REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(J.R) E.L.C MISC.CIVIL APPLICATION NO. 18 OF 2011

IN THE MATTER OF AN APPLICATION BY THE MARKET PLAZA LIMITED FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA) AND ORDER 53 CIVIL PROCEDURE RULES, AND ARTICLES 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF GAZETTE NOTICE NO.15580 DATED 26TH NOVEMBER, 2010 BY THE REGISTRAR OF TITLES, NAIROBI REVOKING THE APPLICANT'S TITLE TO L.R. NO. 209/11856

IN THE MATTER OF THE CONSTITUTION OF KENYA, THE GOVERNMENT LANDS ACT (CAP 280 LAWS OF KENYA), THE TRUST LAND ACT (CAP 288 LAWS OF KENYA) AND THE REGISTRATION OF TITLES ACT (CAP 281 LAWS OF KENYA)

BETWEEN

REPUBLIC...APPLICANT

AND

COMMISSIONER OF LAND...1ST RESPONDENT

REGISTRAR OF TITLES……..2ND RESPONDENT

AND

CITY MARKET STALL HOLDER ASSOCIATION……….………1ST INTERESTED PARTY

KENYA ANTI CORRUPTION COMMISSION………...………….2ND INTERESTED PARTY

EX-PARTE...THE MARKET PLAZA LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd February, 2011 the *ex parte* applicant herein, **The Market Plaza Limited**, seeks the following orders:

> **1. AN ORDER OF CERTIORARI to quash the decision of the Registrar of Titles, Nairobi contained in the Kenya Gazzette Notice No. 15580 dated 26th November, 2010 revoking the Applicant's title to L.R. No. 209/1855/2.**
>
> **2. AN ORDER OF MANDAMUS compelling the Registrar of Titles to issue a fresh Gazette Notice revoking Gazette Notice No. 15580 of 26th November, 2010 with regard to L.R No. 209/1855/2.**
>
> **3. AN ORDER OF PROHIBITION prohibiting the Registrar of Titles and the Commissioner of Lands Nairobi by themselves or through their agents or any other person or authority from recalling, revoking, cancelling and/or impeaching the Applicant's title to L.R no. 209/1855/2 and/or making any entry in the register in respect to L.R. No. 209/1855/2 and permanently restraining the said Respondents either by themselves, or through their agents or any other person or authority from implementing Gazette Notice No. 15580 of 26th November 2010 or acting in any way prejudicial to and/or inconsistent with the exparte Applicant's right of ownership over L.R no. 209/1855/2.**
>
> **4. Costs of this application be provided for.**
>
> **5. Any other order or relief as the Honourable Court may deem fit and expedient to grant.**

Ex Parte Applicant's Case

2. According to the applicant, it is greatly aggrieved by the decision of the 2nd Respondent revoking its title to L.R. No. 209/1855/2 vide Gazette Notice No. 15580 of 26th November 2010 by which decision the applicant contended the Respondents acted in total contravention of the Applicant's rights to own property and in total disregard of the law. The Applicant was therefore apprehensive that the 1st Respondent would proceed and implement the decision of the 2nd Respondent and physically take possession of the suit premises.

3. According to the Applicant, it is the lessee from the Government of Kenya of all that parcel of land known as L.R. No. 209/1855/2 (hereinafter referred to as the suit premises) for a period of 99 years with effect from 1st August 1928. The suit premises, it was averred were transferred to the Applicant by the City Council of Nairobi for a consideration of Kenya Shillings Two Million (Kshs. 2,000,000.00) hence the City Council of Nairobi, being the previous lessee of the parcel of land in question has no claim at all over the said property. The Applicant averred that Land Rates have always been paid to the Government when they fall due.

4. It was however its case that the 2nd Respondent did not take all the relevant factors before issuing the gazette notice aforementioned since the Constitution of Kenya guarantees the right of a person to own land anywhere in Kenya and further under Section 23 of the ***Registration of Titles Act*** (Cap. 281 Laws of Kenya) (hereinafter referred to as "the Act), a certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission, by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof and that the Certificate of Title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.

