



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA
JUDICIAL REVIEW NO. 1 OF 2015
IN THE MATTER OF MITI MINGI/MBARUK BLOCK 8/1242 (KIANJOYA “D”)
BETWEEN
REPUBLIC.....APPLICANT
-VERSUS-
DISTRICT LAND REGISTRAR, NAIVASHA.....RESPONDENT
AND
JANE WANGECI KARIUKI.....EXPARTE APPLICANT
AND
JAMES GICHUHI MUNYAKA.....INTERESTED PARTY/APPLICANT

J U D G M E N T

Introduction

1. On 20th January, 2015 **Jane Wangeci Kariuki**, the exparte Applicant herein approached this court under Certificate of Urgency seeking leave, under Order 53 Rule 1 of the Civil Procedure Rules, to institute judicial review proceedings against the District Land Registrar, Naivasha. Pursuant to leave granted her on the same date, the exparte Applicant filed the substantive Motion on 11th February, 2015.
2. No fresh affidavit was attached to the said Notice of Motion. Instead, photocopies of the court’s order of 20th January 2015, the statutory statement, and verifying affidavit, title deed and search certificate in respect of **MITI MINGI/MBARUK BLOCK 8/1242 (KIANJOYA “D”)**, sale agreement in respect of the said land parcel between the exparte Applicant and **Ainu Shamsi Energy Limited** and letter from **Mohammed Madhani & Co. Advocates** were annexed.
3. In effect, the original application for leave was annexed to the substantive application. The matter was set down for hearing but following adjournment sought by the Attorney General who had come on record for the Respondents, the court adjourned the substantive Notice of Motion to 16/6/2015.

4. However, the Attorney General did not attend on the appointed date and the court proceeded to grant the prayers in the substantive Motion, effectively compelling the Land Registrar to register a transfer in favour of the purchaser, based the sale agreement with the *exparte* Applicant. This provoked the Attorney General's application filed on 23rd June 2015 under Certificate of Urgency, seeking to stay execution of the orders issued on 16/6/2015, pending the hearing of their other prayer seeking to set aside the orders of 16/6/2015, and to have the application filed 11/2/2015 heard *interpartes*.

5. The court directed that the application be served upon the *exparte* Applicant. There was a further hiatus due to the delay by the Attorney General to obtain a report from Criminal Investigations Department regarding the transactions in question. Meanwhile, one **James Gichuhi Munyaka**, claiming ownership of the land parcel **MITI MINGI/MBARUK BLOCK 8/1242 (KIANJOYA "D")**, filed a motion on 20/11/2015 seeking to be enjoined as an interested party, the setting aside of this court's order of 16/6/2015 and the cancellation of the title in name of the *exparte* Applicant.

6. Thus on 23/2/2016 the court directed that the application by the Attorney General filed on 23/6/2015 and the one by the proposed interested party filed (20th November, 2015) be heard simultaneously. On 19/4/2016, the court having heard the latter application allowed prayer 1 reserving its reasons. Thus the Applicant was enjoined as an Interested Party. Prayer 2 and 3 remained outstanding and because Mr. Nguyo for the Attorney General was absent, the court deferred the application filed on 23/6/2015 to 19/5/2016, and also granted leave to the newly enjoined Interested Party to file affidavits.

7. All parties were in attendance on 19th May, 2016. Before the hearing could commence, the parties recorded a consent to the effect that the substantive Motion (filed 11/2/2015) be deemed as disposed off by arguments to be made in respect of the application filed on 23/6/2015 and the outstanding prayers (2 & 3) in the Notice of Motion filed on 20th November, 2015.

8. Before setting out the prayers in the two applications and the parties' respective positions via affidavit evidence and submissions, I find it necessary to set out the undisputed background to this litigation as can be discerned from the various filings.

9. In May 2014, the *exparte* Applicant entered into an agreement for the sale of the land parcel **MITI MINGI/ MBARUK BLOCK 8/1242 (KIANJOYA"D")** (the suit property) to **Ainu Shamsi Energy Limited**. Thereafter the purchaser lodged the transfer documents at the District Land Registry for registration of the parcel in the name of the purchaser. The Land Registrar upon scrutinizing and comparing the lodged documents with records held at the registry suspected forgery and commenced internal investigations. Eventually the matter was handed over to the Criminal Investigations Department.

