REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 188 OF 2015

IN THE MATTER OF REVOCATION OF LAND TITLES BY THE REGISTRAR OF TITLES VIDE GAZETTE NOTICE NO. 1274

AND

IN THE MATTER OF THE PURPORTED REVOCATION OF TITLES: L.R. NO.S 21073/2, 21073/3, 21073/4,21073/5, 21073/6, 21073/7. 21073/8, 21073/9, 21073/10, 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/18, 21073/19 AND 21073/20

AND

IN THE MATTER OF THE GOVERNMENT LANDS ACT (CAP 280 LAWS OF KENYA-REPEALED) AND THE TRUST LAND ACT (CAP 288 LAWS OF KENYA)

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT (CAP 281 OF THE LAWS OF KENYA) REPEALED)

AND

IN THE MATTER ARTICLE 19, 22, 23, 40, 47, 50 AND 64 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC…….…….....……..…...……...APPLICANT

-VERSUS-

REGISTRAR OF TITLES…….....…….....…1ST RESPONDENT

NATIONAL LAND COMMISSION….…….....…...…..2ND RESPONDENT

MINISTRY OF AGRICULTURE,LIVESTOCK & FISHERIES...INTERESTED PARTY

REDCLIFFE HOLIDINGS LIMITED…..…….....EX-PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 26th June, 2015, the *ex parte* applicant herein, **Redcliffe Holdings Limited**, seeks the following orders:

1. **An order of certiorari do issue to remove into the high court quash the gazette notice number 1274 dated 4th February 2011 by the Registrar of Titles purporting to revoke registered certificate of title being 21073/2, 21073/3, 21073/4,21073/5, 21073/6, 21073/7. 21073/8, 21073/9, 21073/10, 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/18, 21073/19 and 21073/20, in favour of Redcliffe Holdings Limited.**
2. **An order of prohibition do issue prohibiting the Registrar of Titles by himself, servants agents or anyone authorized by him in any manner from issuing any title and or license or in any other way alienating the Applicant's land comprised in titles number 21073/2, 21073/3, 21073/4,21073/5, 21073/6, 21073/7. 21073/8, 21073/9, 21073/10, 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/18, 21073/19 and 21073/20.**
3. **An order of mandamus to issuing compelling the Registrar of Titles, National Land Commission, Ministry of Agriculture, Livestock & Fisheries by themselves, servants agents or anyone authorized by him in any manner to delete any entry on the Applicant's titles and give vacant possession on any titles occupied as a consequence to or in furtherance to the revocation of all that parcel of land comprised in titles number 21073/2, 21073/3, 21073/4, 21073/5, 21073/6, 21073/7. 21073/8, 21073/9, 21073/10, 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/18, 21073/19 and 21073/20.**
4. **The costs of the application be provided for.**
5. **Such further or other reliefs as this honourable court may deem fit, just and expedient to grant.**

Ex Parte Applicant's Case

2. The applicant's case was that it is registered proprietor of all that parcel of land known as LR No. 21073, Grant No. I.R. 6866, situate in Loresho, Nairobi County pursuant to a grant issued under the ***Registration of Titles Act*** (Cap 281 Laws of Kenya- repealed) (hereinafter referred to as "the Act") on 14th March 1996. Vide a letter of 20th December 2006, the Applicant applied to have the LR No. 21073 subdivided into 19 portions being LR No. 21073/2-20 (hereinafter referred to as "**the suit properties**") which letter was acknowledge by the Director of City Planning on 26th Janaury2007 informing the Applicant that he was required to surrender 10%of the suit property for public utility in the first instance. The proposed sub-division was later approved by the Town Planning Committee in a meeting held on 25th January 2007 and the Applicant issued with a notification of approval of development permission on 16th February 2007.
3. It was contended that vide a letter of 27th February 2007, the Director of Surveys of Kenya wrote to the Commissioner of Lands (as he then was) approving the proposed sub-division subject to the plot not constituting part of the disputed public utility land allocations and applicant paid the Director of Physical Planning the requisite fees on account of the sub-division application allocations. On 1st March 2007, the said Commissioner of Lands granted the Applicant provisional approval of the proposed sub-divisions of the suit property and advised the Applicant that final approval would be granted upon recommendation from the Council. The proposed subdivision was then approved by the Director of Physical Planning at the Ministry of Lands on 5th March 2007.
4. According to the applicant upon obtaining all the necessary approvals, the deed plans were approved by the Director of Surveys vide a letter of 29th March 2007 and upon payment of the requisite fee and vide a letter of 24th April 2007 the applicant surrendered the original title for the proposed subdivision subject to all the necessary approvals. Thereafter, the Applicant was issued with a sub-divisions certificate on 25th April 20107 for the sub plots LR No. 21073/2-20.

