**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW NO. 58 OF 2011**

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

**-VERSUS-**

**LAND REGISTRAR UASIN GISHU DISTRICT ……………………1ST RESPONDENT**

**ATTORNEY GENERAL ……………………….........................2ND RESPONDENT**

**SAMUEL KIPLAGAT …………………….................………… INTERESTED PARTY**

**EX PARTE JEREMIAH KIPROTICH RONO**

## JUDGEMENT

1. Through a Notice of Motion filed on 30th August 2011, the Exparte Applicant herein ***Jeremiah Kiprotich Rono*** (hereinafter the Applicant) commenced judicial review proceedings against the ***Land Registrar, Uasin Gishu District*** (the 1st Respondent) and the ***Hon. Attorney General*** (the 2nd Respondent) seeking the following orders:-

i. ***That an order of certiorari do issue to remove into this court for the purposes of quashing the decision of the 1st respondent of cancelling the registration of tittle deed of parcel of land known as MOIBEN/MOIBEN BLOCK 4 (TUGEN)/68 which parcel was registered in the names of Jeremiah Kiprotich Rono, the exparte applicant herein.***
ii. ***That the costs of the application be in the cause.***

2. The application is supported by the statutory statement dated 2nd August 2011, the verifying affidavit sworn by the Applicant on even date and a further affidavit sworn on 23rd August 2011 by ***Robert K. Limo*** the Applicant's counsel on record.

The application is premised on grounds stated in the statutory statement and on the face of the Notice of Motion.

Though the Applicant listed about sixteen grounds in support of his application, the same can be collapsed into three main grounds stated as follows:-

I. ***That the Applicant was registered as the owner of Land known as Moiben/Moiben Block 4/Tugen) 68 (the suit land) in the year 2009 after purchasing the same from one Chelimo***

***Cheptoo son of Chepkonga Tallam (deceased).***

II. ***That the Land Registrar, Uasin Gishu District relying on a gazette notice dated 18th February 2011 unilaterally and illegally cancelled the title deed registered in the Applicant's name.***

III. ***That the decision to cancel the Applicant's title deed was not only ultravires the provisions of the Registered Land Act but was also unlawful as it had been made in breach of the rules of Natural Justice.***

3. The application is opposed by the interested party ***Samuel Kiplagat*** through a replying affidavit filed on 23rdSeptember 2012.

Though the Respondents purported to oppose the application through the written submissions filed on their behalf on 1st September, 2014 by Learned litigation counsel ***Mr. Peter Kuria***, they did not file any responses in opposition to the application. They did not file either grounds of opposition or a replying affidavit.

As a matter of law therefore, the application stands unopposed by the Respondent's on issues of fact but it is opposed on a point of law raised in the written submissions which I shall discuss later on in the judgment.

4. In his affidavit, the interested party deposed that the suit land was part of 4,400 acres of land acquired by members of the Tugen Estate community which was allocated to members on the basis of their shareholding; that after subdivision of the entire land, the suit land was allocated to ***Chepkonga Tallam*** now deceased; that ***Chepkonga Tallam*** licensed him to occupy the suit land which he has done from 1989 todate.

The deponent further averred that no letters of administration were ever issued in respect of the administration of the deceased's Estate and in his view, the Applicant fraudulently had himself registered as owner of the suit land in place of the deceased or his legal representative. To support this claim, he annexed to his affidavit a copy of the Black Book extract marked ***SKI(b)*** showing that the deceased's name had been deleted on an unknown date and substituted with the name of the Applicant.

5. The application was prosecuted by way of written submissions; those of the Applicant were filed on 16th July 2014 while those of the interested party were filed on 1st August 2014. The Respondents were the last to file their submissions which they did on 1st September 2014.

6. The Applicant's case as can be discerned from the pleadings and the submissions filed on his behalf is that he was the absolute owner of the suit land having been registered as such in the year 1989 after purchasing the same from one ***Chelimo Cheptoo,*** son of ***Chepkonga Tallam*** (deceased). According to the Applicant, the 1st Respondent through gazette Notice 1564 of 18th February, 2011 expressed his intention to cancel the Applicant's registration as owner of the suit land; that the 1stRespondent subsequently proceeded to irregularly and unprocedurally cancel the Applicant's title to the suit land without according him a fair hearing which was contrary to the rules of natural justice.

The Applicant further submitted that the decision of the 1st Respondent as shown in the copy of extract of the Land Register (green card) exhibited as annexture ***RKLI*** to the Applicant's further affidavit was done without jurisdiction as only courts of law are authorized and mandated by the law to cancel or revoke tittle to land.