10. It was during the subsequent investigations that the Interested Party who also holds a title in respect of the suit property became aware of the goings on. Upon completion of investigations, Police preferred criminal charges against the *exparte* Applicant in connection with the transactions. The *exparte* Applicant is said to be at large. A warrant of arrest issued against her in the Chief Magistrate's Court Naivasha in Criminal Case No. 498 of 2016 remains outstanding.

The Applications

11. In light of the parties' consent recorded on 19/5/2016 it is apposite to set out briefly, the nature of and prayers in the substantive Motion filed on 11/2/2015. The main prayer was that an order of *mandamus* does issue to compel the Respondent (District Land Registrar Naivasha) "*to register transfer and issue Title Deed for all the parcel of land known as Title Number MITI MINGI/MBARUK BLOCK 8/1242 (KIANJOYA "D").*" The grounds on the face of the application accuse the Respondent of failing, neglecting or refusing to take the desired action, being a public duty, owed to and to the prejudice of the *exparte* Applicant.

12. As observed, the *exparte* Applicant, rather than swear a fresh affidavit in support of the substantive Motion photocopied the material earlier annexed to the application for leave. According to her brief

statutory statement, the Applicant desired the transfer of the suit property to the “purchaser”. She stated that without “assigning any plausible reasons”, the Respondent had exposed the exparte Applicant to detriment, through her adamant failure or neglect to effect the transfer.

13. In her supporting affidavit, the exparte Applicant depones *inter alia* that she is the registered owner of the suit property, which she sold to the purchaser named as **Ainu Shamsi Energy Limited** in June 2014; that despite lodging all the necessary documents and settling the necessary fees and rates, the Respondent declined, or neglected to register the transfer and/or to issue a title to the stated purchaser. Furthermore, that no reasons were given for the demurral.

14. Attached to her supporting affidavit is a copy of a title deed in the exparte Applicant’s name, purportedly issued in August 2003, a search certificate dated May 2014 and the sale agreement executed on 19th June 2014, consent to the sale, clearance certificate, application for registration of the transfer, dated 22/7/2014, a letter from the vendor’s advocates to the Respondent and various receipts for the payment of land rates, stamp duty and fees.

15. As no affidavit had been filed in respect of the substantive Motion by the Respondent, the Respondent’s position is contained in the various affidavits sworn in connection with their application filed on 23/6/2015 wherein the live prayer is:

“3. THAT court orders issued on 16th June, 2015 be set aside and the notice of motion dated 10th February, 2015 be heard on its merits.”

16. Grounds 1, 2, 3, 4 and 5 are particularly relevant. They are as follows:-

“1. THAT failure by counsel for the Applicant to appear in court on 16th June, 2015 at the time allocated for hearing was unpremeditated, inadvertent and excusable as he failed to diarize the hearing date and was also attending to other matters.

2. THAT the Applicant has at all times always been keen and desirous of defending this matter.

3. THAT the orders granted on 16th June, 2015 were obtained through misrepresentation of facts.

4. THAT the validity the Respondent’s title is currently under scrutiny by the Criminal Investigations Department and therefore the execution of the court orders of 16th June, 2015 would be an execution of a potential illegality.

5. THAT it will therefore be proper if orders for stay of execution of the orders of 16th June 2015 are granted pending the outcome of the CID investigations.”

17. The affidavit sworn by **Nguyo Wachira** on behalf of the Attorney General, explains that his failure to attend the court on 16/6/2015 was due to the fact that he inadvertently failed to diarise the hearing date for the substantive Motion. That he only realized the omission after the Respondent notified him of the court orders of 16th June 2015, which had been served on her.