5. It was its view that it is only the High Court that can inquire into the validity or otherwise of a certificate of title issued under the Act and that this inquiry can only be undertaken where there is an allegation of fraud or misrepresentation on the part of the registered land owner. In purporting to revoke the title to the said parcel of land, it was contended that the Respondents have not established any fraud or misrepresentation on the part of the Applicant in acquiring title to the property, as required by law and that under the said Act, any person deprived of land or of any interest in land in consequence of fraud or by the registration of any other person as proprietor of the land or interest, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through fraud, error or misdescription. Accordingly, the only remedy available in law to any person alleging fraud, error or misdescription is to bring an action for damages against the Applicant and not revocation of the title as the Respondents have purported to do.

6. According to the applicant therefore, the 2nd Respondent acted unreasonably and acted *ultra vires* the provisions of the Constitution and the Registration of Titles Act in revoking title to the Applicant's parcel of land and by so doing, acted in total failure to observe principles of natural justice. The Respondent were further accused of having relied on irrelevant considerations in breach of the constitutional right of the Applicant to own land anywhere in Kenya hence it is in the interest of justice for this Court to intervene and reign in on the Respondents who have acted in total disregard of the law.

7. It was submitted on behalf of the applicant that even if the Ex-parte Applicant may have obtained the parcel of land improperly, which is not the case here, it does not mean that the land must be taken away from it using an improper process since the Constitution of Kenya in Article 50 recognizes that all are equal before the law and the wrong doer has an equal protection under the "*audi alteram*" doctrine. In support of this submission the applicant relied on **Yasin Fahim Twaha & Anor vs. District Land Registrar – Lamu (High Court Misc. App. No. 17 of 2010** and **Board of Education vs. Rice and Others (1911) AC.**

8. It was submitted that whereas the statute gives the Registrar particular powers, none of those powers is the power to cancel a title documents and reference was made to **R vs. Commissioner of Lands & Registrar of Titles Ex-Parte Chetan Devji Shah & Another [Misc. Application No. 74 of 2010]**, where **Musinga J**, as he then was, at **page 9 and 10** of the judgment stated as follows concerning section 60 of the ***Registration of Titles Act***:

> "**That section only empowers the registrar to summon a holder of a grant, certificate of title or other instrument to deliver to him such document for the purpose of being corrected ...If the Registrar summon a person for any of the aforesaid reasons and the person refuses or neglects to comply with the summons or cannot be found, the registrar may apply to the court to issue summons for that person to appear before the court and show cause why the grant, certificate or other document should not be delivered to be corrected. Only the court has power to direct the registrar to cancel a title, but only in appropriate cases where after examining the person and considering all relevant issues of law and fact, is satisfied that such title ought to be cancelled**. **See section 61 of the Registration of Titles Act**"

9. According to the applicant it is clear that the Registrar has no powers to cancel a certificate of title or other instrument conveying title to land. It is only the court under section 61 of the Act that can direct the Registrar to do so. The 2nd Respondent therefore did not follow the provisions of the ***Registration of Titles Act*** in that he acted beyond the powers conferred to his office by the Act. This ground by itself is sufficient to order the moving into this court of the decision of the Registrar for purposes of being quashed.

10. It was submitted that whereas the 1st and 2nd interested parties have gone on and on about title to the land, how it was acquired and so forth, the ex-parte applicant is clear in its mind on the title it holds to the suit property and does not need any declarations that it owns the property neither does it require a determination of the ownership of the property. The proceedings herein are to question the powers exercised by the registrar in cancelling the title deed and are not in any way about the title to the suit land

and the interested parties cannot use this forum to address whatever grievances they might have regarding title to the land.

11. On the efficaciousness of the proceedings, it was submitted that filing the current proceedings was the most efficacious way of dealing with the impugned action of the registrar and relied on **O'Reilley and Others vs. Mackman and Others [1983] UKHL 1** in which the House of Lords in dismissing the appeals and the petition placed before it was unequivocal that where a party institutes and ordinary writ to seek remedies that would have been obtainable by the procedure of judicial review, that suit so instituted would amount to an abuse of the process of court and should rightly be struck out. According to the applicant, it is curious that the 1st interested party has never instituted any proceedings against the ex-parte applicant herein and is just foraging on the suit brought by the ex-parte applicant to protect title to its property. Its intention has always been to vex the ex-parte applicant and prevent the just and expeditious conclusion of the suit filed by the ex-parte applicant and this has frustrated the fair administration of justice. It was therefore submitted that the ex-parte applicant's motion is properly before the court and the party is entitled to a determination of the issues it raises in the motion since the Respondent's decision to unilaterally revoke title to L.R. No. 209/1855/2 falls well within the purview of actions or inactions that can be corrected through Judicial Review.

