REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 105 OF 2010

REPUBLIC..... APPLICANT

VERSUS

1. DISTRICT LAND REGISTRAR, MOMBASA

2. THE COMMISSIONER OF LANDS

3. MINISTER OF LANDS ……..…… RESPONDENTS

AND

1. KENYA ANTI-CORRUPTION COMMISSION

2. THE JUDICIARY

3. THE JUDICIAL SERVICE COMMISSION……INTERESTED

PARTIES

EX-PARTE: SUPER NOVA PROPERTIES LIMITED

AND

MISCELLANEOUS APPLICATION NO. 103 OF 2010

REPUBLIC..... APPLICANT

VERSUS

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

THE COMMISSIONER OF LANDS……...……2ND RESPONDENT

MINISTER FOR LANDS …….……3RD RESPONDENT

AND

1. KENYA ANTI-CORRUPTION COMMISSION

2. THE JUDICIARY

3. THE JUDICIAL SERVICE COMMISSION… ……INTERESTED

PARTIES

EX-PARTE: NOVA HOLDINGS LIMITED

RULING

Introduction

1. For determination in this Ruling are the Notices of Motion (the Applications) dated 18th October, 2010 and filed in this court on 19th October, 2010 by Super Nova Properties Limited and Nova Holdings Limted, the Ex-Parte Applicants. The orders sought in each of the applications are -

i. **An order of certiorari do issue to remove into this Honourable Court for the purpose of being quashed the decision of the District Land Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein contained in the Gazette Notice No. 3458 published in Special Issue of the Kenya Gazette dated First April 2010 revoking the Applicants' title to their respective parcels of land Super Nova Properties Limited known as Mombasa/Block XXVI/917 (wrongly indicated in the Kenya Gazette as Mombasa/Block XXVI/117), and Nova Holdings Limited known as Mombasa/Block XXVI/916, (hereinafter referred to as the suit properties);**
ii. **An order of prohibition do issue to prohibit the District Land Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein, their servants and/or agents from alienating, allocating, handing over possession of or vesting the titles of the suit properties to any other person and from having any other dealings with the said properties or taking any further proceedings or actions in relation thereto;**
iii. **An order of mandamus do issue directing the District Land Registrar, Mombasa and the Commissioner of Lands, the First and Second Respondents herein commanding them to reinstate the Applicants' titles over the suit properties by, *inter alia*, reinstating the Applicants' names in the respective Registers of the properties as the respective proprietors of the respective leaseholds and to revoke and/or cancel any dealings therein with the said titles and any entry in the register of the said property made pursuant to the purported revocation of the Applicants' titles;**
iv. **Costs of and incidental to the applications be provided for.**

2. Prior to the filing of the substantive Motion, the *Ex-Parte* Applicant sought and was granted leave to apply for the said judicial review remedies. The Application for leave to commence judicial review proceedings was accompanied with the *Ex-Parte* Applicant's Statutory Statement dated 28th September, 2010 and an Affidavit Verifying the Facts sworn by ASHOK LABSHANKER DOSHI on 28th September, 2010. The Ex-Parte Applicant filed a Further Affidavit sworn by ASHOK LABSHANKER DOSHI on 13th June, 2011 as well as a Supplementary Affidavit sworn by ASHOK LABSHANKER DOSHI Third February, 2015.

3. Following the filing and service of the substantive Notice of Motion (the Application), the Interested Parties sought and were granted leave to join in the proceedings herein. The Kenya Anti-Corruption (now the Ethics and Anti-Corruption Commission) was granted leave to join these proceedings by an application dated 7th April, 2011 filed by its counsel, Ms. Kossy Bor. Likewise following an oral application by Mr. Issa Advocate on 4th June, 2015, the Judiciary and the Judicial

Service Commission were joined as the Second and Third Interested Parties.

4. The Applications are consequently opposed by both the Respondents and the Interested Parties. The Respondents' opposition is found in the Replying Affidavit of Renson Ingonga (drawn by the Attorney-General/counsel for the Respondents) and sworn and filed on 18th March, 2011.

5. The Kenya Anti-Corruption Commission the First Interested Party, opposed the Applications by the Ex-Parte Applicants through the Replying Affidavit of OSCAR ANGOTE (then an Investigator with the First Interested Party, and now Judge of the Environment and Land Court), sworn and filed on 19th May, 2011. There was the Further Affidavit of JOEL SAMOEI, an Investigator with the First Interested Party sworn on 22nd May, 2015 and filed on 25th May, 2015.

6. The Judiciary and the Judicial Service Commission, the Second and Third Respondents respectively, opposed the Application by the Replying Affidavit of MOSES SEREM, the Registrar of the Court of Appeal sworn on 8th July, 2015 and filed on 9th July, 2015.

MISCELLANEOUS CIVIL APPLICATION NO. 103 OF 2010

7. Related to the Application, is Miscellaneous Civil Application No. 103 of 2010 filed by NOVA HOLDINGS LIMITED. It related to the Kenya Gazette Notice No. 3458 dated First April, 2010, and the revocation of title known as MOMBASA/BLOCK XXVI/916, registered in the name of the said NOVA HOLDINGS LIMITED. The revocation was stated to be on the basis that MOMBASA/BLOCK XXVI/916 is reserved for use by the Lands Office.

8. Although no formal order for consolidation of this Application with Miscellaneous Civil application No. 105 of 2010 was made, the two files have from the record, always moved together with an order in one file being made applicable to the other. This Ruling and the orders herein shall therefore apply **mutatis mutandis** to Miscellaneous Application No. 105 of 2010. On 26th November, 2014, the court adopted the consent by which the parties had agreed to dispose of both applications by way of written submissions.

9. The parties accordingly filed their respective written submissions which were highlighted before court on 7th March, 2016. The Ruling herein will therefore apply **mutatis mutandis** to Misc. application No. 103 of 2010.

THE EX-PARTE APPLICANTS' CASE

10. The Ex-Parte Applicants' case is that on 17th December, 1996, the Government of Kenya through the office of the Second Respondent let to it (the Ex-Parte Applicant) the parcel of land known as Mombasa Island/Block XXVI/917 (hereinafter *"the suit property"*) for a term of 99 years from First August, 1996 at an annual rent of Kshs. 90,000.00. The said lease was registered at Mombasa District Land Registry on 19th December, 1996 and the Ex-Parte Applicant issued with a Certificate of Lease of the same date. The Ex-Parte Applicant paid to the Second Respondent a sum of Kshs. 90,000.00 as stand premium in addition to the payment that the Ex-Parte Applicant had made to Angeline Cherono Cheboi and Leah Sawe who were the original allottees of the suit property pursuant to a Letter of Allotment dated 18th July, 1996.

11. It is the Ex-Parte Applicant's case that on 11th May, 1997, a suit was filed against it by Fakii Khatib, William Onyango Wameyo and Samuel Ouma being Mombasa HCCC No. 208 of 1997 seeking an order to nullify the Ex-Parte Applicant's title to the suit property on the basis that the same belonged to

Mombasa Law Courts. The said case was consolidated with another suit being Mombasa HCCC No. 164 of 1997 which was filed by the same Plaintiffs against Nova Holdings Limited and which sought the nullification of title granted to Nova Holdings Limited over Mombasa/Block XXVI/916 - which is the subject of Miscellaneous Civil Application No. 103 of 2010 that is running concurrently with this Application as discussed earlier.

12. The Ex-Parte Applicant however pleads that the two consolidated cases were settled through a consent recorded in court on 12th November, 1997 under which it was agreed that the Ex-Parte Applicant is at liberty to enter upon, occupy and/or develop or carry out any other dealings with the suit property without hindrance of any nature from any of the parties.

13. The Ex-Parte Applicant however pleads that by a Gazette Notice No. 3458 published on First April, 2010, the First Respondent acting on instructions of the Second and Third Respondents purported to revoke the Applicant's title over the suit property on the allegation that the suit property is one of the parcels of land that were allocated to private developers illegally. The Ex-Parte Applicant contends that it was not afforded an opportunity to make representation before its title over the suit property was revoked.

14. In its written submissions filed on 3rd February, 2015, the Ex-Parte Applicant submitted that the Respondents had no power in law to revoke the Ex-Parte Applicant's title to the suit property in the manner in which the revocation was carried out, that neither the Constitution of Kenya, the Government Lands Act, (Cap 280 of the Laws of Kenya) (now repealed) nor the Trust Land Act, (Cap 288 of the Laws of Kenya) grants the First Respondent the power to revoke a title to a leasehold land registered under the Registered Land Act. Cap. 300 of the Laws of Kenya (now repealed) by way of a Gazette Notice.

15. The Ex-Parte Applicant further contends that **Article 40** of the Constitution of Kenya forbids deprivation of property through compulsory acquisition or otherwise without payment of compensation and that the procedure provided for in the Land Acquisition Act, Cap. 295 Laws of Kenya (now repealed) for compulsory acquisition of land by the Government was not adopted by the Respondents and no compensation was paid to the Ex-Parte Applicant.

16. The Ex-Parte Applicant submitted that there is no provision in the Government Lands Act, (Cap. 280 of the Laws of Kenya) (now repealed) which allows the Government to revoke a title to a property which the same Government has allocated to a person without following an elaborate procedure set out in the Act.

17. According to the Ex-Parte Applicant, the Trust Land Act is not applicable to the suit property which was not trust land when the Respondents purported to revoke the title held by the Ex-Parte Applicant, that there is no provision in the Trust Land Act which authorizes the Respondents to cancel the Ex-Parte Applicant's title in the manner in which the title was cancelled.