18. Further, regarding the substantive Motion, he states that the contested transfer in respect of the subject property was not effected due to the need on the part of the Respondent, to conduct investigations regarding her suspicions that the transaction was fraudulent. Attached to the affidavit are copies of Mr. Nguyo’s diary and a letter from the Respondent, addressed to the Criminal Investigations Department, concerning alleged forgery of documents in respect of the suit property and the transfer in contention; the suspect title deed and green card in the name of **Jane Wangeci Kariuki** (the exparte Applicant).

19. A further affidavit by the Land Registrar **Gildine Karani** reiterates these matters. **Marwa Olang** of

Naivasha Criminal Investigations Department inquired into the titles and transaction in respect of the suit property and has sworn an affidavit, wherein, he highlights anomalies in the green card and ownership details of one of the purported past alleged owners of the suit property **Charles Karuga Mwangi**, who allegedly passed title to the exparte Applicant.

20. A replying affidavit sworn on the behalf of the exparte Applicant by her advocate **Robert H. Ndubi** accuses the Respondent of bad faith and asserts that the exparte Applicant holds a valid unquestioned title; that there is no evidence that the transfers sought would amount to an illegality; and that there had been no misrepresentation in obtaining the orders of 16/6/2015.

21. Further that, the Attorney General having willfully failed to attend the court has not offered a good reason to warrant the setting aside of orders issued on 16th June 2015. That moreover, the Respondent has no answer to the substantive Motion as the Respondent had earlier confirmed the disputed title through a certificate of search, and no third party had emerged to challenge the exparte Applicant's title.

22. The Interested Party swore an affidavit in support of the Respondent's application filed on 22nd June 2015, asserting that he is the registered owner of the suit property, while the exparte Applicant is a fraudster. He referred to his affidavit supporting his application filed on 20/11/2015, showing how he came into ownership of the suit property.

23. Before reverting thereto, I need to summarise the Supplementary affidavit of **Jane Wangeci Kariuki** the exparte Applicant, sworn by her on 21st December 2015 in support of the Replying affidavit of her advocate R. Ndubi, and in opposition to the affidavits of the Respondent's **Gildine Karani** and **Marwa Olang**. The exparte Applicant claims to have been in quiet possession, without any challenge of her title to the suit property since 2003.

24. She takes issue with the explanation contained in **Gildine Karani's** affidavit regarding the anomaly of the existence of two green cards in respect of the same suit property. And further challenges the bonafides of the register tendered by the Land Registrar, citing the official searches conducted by her prior to the sale agreement. She asserts that any interested claimant "if in existence" ought to have reacted to a change of user advertisement that she previously placed in a local newspaper. To this end she attached a copy of the said advert and several correspondences which are marked as **JWK1**.

25. The exparte Applicant further depones that the Respondent is acting maliciously while conducting a fishing expedition, and has no reason not to effect the contested transfer, even as investigations are carried out. That, the exparte Applicant cannot be expected to answer for entries made on the green card prior to her ownership of the property, and that the actions of the Respondent have occasioned her substantial loss and damage.

26. Pausing here, I have to say that the practice of advocates swearing affidavits regarding matters in controversy on behalf of their clients is irregular and should be discouraged. Both Mr. Nguyo and Mr. Ndubi swore affidavits on matters in controversy on behalf of their respective clients. This court was inclined to ignore these affidavits. But fortunately for them, their respective clients subsequently filed affidavits that appropriately redeem the situation.

27. The Interested Party's application, to which no Replying affidavit was filed, was lodged on 20th November 2015 and sought in prayer 1 his joinder as an interested party; and in prayer 2, the cancellation of "*the title in the name of Jane Wangeci Kariuki – MITI MINGI/MBARUK BLOCK 8/1242 (KIANJOYA "D")*".

28. Grounds on the face of the application are interalia:-

"1. THAT I am the owner of the suit parcel of land MITI MINGI/MBARUK BLOCK 8/1242 AND 1241 (KIANJOYA "D").

2. **THAT the subject/exparte applicant JANE WANGECI KARIUKI is not the genuine owner of the parcel of land.**

3.

4.

5.