12. According to the applicant the issues which the 1st interested parties raised were the subject of **High Court Civil Suit No. 72 of 1994 – Prof. Wangari Maathai & 2 Others vs. City Council of Nairobi & 2 Others** which was upheld by the Court of Appeal in **Prof. Wangari Maathai & Others vs. City Council of Nairobi & Others, Civil Application No. 321 of 1995**. Based on section 7 of the ***Civil Procedure Act*** it was submitted that the issues raised by both interested parties regard title to the property and the process of acquiring such title, were dealt with in the ***Maathai Case*** and raising such issues is asking this court amounts to inviting the Court to sit on appeal or review the said decision through the backdoor. To the applicant, the said issues therefore cannot be dealt with by this court as they are clearly res-judicata.

13. With respect to the existence of Civil Suit No. 1059 of 2009 and the interested parties' allegation that proprietorship of the suit land is in question, it was submitted that this is a blatant misrepresentation of fact as it is evident from the plaint annexed that the Ex-parte applicant herein had sued the defendant for quiet possession and it is not a suit about proprietorship since the Ex-parte applicant has no doubt in its mind regarding its title and it has never brought a suit regarding title to the suit property.

14. It was contended that the ***Registration of Titles Act*** (Cap 281) (now repealed) provides that a certificate of title is conclusive evidence of proprietorship. Normally, the person who is recorded as the owner of a parcel of land cannot have his title impeached, challenged or overturned and in support of its case the applicant relied on **Muchendu vs. Waita** Civil suit No.72 of 2003(KLR), and **Dr. NK ArapNg'ok vs. Justice Moijo ole Keiwa and 5 Others of 1997.** According to the applicant, the Respondents acted in total contravention of the Applicant's right to own property and in total disregard of the law. They acted *mala fides* by failing to consider relevant factors that led to the ownership of the property being vested to the Applicant by the government. Further, the 2nd Respondent failed to consider that under **section 23 (1)** of the RTA, a certificate of title issued under the said Act is conclusive evidence of title and cannot be challenged except under allegations of fraud or misrepresentation. Such an inquiry of the indefeasibility of title can only be done by the High Court and such in revoking the title the 2nd Respondent acted beyond powers. It was the applicant's case that **f**rom the above provisions of the law, it is evident that it is only the High Court that can inquire into the validity or otherwise of a title issued under the Act. Such an inquiry can only be undertaken in a suit properly filed with the allegation of fraud or misrepresentation on the part of the registered owner are alleged being raised and seeking such determination by the court. It was submitted that a clear reading of the law above reveals that the Ex-parte Applicant being the bona fide proprietor of the parcel of land has a fundamental right enshrined in the Constitution to own property and enjoy protection of the same under section 40(2) and cannot be deprived of the same without justifiable cause and without adequate compensation.

15. The applicant contended that from the Notice of Motion dated 23rd February 2011, it is clearly

demonstrated that no other remedy lies in law to protect the Ex-parte Applicant and/ or to prevent the Respondents from abusing their official powers and consequently the Ex-parte constitutional rights apart from judicial review over the administrative actions of the respondents. It the ex-parte applicant's contention that since the 2nd Respondent was not instructed by a court of law to revoke the Ex-parte Applicant's title and his actions seems to have stemmed out of his own discretion, his action falls squarely within the purview of Judicial Review.

Respondent's Case

16. The respondent opposed the by filing the following grounds of opposition:

a. **That the application is inept, incompetent and a gross abuse of the court process.**

b. **The application lacks merit.**

c. **By Section 60 of the Registration of Titles Act, the Registrar is reposited with sufficient powers to cancel an irregularly issued title.**

d. **The title the subject of this application was issued irregularly**

e. **The application is brought mala fides.**

1st Interested Party's Case

17. On the part of the 1st interested party, **City Market Stall Holder Association**, it was averred that all that property known as L.R. No. 209/1855, Nairobi, and covering approximately 1.582 acres, was reserved by the colonial government of Kenya for use as a Municipal Market and that sometimes in 1928, the colonial government of Kenya granted the said L.R. No. 209/1855, Nairobi to the then municipal corporation of Nairobi for a period of 99 years; from 1st August, 1928 to 1st August 2027, to hold in trust for the public and that the said grant contained a special condition that the municipal corporation of Nairobi as grantee shall use and permit the use of L.R. No. 209/1855, Nairobi as a municipal market, or for other municipal purpose.