5. According to the applicant, the surrender of the disputed public land and the proposed sub-divisions were booked for registration on the 25th April 2007 and upon successful registration, the Applicant was issued with Certificates of Titles for the sub-plots number LR No. 21073/2-20. However, vide a gazette number 1274 of 4th February, 2011, which the Applicant stumbled upon while in the process of transferring four of the said parcels of land to a third party, the Registrar of Titles purported to revoke the said titles on the basis that the allocations were unconstitutional, null and void.
6. It was contended that following the purported illegal revocation, the Interested Party through the Veterinary Department illegally took possession of a few of the Applicant's titles being 21073/12, 21073/13, 21073/19 and 21073/20 and/or any other by extending its golf course onto the said parcels.
7. It was averred that though the Gazette notice for revocation of the suit titles dates back on 4th February 2011, the titles have not been cancelled and based on legal advice the applicant contended that the Registrar of Titles acted in excess of its jurisdiction as provided by the Registration of Titles Act (repealed) in seeking to revoke the registered certificates of title; that the Registrar of Titles purportedly revoked the Certificate of title without giving the Applicant any right of recourse; that the Registrar of Titles acted outside the purview of the Constitution, Registration of Titles Act (Cap 281 Laws of Kenya- repealed): Government Lands Act and the Trust Land Act by purporting to revoke the Applicant's registered titles; that the competent authority to revoke and/or cancel a subsisting instrument of title and this case LR No. 21073/2-20 is this Honourable court; that the Registrar of Titles has a duty to maintain the integrity of the Register and shall not register any decision that is a nullity; and that any act by the Respondent and Interested Party or making any entry against the title alienation in any manner of taking possession of nay of the titles LR. No. 21073/2, 21073/3, 21073/4, 21073/5, 21073/6, 21073/7. 21073/8, 21073/9, 21073/10, 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/18, 21073/19 and 21073/20 are nullities.
8. It was further averred by the 1st Respondent making a decision to expropriate the *ex-parte* Applicant's land without according it an opportunity to be head and without being given any reason for the said decision, the 1st Respondents violated the ex-parte Applicant's constitutional right guaranteed by Article 40 as well as Article 47 (1) of the Constitution of Kenya 2010.
9. To the applicant, under the Act the Registrar does not have power to revoke titles and that the *ex-parte* applicant learnt of the Gazette Notice in question just before instituting this suit. In its view, the rules of natural justice were breached by the Respondents and the *ex-parte* Applicant was not afforded fair administrative action that was lawful, reasonable and procedurally fair. Furthermore the illegal, irregular, and arbitrarily decision of the Respondents to revoke the ex-parte applicant's titles cannot be categorised as an order, decree, conviction, judgment or other proceedings to fall under the ambit of statutory limitation. Since the process of gazetting cancellation was in breach of the rules of natural justice, it was contended that the 6 months limitation does not apply in this case.
10. It was asserted that when ex-parte applicant was issued with the letter of allotment to the suit titles no other letter of allotment has been previously issued and/or leased to any other party. According to it, the President through the Commissioner of Lands lawfully issued the title as this was un-alienated government land which was not leased to any party in the respect to which the Commissioner had not issued any letter of allotment. In its view, the title is indefeasible and the Respondents have not alleged any fraud or misrepresentation against the ex-parte applicant.