18. The Ex-Parte Applicant contends that due to the foregoing, the Respondents acted without authority when they revoked the Ex-Parte Applicant's title to the suit property, that the Respondent therefore assumed and exercised powers that they did not have, and that a decision made without legal authority or power is null and void.

19. It was the submission of the Ex-Parte Applicant that the decision of the Respondents to revoke its title to the suit property was *ultra vires* the powers conferred upon the Respondents by law and thus the decision was unconstitutional and illegal, that under **Sections 142 and 143** of the Registered Land Act, the Registrar is only empowered to rectify the register, but that it is only a court of law that can cancel and/or revoke the registration of any person as a proprietor of land or lease under the Registered Land Act.

20. The Ex-Parte Applicant submitted that the decision to revoke its title was not only in breach of the Registered Land Act but also the Constitution of Kenya and that in purporting to revoke the Ex-Parte Applicant's title without compensation, the First Respondent acted in violation of **Article 40** of the Constitution.

21. The Ex-Parte Applicant further submitted that the Respondent's decision to revoke the Ex-Parte Applicant's title was made in breach of the rules of natural justice because the Respondent failed to give the Ex-Parte Applicant an opportunity to explain how it acquired the suit property.

22. It was the Ex-Parte Applicant's submission that the Respondents' decision to revoke its title without following the procedure laid down in the Constitution and the Land Acquisition Act was arbitrary, high handed and amounted to an abuse of power and therefore illegal, null and void.

23. The Ex-Parte Applicant further submitted that in judicial review proceedings, the court is called upon to consider the process used to arrive at a decision and not the merit of the decision complained of. In these proceedings therefore, what the Ex-Parte Applicant is challenging is the process that was adopted by the Respondents in revoking the title and that whether the Ex-Parte Applicant's title is illegal as claimed by the Respondents or valid as claimed by the Ex-Parte Applicant is not for determination by the Court in these proceedings.

24. To support its submission that this court is not concerned with the merits of the impugned decision, the Ex-Parte Applicant quoted the decision of the Court of Appeal in the case of **COMMISSIOER OF LANDS VS. KUNSTE HOTEL LIMITED [1995-1998] 1 EA** 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."**

25. The Ex-Parte Applicant also quoted from the case of **REPUBLIC VS. THE REGISTRAR OF TITLES, NAIROBI & 3 OTHERS EX-PARTE CAROGET INVESTMENTS LIMITED (unreported)**.

26. Further, the Ex-Parte Applicant supported its position by quoting the holding of Omondi, J. in the case of **FAHIM YASIN TWAHA & ANOTHER VS. DISTRICT LAND REGISTRAR - LAMU [2011] eKLR** as follows -

> **"Lest we lose focus, the issue here is not as regards the merits of the decision, but the procedure used in arriving at that decision. The issue for determination is simply this;**
>
> a. **Did the District Lands Registrar Lamu have authority/jurisdiction to revoke and cancel tile issued under the Registration of Lands Act.**
> b. **Were the principles of natural justice**
>
> **adhered to, in exercising that decision?"**

27. The Ex-Parte Applicant concluded by submitting that neither the Respondents nor the Interested Parties adequately addressed the issues before court for determination but instead delved into the merits of the decision being challenged.

THE RESPONDENTS' CASE

28. The Respondents' case is that following a public outcry regarding illegal and irregular acquisitions of land meant for public use by private individuals, the Government appointed a Commission which later became commonly known as **"Ndungu Commission"** which investigated all illegally and irregularly acquired public land and submitted a Report which became known as **"Ndungu Report"**. The Ndungu Report listed thousands of irregularly acquired plots such as the one owned by the Ex-Parte Applicants upon receipt and study of the Ndungu Report the Government embarked on revocation of the parcels of land identified in the Ndungu Report as having been irregularly acquired leading to the publication of many Gazette Notices for the revocations such as the Gazette Notice No. 3458 that is the subject in these proceedings.

29. The Respondents averred that the suit properties were allocated to Mombasa Law Courts and that the title has, after the revocation, been registered in the name of the Permanent Secretary to the Treasury a corporation sole under the Permanent Secretary to Treasury Act [Cap 101, Laws of Kenya] to be held in trust for the Judiciary.

30. The Respondents further averred that the Ex-Parte Applicants had knowledge that the suit property had been reserved for the use of the Mombasa Law Courts and that the revocation did not come as a surprise to the Ex-Parte Applicants.

31. In their written submissions dated 29th May, 2015 and filed on Third June, 2015, the Respondents relied on the cases of **MOHAMED TARIQ KHAN VS. LAND REGISRAR LAMU (MALINDI HIGH COURT MISC. APPLICATION NO. 27 OF 2010 (unreported)** and **PETER BOGONKO VS. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) (NAIROBI HIGH COURT MISC. APPLICATION NO. 1535 of 2000) (unreported)** to urge the court to uphold the revocation of the Ex-Parte Applicant's title in the public interest.

THE FIRST INTERESTED PARTY'S CASE

32. The First Interested Party's case is that it carried out investigations into allegations that, through corrupt conduct, the land on which the High Court at Mombasa is erected had been illegally alienated to private companies. Investigations revealed that all that parcel of land known as Mombasa Block XXVI/244 was reserved for use by the Judiciary, and that Mombasa Block XXVI/244 was irregularly subdivided into Mombasa Island Block XXVI/916, 917 and 918 and parcel Number **Mombasa Island Block XXVI/916** was alienated to Nova Holdings Limited, the Ex-Parte Applicant in Misc. Civil Application No. 103 of 2010 while parcel Number **Mombasa Island Block XXVI/917** was alienated to Super Nova Holdings Limited, the Ex Parte Applicant herein. Parcel Number Mombasa Island Block XXVI/918 is where Mombasa Law Courts presently stand. The First Interested Party stated that the Judiciary was not consulted when the property was being sub-divided as aforesaid.

33. The First Interested Party contended that the Ex-Parte Applicant is not entitled to the suit property and that the only recourse that the Ex-Parte Applicant has is to seek refund of the consideration of Kshs. 2,000,000.00 which it paid as stand premium together with the rents and rates paid to the Government to date and not reinstatement of its title to the suit property.

34. In its written submissions filed in court on Third June, 2015, the First Interested Party submitted that **Section 3(a)** of the Government Lands Act empowers the Commissioner of Lands to make grants or dispositions of interests or rights over unalienated Government Land and sets out the cases in which the President's power is delegated to the Commissioner of Lands. The parcel known as **Mombasa Block XXVI/244** was already alienated in favour of the Judiciary and was therefore not available for alienation to the Ex-Parte Applicant or any other person.

35. The First Interested Party submitted that **Section 9** of the Government Lands Act empowers the Commissioner of Lands to cause a part of the municipality that is not required for public purposes to be divided into plots to be disposed of in the manner set out in the Act. It concluded that the purported lease of the suit property to the Ex-Parte Applicants contravened the provisions of the Government Lands Act.

36. The First Interested Party contended that the Respondents were within their statutory powers pursuant to **Sections 120 and 121** of the Government Lands Act to correct the error on the register by revoking the Ex-Parte Applicant's registration as the proprietor of the suit property in light of the illegalities.

37. The First Interested Party further submitted that **Section 70** of the repealed Constitution provided that the protection of property safeguarded by that section, was not absolute but was subject to other people's rights and the general public interest. Further, that **Article 40** of the Constitution of Kenya, 2010 protects the right to property but pursuant to **Article 40 (6)** of the Constitution**,** the rights under Article 40 do not extend to any property that has been unlawfully acquired, and that the Constitution of Kenya, 2010

recognizes the principle of public interest in **Article 22 (2) (c) and (d), Article 23 (e), Article 24 (d)** and **Article 258**.

38. It was the First Interested Party's submission that the Constitution of Kenya acknowledges rampant grabbing of land reserved for public purposes and provides at **Article 68 (c) (v)** that Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality, that the drafters of the Constitution had in mind instances such as the illegal alienation of the Mombasa Law Court land.

39. The Interested Party submitted that contrary to the Ex-Parte Applicant's contention that the Interested Party ought to have filed a suit in court to annul its title, this Court can find, in these proceedings and pursuant to **Article 40 (6)** of the Constitution of Kenya, 2010, that the suit property was illegally alienated to the Ex-Parte Applicant, that by so doing, the court will avoid the multiplicity of suits and ensure speedy determination of the dispute.

40. On public interest, the First Interested Party relied on the case of **KENYA NATIONAL EXAMINATIONS COUNCIL VS. REPUBLIC EX-PARTE KEMUNTO REGINA OURU [2010] eKLR** where the Court of Appeal stated that -

> **"Considering the foregoing we come to the conclusion that balancing one thing against the other the balance tilts in favour of subordinating the right to be heard directly, in favour of the public interest of ensuring that national examinations results enjoy public confidence and integrity by letting the experts handle them as they deem best provided what they do is applied equally to all candidates with similar complaints against them. In view of the conclusion we have come to, it is our judgment that Ibrahim, J. was in error to issue an order of certiorari, more so because, other than the alleged denial of a hearing as we strictly know it, there was no proper basis for him to interfere."**

41. The First Interested Party also relied on the case of **KENYA POWER AND LIGHTING COMPANY LTD VS. NMG COMPANY LTD [2010] eKLR** where the Court of Appeal stated that -

> **"The respondent has filed a judicial review application seeking public law remedies. In my view, the appropriate test is whether it is in the public interest and also in accordance with the policy of the Public Procurement and Disposal Act to grant the orders of stay sought in the application. This is so because in East African Cables Ltd and The Public Procurement Complaints Review and Appeals Board (First Respondent) Kenya Power and Lighting Co. Ltd. (Second Respondent) – Civil Application No. Nairobi 109 of 2007 (unreported) this Court said in part -**
>
> > **"We think that in a case like this, we must consider the likely effect of the orders sought by the applicant. We should take into account the special nature of the set-up of the Second respondent. It is common ground that it is the sole supplier of electricity in the country and that has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached nevertheless the court has a reciprocal duty to ensure that it does not hamstring such bodies like the Second respondent from performing their lawful duty or duties as bestowed upon them by the relevant law."**

42. The First Interested Party therefore urged this Court to consider the likely effect of granting the orders sought which would make part of Mombasa Court land private property and deny many access to courts as enshrined in the Constitution.