18. Pursuant thereto, in the 1930s, a structure was put up for the market, the present day city market, on part of L.R. No. 209/1855, Nairobi for public use while he remaining portion was reserved for future extension of the market to accommodate an anticipated increase in the number of traders and consumers. The 1st Interested Party and its members have thus being doing business at the City Market since its establishment, subject to the terms and conditions stipulated by the City Council of Nairobi. Come sometimes in 1990s, the said L.R. No. 209/1855 was subdivided and two parcels created therefrom; L.R. No. 209/1855/1 and L.R. No. 209/1855/2 respectively and the use of the above parcels was subject to the special condition aforementioned.

19. However, on 22nd December, 1992, Nairobi City Commission purported to transfer L.R. No. 209/1855/2 to the Applicant for private developments while L.R. No. 209/1855/1, Nairobi was left for the City Market. To the 1st Interested Parties, the objective of the abovementioned subdivision was not clear until the transfer of L.R. No. 209/1855/2 was undertaken since the said subdivision and subsequent transfer were not notified to the traders/public. Sometimes in the early 1990s, the Applicant began constructions upon L.R. No. 209/1855/2, Nairobi which was reserved for extension of the City Market though the said construction stalled; and the property is now under use by Market Plaza Limited as a car park.

20. To the 1st Interested Party, the foregoing subdivisions and transfer were irregularly/illegally and discretely done in favour of the Ex parte Applicant herein. On the 24th December, 1992, the Registrar placed a caveat against the title to L.R. No.209/1855/2 for non-payment of stamp duty. It was disclosed that at the time of the said purported transfer, the suit property was under use as a public market, which

was the only objective of its grant from the Government of the Republic of Kenya; and was therefore unavailable for appropriation to a private entity, or for private use.

21. It was the 1st interested party's position that the purported transfer in favour of the Applicant was void since the Nairobi City Commission as transferor was not recognised by law, and it was not the proprietor of the subject property. Further, the foregoing transfer was illegal and therefore void for non-payment of the requisite stamp duty before registration thereof.

22. To the 1st interested party, the irregular/illegal and unlawful transfer herein has deprived the public and the traders of the use of L.R. No. 209/1855/2 as a public market, which was the sole objective of the grant of the property to City Council of Nairobi and that the City Market now stands only on L.R. No. 209/1855/1 with no room for expansion as intended on L.R. No. 209/1855/2 and that this has left the market congested and unfit for public use as such.

23. It was averred that the illegal and irregular allocation of L.R. No. 209/1855/2, Nairobi to the Applicant encouraged the subsequent appropriation of L.R. No. 209/1855/1 to a private entity, against public interest which appropriation is subject matter of Misc. Suit (JR) No. 433 of 2012 pending before the Court. It was contended that initially the market had about ten toilets/wash rooms; but following the alienation of L.R. No. 209/1855/2 to the Applicant, and the increase in the number of traders at the market without room for expansion, the available toilets have been converted into food stalls against public health concerns and today, over 400 traders use the City market, beyond the intended 143 traders which has caused congestion, and inconvenienced traders and the public.

24. It was asserted that as a result of the irregular and illegal allocations herein, the Registrar revoked titles to both L.R. No. 209/1855/1 and L.R. No. 209/1855/2 in private hands, and returned the properties to the public for use as a market, or any other municipal use. To the 1st interested party, the cancellation of the revocation as sought herein will expose the title to L.R. No. 209/1855/1, Nairobi (City Market) to challenge thus divesting the public of their rights and interests appurtenant thereto.

25. It was therefore the 1st interested party's case that it is only fair that the Honourable court justly exercises its discretion in the advancement of public interest, by dismissing the application herein with costs in order to guarantee adequate space for expansion of the market to accommodate the traders and consumers as intended by the original grant herein.

