respondent purported to revoke. In *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 it was held:

**"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.... Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality."**

The learned judge made a finding that the 1<sup>st</sup> respondent had no authority or power to revoke titles.. Indeed, the learned judge at paragraph 17 of his judgment stated that the appellant had demonstrated that the gazette notice no. 6652 of 2011 was made without authority and in breach of the right to fair administrative action under Article 47 of the Constitution....

27. On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively, if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the Constitution and the Land acquisition act to acquire the land. The Government chose to follow none of these processes but acted in clear violation of the law. It is in public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the Court with judicial power. The remedy of judicial review of administrative action is intended to check excesses of power to ensure that the rule of law prevails.

**28. The appellant having established its titles to the suit properties, backed with the order from the civil suit, it was unreasonable for the trial judge to refuse to exercise his discretion in the appellant's favour."**

22. Moreover, as pointed by Counsel for the petitioners, there was no cross-petition by the Respondents as would entitle the court to make orders to restrain the petitioner's dealing with the suit property as sought by the 2<sup>nd</sup> Interested Party. I respectfully agree with Majanja, J in *Satima* that without a counter petition there is no basis for finding for the respondents on the contention of fraudulent acquisition of the disputed property, when he held that-

"12. Serious allegations of fraud fraudulent acquisition have been raised but I have been circumspect in dealing or commenting on them for several reasons. Firstly, Article 40(6) as I have held contemplates a legal process to establish these kinds of issues (see *Chemei Investments Ltd v. The Attorney General & Ors.* Nairobi Petition No. 94 of 2005 (unreported). **In this case there was no counter petition upon which the court could make a finding or grant relief to the respondents on the basis of the fraud alleged.** Secondly, there is in fact a case pending between the parties in respect of the suit property to wit: Nairobi HCCC No. 663 of 2004 *Satima Enterprises Ltd. v. Kenya revenue Authority & Commissioner of Lands*. In that case the same issues of fraud alleged in this suit have been raised and the Court adjudicating over that suit will no doubt deal with them.

13. I therefore find and hold that the issuance of the Gazette Notice No. 6332 in relation to the suit property was in fact an attempt to undercut the pending proceedings and also a breach of the petitioner's rights under Article 40 and 47 (1) of the Constitution."

23. Of course, the orders for setting aside of the Respondent's Gazette Notice on revocation of the titles subject of this petition do not affect the ownership dispute suits pending before the Environment and Land Court which must heard on the merits, and the plaintiffs therein may move that Court as appropriate for the protection of the suit property, or their interest therein, as they may be advised by their Counsel."

35. In this instant case the respondents revoked the Ex-parte Applicant's title known as L.R NO. MN/VI/3832 vide Gazette Notice No. 9058 for the reason that it was a public utility as stated by the 3<sup>rd</sup> interested party. The portion of land in question in possession of the ex-parte applicant is allegedly not in any use but Judicial Review is not a fact finding procedure though constitutionally recognized remedy for enforcement of fundamental rights and freedoms under the Bill of Rights. In addition, fair administrative action is enforceable through Judicial Review remedy is a constitutionally guaranteed right under Article 47 of the Bill of Rights of the Constitution. On the other hand, public interest in the rule of law and public interest in the provision of clean water to the residents of Mombasa County by the 3<sup>rd</sup> respondent must be capable of co-extensive realization.

36. As held in *Kunste*, supra, the judicial review court is not a fact finding court for determination of disputed facts or merits of the case. When considering a similar question in the *Franns*, supra, this Court said:

**"Determination**

15. There was no dispute that there were pending before the Environment and Land Court nine suits filed by the 1<sup>st</sup> Interested Party as plaintiff against the Petitioner and others as defendants alleging fraud and illegality, breach of statute and misfeasance of public office and seeking orders *inter alia* for rectification of the relevant land registers “by cancellation of the Certificate of Title” of the lands subject of the suits. Therefore, the matter of the merits of the contention by the Interested Parties that the titles in the Petition were unlawfully acquired by the Petitioner are not before this Court. They are properly for determination before the Environment and Land Court where the 1<sup>st</sup> Interested Party has already filed suits in that behalf. The worthy rival arguments as to whether the Court will eventually uphold the petitioner’s title to the suit property is for determination outside these proceedings.

16. Indeed, the question of title to land or ownership of the suit property being one which oral evidence must be taken is best dealt with in a civil suit where procedure by *viva voce* evidence is the regular method of fact finding. Although, oral evidence may be taken in constitutional litigation pursuant to Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the fact that the civil suits in the Environment and Land Court are first in time and the question of title and ownership of land is proper province of the Environment and Land Court under Article 162 of the Constitution. That is the farthest the court may go in looking beyond the issue of revocation of petitioner’s title to the suit parcels of land.”

37. The merits of the case, including the alleged illegality of title on the principle of *ex turpi causa* and fraud must be proved and determined in suitable proceedings in that behalf.

**Conclusion**

38. The Court has determined that the land Registrar has no jurisdiction to revoke title to land. The purported revocation by the Gazette Notice herein must be quashed and any further action thereon be prohibited by judicial review orders, as appropriate. However, the determination of the merits of ownership dispute between the parties is a matter for the civil court and not this judicial review court. This Court, in granting the relief sought herein must take cognizance of the jurisdiction of the Environment and Land Court to determine the ownership question on the merits and, therefore, direct that the court order in these proceedings abide the outcome of the civil suit, and are, therefore, granted until any or further orders of a competent court on the ownership dispute.

**ORDERS**

39. Accordingly, for the reasons set out above, the court makes the following orders:

1. The ex-parte application dated 27<sup>th</sup> August, 2012 is allowed in terms as prayed and to the effect that the Respondent and the Interested Parties shall not interfere with the parcel title no. L.R NO. MN/VI/3832, and the purported revocation of the title by the respondent Registrar is quashed.
2. The respondents are hereby prohibited from registering, or alienating, allocating, handing over the title parcel no. L.R NO. MN/VI/3832, to any person or from having any dealing with the said property, except in accordance with the order of a competent court.
3. The 1<sup>st</sup> Respondent shall pay costs of the suit to the Ex-parte Applicant.

**40. For avoidance of doubt, the orders of the Court herein do not authorize any interference with the *status quo* on the suit land as at the date of this order with regard to any houses, facilities and or equipment and plant machinery thereon or the current user thereof.**

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 30<sup>th</sup> DAY OF April 2018.**

**E.K.O.OGOLA**

.....

**JUDGE**

**Appearances:**

M/S Anjarwalla & Khana & Co., Advocates for the Ex-Parte Applicants.

Ms. Namahya, Litigation Counsel for the Respondent.

Mr. Justus A. Wabuyabo, Advocate for the 1<sup>st</sup> Interested Party.

M/S Muturi Gakuo & Kibara, Advocates for the 2<sup>nd</sup> Interested Party.

M/S Otieno Okeyo, Advocates for the 3<sup>rd</sup> Interested Party.