6. **THAT this court needs to cancel the title issued to JANE WANGECI KARIUKI since she is not the owner of the land MITI MINGI/MBARUK BLOCK 8/1242.**

7 **THAT I have never sold my land to anyone and not even the subject/exparte applicant JANE WANGECI KARIUKI.**

8. **THAT I do not understand how my land MITI MINGI/MBARUK BLOCK 8/1242 (KIANJOYA “D”) was transferred to JANE WANGECI KARIUKI without my authority.”**

29. His affidavit sets out the chronology of transactions leading to the conveyance of the title to the suit property to himself in 1996. To this end he attached payment receipts and correspondence with the transaction advocates **Kamere & Co. Advocates** as well as a members’ register. He denied selling the property at any time. He also attached a copy of the title issued to him in 1996.

30. Mr. Nguyo for the Respondent in his oral submissions reiterated the material in the Respondent’s affidavits. He highlighted in particular the entry number **6** in the suspect Green Card and stated that the purported transferee **Charles Karuga Mwangi** used a forged ID card belonging to a female one **Mishi Suleiman Hassan**. He stated that the title of the said transferee was defective and he had no good title to pass to the exparte Applicant per entry **9** of 12/8/2003. He also tendered a copy of the charge sheet in **Naivasha Chief Magistrate’s Criminal Case Number 498 of 2016** where several counts were preferred against the exparte Applicant and a warrant of arrest issued against her.

31. Pointing to annexures attached to the Respondent’s affidavits, Mr. Nguyo argued that the second register that was the basis of the exparte Applicant’s title consisted of forgeries. He took issue with the annexures of the exparte Applicant, which, he said did not prove title. He emphasised that the Respondent, suspecting fraud and forgery, confirmed through subsequent investigation, did not register the transfer sought by the exparte Applicant. That she acted out of caution not malice. In addition to arguing his own application, the Interested Party supported the Respondent’s application. His counsel reiterated that he was the bonafide registered owner of the suit property.

32. On behalf of the exparte Applicant Ms Kerubo argued that the Respondent and Interested Party had failed to address their two Notices of Motion. That the Respondents did not give sufficient explanation for their failure to attend the hearing on 16/6/2015. She further stated that the orders of the said date should be left to stand, as no complaint had been raised before the date.

33. Without elaborating, she cited the grounds of opposition filed in response to the application by the Interested Party. These are that the application is defective, that orders sought are incapable of being granted in Judicial Review proceedings and that enjoinderment of the Interested Party is not necessary for the determination of the present suit.

Analysis and Determination

34. I have considered the affidavit evidence on record and the parties’ respective submissions. I propose to start with a consideration of prayer 1 of the Notice of Motion filed on 20/11/2015. Prayer 2 therein is similar to the prayer for the setting aside of the orders of 16th June 2015 contained in the Respondent’s Notice of Motion of 23/6/2015. Both can be handled jointly with prayer 3 of the Interested Party’s Notice of Motion.

35. In light of the consent adopted at the hearing by this court, a determination on these prayers will dispose of the substantive Motion filed on 11/2/2016. The said prayers will be considered last.

36. Regarding the joinder of the Interested Party, no specific provision of the law was cited. Failure to invoke a particular provision of the law in the present circumstances should not defeat the Motion, as is urged in the exparte Applicant's grounds. At the time of filing the application, the Interested Party was acting in person. It is trite that technicality should not trump substance. Under Article 159 2(d) of the Constitution courts are expected to guard against undue regard for technicalities.

37. In the present context, the application by the Interested Party falls squarely within the provisions of Order 53 Rule 6 of the Civil Procedure Rules which states:-

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.”

38. As one asserting bonafide title to the suit property, the Interested Party was entitled to be enjoined independently of the Respondent. On all accounts, he was unaware, until police investigators contacted him, of the transactions in dispute. Thus he clearly had no notice of the judicial review proceedings before then. It would therefore be a travesty of justice to shut him out, when it appears that, the orders made on 16th June, 2016 could adversely affect his title in the disputed property.