THE SECOND AND THIRD INTERESTED PARTIES' CASE

43. The Second and Third Interested Parties' averred that the parcel of land known as Mombasa Block XXVI/224 was reserved for use by the Judiciary but since the Judiciary is one of the three arms of the Government, no title was issued in favour of the Judiciary. The said parcel was therefore not available for alienation or allocation to any other party; that the sub-division of the parcel into Mombasa Island Block XXVI/916, 917 and 918 was a nullity as the Director of Surveys did not approve the subdivision which was irregularly undertaken by the Second Respondent. Further, that the Judiciary was never involved when the decision was taken to subdivide the land and that the Judiciary did not give its consent for the sub-division.

44. The Second and Third Interested Parties stated that the Judiciary was not a party to the two suits being HCCC No. 164 and 208 of 1997 and did not participate in the consent entered therein and therefore the consent is tainted with mistake and illegality and is void for want of authority.

45. The Second and Third Interested Parties asserted that the Second Respondent caused to be resurveyed and consolidated Mombasa Island Block XXVI/916, 917 and 918 to create Mombasa Island Block XXVI/1157 and a Lease and Certificate of Lease were issued to the Permanent Secretary, Treasury as a Trustee for the Judiciary for a term of 99 years with effect from First August, 2012.

46. The Second and Third Interested Parties contended that the Ex-Parte Applicant's title having been procured fraudulently, the present application for judicial review remedies is not merited and should be dismissed with costs. Just like the First Interested Party, the Second and Third Interested Parties stated that the Ex-Parte Applicant's only entitlement is the Kshs. 2 million it had paid as stand premium plus all rents and rates it has paid to the Government to date.

47. In their written submissions filed in court on 9th July, 2015, the Second and Third Interested Parties submitted that the suit property was reserved for public use by the Judiciary and therefore pursuant to **Section 9** of the Government Lands Act, the Second Respondent ceased to have any authority to allocate the parcel of land to any other person.

48. Further, the Second and Third Interested Parties submitted that the Second Respondent had statutory power in **Section 120 and 121** of the Government Lands Act as read together with **Sections 59 and 60** of the Registration of Titles Act to cancel the title to the suit property.

49. On public interest, the Second and Third Interested Parties submitted that the need to safeguard the public good disentitle the Ex-Parte Applicant of any remedy to rectify any procedural lapses in preserving the suit property, that construction of a modern court complex is of strategic importance to the members of the public and therefore the private rights of a few individuals should not interfere with public interest. The Second and Third Interested Parties relied on the case of **BASELINE ARCHITECTS LIMITED & 2 OTHERS VS. NATIONAL HOSPITAL INSURANCE FUND BOARD MANAGEMENT [2008] eKLR** where the High Court stated that -

> **"It is, I think, a principle which commands general acceptance that there are circumstances in which the public interest must be dominant over the interest of a private individual. To the safety or the well-being of the general public, the claims of a private litigant motivated by profit may have to be subservient. It is therefore vital to protect the public from private interest peril – i.e. interests of a litigant must give way to that of the general public…**
>
> **As stated the court has ultimate power in the interest of justice to fulfill the mandate given to it, to safeguard the interests of the public and in doing so, where there is reasonable grounds to protect and preserve the interests of the public. Such duty must be performed in order to do justice between the parties. It is also instructive to note that the court has a duty to safeguard genuine interest of a litigant but also ensure that the scope of privilege is not extended in matters which have strategic importance to members of the public."**

50. The Second and Third Interested Parties further relied on the case of **JOHN PETER MUREITHI & 2 OTHERS VS. ATTORNEY GENERAL & 4 OTHERS [2006] eKLR** where Nyamu, J. (as he then was) stated as follows -

> "In the unreported case of **KENYA GUARDS ALLIED WORKERS UNION VS. SECURITY GUARDS SERVICES & 38 OTHERS & ANOTHER (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."**

51. The Second and Third Interested Parties submitted that the matter before court involves the cancellation of an illegal title and the merits of the cancellation cannot be determined in judicial review proceedings. The Second and Third Interested Parties in that regard relied on the case of **SANGHANI INVESTMENT LIMITED VS. OFFICER IN CHARGE NAIROBI REMAND AND ALLOCATION [2007] 1 EA** to buttress that position. They further relied on the case of **REPUBLIC VS. PERMANENT SECRETARY MINISTRY OF PUBLIC WORKS & HOUSING EX-PARTE TOM MALIACHI SITIMA [2014] eKLR** where Odunga, J. observed that:

> **"Similarly, in this case even if I were to grant the orders sought herein, the issue of validity of the applicant's title would remain unresolved. In my view, that issue ought to be determined before a proper forum in which viva voce evidence will be taken so that appropriate declaratory orders can be made and the matter brought to finality. To grant the reliefs sought without determining the ownership of the suit land would in my view be an exercise in futility.**
>
> **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. See R vs. Secretary of State for Education and Science ex parte Avon County Council [1991] 1 All ER 282, at P. 285.**

It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review."

52. The Second and Third Interested Parties concluded by submitting that the Ex-Parte Applicant has not demonstrated that the remedy of seeking the refund of the premium it paid to the Government would be less convenient, less beneficial or ineffectual for the court to grant it the judicial review orders it is seeking herein.

ISSUES FOR THE COURT'S DETERMINATION

53. I have taken time to go through and consider the pleadings filed in this case, the Supporting, Further and Supplementary Affidavits filed for the Ex-Parte Applicant, the Replying Affidavits filed for the Respondents and the Interested Parties as well as the documents attached thereto. I have also taken time to go through and consider the respective parties' written submissions and the authorities supplied to the court as well as taken into account the oral submissions made by the respective Advocates on behalf of the parties. I must commend the Advocates for the effort they employed in this case to assist the court to appreciate the factual and legal issues involved so as to arrive at a just and fair determination of the dispute. In my view, the issues for determination are three, namely -

i. **Whether the Government through the District Land Registrar, Mombasa had the power or jurisdiction to revoke the Ex-Parte Applicant's title to the suit property;**
ii. **Whether the decision to revoke the Ex-Parte Applicant's title was made in compliance with the rules of natural justice; and**
iii. **Whether the Respondents' decision to revoke the Ex-Parte Applicant's title should be upheld on the basis of public interest.**

ANALYSIS

54. First and foremost, it is most important to note that the case law or authorities relied upon by the Applicants emphasize the principle that these are judicial review proceedings, and that what was being challenged was not the merits of the decision, but the process by which the decision was made.

55. But as I will show in the course of this analysis, that view of judicial review is unnecessarily narrow and restrictive. I will demonstrate the necessity of piercing and opening the veil of judicial review. I will argue that consideration and grant of judicial review reliefs is no longer solely dependent upon the common law principles of *ultra vires*, illegality, irrationality and procedural impropriety (the three "I's"). I will show that following the promulgation of the new Constitution, and the enactment of the Fair Administrative Action Act 2015, (the "FAA Act"), determination of judicial review application is subject to the provisions of Article 47 of the Constitution, and the principles of proportionality set out in Section 7(2)(l) and justice and equity in Section 11(1) of the Fair Administrative Action Act enacted pursuant to the said Article 47.

56. I will also argue that the grant of judicial reliefs, even where the court found default or lack of jurisdiction in the decision-making process, is a discretionary exercise, may be granted or as the way be, refused. I will argue that antecedents leading to the decision being impugned are relevant merit considerations on the aforementioned principles of proportionality, justice and equity. I will argue on the same grounds that the public interest will, where appropriate, override private commercial interests.

57. On the same grounds I will argue that the judicial review court is also a court of equity, and will not sanitize and give imprimatur to land transactions which are tainted with illegality through fraud or other irregularity and contrary Article 40(6) of the Constitution.

58. I will therefore conclude that though the rules of natural justice (procedural impropriety) were breached, in that the Applicants were not given prior notice of the impending cancellation of their irregular title to the suit premises, I will also argue that though the Respondents had no jurisdiction to

cancel the Applicants title to the suit premises, the said principles of proportionality, justice and equity dictated that the reliefs sought be declined. So back to the case law.

JUDICIAL REVIEW IS NOT CONCERNED WITH MERIT BUT DECISION-MAKING PROCESS

59. In the case of **COMMISSIONER OF LANDS VS. KUNSTE HOTEL LIMITED [1997] eKLR**, the Court of Appeal stated that -

> **"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."**

60. Indeed the Second and Third Interested Parties appreciated the principle that judicial review is not concerned with the merit of the impugned decision but with the decision making process when they submitted in their written submissions as follows -

> **"The 2nd and 3rd Interested Parties submit that the matter before this honourable court involves the cancellation of an illegal title by way of rectification and the issuance or restoration of a title that rightfully belongs to the Judiciary. The bonafides (sic) and merits of the cancellation cannot be determined in judicial review proceedings."** *(emphasis mine)*

61. According to this doctrine therefore, this court's mandate is therefore clearly defined and that the same does not include making a finding as to whether the Ex-Parte Applicant's title was illegally and irregularly procured or not. Doing so would be tantamount to delving into the merits of the impugned decision rather than looking into the process through which the decision was made.