1st Respondent's Case

11. In response to the application, the 1st Respondent filed the following grounds of opposition:

1. **That L.R. No. 21070 and the 19 plots enlisted by the ex-parte Applicant as 21073/2-21073/20 is the land that was reserved for the Ministry of Agriculture, Livestock and Fisheries where the Kabete Veterinary Laboratories sand headquarters of the Directorate of Veterinary Services are currently situated.**
2. **That the right procedure for allocating government land to institutions and individuals at**

that time was through a cabinet memorandum that is counter signed by the Minister of Lands and which was not the case in the allocation of the suit parcels of land to the ex-parte applicant.

3. **That the Registrar of Titles as the custodian of titles issued under registration of Titles Act (now repealsed0 had the authority to revoke any title issue d irregularly under the Act.**
4. **That the suit is bad in law as an order of certiorari cannot be issued to challenge a decision that was made over 6 years ago since the gazette notice that is subject of this suit was issued in February 2011.**
5. **That the order of mandamus to compel the interested party to give a vacant possession of part of the suit properties as sought by the ex-parte Applicant cannot issue since the Gazette Notice has not been quashed.**
6. **That the suit is otherwise incompetent, misconceived, misplace and is an abuse of the process of this honourable court and it ought to be dismissed with costs.**

Interested Party's Case

12. In response to the application, the Interested Party herein, Ministry of Agriculture, Livestock and Fisheries (the Ministry), contended that LR Nos 21070 and the 19 plots listed by the ex parte applicant was the land reserved for it where the Kabete Veterinary Laboratories and Headquarters of the Directorate of Veterinary Services are currently situated and that the land initially comprised LR No. 189R and 2952. However sometimes in 1995, the then Ministry of Agriculture, Livestock Development and Marketing awarded **Kamwere and Associates** (the firm) a contract to carry out a survey of land No. 189R and process the title deed for the same. Instead of doing so, the said firm sub-divided the said land into multiple plots with some being allocated to companies, private individuals, churches, Government institutes while 12 parcels were allocated to the Ministry of Livestock but the titles were never delivered by the said firm as agreed.
13. According to the interested party, it was during this time that the said firm engaged in the irregular excision of LR No. 2952 into many plots inter alia 2173 which was later subdivided into the 19 plots the subject of these proceedings. According to the interested party, even though the suit parcels had not been leased out to any person or institution, letters of allotment and subsequent titles should not have been issues to the Interested Party or to any other person or institution since the land was reserved for the Ministry as evidenced by Gazette Notice No. 1274.
14. It was further added that the suit properties are some of the several parcels of land reserved for the Interested Party that over the years were irregularly allocated and titles issued to various private developers including the ex parte applicant. The interested party disclosed that the correct procedure for allocating Government land o institutions and individuals at that time was through a Cabinet Memorandum countersigned by the Minister for Lands and allocation was only done after the same was authorised by the Cabinet which procedure was not followed. In its view, the Registrar of Titles as the custodian of titles issued under the Act had the authority to revoke any title issued irregularly under the Act. Subsequent to the revocation the Interested Party and/or any of the public bodies under it had the right to take possession of any part thereof as the interested party did.
15. To the interested arty the suit is misconceived and bad in law as an order of certiorari cannot issue to challenge a decision made over 6 months ago as the Gazette Notice was issued in February, 2011 and unless the Gazette Notice is quashed an order of mandamus cannot equally issue.
16. It was the interested party's case that the Respondents had the powers under the ten Constitution, the ***Government Lands Act*** and ***Trust Land Act*** to revoke titles irregularly issued as was done vide Gazette Notice Number 1274.

Determination

17. Having considered the foregoing this is the view I form of this matter.

18. Before dealing with the merits of the application, it is important to address the issue of limitation. As this Court has held time and again, a Court of law ought not to drive a litigant from the seat of

justice unless the law is clear that the cause of action is time barred under the relevant limitation statute. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

19. Similarly, in the case of **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 Of 1998.** In these cases it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else. A decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months' limitation.