39. Having considered matters canvassed in respect of the injunction prayer, I was satisfied that he stood to be directly affected by the orders granted by this court. And in terms of Order 53 Rule 6 of the Civil Procedure Rules, he was a proper person to be heard. The fact that the orders were already in force, in my view, served to increase the necessity of his injunction rather than render it otiose, as was submitted by Ms Kerubo. For these reasons I allowed the prayer for his injunction.

40. Two grounds are advanced by the Respondent and the Interested Party in support of the prayer for the setting aside of the orders of this court made on 16th June, 2015. The first is that counsel for the Respondent, though represented on 19/3/2016 when the date was fixed, did not diarise the hearing date. In that regard, a copy of the blank diary page of 16th June, 2015 is annexed to the affidavit of Mr. Nguyo. As counsel for the exparte Applicant has observed, it would seem that since being served with the application filed on 11/2/2016 and appearing in court on two occasions, no draft reply had been prepared by the Respondent. Further on both occasions different counsel appeared and not Mr. Nguyo.

41. It is not clear when Mr. Nguyo was instructed to take up the matter from Mr. Kirui who had previously attended, on one occasion in person, and on the second occasion through Mrs. Khatambi. The evidential value of Mr. Nguyo's diary is therefore diminished.

42. In the absence of evidence regarding how Mr. Nguyo learned of and was expected to diarise the hearing date, I am inclined to believe that the failure to attend was in fact occasioned by lack of co-ordination in the office of the Attorney General between respective counsels. It would seem that the Attorney General's office was stirred into action by the order of mandamus served upon the Respondent.

43. All in all, it is my considered view that the explanation give by the Attorney General's representative for non-attendance on 16th June, 2015 is rather tenuous. Ms Khatambi's diary ought to have been tendered by the Attorney General to support their explanation. For his part, the Interested Party was unaware of the questioned transactions or the judicial review proceedings until Criminal Investigations Department officers contacted him. He has pleaded with the court to allow him to be heard as he stands to be adversely affected by the orders of 16th June, 2015.

44. The exparte Applicant cannot be blamed for the failure to involve the Interested Party, because of the

nature of the transaction for which registration is sought. However, the Interested Party in all probability stands to suffer prejudice resulting from orders in respect of which he did not get a hearing.

45. In her first affidavit, the *ex parte* Applicant highlighted the fact that no third party had come forward to dispute her title to the suit property, and thus, the Respondent's actions to her mind were driven by malice. Upon the Interested Party's appearance, the *ex parte* Applicant deposed in her Supplementary affidavit that:-

“[8] I am currently the registered legal owner and all the rights in the property are exclusively vested in me and the insinuation that there might be another “owner” is a fishing expedition by the Applicant

[9] THAT indeed if there is anybody anywhere claiming ownership or any interest in the property he or she should have come forward when consent for change of user was sought and this suit property was advertised in the Local Newspaper for a whole month for change of user.....”(sic)

46. Evidently, what is at stake here is the ownership of the suit property. According to the agreement for sale annexed to the *ex parte* Applicant's Motion for leave, and marked as **Exhibit 3**, the land measures 0.4047 hectares and was to be sold at a sum of Shs 1,500,000/=.

47. Notice to the widest possible number of parties of judicial review proceedings lies at the heart of Order 53 of the Civil Procedure Rules and is particularly underscored in Rules 3 (1) to (4) as follows:-

“(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”

48. Further, Order 53 Rule 6 of the Civil Procedure Rules opens a window for leave to be granted to proper persons to be heard notwithstanding the fact that they had not been served with the notice or Summons. These provisions clearly indicate that judicial review proceedings are not necessarily limited to the parties to the suit but that the door is open to other different categories of people, including all those directly affected and other “proper” persons. The widest participation of persons is anticipated under the rules.

49. I emphasise this while fully conscious of the *ex parte* Applicant's assertions that she is the “legal registered owner” of the suit property, and that, no person had challenged her claim to the suit property

prior to the orders being made. However, in my view she cannot use as a shield nondescript notices of change of user published in a newspaper and her private correspondence to shut the door against the participation of and challenge by a party who clearly stands to be “directly affected” by orders made herein.