62. Again according to this common law doctrine finding on the legality or lack thereof of the Ex-Parte Applicant's title and whether the same was procured fraudulently and irregularly or not can only be made by a civil court after receiving direct and *viva voce* evidence on the issue. In the case of **REPUBLIC VS. LAND REGISTRAR TAITA TAVETA DISTRICT & ANOTHER [2015] eKLR**, Muriithi, J. addressed himself on the issue as follows -

> **"The Judicial Review Court is particularly ill-equipped to deal with disputed matters of fact where, as in this case, it would involve fact finding on an issue of fraud which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. To prove fraud there is need for direct evidence to be adduced and tested through cross-examination of the witnesses before the court can conclude that fraud has been committed and that the applicant had participated in it to warrant revocation of title by the Court under sections 143 of the Registered Land Act Cap. 300, section 23 of the Registration of Titles Act Cap. 281 and now Section 80 of the Land Registration Act 2012 which repealed the former two Acts."**

63. In the case of **LIVINGSTONE KUNINI NTUTU VS. MINISTER FOR LANDS & 4 OTHERS [2014] eKLR**, the High Court (Korir, Odunga & Kamau, JJ.) stated that -

> **"We would align ourselves with the school of thought which holds that judicial review is not the most efficacious remedy where the process under which a title was obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy."**

64. The Respondents and the Interested Parties have dwelt at length and substantially addressed themselves to the fact that the Ex-Parte Applicant's title was procured illegally. The First Interested Party laid emphasis on the fact that its investigations revealed that the Ex-Parte Applicant obtained the title to

the suit property fraudulently and should not have been issued with the title in the first place since the land had been reserved for public use and was not available for alienation.

> **"We have not at any moment pretended to be capable of determining the legality of the Applicant's title. What we have only done is to restore the Applicant to the position he was in prior to the cancellation of his title so that the Environment and Land Court can have the opportunity of making a pronouncement on the legality or otherwise of his title since the concern of this court is to establish whether or not the process of revocation and cancellation of the Applicant's title adhered to the laid down procedures of the law. The question before this court is not whether or not the suit property was regularly obtained…"** (*emphasis mine*)

65. In the case of **JOHN MUKORA WACHIHI VS. MINISTER FOR LANDS & 6 OTHERS [2013] eKLR**, Mumbi, J. observed as follows -

> **"…I am not in a position to pronounce [myself] on whether the petitioners who hold titles to the properties they claim do so in accordance with the Constitution. Whether the properties were lawfully or unlawfully acquired is a matter that must be determined through a process and in a forum that allows all the parties to present their respective cases on their merits. As Majanja J observed in Power Technics Limited –vs- The Attorney General & Others (supra) in reliance on the decision in Chemei Investments Limited -vs- The Attorney General & Others, even where property is acquired unlawfully, the finding of "unlawful acquisition" contemplated in Article 40(6) must be through a legally established process. It cannot be by whim or revocation by Gazette Notice."** *(emphasis mine)*

66. The next question therefore is whether the Mombasa District Land Registrar had the jurisdiction to revoke the Ex-Parte Applicant's title and whether he followed the due process in arriving at that decision.

WHETHER THE DISTRICT LAND REGISTRAR, MOMBASA HAD JURISDICTION TO REVOKE THE TITLE

67. As the following cases will show, it is now almost unanimous that the Registrar has no jurisdiction to revoke a title to land, whether under the Registered Land Act, the Registration of Titles Act, Trust Land Act or any other law. In the case of **REPUBLIC VS. LAND REGISTRAR TAITA TAVETA DISTRICT & ANOTHER (supra)**, Muriithi J. stated as follows -

> **"It is now accepted that the Registrar had no jurisdiction to revoke titles to land under the Registered Land Act or the Registration of Titles Act."**

68. In the case of **REPUBLIC VS. THE REGISTRAR OF TITLES, MOMBASA & 2 OTHERS EX-PARTE EMFIL LIMITED [2012] eKLR**, the same learned Judge (Muriithi, J.) held as follows -

> **"I have considered the respective submissions by counsel on the main issue of the Registrar's power to revoke title to land and the justification of public interest and I have to find that there is unanimity among the courts that the Registrar has no authority in law to revoke or cancel titles to land, whether in public interest or otherwise. It is the courts which must order the revocation of titles or refuse to uphold the private individual's title to land in case of public interest or where the Applicant has committed fraud or other illegalities with regard to the title as happened in the several case authorities cited by the Respondents. To hold otherwise would lead to the usurpation of the judicial mandate of the courts by the Executive in contravention of the constitutional doctrine of Separation of Powers."** *(emphasis mine)*

69. In the case of **JOHN MUKORA WACHIHI VS. MINISTER FOR LANDS & 6 OTHERS**

(supra), Mumbi, J. stated that -

> **"The question whether the Registrar or indeed any of the respondents has a right to revoke the title of a registered owner of property by way of a Gazette Notice has been the subject of several decisions of this court and, in my view, is now settled in the negative."**

70. The issue was extensively addressed by Musinga, J. (as he then was, now Court of Appeal Judge) in the case of **KURIA GREENS LIMITED VS. REGISTRAR OF TITLES & ANOTHER [2011] eKLR** where the learned Judge succinctly observed that the Registrar, the Commissioner of Lands or the Government have no powers to revoke a registered title to land. The learned Judge stated as follows:

> **"In Gazette Notice No. 15584 which the First respondent purported to revoke the petitioner's title to the suit land he did not indicate the provisions of law that he invoked as the basis for his decision. Was that an omission? I do not think so. This is simply because <u>there is no provision under the Registration of Titles Act or any other Act that bestows on the First respondent or the Commissioner of Lands or the Government power to revoke a registered title in the absence of a court order to that effect. I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the Registered Lands Act and the Land Control Act and I did not come across any provision that grants power to a Registrar of Titles or the Commissioner of Lands to arbitrarily revoke a valid land title</u>."** *(emphasis mine)*

71. The above decision has since been cited with approval in many cases. It was followed by Majanja, J. in the case of **POWER TECHNICS LIMITED VS. THE HON. ATTORNEY GENERAL & 2 OTHERS [2012] eKLR** where the learned Judge stated as follows -

> **"I have considered the submissions, oral and written, made by the various counsel who appeared on behalf of the petitioner and in my view, the issue of the constitutionality of the revocation of titles by the Registrar was decided in Kuria Greens Limited v Registrar of Titles and Commissioner of Lands (Supra). Though the case is not binding on me, I think it sets out the proper legal position as regards the legality of the actions of the Registrar.**
>
> **In that case the Registrar issued a Notice in the Kenya Gazette titled, "Notification of revocation of Land Titles," wherein he purported to revoke certain titles on the basis that they had been reserved for public purposes under the provisions of the Government Lands Act (Chapter 280 of the Laws of Kenya) and the Trust Land Act (Chapter 288 of the Laws of Kenya). The court concluded that the Registrar has no authority under the Registration of Titles Act to revoke the titles.**
>
> **Hon. Justice Musinga also held that the Registrar's decision was contrary to the petitioner's constitutional right to the protection of its property under Article 40 as the revocation amounted to taking away the petitioner's titles as protected by the provisions of section 23 of the Registrations of Titles Act.**
>
> **The court further held that the Registrar's action violated and breached the right to fair administrative action protected under Article 47(1) as the petitioner was not given a hearing having regard to the far reaching ramifications of the decision.**
>
> **In my view, the finding of in Kuria Greens Limited vs. Registrar of Titles and Commissioner of Lands (Supra) applies with equal force to the facts and circumstances of this case and I see no reason to depart from it."**

72. The decision was also followed by Warsame, J. (as he then was, now Court of Appeal Judge) in the

case of **CHARLES MALENYA & 22 OTHERS VS. REGISTRAR OF TITLES NAIROBI & ANOTHER [2012] eKLR** where the learned Judge stated as follows -

> **"The first issue for determination is whether the First Respondent acted ultra vires in issuing the Gazette Notice in question. This question has been the subject of a number of decisions of this court. See the cases of Kuria Greens Limited VS. Registrar of Titles & Another (2011) eKLR (Petition No. 107 of 2010), Kongowea Market Estate Ltd VS. Registrar of Titles [2011] eKLR (Miscellaneous Application 92 of 2010).**
>
> **The Principles running through all these cases is that the Registrar of Titles, on his own motion, has no power to cancel or revoke a title to land by way of a Gazette Notice." *(emphasis mine)***

73. The three-judge bench in the case of **LIVINGSTONE KUNINI NTUTU VS. MINISTER FOR LANDS & 4 OTHERS (supra)** added weight to the issue by holding as follows:

> **"We are not aware of any written law which empowered the Minister to direct the Commissioner of Lands to revoke titles. In our view by so directing the Minister was acting ultra vires his powers.**
>
> **Under section 162 of the said Act, the Government is bound by the Act and this in our view includes the sanctity of title unless it is found under Article 40(6) of the Constitution that the title was unlawfully acquired which finding in our view can only be made by a Court of law. As was held in Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR, by Majanja, J:**
>
> > **"……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."**
>
> **While we appreciate that under Article 68(c)(vi) of the Constitution Parliament is empowered to enact legislation to enable review of all grants or dispositions of public land to establish their propriety or legality, such law must comply with the Constitution which under Article 40 therein protects a person's right to property unless it has been found to have been unlawfully acquired." *(emphasis mine)***

74. That the Registrar had no power, authority or jurisdiction to cancel the Ex-Parte Applicant's title to the suit property is therefore not in doubt. The only institution with the mandate to cancel a title to land on the basis of fraud or illegality is a court of law. The court can only do so upon evidence being tendered to prove the illegality. In the case of **REPUBLIC VS. KISUMU DISTRICT LANDS OFFICER & ANOTHER [2010] eKLR**, the court reiterated the foregoing position as follows -

> **"…it is clear that it is only the court that can cancel or amend [a title] where the court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration."**

75. The Gazette Notice that is the subject of these proceedings was drawn and worded in the following manner -

> **"Gazette Notice No. 3458**
>
> **THE CONSTITUTION OF KENYA**

THE GOVERNMENT LANDS ACT

(Cap. 280)

THE TRUST LAND ACT

(Cap. 288)

REVOCATION OF LAND TITLES

WHEREAS the parcels of land whose details are described under the Schedule herein below were allocated and title issued to private developers, it has come to the notice of the Government that the said parcels of land were reserved for public purposes under the relevant provisions of the Constitution of Kenya, Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288). The allocations were therefore illegal and unconstitutional.

