



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 35 OF 2012

REPUBLIC.....APPLICANT

-VERSUS-

KENYA URBAN ROAD AUTHORITY.....1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF ROADS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE TAMARIND VILLAGE LTD

JUDGMENT

INTRODUCTION

1. The Ex parte applicant is described in the statement as a public company incorporated in Kenya and formerly known as Baric Developments Limited and it the registered owner of suit properties Plots Nos. 755 and 4/6 Section 1 Mainland North, Mombasa.

2. Following debate in Parliament over the need to establish a second bridge to link Mombasa Island with the Mainland, where, according to the *Hansard*, the Members of Parliament acted on information that the ex parte applicants parcels of land were on a road reserve and resolved that the apartments on the ex parte applicant's parcels of land be demolished to clear way for the building of the bridge. Soon thereafter the 1st Respondent moved to give notice to the ex parte applicants to demolish the buildings on the suit properties and marked the areas to be demolished by placing large X marks on the properties.

JUDICIAL REVIEW APPLICATION

3. Being aggrieved by the Respondent's actions, the Ex parte applicant, through this Judicial Review proceedings sought relief as follows:

1. An **ORDER OF CERTIORARI** quashing the purported notice dated 10th March, 2012 in so far as it applies to the Applicant's properties being Plot numbers 755, and 4/6 section 1 Mainland North.

2. An **ORDER OF MANDAMUS** compelling the Kenya Urban Roads Authority to wash out, scrub out, eliminate or otherwise remove the crosses or other markings they have placed on the Applicant's property Plot numbers 755, and 4/6 section 1 Mainland North.

3. An **ORDER OF PROHIBITION** restraining the Government from issuing any other notice indicating or suggesting or otherwise implying that the Applicant's properties Plot numbers 755, and 4/6 section 1 Mainland North is constructed on a road reserve.

4. An **ORDER OF PROHIBITION** restraining the government or the Kenya Urban Roads Authority and any other government agency from demolishing, defacing, destroying, bringing down or otherwise interfering in any way with the buildings located on the Applicant's property being Plot numbers 755, and 4/6 section 1 Mainland North or in any way blocking the Applicant's constitutional right of ownership, possession, access, ingress and egress to the same.”

4. The Grounds upon which the Relief is sought were set out in the Statement dated 26th March 2012 as follows:

a. The Government gave up its right to the land when it issued fee simple titles to the Suit Properties way back in 1919.

b. The approved deed plans and beacon certificates done by Government officials clearly indicate that the property does not lie on a road reserve.

c. The threats to demolish the buildings on the Suit properties violate the Applicant's constitutional right to own property.

d. The Government can only acquire the Suit properties through compulsory acquisition under the Land Acquisition Act because they are private with bona fide title documents.

e. KURA (Kenya Urban Roads Authority) and the minister for roads acted in breach of the rules of natural justice by failing to engage the Applicant prior to marking the buildings for demolition.

f. The purported notice via the letter dated 10th March, 2012 is illegal because it was not gazette as required by statute and the author of the letter had no authority to issue it. And even if it was so gazette any move to interfere in the private ownership of the suit properties would be illegal.

g. The Government through the Commissioner of Lands has also neither made an offer for compensation nor an inquiry as to damages.

h. The Applicant's legitimate expectation is that the due process of the law would be followed and that it would not be surprised by any abrupt demolitions without giving it a fair hearing.

5. The parties filed written submissions – Ex Parte Applicant's Submissions dated 1st October 2012, the Respondents' Submissions dated 28th September 2012; and the Ex Parte Applicant's Supplementary Submissions dated 26th October 2012 - with the ex parte applicant asserting the rights of a registered proprietor against what it considered an unlawful enrichment or threatened encroachment by the Kenya Urban Roads Authority (KURA) without due process through compulsory acquisition in accordance with the Constitution.

6. The Respondent's case was set out in the Submissions dated 28th September 2012 as follows:

“By our affidavit dated 14th May, 2012 sworn by Permanent Secretary Ministry of Roads Eng. Michael Sisitu Mwaura Kamau which is the ministry concerned with the intended project states that the government intends to establish a new bridge where the Old Nyalı Pontoon Bridge used to be. This is intended to link the Island to the mainland.