50. It seems to me, that Order 53 of the Civil Procedure Rules is a self-contained Order intended to provide for different situations relating to the exercise of judicial review jurisdiction by the court. (**See Sanghani Investment Limited –Vs- Officer-in-Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**). There is no provision however for the setting aside of an order, made *ex parte*, in the court’s exercise of jurisdiction thereunder. Not surprisingly neither the Interested Party, nor the Respondent has invoked any legal provision in support of the prayer for setting aside of the orders of 16th June, 2015. In my considered view, that jurisdiction is implied from the provisions of rules 3 and 6 of Order 53; it is the court’s inherent jurisdiction.

51. It is my considered opinion that nothing contained in Part VI of the Law Reform Act, or Order 53 of the Civil Procedure Rules excludes the application of Section 3 and 3A of the Civil Procedure Act to proceedings brought under Order 53 of the Civil Procedure Rules. Section 3 of the Civil Procedure Act is particularly apt, considering that Order 53 of the Civil Procedure Rules confers a special jurisdiction on the Court. It states:-

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”

52. The impugned orders of 16th June, 2015 were issued without any input by the Interested Party who stands to be adversely affected if the orders are to remain in force, without having opportunity to be heard. I think, this is by far more compelling reason in support of the setting aside of the orders of 16th June, 2015 than the rather flimsy explanation offered by the Respondent, who at any rate have no personal interest in the suit property.

53. Even then, as a famous Judge observed, blunders will continue to be made. Blunders by counsel and by parties. The court has always to look to doing justice to the parties. The stakes in this litigation are high, not only because of the value of the suit property, but also its impact on public law administration, calling into question as it does the integrity of public records held in the Respondent’s registry. For these reasons alone, I would view the Respondent’s plea to be heard on the substantive application with a little more sympathy, their unconvincing explanation notwithstanding.

54. The second reason advanced by the Respondent and the Interested Party is that the delay by the Land Registrar in effecting the disputed transfer was occasioned by fears that the transaction was tainted by fraud. That she deemed it prudent to conduct internal investigations, and subsequently handed over the matter to the Criminal Investigations Department for further investigations. Following investigations, the Criminal Investigations Department preferred several charges against the *ex parte* Applicant in connection with the disputed transactions. The said Applicant is still at large and a warrant of arrest against her is pending execution.

55. By the time of the Interested Party made his appearance in court with the application filed on 20th November, 2015 much water had gone under the bridge. The emphasis laid in Order 53 of the Civil Procedure Rules on notice to different categories of people, even non-parties in some cases speak to the nature of judicial review proceedings. Judicial review is a public law remedy and more often than not, the court has to balance the rights of individuals against the public interest. (**See Republic –Vs- National Environment Management Authority *ex parte* Peter Bogonko [2005] eKLR**).

56. It cannot be disputed that the Interested Party, would no doubt have appeared to oppose the substantive Motion had he had notice thereof. The Respondent, from their filings had a case to make against the substantive Motion, but for their own seeming tardiness. The alleged fraudulent nature of the contested transactions is the reason proffered by the Interested Party and the Respondent both in

supporting the prayer for setting aside of the prayers of 16/6/2015 and for the dismissal of the substantive Motion filed on 11th February, 2016

57. The gist of the Applicant's complaint is that the Respondent has refused or neglected to carry out a public duty, thereby exposing the exparte Applicant to loss. She therefore prays for an order of mandamus to compel the Respondent. The parameters of judicial review are wide and will possibly continue to expand to meet different situations. **(See Bahajj Holdings Limited –Vs- Abdo Mohammed Bahajj & Co. Ltd & Another Civil Application Number Nai 97 of 1998 and Kuria & 3 Others –Vs- Attorney General [2002] 2 KLR 69).**

58. That said, the court's jurisdiction is exercised within broad but well defined grounds. As stated in the Ugandan case of **Pastoli –Vs- Kabale District Local Government Council & Others [2008] 2 EA 300** whose dicta has become a part of our jurisprudence:

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

.....Irrationality is when there is such gross unreasonableness in the decision take or act done, that no reasonable authority, addressing itself to the facts and the law before, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

.....Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with professional fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

59. By alleging that malice is the motive behind the delayed action by the Respondent, the Applicant is by and large asserting procedural impropriety against the Respondent; that she has not acted fairly in respect of the conveyance in contestation. Although it seems that the Respondent, perhaps out of prudence did not announce her fears regarding the transfer document to the exparte Applicant until the matter came to court, it seems to me that her explanation is reasonable.