7. It was also the Applicant's case that the impugned decision violated the Applicant's right to own property guaranteed under ***Article 40*** of the***Constitution*** and***Section 26 of the Land Registration Act.***

For the foregoing reasons, the Applicant urged the court to find merit in the application and quash the impugned decision by issuing an order of certiorari as prayed.

To buttress his submissions, the Applicant relied on the following authorities:-

***Republic vs Kisumu District Lands officer and Another (2010) eKLR*** and ***Kuria Greens Ltd vs Registrar of Tittles and Another (2011) eKLR.***

8. The 1st Respondent was represented in this proceedingsby the office of the Hon. Attorney General. As stated earlier, both Respondents did not file any response to the application except written submissions. The Respondents attacked the application on three fronts: Firstly, they disputed that the 1stRespondent‘s decision contravened the rules of natural justice particularly the rule that no man shall be condemned unheard. It is the Respondent’s case that the Applicant was afforded an opportunity to be heard to show how he had acquired title to the suit land before the impugned decision was made which opportunity he failed to utilize; the opportunity allegedly accorded to the Applicant was issuance of a letterinviting him to a site visit on the disputed land by the 1st Respondent and the Sergoit location chief and the gazette Notice referred to by the Applicant. And that under ***Section 154 (1) (c)*** of the ***Registered Land Act***, the notices were sufficient to comply with the rules of natural justice.
9. Secondly, the Respondents appeared to be implying that as the Applicant had failed to demonstrate that he had legally acquired the suit land by exhibiting evidence to prove that he had bought it from the legal representative or administrator of the Estate of ***Chepkonga Tallam***, the transfer of the property in his name was illegal; that the suit land was therefore illegally acquired and did not merit protection of the law.

10. Thirdly, the Respondent’s claimed that the application was incompetent and bad in law as leave to institute these proceedings was sought and obtained outside the six months limitation period imposed by ***Order 53 Rule 2*** of the ***Civil ProcedureRules***; that in the circumstances the remedy of certiorari was not available to the Applicant. For this proposition, the Respondents relied on the following authorities:-

- ***Republic v Busia Municipality Land Dispute Tribunal & another (2013) eKLR***

- ***Dickson Miricho Muriuki v Central Provincial Land Dispute Appeal Committee & 6 others (2006) eKLR.***

11. The interested party on his part through the submissions filed by his advocates ***Ms Angu Kitigin & Company Advocates*** supported the Respondents’ position especially regarding the claim that the Applicant’s tittle to the suit land had been fraudulently acquired and that for this reason, the 1st Respondent’s decision was justified and lawful.

12. I have carefully considered the pleadings, the rival submissions filed by the parties as well as all the authorities cited. I find that three main issues emerge for determination by this court namely;

**(i)** Whether the application is statute barred and therefore incompetent.

**(ii)** Whether the impugned decision was made in violation of therules of natural justice.

**(iii)** Whether the 1st Respondent had jurisdiction or power to cancel the Applicant’s registration as owner of the suit land.

**(iv)**Whether the Applicant is entitled tothe relief sought.

Before I delve into a consideration of the issues raised, I wish to observe from the outset that the decision challenged in these proceedings was made when the old regime of land laws was in force. The Registered Land Act and other land laws have since been repealed by the Land Registration Act of 2011. Any reference to the law in this judgment will therefore be a reference to the Registered Land Act (RLA) since it is the law that was applicable in this case when the impugned decision was made.

13. Turning now to the first issue, it is the Respondent's contention that the application is incompetent and ought to be dismissed as the leave on the basis of which it was filed was improperly granted by the court. The Respondents claimed in their submissions that leave to institute the instant judicial review proceedings was sought and obtained on 24th August 2011; that by this date, the six months statutory period within which applications for leave to apply for orders of certiorari should be made had already expiredas the gazette notice which was under challenge had been issued on 18th February 2011; that the application for leave ought to have been filed before 18th August, 2011 when the limitation period of six months expired.

14. It is worth noting that the Applicant whether by design or inadvertence failed to respond to this claim. That said, I wholly concur with the Respondents submission that ***Order 53 Rule 2 of the Civil Procedure Rules*** (the Rules) which is a replica of ***Section 9 (3)*** of the ***Law Reform Act*** makes it crystal clear that no leave should be granted to apply for an order of certiorari unless the application for leave was made within six months of the date the impugned decision, order or proceedings was made. This is the legal position that was expounded by the court in the authorities cited by the Respondent and many others including decisions by the Court of Appeal.See for example ***Wilson Usolo v John Ojiambo Ochola & Another CA at Nairobi Civil Appeal No. 6 of 1995 (1967) eKLR Kimanzi Mboo v David Mulwa Muthusi CA at Nairobi Civil Appeal No. 233 of 1996 (1997) eKLR*** among others.