18. The decision complained of herein similarly was a decision made by the 1st Respondent revoking the applicant's titles to land. It is therefore my view and I so hold that the six months' time bar does not apply to these proceedings.
19. However, it must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**
20. Therefore whereas, this Court has held that in the circumstances of this case the 6 months' limitation is inapplicable, the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.
21. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

> ***"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and***
>
> ***Fulham (Respondents) and Other Exparte Burkett &***
>
> ***Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,***
>
> > ***"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be***

found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision… But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

22. Apart from that it is stated in ***Halsbury's Laws of England*** **4thEdn. Vol. 1(1) para 12 page 270** that:

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. *Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief*."** [Emphasis added].

23. Judicial review proceedings, it was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

> **"…is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

24. Accordingly, the Court in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
25. Accordingly, this Court will only concern itself with the process followed by the Registrar in arriving at the impugned decision and therefore will not dwell on whether the documents held by the applicant are genuine or otherwise. That is an issue which can only be resolved in a merit hearing before the Environment and Land Court.
26. Section 23 of the repealed Registration of Titles Act was based on the Australian Torrens system of registration and its prime principle was the sanctity of the register. See **Popatlal vs. Visandjee [1960] EA 361, 365; [1959] EA 372, 376 (PC); Souza Figuiredo vs. Moorings Hotel [1960] EA 926; Cross vs. Great Insurance Company Limited of India [1966] EA 94.** The title of a

person appearing on the register as proprietor was, as against third parties, conclusive of that fact and was *prima facie* valid notwithstanding a defect in title. Indeed, the position was that, were it otherwise the principle object of the Act, would have be defeated. See **Govindji Popatlal vs. Nathoo Visandji [1962] EA 372** at **376** and **Dinshaw Byramjee & Sons Ltd vs. The Attorney General of Kenya [1966] EA 198**.

27. This provision was dealt with by **Kimaru, J** in **Punda Milia Co-Operative Society vs. Savings & Loan (K) Limited Nairobi HCCC No. 273 of 2008** in which the learned Judge expressed himself as follows:

> **"Section 23 of the Registration of Titles Act requires the court to consider a certificate of title issued under that Act as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements, restrictions and conditions contained therein. The said section prohibits the challenge to such certificate of title on any other ground than that of fraud or misrepresentation to which the registered owner is proved to be party."**

28. The Respondent's and Interested Parties' case in a summary was that that the applicant obtained the suit parcels unlawfully since the process to be followed in the alienation of the said lands was never followed. That a title to land even under the then regime could be challenged was not in doubt. The title could under section 23(1) of the ***Registration of Titles Act*** be impugned on the basis of fraud or misrepresentation to which the owner was proved to be a party. However, with the advent of the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution nolonger extend to any property that has been found to have been unlawfully acquired. The effect of this provision, according to my understanding is that any title to land is nolonger indefeasible and may be challenged if found to have been unlawfully acquired. In other words the Torrens System which has been with us for decades is now subject to Article 40 of the Constitution and we are nolonger bound to apply it line, hook and sinker. This in a nutshell is the respondents' and interested parties' case.

29. However, it is important to note that the said Article employs the use of the words ***"found to have been unlawfully acquired"***. Therefore there must be a finding that the property in question was unlawfully acquired and where such a finding is made, the registered proprietor's title must be cancelled. Even before the promulgation of the current Constitution, it was appreciated that the mere fact that a person had title to land did not mean that such title could not be successfully impugned. This was appreciated in **Mureithi & 2 Others (For Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443,** where the Court expressed itself as follows:

> **"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."**

17. However, the power to nullify titles must be exercised within the legal parameters provided. Section 60 of the ***Registration of Titles Act*** provided as follows:

> ***(1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or***

instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.

(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.