2nd Interested Party's Case

26. The 2nd Interested Party hinged its case on the following grounds of opposition:

> **1. The Applicant I seeking final orders by way of judicial review when Nairobi ELC No. 1059 of 2010 between the same parties and in respect of the suit property hereof is pending hearing.**
>
> **2The 2nd Interested Party has demonstrated that the suit property was acquired by the ex parte applicant illegally and the Honourable Court cannot be used to enforce obligations alleged to arise out of illegal transactions perpetrated by the ex parte applicant.**
>
> **3. The applicant has not satisfied any of the requisite conditions which would enable this Honourable Court to issue the orders prayed for by the ex parte applicant.**
>
> **4. The Notice of Motion does not disclose any reasonable cause of action against the Respondents.**
>
> **5. The ex parte applicant has not come to Court with clean hands.**
>
> **6. The application is incompetent and without merit and should be dismissed with costs to the**

Interested Party.

Determination

27. I have considered the application herein, the affidavits filed, the submissions made and the authorities relied upon.

28. Before delving in the matter, I must point out that the manner in which the verifying affidavit was drawn leaves a lot to be desired. An affidavit is a factual document that ought to be drafted in a manner that flows sequentially. It ought to be informative of the factual issues the applicant wants to put across. Accordingly, it ought not to leave portions of the story the applicant wants to put forward to be filled in by the Court. In this case the first paragraph describes the deponent. The 2nd paragraph states that the application is meant to protect the applicant's property. The 3rd paragraph states that the applicant is aggrieved by the 2nd Respondent's decision to revoke the applicant's title. The 4th paragraph contends that the said action contravened the applicant's right to own property. In my view the applicant ought to have, in the affidavit, set ought the facts that gave rise to his grievance. How for example did it come to know about the existence of the gazette notice and before that how did it acquire the suit property. Such information ought to appear in the earlier paragraphs of the affidavit as opposed to being contained in the body thereof.

29. Section 23(1) of the repealed ***Registration of Titles Act*** provides as follows:

> ***The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.***

30. Section 23 of the ***Registration of Titles Act*** was based on the Australian Torrens system of registration and its prime principle was the sanctity of the register. See **Popatlal vs. Visandjee [1960] EA 361, 365; [1959] EA 372, 376 (PC); Souza Figuiredo vs. Moorings Hotel [1960] EA 926; Cross vs. Great Insurance Company Limited of India [1966] EA 94.** The effect was that the title of a person appearing on the register as proprietor is, as against third parties, conclusive of that fact and a charge created by such a proprietor is valid notwithstanding a defect in title. Indeed, it has been held that were it otherwise the principle object of the ***Registration of Titles Act***, which is founded on the said system of land registration, would be defeated. See **Govindji Popatlal vs. Nathoo Visandji [1962] EA 372** at **376** and **Dinshaw Byramjee & Sons Ltd vs. The Attorney General of Kenya [1966] EA 198**.

31. Dealing with the provisions of section 23 aforesaid **Kimaru, J** in **Punda Milia Co-Operative Society vs. Savings & Loan (K) Limited Nairobi HCCC No. 273 of 2008** expressed himself as follows:

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

32. It is not disputed that vide Gazette Notice No. 15580 dated 26th November 2010, one of the land titles which were revoked on the authority of the District Land Registrar, Kajiado was LR No 209/1855/2. From the exhibited copy of the Certificate of Title in respect of the said property, the proprietorship of the interest therein was on 24th December, 1992 transferred to the applicant herein at the consideration of Kshs 2,000,000.00.

33. The Respondent and interested parties' positions is that the ex parte applicant acquired the title to the said property irregularly as the same was public land and therefore not available for alienation to a private entity like the applicant herein hence the revocation of its title was warranted. No doubt under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The crucial words in the said Article are ***"found to have been unlawfully acquired"***. Therefore there must be a finding that the property in question was unlawfully acquired. Who then is empowered to make this finding? That the disputed land fell within the legal regime of ***Registration of Titles Act*** is not disputed. Section 60 of the ***Registration of Titles Act*** states as follows:

> ***(1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.***
>
> ***(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.***

34. Section 61 of the Act then provides as follows:

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

35. Section 60 of the Act sets out the steps the Registrar is to take if he deems that there is an error or mistake in the Grant or Title or where the Grant or Title for reasons disclosed therein ought not to have been issued. He is enjoined to summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected. The summons, in my view, must expressly require that the Grant, certificate or instrument be delivered for the purpose of being corrected. At that stage the issue of revocation of the title does not arise. In default of honouring the summons the Registrar then moves to the next stage which is to apply to the Court for the issuance of summons to issue to the person why the same cannot be delivered for correction. It is only in default of honouring the Court summons that the warrants are issued for the persons to be apprehended for examination.