The history of the bridge dates back to an agreement dated 9th October, 1929 made between Nyali Limited and the Government of Kenya colony and protectorate.

The old bridge was built and operated and maintained by the Nyali Limited including its approaches up to 100ft (30 meters) on both side while the government did the side roads that connected to the main road on both sides.

*To facilitate such works a survey was commissioned to establish the road reserve for the approaches survey plan F/R No. 36/34 created the reserves on the Island by a subdivision to MSA/XLVI/7 while the subdivision of Plot No. 41/98 created Plots No. 755 which belongs to the applicant herein and 4/R on the main land. **See a copy of the survey plan marked 'FKI 1' of the said affidavit.***

This arrangement subsisted until 1986 when the New Nyali Bridge was commissioned and concession to Nyali Limited to operate a pontoon bridge was terminated and the road reserves and the approaches to the bridge reverted back to the government.

Any dealings that were undertaken by the petitioners or any other persons on the said road reserves and approaches are irregular as the roads were not decommissioned. The subsequent dealing with or alienation of the road reserves and the approaches being irregular and unlawful and therefore null and void and so is any title obtained thereto.

Exhibit MSMK 1 of the affidavit shows that the suit property herein falls partially within the said road reserve corridor. Consequently 4R (and/ or / 4/6) is for all intents and purposes a road.

It is instructive to note that no tracing back was been done by the petitioner to see how they acquired the property and if the title deed initially allocated was regular or irregular. Neither have they provided any maps plans etc to discount our claim to the suit property.

Once we have established that the suit property is essentially on a road the next question to answer is what is the validity of the petitioners title vis a vis the government's claim to the suit property and its intention to construct a bridge on the site. How did the petitioners acquire the suit property, was the said acquisition regular and therefore the title deed held by the petitioner valid and protected by the provision of article 40 of the constitution.

When the Old Nyali Bridge was decommissioned, the suit land reverted back to the government but remained alienated government land because it was reserved for a road.

The Law

Government land is government by the provision of the repealed Government Land Act. According to this Act, the Commissioner of Land has no jurisdiction to alienate alienated government land.

Section 85 of the Government Land Act protects proclaimed and reserved roads, thoroughfares and out spans and stipulates that they shall remain free and uninterrupted unless closed and altered by a competent authority.

Section 182 of the Local Government Act stipulates that every Municipal Council shall have general control and care of all public streets which are situated within its area of trust for maintenance and for the benefit of the public.

Section 185 of the Local Government Act sets out an elaborate procedure to be followed in alteration, diversion or closing of a road vested in a municipal council. It stipulates that notices were to be issued to land owners whose land abuts the road to be closed. There is no evidence that this was done in the instant case before the road was closed, subdivided and allocated to individuals.

Section 192 of the Local Government Act expressly prohibits the transfer of the land from part of a road.

The above provision shows that if the petitioner obtained the titles in the face of these statutory provisions then the titles are void.

They cannot seek the protection of the Constitution whether the repealed one or the current Constitution. The protection of the right to property is guaranteed under **Section 70 of the repealed Constitution as well as article 24 of the current constitution** provided that it is subject to other people's right and the general public at large.

Article 40 of the current Constitution also protects the right to property; however, clause 6 therefore states that the rights under this article do not extend to any property that has been found to have been unlawfully acquired. If the makers of the Constitution wanted that finding of unlawful acquisition to be made by the courts nothing would have prevented them from stating so. In a situation like this, the facts are quite obvious that the acquisition was unlawful bringing it within the ambit of the proviso to article 40. The court will read and interpret this section depending on the circumstances of each case and the general public good."

7. In response to those submissions, with leave of Court, the ex parte applicant submitted in its Supplementary Submissions that:

"2.0 Firstly, the suit properties are freehold titles that were registered under the Land Titles Act and not the Government Land Act. ¹ They were not subject to a lease that would revert back to the government at some date in the future. On the contrary, the certificate of title under the Land Titles Act granted them inviolable rights to use the whole area that the Suit properties covered. There were accordingly no roads on the properties that were proclaimed or reserved. Therefore, the provisions of section 85 of the Government Land Act that protects proclaimed and reserved roads do not apply to this case.