Under the circumstances an in view of the public need and interest, the Government revokes all the said titles.

SCHEDULES

Mombasa

MSA/BLOCK/XXVI/117 - Reserved for Law Courts

MSA/BLOCK/XXVI/916- Reserved for Lands Office

GEOFRREY BIRUNDU,

***District Land Registrar, Mombasa*"**

76. The Ex-Parte Applicant pointed out, and it was not in dispute, that the title revoked by the Gazette Notice was **Mombasa Block/XXVI/917** which was erroneously cited as parcel number **MSA/BLOCK/XXVI/117.** The Gazette Notice was published under the **Repealed Constitution of Kenya**, the **Government Lands Act** and the **Trust Land Act**. The same did not specify what specific provisions of the Constitution and the said Acts the Registrar was relying on to make the revocation. Even then, the said Acts do not have any provisions which empower the Registrar to revoke a person's title by way of Gazette notice or at all. To support this position, I rely on the decision of **POWER TECHNICS LIMITED VS. THE HON. ATTORNEY GENERAL & 2 OTHERS (supra)** where Majanja, J. stated that:-

> **"I also note that the impugned Gazette Notices are stated to be made under the Government Lands Act and the Trust Land Act. The Notices do not specify the particular section invoked to justify the actions taken by the Registrar. I have read these Acts and they do not empower the Registrar of Titles to revoke titles issued under the Registration of Titles Act nor do they grant authority to any person to revoke a title so issued."**

77. The Registrar could not have derived the power to revoke the Ex-Parte Applicant's title from the Repealed Constitution either because the same did not have any provisions empowering the Registrar to revoke a person's title through a Gazette Notice.

78. In my view, therefore, by purporting to revoke the Ex-Parte Applicant's title, the First Respondent exercised powers which he did not have and therefore he acted unlawfully. His action was *ultra vires* his powers. In the case of **KURIA GREENS LIMITED VS. REGISTRAR OF TITLES & ANOTHER (supra)**, the court held that-

> **"There can be no dispute that an ultra vires act by a public authority is unlawful."**

79. I therefore find and hold that the decision of the First Respondent to revoke the Ex-Parte Applicant's title to the suit property through the impugned Gazette Notice No.3458 was unlawful and without legal authority and deserves to be quashed.

WHETHER THE DECISION TO REVOKE THE EX-PARTE APPLICANT'S TITLE WAS MADE IN COMPLIANCE WITH THE RULES OF NATURAL JUSTICE

80. The rules of natural justice demand that no person should be condemned unheard. There is no dispute that the Ex-Parte Applicant held the title to the suit property before the same was revoked by the First Respondent. No evidence was adduced in court to demonstrate that the Respondents afforded the Ex-Parte Applicant a hearing before revoking its title. The decision to revoke the Ex-Parte Applicant's title was adverse to its constitutional right to property. The Respondents ought to have afforded the Ex-Parte Applicant an opportunity to be heard before making such adverse decision. In the case of **FAHIM YASIN TWAHA & ANOTHER VS. DISTRICT LAND REGISTRAR – LAMU (supra)**, Omondi, J. stated that -

> **"It defeats all reason for the District Land Registrar to state in his affidavit that because other persons have been affected by his decision and not just the *ex* parte applicants, then they need not whine. If that kind of approach is allowed to go on unchecked we will end up with a most timorous populace which cannot as much as cough when their rights are affected and I am persuaded that this court has a duty to ensure that the respondent refrains from engaging in conduct which results in an individual not being given an opportunity to be heard, and where excesses are allowed, my finding therefore is that the application is merited, the decision was *ultra vires* and also offended the rules of natural justice and the same is quashed by way of certiorari."** *(emphasis mine)*

81. In the case of **CHARLES MALENYA & 22 OTHERS VS. REGISTRAR OF TITLES NAIROBI & ANOTHER (supra)**, Warsame, J. held that -

> **"Moreover, in this case, it is clear that the rules of natural justice were clearly ignored. The Gazette Notice in question, as has been the case with other gazette notices issued by the Respondent, was issued without consultation of the affected parties. In this case, the publication of the Gazette Notice was intended to dispossess the Applicants of their property, yet they were not informed of this. The Applicants were not given an opportunity to present their claims, and or defend themselves against the Respondent claim that the property had initially been set aside for Dagoretti Estate.**
>
> **In Fahim Yasin Twaha & Another Vs. District Land Registrar - Lamu [2011] eKLR (Miscellaneous Application 17 of 2010) the court adopted the statement of Lord Diplock in Attorney General v Ryath [1980] AC 718 at page 730:**
>
> **"it has long been settled, that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority"**
>
> **I too adopt these sentiments as good law. It is therefore my finding and decision that the First Respondent acted outside the law in purporting to revoke the Applicants**

titles by way of Gazette Notice. The Applicant's prayer for an order of certiorari therefore succeeds."

82. In the case of **LIVINGSTONE KUNINI NTUTU VS. MINISTER FOR LANDS & 4 OTHERS (supra)**, the three-judge bench held as follows:

> **"However, bearing in mind the historical background in this matter, this court is of the view that the Minister for Lands denied the Applicant a right to a hearing when he revoked his title in the Gazette Notice Number 2934/2010 thereby infringing on his rights of natural justice. On this ground, the court is satisfied that the Applicant has demonstrated a good case why this court should quash the said Gazette Notice."**

83. The Respondents' decision to revoke the Ex-Parte Applicant's title to the suit property should therefore be quashed for failing to comply with the rules of natural justice and the prayer for an order of certiorari granted.

WHETHER THE RESPONDENTS' DECISION TO REVOKE THE EX-PARTE APPLICANT'S TITLE SHOULD BE UPHELD ON THE BASIS OF PUBLIC INTEREST.

84. The Respondents and the Interested Parties urged the court to uphold the decision to revoke the Ex-Parte Applicant's title to the suit property because it is in the public interest to do so since the land in question is required for purposes of constructing a building for the Mombasa Law Courts. The First Interested Party cited the decision in the case of ***MILANKUMARN SHAH* & TWO OTHERS VS. *CITY COUNCIL* OF NAIROBI & OTHERS, NAIROBI HCCC NO.** ***1024 OF 2005 (unreported)*** *to buttress its argument that the court ought to bear in mind public interest considerations in deciding this case and that the court should not close its eyes to the fact that the Ex-Parte Applicant had obtained its title to the suit property illegally. In that case, the High Court stated as follows -*

> ***"In a memorable passage in the case of KENYA GUARDS & ALLIED WORKERS UNION VS. SECURITY GUARDS SERVICES & 30 OTHERS AND KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS (H.C. Misc. Application No. 1159 of 2003) Nyamu, J. posed the following legal and moral questions at pages 16-17 of his Ruling.***
>
> ***"It is becoming increasingly clear that the challenges which now stare in the face of the Courts and to a certain extent, the legislature is whether the public interest where relevant and in some ways individual rights can be advanced further by the two institutions so as to realize the millennium dreams of this nation. Should the two institutions just fold their hands and wait for the slow evolution of the right laws to deal with the challenges now knocking on our doors? 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 the title? Are the courts going to shy 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 a 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 to the dustbins.***
>
> ***As grabbing of land and deforestation and other excesses went on unchecked at the height of the human rights crusade, the Constitution while recognizing the rights of the individual to own and to enjoy other fundamental rights and freedoms expressly made those rights and freedoms subject to freedoms of others and to the public interest. Indeed no fundamental freedom is absolute. There are other considerations like interests of defence, public safety, public order, public morality, public health, etc., and***

what is justifiable in a democratic society."

"We adopt and endorse those questions in this judgment."

85. Though it is important to distinguish the forum in which the issues of fraud and land grabbing were discussed in the case of ***MILANKUMARN SHAH* & TWO OTHERS VS. *CITY COUNCIL* OF NAIROBI & OTHERS (supra)** vis-a-vis the present proceedings, the said case was a civil suit instituted by way of Originating Summons and therefore distinguishable from the instant case which is a judicial review and the court was right to express itself on the legality of the title and to hold that it could not shy away and refuse to rise to the greater call of holding that a title to a grabbed land violates public and national interest, judicial review court cannot ignore the critical similarities that is the irregular and unlawful allocation of the suit premises. The court of judicial review has under both Article 47 of the Constitution and the Fair Administrative Action Act, mandate to review the circumstances under which the Applicants obtained the suit land, and not merely the process through which the title was revoked.