30. The foregoing provision set out the steps the Registrar was to take if he deemed that there was an error or mistake in the Grant or Title or where the Grant or Title for reasons disclosed therein ought not to have been issued. He was enjoined to summon the person to whom the grant, certificate or instrument had been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected. The summons, in my view, had to expressly require that the Grant, certificate or instrument be delivered for the purpose of being corrected. At that stage the issue of revocation of the title did not arise. In default of honouring the summons the Registrar then moved to the next stage which was to apply to the Court for the issuance of summons to issue to the person why the same could not be delivered for correction. It was only in default of honouring the Court summons that the warrants were then to be issued for the persons to be apprehended for examination.
31. Section 61 of the Act then provided as follows:

Upon the appearance before the court of any person summoned or brought by virtue of a warrant the court may examine that person on oath or affirmation, and may order him to deliver up the grant, certificate of title or other instrument, and, upon refusal or neglect to deliver it up pursuant to the order, may commit him to prison for any period not exceeding six months, unless the grant, certificate of title, or instrument is sooner delivered up; and in that case, or where the person has absconded so that a summons cannot be served upon him as hereinbefore directed, the court may direct the registrar to cancel or correct any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute and issue such certificate of title or other instrument, or make such entry, as the circumstances of the case may require.

32. What these provisions were intended for was that before a person was deprived of his title to property the due process which included an opportunity to be heard had to be followed. There was no power, however conferred upon the Registrar of Titles to revoke a registered proprietor's title before the due process was adhered to.
33. Accordingly, the *Registrar only had the power to rectify titles where there were wrongful or fraudulent entries under section 60. However, the Respondent could cancel title when directed by the court under section 64 of the Act which provided that:*

In any proceedings respecting any land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.

34. *It is therefore clear from the foregoing that the Respondent had no power to revoke or cancel the title, whether in public interest or otherwise, under section 60 unless directed by the court under section 64 of the Act.* See **Kuria Greens Limited v Registrar of Titles and Commissioner of Lands Nairobi HC Petition No. 107 of 2010 (Unreported)** and **Satima Enterprises Ltd v Registrar of Titles & 2 Others [2012] eKLR**.
35. Section 64 of the Act envisaged a situation where the court was in a position to address itself to

the substantive issues of cancellation of title after considering all the facts and evidence presented by the parties. Judicial review court like in the current application has no such advantage as its jurisdiction is confined to the procedural propriety.

36. Under the current Constitution, Article 40(3) provides that:

> ***The State shall not deprive a person of property of any description, or of 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 for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***
>
> ***(i) requires prompt payment in full, of just compensation to the person; and***
>
> ***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

37. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

38. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. Both under the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. The Respondents' position that the Registrar has power to revoke illegally acquired land would fly in the face of the express constitutional provisions and even if the interpretation adopted by the Respondents of the Act was correct I would have no hesitation in declaring the same to be ineffectual on the ground of its being *ultra vires* the express provisions of the Constitution.

39. In the case of **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR**, **Majanja J.** on a matter similar to the current one expressed himself thus:

> **"……first, the Registrar of Titles has no authority under the *Registration of Titles Act* to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation."**

40. I find the said decision persuasive.

41. I am however cognisant of the position stated in ***Halsbury's Laws of England 4th Edition Vol. 1(1) paragraph 122***, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the

discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

42. Similarly in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**, the Court expressed itself as follows:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced…It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts**."

43. I also refer to Apart from that it is stated in ***Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270** that:

> **"The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant…Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the**

public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

44. In this case, the decision being challenged was made vide Gazette Notice published on 4th February, 2011, more than 5 years ago. These proceedings were commenced on 19th June, 2015, more than 4 years after the decision. It is agreed by the parties that the interested party has taken possession of the suit land. Whereas the applicant contends that it stumble upon the said Gazette Notice while in the process of transferring some of the said parcels to a third party, it does not disclose when this "stumbling" occurred. The purpose for Gazette Notice was dealt with in **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational.
45. In the absence of the exact time when the applicant came to know of the existence of the Gazette Notice, coupled with the time lapse between the Gazettement and the commencement of these proceedings, which is undoubtedly a long period this Court is unable to exercise its discretion in these proceedings. The applicant is at liberty to challenge the decision in question before the ELC Court.

Order

46. In the premises, the Notice of Motion dated 26th June, 2015 fails and is dismissed. In light of my findings herein with respect to the powers of the Respondents, there will be no order as to costs.
47. It is so ordered.

Dated at Nairobi this 22nd day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sagana for the Applicant

Cc Patricia