15. Though the position advanced by the Respondent's on the six months statutory limitation for applying for orders of certiorari is correct, my perusal of the court record does not support the Respondent's claim that the Applicant had applied for leave to institute the current proceedings outside the six months prescribed period. The record clearly shows that the Applicant's Chamber Summons seeking leave to apply for orders of certiorari was filed in this court on 3rd August 2011. It is dated 2nd August 2011.

16. The application was heard exparte before Azangalala J (as he then was) on 10th August, 2011 who granted the Applicant leave to file a further affidavit and adjourned the hearing of the summons to 24th August, 2011 when leave as sought was eventually granted. There cannot therefore be any doubt that the Applicant's application for leave was filed well within time.

17. It is also apparent that the Respondents were laboring under the misconception that what was challenged in these proceedings was the legal notice in gazette No. 1564 of 18th February 2011 (the gazette notice).

This is not however the position. The legal notice as will be demonstrated shortly did not contain the impugned decision. The Notice of Motion clearly shows thatwhat is challenged in these proceedings is the 1st Respondent's decision of cancelling the tittle deed issued to the Applicant in respect of the suit land on 1st July, 2011. That decision is reflected in the copy of the Land Register maintained by the 1st Respondent in respect of the suit land.(annexture ''RKL1'' ).

The impugned decision having been made on 1st July, 2011, there is no way that an application filed on 3rd August, 2011 seeking leave to apply for an order of certiorari to have it quashed can be said to have been statute barred.

For the above reasons, I have come to the conclusion that the Respondent's claim that the substantive motion was incompetent is misconceived and totally without merit. I find that the substantive motion is competent and properly before this court.

18. Turning to the second issue for my determination, it was alleged bythe Applicant that the decision sought to be quashed was bad in law as it was made in contravention of the rules of Natural Justice. The Applicant complained that the decision was made without according him a fair hearing.

The Respondent and the interested party disputed the Applicant's claim and contended that the 1st Respondent had complied with the rules of natural justice as he had accorded the Applicant two opportunities to be heard on how he had acquired tittle to the suit land before cancelling his tittle deed; that the two avenues created for that purpose was a letter directing him to attend a certain site visit with the 1st Respondent and the area chief and the gazette notice ; that the Applicant spurned both opportunities and he cannot now turn around and claim that he had not been given an opportunity to be heard.

19. One of the twin rules of natural justice is that no man shall be condemned unheard (audialterampartem). The other rule is that no man shall be a judge in his own cause (Nemojudexcausasua). These twin rules are an embodiment of the public law principle that public bodies which exercise judicial or quasi judicial functions or public officers who make decisions that affects the rights and interests of citizens have a public duty to act fairly.

The rule that no man shall be condemned unheard creates an obligation on all decision makers to accord all persons who are likely to be adversely affected by their decision a hearing or an opportunity to be heard before making the final decision.

20. This rule has also been codified in ***Article 47 (1) of the Constitution of Kenya 2010*** which provides that:-

***"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and Procedurally fair–( emphasis mine).***

21. In this case, the Respondents and the interested party alluded to a letter inviting the Applicant to attend a site visit with the 1st Respondent to explain how he acquired tittle to the suit land. This letter was however not produced as evidence in this case. It is therefore impossible for this court to make a finding of fact that such a letter actually existed.

Secondly, the gazette notice aforementioned was a notice notifying members of the public in general that the 1st Respondent intended to cancel the tittle deed issued in favour of the Applicant to the suit land if he did not receive any valid objection to prevent him from so doing.

22. In my considered view, the right to procedural fairness which as stated earlier encompasses the right to be heard and is currently a constitutionally guaranteed right requires that the person who is likely to be adversely affected by a contemplated decision is personally given notice of the allegations made against him and is given an opportunity to be heard before the final decision is made.

23. My take is that a general notice to the public in a gazette notice in a matter as grave as the one raised in this application where the contemplated decision if made would have the effect of depriving a citizen of his right to own property does not meet the threshold of complying with the rules of natural justice. This is more so when one considers that the Kenya Gazette in which such notices are published is not a publication of wide or general circulation such that a notice therein may easily escape the attention of the person or persons who may be targeted by such a notice. Section 154 (1)(c) of the RLA which defines the term "opportunity of being heard'' in my view also envisages service of notice to be heard either personally on the person likely to be adversely affected by the contemplated decision or through his or her agent.