3.0 Secondly, the Respondents have alluded to the fact that since there was a bridge that existed over the suit properties it means that the area was automatically vested in the local authority under the Local Government Act. They thus aver that the Commissioner of Lands had no authority to create titles over the Suit properties. However, sections 182, 185 and 192 of the Local Government Act (LGA) do not apply to this case. The above sections merely provide that public streets that are within its municipalities are vested in the council which is responsible for their maintenance. Titles to the suit property were however issued in 1935 even before the LG Act came into existence. The area was therefore private property and not a public street as alluded by the Respondents. Moreover, even when the "old Nyalii Bridge" was in existence the Suit properties were still private property and the bridge was being maintained by a private entity. ² Therefore, the above provisions of the LG Act on public streets and roads do not apply in this case.

4.0 Finally, according to **Section 21 and 27 of the Land Titles Act** the Certificate of Title is conclusive evidence against all other persons including the government of the several matters contained therein including proof of ownership. Section 21 provides that:

"Save as in this Act otherwise expressly provided, every certificate of title duly authenticated under the hand and seal of the Recorder of Titles shall be conclusive evidence against all persons (including the Government) of the several matters therein contained, and a certificate of ownership shall be conclusive proof that the person to whom the Certificate is granted is the owner of the coconut trees, houses and buildings on the land in respect of which the Certificate is granted, at the date of the certificate, unless there is noted thereon in manner hereinafter provided a memorandum to the contrary effect.

Section 27 of the Land Titles Act further provides that

“1. Every Certificate of Title shall set out a description of the immovable property therein referred to, with figures and references necessary to identify it on the plan or map of the area in which it is situated, and a correct statement of the right, title or intend of the person to who it is issued.

2. The Recorder of Titles shall note thereon in such a manner as to preserve their priority a memorandum of the particulars of all subsisting mortgages or other encumbrances or of any lease to which the property may be subject, and of the right or interest in the property existing at the date of the certificate of any person other than the person to whom the certificate is issued.”

This means that the Certificate of Title is the final word on the matters touching on that land. Therefore, if the certificate of title does not show or mention that the property is subject to an encumbrance such as a road reserve it means that the property does not lie on a road reserve.

4.1 Moreover, all persons are bound by the contents of the Certificate of title including the government. This means that as much as the local authorities have general control of public streets and roads which are within its area, their powers of management are subject to proprietary rights as evidenced by a certificate of title.”

8. Counsel for the Parties – Mr. Odhiambo for the ex parte applicant and Mr. Eredi for the Respondents - then made the supplementary oral argument as set out below.

“Mr. Odhiambo

Notice of Motion dated 30th March 2012. I rely on applicants’ submissions dated 1st October 2012. I have supplementary submissions filed on 26th October 2012. I also rely on the verifying affidavit of Harrison Muambi sworn on 26th march 2012. I also rely on supplementary affidavit of Harrison Muambi of 2nd July 2012. I also have a list of authorities filed on 1st October 2012.

Decision of Kenya Urban Roads Authority to demolish the apartments in Tamarind Village. There is a notice of demolition dated 10th March 2012 issued by the Kenya Urban Roads Authority on 21st March 2012.

The applicant seeks to quash the decision and stop the Kenya urban roads authority from demolishing the apartments until the procedures set for compulsory acquisition under the Land Acquisition Act.

The suit is not about public interest versus private interest of a few individuals who own apartments in Tamarind Village. It is not also a suit to determine whether the City of Mombasa deserve a 2nd Bridge from the Island to the Mainland.

The question is whether the Respondent complied with the legal provisions in achieving their intended objective. The actions of the Respondent were unreasonable in that they rushed to mark the property for demolition with large paintings on 16th March 2012 before issuing any notice whatsoever to the residents of Tamarind Village.