60. I say so based on the latent and patent defects in the transactions as outlined in the Respondents' affidavits and supported by the annexures thereto. As a public officer, the Respondent was entitled to assure herself of the bonafides of the contended conveyance before acting thereon.

61. Based on her internal inquiry, the Respondent moved the Criminal Investigations Department who commenced investigations that terminated with criminal charges being laid against the exparte Applicant, now at large. These latter facts are not disputed and neither has the exparte Applicant in her latest affidavit filed on 2/2/2016 attempted to explain how she came to be registered as the owner of the property, allegedly in 2003. Her indirect answer to the affidavits and annexures of the Interested Party asserting his claim is that, he ought to have taken action when the change of user notice appeared in local dailies.

62. The said affidavit by the exparte Applicant curiously fails to address directly the claims of ownership by the Interested Party or his affidavit and annexures, even though by the date of swearing, the Notice of Motion by the Interested Party seeking setting aside was already filed. The exparte Applicant in my view has glossed over the concerns raised by insisting *inter alia*:-

“THAT I have been advised by my counsel on record which advise I verify believe to be sound in law that investigations can still continue even after registration of transfer of the subject property and in any event can be reversed.....”(sic)

63. By so stating, the exparte Applicant appears to dismiss the value of the investigations outlined by the Respondent. In order to go along with such an argument and therefore compel the transfer, this court would have disregarded public interest, a linch pin of the exercise judicial review jurisdiction of this court. As stated in **Maritime Electronic Co. Ltd –Vs- General Dairies Ltd [1937] AC 610**, where estoppel was sought in judicial review proceedings:-

“The underlying principle is that the crown cannot be stopped from exercising its powers, whether given in a statute or common law when it is doing so in proper exercise of its duty to act to the public good, even though this may work some injustice or unfairness to the private individual. It can however, be stopped when it is not properly exercising its powers but is misusing them and if it does misuse them in circumstances which work injustice of unfairness to the individual without contravening benefit to the public.”

64. It is true that the Respondent had delayed in effecting the transfer, but has explained the cause of delay. Now that the exparte Applicant has been charged with criminal case in connection with the impugned transaction, she is innocent until proven guilty. However, this court would be questioning the merits of the decision by the Respondent and by extension the Director of Public Prosecutions if it were to order, nonetheless that the transfer be effected. That would not be in public interest and would particularly be prejudicial to the Interested Party. A transfer of immovable property is not as easily reversed as the exparte Applicant touts it to be.

65. As stated by the Court of Appeal in **Municipal Council of Mombasa –Vs- Republic and Umoja Consultants Ltd, Civil Appeal No. 185 of 2001:-**

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

66. The Respondent was exercising her discretion under the relevant statutes and this court cannot second-guess her wisdom in deciding that an inquiry was necessary before effecting the contested transfer.

67. As a public officer she is expected to act with probity and to exercise her discretion in a judicious manner. As regards the efficaciousness of the remedy of mandamus sought in this case, the Court of Appeal explored the question in **Republic –Vs- Kenya National Examination Council exparte Gathenji & Others Civil Appeal No. 266 of 1996**, observing interalia that:-

“.....The order of mandamus is of a most extensive remedial nature, and is, in form a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing the right; and in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.

.....These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and that where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect that duty to be performed.....

but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.....”

68. So it is in this case. In the exercise of her discretion, the Respondent deferred effecting the disputed conveyance pending investigation, initially internal and later by the Criminal Investigations Department. In her words, she would be perpetrating an illegality by effecting the conveyance in the circumstances of this case. Can this court compel her to go ahead and effect transfer? I think not.