86. At this point, the case that comes to my mind is **REPUBLIC VS. THE REGISTRAR OF TITLES, MOMBASA & 2 OTHERS EX-PARTE EMFIL LIMITED (supra)**. In that case, Muriithi, J. made the following finding -

> **"… I find that the government cannot revoke title to land even for "public need and interest" or for alleged illegality. The Government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the court in an appropriate case in making an order for cancellation of title or in authorizing subject to due compensation the compulsory acquisition or takeover of private property."** *(emphasis mine)*

87. After making the above finding, the learned Judge did not, however, quash the Registrar's decision to revoke the Applicant's title. He did not grant the judicial review remedies sought by the Applicant. Instead, the learned Judge upheld the Registrar's decision to revoke the title on the basis that the land was required to settle over 180 squatters whose public interest far more outweighed the individual interest of the Applicant. The learned Judge stated as follows -

> **"When made aware that there were squatters on the suit property who had been granted title documents by the Government under a settlement scheme undertaken by the Director of Land Adjudication and Settlement, I made a decision to visit the site to establish the position on the ground. I reasoned that the judicial review remedies are discretionary and their grant or refusal depends on the circumstances of the case including the possession or occupation of land and development thereon…**
>
> **In my view the settlement of the over 180 families in the scheme known as Ramisi Kinondo Squatter Settlement Scheme… would in public interest override the single Applicant's interest to the suit property…**
>
> **In the circumstances, I am not able to grant the judicial review orders of certiorari, mandamus and prohibition even though the Applicant has demonstrated that the Gazette Notice 6652 of 2011 was made without authority and in breach of the right to fair administrative action under Article 47 of the Constitution."**

88. The Applicant was aggrieved by the learned Judge's finding and lodged an appeal to the Court of Appeal being **EMFIL LIMITED VS. REGISTRAR OF TITLES MOMBASA & 2 OTHERS [2014] eKLR**. The Court of Appeal overturned the learned Judge's decision to decline the judicial review remedies and held that **public interest must be pursued within the law.** The Court of Appeal stated as follows:

"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. <u>It is in the 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 the excesses of power to ensure that the rule of law prevails</u>.

<u>The appellant having established its titles to the suit properties… it was unreasonable for the trial judge to refuse to exercise his discretion in the appellant's favour</u>." *(emphasis mine)*

89. Indeed Muriithi, J. in a subsequent judgment in **REPUBLIC VS. KENYA URBAN ROAD AUTHORITY & 2 OTHERS EX-PARTE TAMARIND VILLAGE LTD [2015] eKLR** departed from his earlier position and followed the said Court of Appeal decision by holding that although the Government had a public interest justification for revoking the Applicant's title, to wit, construction of a second bridge across the Nyali Bridge tunnel, the Government had no authority to unilaterally revoke land titles and is under obligation to follow the laid down procedure of compulsory acquisition in order to take over a private property. The learned Judge expressed himself thus -

"There is no dispute that the Ex-Parte Applicant is the registered proprietor of the suit property, only allegations of fraudulent dealings in the creation of the parcel of land were made on the basis that the property had been preserved for use as a road. Subject to proof of fraud the Ex-Parte Applicant is entitled to the rights of a registered proprietor in accordance with section 26 of the Land Registration Act…

The Government has a public interest justification, and a legitimate and noble object in building a second bridge to offer alternative linkage between Mombasa Island to the mainland in event that the only existing Nyali Bridge is for any reason impassable. In the pursuit of this object, the Government is entitled to seek to take over the piece of land the subject of this judicial review proceedings where there once was established the old private bridge owned and run by Nyali Limited, the predecessors in title to the ex-parte applicant…

<u>The Government has no authority to unilaterally revoke titles to land and or to require title holder/registered proprietors to vacate their private property, save in accordance with the constitutional process of compulsory acquisition under the Land Acquisition Act</u>. <u>Accordingly, while the Court approves the public interest object of the Government in the construction of the adjutant second bridge for Mombasa Island, the public interest requirement for observance of the Rule of Law calls for the due process in acquisition of the private property and payment of due compensation</u>." *(emphasis mine)*

90. In the case of **CHARLES MALENYA & 22 OTHERS VS. REGISTRAR OF TITLES NAIROBI & ANOTHER (supra)**, Warsame J. stated that -

"The Respondent submits that the said revocation was done in the public interest. <u>On</u>

> **this I wish to state that even where a revocation needs to be done for the greater good, the First Respondent would still need to go through the proper procedure that is outlined in the law to do so. See the holding of Justice Mwongo in Republic Vs. The Registrar of Titles, Mombasa & 2 Others Ex-parte Emfil Limited [2012] eKLR (Miscellaneous Civil Application 84 of 2011) wherein he stated:**
>
> > **"I have considered the respective submissions by counsel on the main issue of the Registrar's power to revoke title to land and the justification of public interest and I have to find that there is unanimity among the courts that the Registrar has no authority in law to revoke or cancel titles to land, whether in public interest or otherwise…."**
> >
> > **... I find that the government cannot revoke title to land even for "public need and interest" or for alleged illegality. The Government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the court in an appropriate case in making an order for cancellation of title or in authorizing subject to due compensation the compulsory acquisition or takeover of private property."** (*emphasis mine*)
>
> *"I am in total agreement with this position. Even where the Respondent purports to act in the public interest and need, it must do so within the law that is in place. After all the court cannot sanction an illegal or ultra vires act for the public good or public interest."* (*emphasis mine*)

91. The above decisions of **REPUBLIC VS. KENYA URBAN ROAD AUTHORITY & 2 OTHERS EX-PARTE TAMARIND VILLAGE LTD (supra)**, **CHARLES MALENYA & 22 OTHERS VS. REGISTRAR OF TITLES NAIROBI & ANOTHER (supra)** as well as the Court of Appeal decision in **EMFIL LIMITED VS. REGISTRAR OF TITLES MOMBASA & 2 OTHERS (supra)** (which is binding on this court), show that even where the land is required by the Government for public use and for the benefit of the larger public, the **process for the acquisition thereof must be undertaken in accordance with the law**.

92. In considering a case where the District Land Registrar purported to cancel titles by Gazette Notice, Omondi J. in **FAHIM YASIN TWAHA & ANOTHER VS. DISTRICT LAND REGISTRAR – LAMU (supra)** observed that -

> **"I doubt that an illegality or what is deemed as irregular or an act of impunity can be cured by another irregular action or impunity. Just because the ex parte applicants may have obtained the plots using improper process does not mean that the same has to be taken away from them using an equally improper process. As I have already pointed out, the Constitution of Kenya does allow for compulsory acquisition to land, and this provision exists so as to ensure that land which had been set aside for public use, and eventually illegally obtained, does not end up lost forever on account of the technicoloured refrain about sanctity of property."** *(emphasis mine)*

93. In the case of **CHARLES MALENYA & 22 OTHERS VS. REGISTRAR OF TITLES NAIROBI & ANOTHER (supra)**, Warsame J. (as he then was) stated as follows -

> **"The court will also not uphold an illegality for the reason that it could correct another wrongdoing."**

94. Thus, the courts clearly frown upon attempts by the Government to repossess property believed to have been acquired illegally through means that are themselves irregular. Majanja, J. in the case of **POWER TECHNICS LIMITED VS. THE HON. ATTORNEY GENERAL & 2 OTHERS (supra)**,

clearly expressed his displeasure with the Registrar's continued revocation of titles through Gazette Notices, even after similar Gazette Notices had been declared a nullity by the courts. The learned judge expressed himself thus -

> **"I would be remiss if I did not comment on the actions by the Registrar of Lands. In the case of Kuria Green Limited v Registrar of Titles and Commissioner of Lands (Supra), the Gazette Notice that was revoked by the court was dated 10th November 2010 and signed by G A Gachihi, the Registrar of Titles, Nairobi. The judgment declaring such action unconstitutional was delivered on 14th June 2011. A declaration of unconstitutionality is a declaration of the legal status of the impugned action. Instead of acting in accordance with the directions of the court, the self-same Registrar continued to issue similar Gazette Notices.**
>
> **28. In fact in Sound Equipment Limited vs. Registrar of Titles and Commissioner of Lands (Supra), apart from making the finding, the court had already declared Gazette Notice Number 3640 unconstitutional null and void. I would have expected that in the face of two clear decisions of the High Court, the Registrar would have reviewed his decision to continue revoking titles by way of Gazette Notice and acted in deference to the decisions of the Court.**
>
> **This action is clearly contemptuous of the decisions of the court. The court, particularly the High Court, is given responsibility by the Constitution under Article 165 to interpret the Constitution and declare what the law is and in addition to enforce fundamental rights and freedoms. It is expected that in this dispensation that values the rule of law, public officers and their legal advisers, that is the Office of the Attorney General, will ensure that all State and public officers not only acquaint themselves with the directions and decisions of this court but also follow them to the letter. I must warn State officers and public officers that this is the kind of conduct that may invite the court to invoke the provisions Chapter 6 of the Constitution and making (sic) appropriate declarations"**

95. As I conclude, I wish to quote elaborately and with approval the statement made by the three Judges in the case of **LIVINGSTONE KUNINI NTUTU VS. MINISTER FOR LANDS & 4 OTHERS (supra)**. They stated as follows -

> **"Whereas we are aware that the Second Interested Party had filed an application seeking to set aside that order, the respondents were alive to this fact when they decided to revoke the Applicant's title. That is the height of impunity. <u>The mighty and the powerless in this country seek refuge in the courts. The Constitution has given the courts the mandate to settle disputes. It is an abuse of power for a party to bypass the courts and use its might to determine its case against a powerless opposite party. The state is all powerful. Everybody shakes in its wake. The courts will however not lack one last arrow in its quiver for slaying the state's impunity. That is what is required in this case</u>…**
>
> **Whereas the legal process is sometimes slow and time consuming, that does not give an excuse to anybody and particularly those given the responsibility of leadership to take the law into their hands. In such circumstances judicial review must come to the aid of the aggrieved. The Land Acquisition Act provided a detailed code of how the Government could compulsorily acquire private land for public benefit and the mode of compensation of land owners once the acquisition was done.**
>
> **The suit property herein was not compulsorily acquired by the Government of Kenya but rather the Applicant's title was revoked. In the Press Statement attached to the Applicant's application, the Minister for Lands directed that the title be revoked and the same be re-issued to the Permanent Secretary as trustee for the Ministry of**

Housing.