24. There being no evidence to show that the 1st Respondent invited the Applicant to make his presentations regarding how he acquired tittle to the suit land before depriving him of its ownership by cancelling the tittle deed issued in his favour, I am persuaded to accept the Applicant's contention that the impugned decision was made in contravention of the rules of natural justice and i so find. The law is that a decision made contrary to the rules of natural justice is illegal and void *abinitio* – See:

***Attorney General vs Ryath (1980) A.C 718 at page 730***; ***FahimYasin Twahee v District Land Registrar – Lamu (2011) eKLR.***

25. Lastly, regarding the issue concerning whether the 1st Respondent had jurisdiction or power to cancel the Applicant's tittle to the suit land, it is now settled law that a Land Registrar or a Registrar of tittles does not have power to revoke or cancel a tittle document or certificate of tittle to land issued to any person. The powers of a Land Registrar are set out*in* ***Section 8*** of the ***Registration of Land Act*** and they do not include power to cancel a tittle deed.

The most that a Land Registrar can do is to summon a person under ***Section 8(b)*** to appear before him to give any information or explanation respecting land, a lease or a charge, instruments or other documents relating to land.

26. This court has had numerous occasions to pronounce itself on the issue of revocation or cancellation of tittles by Land Registrars or Registrar of titles. See:***Yellow House Insurace Ltd & Another v A.A Kawir Transporters & 4 others (2014) eKLR***, ***Republic v G.G Gachehi Land Registrar/Registration of tittles Exparte Varun Industrial Credit Limited (2013) eKLR***; ***Kona Greens Limited v Registrar of Tittles & Another (2011) eKLR, Kongowea Market Estate Ltd vs Registrar of Tittles (2011) eKLR; Sound Equipment v Registrar of Tittle & Another (2011) eKLR*** among others.

The golden thread that runs through all the above authorities is that there is no provision under the Constitution or any other law which bestows upon the Land Registrar, Registrar of tittles or the Commissioner of Lands power to revoke tittle to registered land in the absence of a court order to that effect.

There is no evidence in this case that the 1st Respondent was implementing a court order when he decided to cancel the Applicant's tittle deed. It is therefore clear that the 1st Respondent acted without jurisdiction when he cancelled the Applicant's tittle to the suit land on 1st July, 2011. His action amounted to deprivation of the Applicant's property without compensation and this amounted to a violation of his right to own property guaranteed under ***Article 40*** of the ***Constitution***.

27. The fact that there was suspicion that the Applicant may have acquired the suit land illegally or fraudulently did not give the 1st Respondent power or authority to cancel the Applicant's tittle.

Under ***Article 40 (6)*** of the ***Constitution***, the only time that a tittle holder looses constitutional protection of the right to own property is where there is a determination or finding that the property in question had been unlawfully acquired. That finding however can only be made through an established legal process which can only be provided by a court of law. My view is that such a determination cannot be left to the subjective opinion or whims ofa Land Registrar like the 1st Respondent.

28. In view of the foregoing, it is my conclusion that the decision of the 1st Respondent of cancelling the Applicant's tittle as reflected in the exhibit marked ***" RKLI"*** was not only ultravires the powers of the 1st Respondent but was also unconstitutional. It was also a decision made against the rules of natural justice. And a decision made without jurisdiction or against the rules of natural justice is a nullity in law with no legal effect. Such a decision automatically attracts the intervention of this court by way of judicial review.

It is therefore my finding that the Applicant is entitled to the relief sought in these proceedings.

Consequently, I grant an order of certiorari to remove to this court for purposes of being quashed the decision of the 1st Respondent cancelling registration of the tittle deed issued in the names of the Applicant in respect of land known as Moiben/Moiben Block (Tugen) 68.

29. Before concluding this judgment, I wish to clarify for the avoidance of doubt that in making the

above order, this court is not affirming or making a finding that the Applicant's tittle to the suit land had been validly acquired. These proceedings only invoked the supervisory jurisdiction of this court and in the exercise of that jurisdiction, this court's only concern was to establish whether or not the process of cancelling the Applicants tittle was done in accordance with the law. The legality or validity of the Applicant's tittle was not an issue for determination by this court as was meant to appear by the Respondents and Interested party in their submissions.

30. A judicial review court with its restricted procedure of settling disputes by way of affidavit evidence would be ill equipped to resolve issues of ownership or legality of tittle. Such a determination can only be made in a civil suit filed in the Environment and Land court. But since this court cannot condone or perpetuate an illegality, the decision of the 1st Respondent must be quashed in order to restore the Applicant to the position he occupied prior to the making of the impugned decision.

31. For all the foregoing reasons, I am satisfied that the Notice of Motion dated 30th August, 2011 is merited. The same is hereby allowed with no orders as to costs.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED** and **DELIVERED** at **ELDORET THIS 25TH DAY OF FEBRUARY 2015.**

In the presence of:-

Mr. Makuto holding brief for Mr. Angu Kitigin for the interested party

N/A for Hon. Attorney General for the 1st and 2nd Respondent

N/A for Exparte Applicant