36. In my view what these provisions of the said Act are intended for is that before a person is deprived of his title to property the due process which includes an opportunity to be heard must be followed. There is no power, however, conferred upon the Registrar of Titles to revoke a registered proprietor's title before the due process is adhered to. The power to direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register is conferred on the Court under section 64 of the said Act.

37. Article 40(3) of the Constitution provides:

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

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

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

39. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. Both under the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. A decision by the Registrar to unilaterally cancel or revoke a title even if he had such powers would fly in the face of the express constitutional provisions.

40. The purview of judicial review was clearly set by **Lord Diplock** in the case of **<u>Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D</u>** when he stated that:-

> **"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."**

41. In **<u>Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR</u>**, **Majanja J.** expressed himself thus:

> **"……first, the Registrar of Titles has no authority under the *Registration of Titles Act* to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the**

petitioner was not given a hearing to contest the allegations subject of the revocation."

42. That holding in my view expresses the correct legal position.

43. However decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant*. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment*. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. *Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.*" [Emphasis added].

44. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."

45. In this case, the issues raised are very weighty matters that require investigations. The allegation of illegal acquisition of a public utility property meant for a market ought not to be taken lightly once such an issue is brought to attention of the Court, however irregularly. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the

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

46. In this case, there is clearly a conflict between private rights and public interests. As appreciated by **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606:

> **“it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest”.**

47. Further, in **Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others [2014] EKLR** it was held that:

> **“…a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large”.**

48. As is appreciated in ***Black’s Law Dictionary, 9th Edn***. “public interest” is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

49. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

50. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

51. I associate myself with the decision in **Kenya Guards Allied Workers Union vs. Security Services & 38 Others High Court Miscellaneous Application No. 1159 of 2003** that:

> **"public interest must be engine of the millennium and it must where relevant occupy the centre stage in the courts...should the Land Acquisition Act give shelter to the land grabbers of public land or are courts going to invent equally strong public interest vehicles to counter this, should individual land rights supersede the communal land, catchments and forests? How far are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indivisibility of title? Are courts going to stay away and refuse to rise to the greater public good call of unravelling 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 to the dustbins".**

52. This was appreciated in **Mureithi & 2 Others (For Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443,** where the Court expressed itself as follows:

> **"The President has power to alienate land by way of lease under the *Government Lands Act* which came into force on 18th May 1915. His powers relate to Government land as defined in s 2 of the same Act, this includes the land described in the Kenya Independence Order in Council 1963 by section 204 and 205 of the Constitution (see schedule 2 of the order) and section 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Thus, under s 3 of the Act, the President, in addition to, but without limiting any other right, power or authority vested in law under the Act, may subject to any other written law, make grants or disposition of any estates, interests or rights in or over unalienated Government land. The President's powers under this section were delegated to the Commissioner in some cases for example in respect of land for religious, charitable, educational or sports purposes and for general purposes of the Government. Unalienated Government land means Government land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment – see s 3 of the Act. The President has powers under s 12 to grant leases of town plots to individual and companies. Under s 19 he has power to alienate land available for agricultural purposes to be surveyed and subdivided into farms. He can direct the Commissioner in this regard. He can grant leases of farms under s 20. His powers under s 3 except as provided, s 12, 20 are not delegable to the Commissioner. Since Kenya is a democracy, pursuant to s 1 and 1A of the Constitution the doctrine of public trust does also apply to public land except where it is excluded by the Constitution because alienating public land is not a practice which is necessary in any democratic state…[I]n all the Acts the President's powers to alienate are defined and in any**

event after adjudication and consolidation in the former special areas the effect of registration was to extinguish any clan or tribal interest in the land. The President through the Commissioner does have powers to allocate Government land for the purposes set out in s 3 of the *Government Land Act* which are principally public purposes. To me the doctrine of public trust is implied in the relevant Acts and ought to apply in respect of Government land except the town plots which can be alienated as leases after public advertisement. "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."…It is clear from the above constitutional provisions that the doctrine of public trust is recognized and provided for by the superior law of the land i.e. the Constitution and applies in a very explicit way as regards trust land. The doctrine is however not only confined to Trust lands and covers all common properties and resources…it applies to public land. Although the doctrine had origins in Roman law it is now a common heritage in all countries who adopted the English common law. To many African communities land was owned by the communities or possessed by their community. The doctrine has deep roots in African communities and is certainly not inherited from the Romans. Forests and other common resources have never been individually owned. Its basis was the belief that certain common properties such as rivers, the seashore, forests and the air were held by the State in trust for the general public. Under the English common law ownership of common properties vested in the sovereign and the sovereign could not grant ownership in them to private owners if the effect of such grant was to interfere with the public interest because such resources were held in trust by the sovereign for the benefit of the public, such property may not be sold or converted to other kinds of use…It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and s 1A of the Constitution or under the doctrine of public trust, a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept…In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in "a democratic society." This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency…A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view. Sections s 1 and 1A of the Constitution expressed the democratic foundations of this nation