Therefore, in answering the issues raised by the Applicant, this court has found it necessary to look at the provisions of the Registered Land Act as the revocation of the Applicant's title squarely lay in this Act. Section 143 (1) of the said Act stated that a court could order rectification by directing that any registration be cancelled or amended where it was satisfied that any registration (other than a first registration) had been obtained, made or omitted by fraud or mistake. This provision is, however, not pertinent in the proceedings herein as this court has not been called upon to cancel or amend the title on account of the title being obtained by fraud or mistake. In this regard, the Interested Parties' submissions on the issue of how the Applicant obtained the title, though noted by this court, will be disregarded as they do not address the legality or otherwise of the process of the revocation through the Press Statement of 11th February 2010 or Gazette Notice Number 2934/2010.

It is evident from the provisions of the Act that granting a hearing to a person whose interest will be affected by cancellation or amendment of the title is very critical. Section 142 (c) of the said repealed Act provided that a Registrar could rectify the register where upon resurvey, a dimension or area in the register was found to have been incorrect, but in such case, he was required first give notice to all persons appearing in the register to be interested or affected of his intention to rectify.

Under Section 154 (1) (c) of the said Act, a party was deemed to have been given an opportunity of being heard if he had been notified of the thing to be done and appointing a day and time to be heard.

It is clear from the provisions of the said Act that being given an opportunity to be heard is a fundamental issue. The Minister for Lands was therefore required to ensure that rules of natural justice were strictly adhered to while implementing the Government's policies to recover land it purported was irregularly acquired." *(emphasis mine)*

96. I adopt the above holding. The Government, being a creature of the people, must ensure that those very people are protected from excesses that may result from non-observance of the rule of law. Where the Government fails to respect the laid down procedure, the courts will not hesitate to remind it of the importance of ensuring that the rule of law is upheld.

97. The Interested Parties urged the court not to grant the orders of prohibition and mandamus because the suit property has since been registered in the name of the Permanent Secretary to Treasury as Trustee for the Judiciary. The title was registered in the name of the Permanent Secretary to Treasury pursuant to the decision to revoke the Ex-Parte Applicant's title and after these proceedings had been commenced. I notice from the record that leave to institute these judicial review proceedings was to operate as stay on condition that the case is heard and determined within six (6) months. It is not clear from the record that the order of stay was extended.

98. Be that as it may, since I have found that the revocation was done illegally, without lawful authority and in breach of the rules of natural justice and therefore null and void, it follows that any act done pursuant to the revocation is equally lacking the force of law and must therefore be declared a nullity.

99. Once again I would have been guided by the three bench decision in the case of **LIVINGSTONE KUNINI NTUTU VS. MINISTER FOR LANDS & 4 OTHERS (supra)** where the learned Judges granted the judicial review remedies of certiorari, prohibition and mandamus and held that the Applicant ought to be restored to the position he was in before the revocation of the title. The learned Judges stated that -

"Having considered the application herein, we are of the view that the First

Respondent's decision was unlawful in the sense that it was made both in breach of the rules of natural justice and ultra vires his powers.

Accordingly, the decision conveyed through the Second Respondent and contained in Kenya Gazette Notice Number 2934/2010 revoking the suit property ought to be quashed and the parties' restored to their position before the impugned decision was made."

100. The foregoing discussion and case law clearly shows that neither the Minister nor the Registrar of Titles has statutory power to revoke title to land of any person without due process. The power conferred upon the Registrar of Titles under Sections 120 and 121 of the Government Land Act, (now repealed, but retained in Section 79 of the Land Registration Act 2012 (No. 3 of 2012), do not confer upon the Registrar power to revoke title, but only to rectify particulars like names, addresses, areas of land but again subject to inquiry in conformity with the rules of natural justice, in respect of persons who may be adversely affected by such rectification, or cancellation of entries in the Register, hence the decisions for instance in **Emfil Limited vs. Registrar of Titles**, and **Republic vs. Kenya Urban Roads Authority & 2 others**, **Charles Mulenya & 22 others vs. Registrar of Titles** (supra). The case law and discussion would also lead to the inevitable conclusion that the orders of **certiorari**, **prohibition** and **mandamus** should be granted. These orders are however discretionary.

JUDICIAL REVIEW ORDERS ARE DISCRETIONARY

101. In **LINCOLNSHIRE CC and WEALDON DC ex parte Atkinson Wales & Stanford [1986] 8 Adm. L.R.** at pp 550, Sedley J said –

"…to refuse relief where an error of public law by a public authority is shown, is unusual and strong, but there is no doubt, it can be done."

102. And in **REGINA VS. N. M. CORONER FOR INNER LONDON SMITH DISTRICT, ex parte Douglas William [1999], I ALL E.R. 344**, CP page 347, Lord Woolf MR said –

"When it comes to exercising the discretion, I cannot suggest a better test for the court to apply when deciding whether it should give relief than that it should be necessary or desirable to do so in the interest of justice."

103. In **REGINA VS. MONOPOLIES AND MERGERS COMMISSION AND ANOTHER, ex-parte Argyle Group, Plc. [1986] 2ALL ER 257**, at page 266, the court said of discretion –

"(iii) good public administration requires a

proper consideration of the public interest;

(iv) good public administration requires a

proper consideration of the legitimate interest of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons. But in judging the relevance of an interest, however legitimate, regard has to be had to be purpose of the administrative process concerned;

(v) lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary."

104. In **PETER BONGONKO VS. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [2006] eKLR**, Wendoh J, cited with approval, reference to Halsbury's Laws of England, 4th Edition Volume 2, page 508, paragraph 1508, entitled Judicial Review – where it says –

> **"Certiorari is a discretionary remedy which the court may refuse to grant even when the requisite grounds for its grant 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 judicial discretion of the court being a judicial one, must be exercised on the basis of evidence and sound legal principles." [and the order for certiorari was denied]**

105. In **ADAN ABDIRAHMAN HASSAN & 2 OTHERS VS. THE REGISTRAR & 2 OTHERS [2013]eKLR**, the court granted an order of certiorari on the grounds of lack of notice to the Applicant notwithstanding the holding that alienation of land already alienated is void *ab initio*, and is no title at all. The court said –

> **"The Commissioner of Lands or his subordinates while alienating government land can only do so over unalienated government land as defined in the Constitution and under the repealed Government Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.**
>
> **Any alienation of land reserved for public purposes and issuance of a title for the same, whether under the Registration of Titles Act, (Cap 281, or the Registered Land Act, Cap 300, is null and void ab initio. Such a title does not exist in the first place because the land belonged to the public and was not available for alienation. The cancellation of such a "title", which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office."**

106. It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such (unqualified) Advocates would discourage excuses being given. **NATIONAL BANK OF KENYA LIMITED VS. WILSON NDOLO AYAH [2009]eKLR**.

107. As with other aspects of the judicial review process, the court must give effect to the "overriding objective" of the Civil Procedure Rules in its decision-making process about remedies. The court may exercise discretion not to provide a remedy if to make an order would serve no practical purpose. For example, events can overtake proceedings. In this case, the land was reserved for and was always occupied by the Second Interested Party and chances of its relinquishment are remote indeed, non-existent.

108. It further seems to me that under Section 11(1) of the Fair Administrative Action Act, the general approach ought to be that an applicant or claimant who succeeds in establishing the unlawfulness of administrative action is entitled to a remedial order. The court does however have a discretion in the sense of assessing **"what is just and equitable"** in the particular case, to hold a remedy altogether or to grant a declaration (rather than a more coercive quashing or prohibiting or mandatory order which may have been sought by the Applicant), or to grant relief in respect of one aspect of the impugned decision, but not others, even though the requirement of the rule of law meant that "the discretion of the court to do otherwise than to quash the relevant order or action where such excessive exercise of power is shown to be narrow" (**Berkeley vs. Secretary of State for Environment, Transport and Regions (No. 1) [2001] 2AC 603**).

109. In **EAST AFRICAN CABLES LIMITED VS. THE PUBLIC PROCUREMENT COMPLAINTS REVIEW & APPEALS BOARD** and **KENYA POWER AND LIGHTING COMPANY LIMITED** (Civil Application No. 109 of 2007, (unreported), the court said –

> **"We think that a case like this, we must consider the likely effect of the orders sought by the Applicant. We should take into account the special nature of the set-up of the second respondent. It is common ground that it is the sole supplier of electricity in**

the country and that it has a duty to satisfy its ever surging numbers of consumers of the vital commodity."

"…the public interest in the contract outweighs the commercial interest of the respondent and the order of stay granted by the superior court has the effect of paralyzing the supply of electricity to a large public and industries."