69. In her discretion the Respondent may or may not approve a conveyance. Unless it is shown that her demurral is purely based on malice, which has been effectively discounted, this court would be slow to issue an order of mandamus.

70. The Respondent and the Interested Party have emphasised the alleged fraudulent nature of the transaction that is sought to be enforced. On the face of it, there are some glaring documentary discrepancies that require an answer, in respect of the title of the *exparte* Applicant and even the records held at the registry of the Respondent. These are issues that will be thrashed out in the criminal trial once the *exparte* Applicant is arrested or surrenders herself to the court.

71. Regarding the proper exercise of discretion by a public body the court observed in **Keroche Industries Limited –Vs- Kenya Revenue Authority & 5 Others Nrb HCC Misc. Application No. 743 of 2006 [2007] KLR 240** that:-

“[B]ut for public bodies the rule isthat any action to be taken must be justified by positive law. A public body has heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed it exist for no other purposeBut in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to indicate the better performance of the duties for whose merit it exists.”

72. Allegations of abuse of power i.e. for collateral purposes as made by the *exparte* Applicant herein have been blunted by the appearance of the Interested Party who asserts to be bonafide owner of the suit property since 1996. Judicial Review orders are discretionary. (See **Republic –Vs- Judicial Service Commission *exparte* pareno [2004] 1 KLR 203**). In this case, there are allegations that the *exparte* Applicant’s title is tainted with fraud, which she denies, while saying nothing directly concerning the asserted claim by the Interested Party to the suit property.

73. The principle in **Scott –Vs- Brown Doering, McNab and Co. (1892) 2 QB 724**, which has been applied variously in our courts is derived from the passage therein stating that:-

“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 transaction 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, it matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the proves the illegality, the court will not assist him.”

74. The court must allow for investigations to be carried out regarding such alleged fraud as the judicial review procedure is not suited for investigating such claims to conclusion. (See **Sanghani case supra**).

75. The Court of Appeal reiterating its judgment in Commissioner of **Lands –Vs- Kunste Hotel (1997) eKLR in Emfil Ltd –Vs- Attorney General and 2 Others [2014] eKLR** stated that judicial review is not concerned with private rights or merits of the impugned decision but to ensure that individuals are given fair treatment by the authorities to which he is subject. The final determination, based on tested evidence regarding the fraud alleged against the exparte applicant by the Respondent and the Interested Party must be made in appropriate proceedings.

76. Section 142 and 143 of the repealed Registered Land Act provided for correction of records by the Land Registrar and the cancellation by the court of titles acquired through fraud, respectively. In this case, the fact that the exparte Applicant is currently a fugitive from justice and has failed to answer in any substantive way the assertion to title by the Interested Party, creates some doubts in her alleged bona fides. Be that as it may, the judicial review process is not the forum for the final adjudication of the questions raised by the defects highlighted in the exparte Applicant's alleged title to the suit property. The court's jurisdiction under Order 53 of the Civil Procedure Rules and the Law Reform Act does not envisage an order for the cancellation of titles or issuance of declarations. (**See Saghani case supra**).

Disposition

77. In light of all the foregoing I will allow prayer (3) as contained in the Respondent's Notice of Motion filed on 23/6/2015 and prayer (2) of the Notice of Motion of the Interested Party filed on 20th November 2015, by setting aside the orders made by this court on 16/6/2015. In light of what has been observed regarding the purview of judicial review proceedings, prayer 3 of the Notice of Motion filed on 20/11/2015 seeking cancellation of the title in the name of **Jane Wangeci Kariuki** in the suit property is declined.

78. With regard to the exparte Applicant's Substantive Motion filed on 11/2/2016, and in accordance with the parties' consent recorded at the hearing, I do, for all the reasons given in this judgment dismiss the said application with costs to the Respondents and the Interested Party.

Delivered and signed this 22nd day of July, 2016

In the presence of:-

For the Exparte Applicant : absent

For the Respondent : Mr. Otieno holding brief for Mr. Nguyo

For the Interested Party : Mr. Otieno

Court Assistant : Lillian

C. MEOLI

JUDGE