and *inter-alia* that the people cannot be prevented from giving birth to a new Constitution because these sections were designed by the framers to secure and preserve avenues for political change and the people could not, in a democracy, be restrained from bringing that change by way of a new Constitution. Any undemocratic practice is therefore challengeable under these provisions…Under the judicial review jurisdiction the grant of judicial orders is at the end of the day discretionary and watertight reasons for the grant of orders after 40 years would be mandatory, because as stated above, promptness is the hallmark of judicial review proceedings. In addition, in exercising that discretion I would have to take into account the needs of a stable system of land registration. To unravel a system of registration going back almost a hundred years one, must reflect on the hardships and prejudice to third innocent parties. In such situations the virtues of certainty, predictability and stability of the land registration system, do in my view heavily out-weigh the short term individual gains since a compensation fund as recommended above could do the trick in rectifying some of the injustices of the past. The policy makers would have to have regard to the principle of proportionality. Whereas the objective or aim may be legitimate, the means of attaining the objectives must be necessary, reasonable and proportionate. Finally, as is apparent from the facts in this case no evidence has been offered on the method used in the alienation of the three parcels. Each case would have to turn on the evidence offered or not offered and the exercise of discretion has to be on the basis of evidence since discretion cannot be exercised in a vacuum. The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and "*kayas*" just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land."

53. However I stress that the process of nullification or revocation of such titles must be lawful and must adhere to the due process.

54. Nevertheless, 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. Mercifully in these proceedings it is disclosed that there in fact exist pending civil cases and proceedings in which the suit parcel of land is the subject. Whereas the applicant contends that those proceedings are not about proprietorship of the suit land, in my view there is no reason why the pleadings therein cannot be appropriately amended so as to have the issue of ownership of the suit land finally determined in order to bring the issues which were raised in these proceedings to a rest.

55. It is therefore clear to me that the applicant herein has an alternative remedy in the existing proceedings. In **Re Preston [1985] AC 835 at 825D** **Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. In considering whether the alternative remedy or the pending remedy ought to be resorted to, the determinant factor is whether that other remedy is less convenient, beneficial, effectual or less appropriate. In ***Ex parte*** **Waldron [1986] 1QB 824 at 825G-825H,Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. This was in fact the position adopted by this Court in **Bernard Murage vs. Fine Serve Africa Ltd & Others, Petition No. 503 of 2014**, which the applicant relied on and in which the Court expressed itself as follows:

"I entirely agree and confronted with a question as to which remedy a litigant ought to seek, *a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance***. In that regard, the Petitioner has filed this Petition pursuant to the provisions of Articles 22, 23 and 165(3) (b) of the Constitution which grants every person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated or is threatened with an infringement. That right, to access this Court,**

should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in Belfonte (supra)."

56. What are these circumstances in ***Belfonte***? Those circumstances were set out by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** where the Court held:

> **"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:**
>
> **"*Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process*. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights".** [Emphasis added].

57. Accordingly, confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In this case, it is my view that the substance of the orders being sought in these proceedings may well be achieved in the pending proceedings if properly amended and that in my view is the way to go.

Order

58. Accordingly as the power to grant judicial review orders is discretionary in the circumstances of this case I decline to exercise my discretionary jurisdiction in favour of the applicant/s and disallow the orders sought in the Notice of Motion dated 23rd February, 2011.

59. In the premises the order that commends itself to me and which I hereby grant is that the parties do fix the pending case(s) revolving around the suit land for hearing and final determination.

60. Since I have found that *prima facie* the Registrar of Titles had no power to cancel the titles there will be no order as to costs.

Dated at Nairobi this 22nd day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njenga for the Applicant

Mr Midenga for the 1st Interested Party

Mr Ayoo for the 2nd Interested Party

Cc Gitonga