110. The general principle of law is that a base cause does not give rise to an action in law. This is covered by the Roman or Latin expression **"ex turpi causa non oritur actio"** (literally a right of action will not arise from a base cause). Thus where an action is void, **it is in law a nullity**. **It is not only bad** but it is incurably bad. **There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse**, per Denning L.J. in **MACFOY VS. UNITED AFRICA COMPANY LIMITED [1961]3ALL ER 1169**, at 1172.

111. Likewise, it is a principle of the law of contract that no action arises from a wrongful contract (*ex turpi contractu non oritur actio*). In **GORDON VS. METROPOLITAN [1910]2 KB**, Lindley L.J. held as follows –

"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or t<u>ransaction</u>, which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."

112. The two principles of proportionality referred to in Section 7(2)(l) and justice and equity referred to in Section 11(1) of the "Fair Administrative Action Act, (the FAA Act)" are founded on the twin principles of public interest and public policy that courts should not aid in the perpetuation of illegalities.

113. Section 7(2)(l) of the FAA Act provides as follow –

"7(1) …

(2) A court or tribunal under sub-section (1) may review an administrative action or decision if –

(a) the person who made the decision –

(i) was not authorized to do so by the empowering provision.

(b)- (k)

(l) the administrative action or decision is not proportionate to the interests of the person or rights affected."

114. And Section 11(1) of the FAA Act provides –

"11(1) In proceedings for judicial review under 8(1), the court may grant any order that is <u>just</u> and <u>equitable</u> including an order -

a. **Declaring the rights of the parties in respect of any matter."**

115. In **REPUBLIC VS. COMMISSIONER OF LANDS, ex-parte Somken Petroleum Company Limited [2005]**, Nyamu J (as then was), after discussing the questions of fairness, unreasonableness, the Wednesbury unreasonableness….illegality and public policy, the maxim "**Ex turpe causa non oritur actio"** referred with approval, the English case of **GORDON METROPOLITAN [1920]2KB 1080** at

page 1098, and to the case of **SCOTT VS. BROWN [1892]2QB 724** at page 1128, where Lindley L.J. held as follows –

> **"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or t<u>ransaction</u>, which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."**

116. In **Chanhan vs. Omagwa [1985] KLR 656** the Court of Appeal held that under Section 143 of the Registered Land Act (Cap 300, repealed), the two prerequisites to the impunity of a party from rectification of a land register are that –

(a) the registration of that party was a first registration

and

(b) that party is in possession of the land having acquired it for valuable consideration and without knowledge of any omissions, fraud or mistake.

117. In any determination today of an application of the judicial review remedies, the court must not only consider, the common law grounds of illegality, irrationality and procedural impropriety (**the three "I's"**) but must also take into account the constitutional foundation of judicial review laid down in Article 47 of the Constitution of Kenya 2010. In the recent case of **SUCHAN INVESTMENT LIMITED VS. THE MINISTRY OF NATIONAL HERITAGE AND CULTURE & 3 OTHERS, [2016]eKLR**, the Court of Appeal sitting at Nairobi said at paragraph 53 –

> **"53. …the common law principles of administrative review have now been subsumed under Article 47 of the Constitution and Section 7 of the Fair Administrative Action Act. In this regard, there are no two systems of law regulating administrative action – the common law and the Constitution – but only one system grounded in the Constitution. The court's power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated Fair Administrative Action Act and Article 47 the Constitution."**

118. And at paragraph 54 the court said –

> **"54. The law on judicial review of administrative action is now to be found not exclusively in the common law but in the principles of Article 47 of the Constitution as read with the Fair Administrative Action Act 2015. The Act establishes statutory judicial review with jurisdictional error in <u>Section 2(a)</u> as the entire piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review, the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in Article 47 and 10(2) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case- by-case basis as the courts interpret and apply the provisions of the <u>Fair Administrative Action Act</u> and the Constitution. As correctly stated by the High Court in <u>MARTIN NYAGA WAMBORA VS. SPEAKER OF THE SENATE [2014]eKLR</u> it is clear that they – Articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."**

119. On the question of the nature of judicial review, that judicial review was not concerned with the merits of the case but with the propriety of the decision-making process and procedure in arriving at a

decision, the court is said –

> **"…traditionally, judicial review is not concerned with the merits of the case. However, Section 7(2) (1) of the Fair Administrative Acton Act provides proportionality as a ground for statutory judicial review. Proportionality was a ground first adopted in England as an independent ground of judicial review in Republic vs. Home Secretary, ex parte Daly [2001]2 AC 532. The test of proportionality leads to a greater intensity of review than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decisions, first proportionality may require the reviewing court to assess the balance which the decision-maker has struck, firstly whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations, thirdly, the intensity of the review guaranteed by the twin requirements in article 24(1)(b) and (e) of the Constitution to wit, that limitation of the right is necessary in an open and democratic society in the sense of meeting a pressing social need and whether interference via administrative action is proportionate to the legitimate aim being pursued. In our view consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications."**

120. In addition to the proportionality test set out in Section 7(2)(l) of the Fair Administrative Action Act, there is also the question under Section 7(2)(i) whether the administrative action or decision was rationally connected to the purpose for which the decision was taken. There is the further consideration under Section 11(1) of the Fair Administrative Action Act, that in an application to quash, that remedy does not follow as a matter of right, and that the relief can be refused even if the court finds that the decision-maker lacked jurisdiction.

121. In this case, the purported allocation in favour of the applicant was an illegality *ab initio* and therefore null and void.

122. Finally, there is the question of public vis-à-vis, private rights, the public interest, the public trust and alienation of alienated government land. The question of public interest and public trust was considered in the case of **MILANKUMAR SHAH& 2 OTHERS VS. CITY COUNCIL OF NAIROBI and ATTORNEY-GENERAL** (HCCC NO. 1024 of 2008 (OS), (unreported) and **JOHN PETER MUREITHI & 2 OTHERS VS. ATTORNEY-GENERAL & 4 OTHERS [2006]eKLR**. In the former case, the court referred to the **obiter** in **KENYA GUARDS & ALLIED WORKERS UNION VS. SECURITY GUARDS SERVICES & 3 OTHERS**, AND **KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS UNION** (HC MISC. APPLICATION NO. 1159), where Nyamu J (as he then was) posed the legal and moral questions at paragraph 50 (supra).

123. The doctrine of public trust postulates that certain resources, like air, sea, waters and forests have great importance to the public as a whole and that it would be wholly unjustified to make them a subject of private ownership. The doctrine enjoins the Government to protect the resources for the enjoyment of the general public rather than permit their use for private ownership or commercial purpose to the exclusion of the public. In the case of **M.C. Mehta vs. Kamal Nath & Others** where Kamal Nata (former Minister for Environment and Forests) leased a parcel of land to build a club on the banks of a river, encroaching land and substantial part of a forest land. The Indian Supreme 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.

124. The doctrine of public trust is expressly provided for in Articles 10 and 73(1) of the Constitution of Kenya. Under Article 10(2)(d), the national values and principles of governance include "*sustainable development*" But Article 73(1) states –

"(1) Authority assigned to a State officer—

a. **is a public trust to be exercised in a manner that—**
    i. **is consistent with the purposes and objects of this Constitution;**

…

2. **The guiding principles of leadership and integrity**

include —

a. **selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;**
b. **objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;**
c. **selfless service based solely on the public interest, demonstrated by -**
    i. **honesty in the execution of public duties; and**
    ii. **the declaration of any personal interest that may conflict with public duties;**
d. **accountability to the public for decisions and actions; (taken)"**

125. Article 159(2) enjoins the courts and tribunal in exercising judicial authority to be guided by the principles set out herein, including the principle that, the purpose and principles of the constitution shall be promoted and protected.

126. Article 40(6) provides that rights under this Article do not extend to any property which has been found to have been unlawfully acquired. The inquiry here has established that the alienation of the suit property was contrary to the provisions of the Government Lands Act, as alienation of alienated land is an illegality.

127. There can be no indefeasibility of title as against the principles of the Constitution which is supreme law.

128. In the foregoing concluding of this long ruling, I have sought to advance and establish the view that review of the administrative action on the principal grounds of illegality, irrationality or procedural impropriety does not merely revolve around the administrative action being challenged, but the review on the same grounds, extends to the antecedent actions of the public authority and the claimant/applicant leading to the conclusion of the transaction subsequent to the action for judicial review. In terms of Section 11(1) of the Fair Administrative Action Act, it would neither be just nor equitable for the court to ignore the antecedent illegalities, irrationalities, or procedural improprieties. The principles of judicial review include the requirement that the individual subject to administrative action receives or has received fair treatment from the public authority. The review of antecedent actions of the public authority and the applicant is relevant to the exercise by the judicial review court of its discretion to grant or not to grant the judicial review sought by the Applicant.

129. Where the judicial review court finds that the antecedent transition is tainted with illegality (as in this case), the court would be sanitizing both illegality, irrationality and procedural improprieties in the transaction. In doing so the court would be failing in its core and primary function, to do justice to all irrespective of status.

130. Being of that mind, and for reasons, and in exercise of the court's jurisdiction to do justice to all irrespective of status, I decline to grant the orders sought. The Ex-Parte Applicant's Notice of Motion dated 18th October, 2010 and filed on 19th October, 2010 is dismissed with costs to the Respondents.

131. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 23rd day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Aneya for Applicants

Miss Luta for respondents

Miss Lutta holding brief for Miss Kossy Bor for 1st Interested Party

Mr. Issa Mansur for 2nd and 3rd Interested Parties

Mr. Silas Kaunda Court Assistant