The action of the Respondent was based on the idea that the Tamarind properties sit on a road reserve. The Respondents failed to carry out a search at the registry which could have established that the property had title way back in 1917 from which dated the property has enjoyed uninterrupted occupation as private premises.

Copies of the title documents and conveyances have been annexed to the verifying affidavit at pp23-58.

The Bridge that used to be on the tamarind property was actually a private bridge which had been built by Nyali Ltd which used to own the property in the early 1930s. The reason why Nyali Ltd. had built the bridge was to transport their sisal product from the Mainland to the Island. The company used to charge - toll fee to citizens to use the bridge. This reflected in the case of **Nyali Ltd. v. AG** {1955} ALL ER 646 where it was held that the bridge was a private bridge.

The bridge was a private bridge. The authority is also supported by the title documents on the property.

Subsequently, the Tamarind management bought the property in 1989. The conveyance documents are attached in the verifying affidavit. At the time, the Bridge was no longer being used because the Government had already built the now modern Nyali Bridge. The old bridge had already been demolished.

The respondents rely on an old survey done in June 1934 on which there is an abbreviation '4/R' and the respondents allege that this abbreviation meant that the property was marked as Road reserve. The respondent did not look at a subsequent survey done in December 1934 a copy attached to verifying affidavit at pp. 32 -34. In this subsequent survey the same area which was marked as 4?R is now marked plot 4/6 section 1 Mainland North and Plot No. 755 Section 1 Mainland North. The new plot numbers are reflected on the titles that the applicant's hold. The Deed Plan No. 33590 is reflected on both Surveys. The purposes of the survey was to earmark the properties as a road reserve because the titles could not have been issued 7 months later over the same property and the titles themselves do not indicate that there is a road reserve on any part of the property.

The simple abbreviation is inconsistent with ownership by the applicant and it cannot form a basis for demolition of the applicant's properties. This clearly shows that the respondent failed to take into account relevant matters and instead took into account irrelevant matters in making their decision.

The actions of the Kenya Urban Roads authority were politically motivated without any genuine intention of building a bridge. I refer to the verifying affidavit annexure of Hansard at pp. 70-73. A few politicians urged government to demolish the properties because they believed the properties were lying on a road reserve. A debate occurred on 14th March 2012 and the Kenya Urban Roads authority went to the property only 2 days later and marked them with large Xs for demolition. If indeed the applicant obtained their titles fraudulently, the Respondent would have moved the Court to revoke the titles. Having failed to do that, the respondents are obliged to follow the procedures for compulsory land acquisition. I rely on the case of **Emfil Ltd. v. A.G.**, HCCC 84 of 2011 on the Respondent's List. The jurisdiction to determine whether title is fraudulent lies with the Court not on government agencies.

The actions of the Respondents were **ultra vires**. As the titles had not been revoked the Respondents should have followed the acquisition procedure. The respondents would have been entitled to demolish the properties only after an award had been made to the applicant under the compulsory acquisition procedure. The respondent's action was therefore not procedural and beyond their mandate.

The authorities filed by the Respondent show that courts in various instances declined to issue certiorari orders based on finding that titles were obtained fraudulently or there were indications of fraud. In this case, there has not been shown that the titles were obtained fraudulently.

In the *ex parte* Komen, Kasango, J. declined judicial review on a property at Mombasa Park because the park was public property before the [title] was issued and the private individual did not take up possession even after title was issued.

I pray that the prayers sought in the Notice of Motion be granted.

Mr. Eredi

We oppose the motion dated 26th March 2012. We rely on Affidavit sworn by Eng. Michael Mwaura Kamau of 15th May 2012. We also rely on the Submissions dated 28th September 2012 and our list of Authorities of the same date.

Public Interest. The public interest in having a second bridge at Mombasa Island outweighs the private interest of the applicant. There would be chaos if anything happened to the only bridge. The Government thought it wise to put up a bridge. There was a debate in parliament but the events that followed were not on account of the debate as MPs had a right to debate the issue.

Notice of 26th March 2012. We have annexed a map showing where the road reserve [sits]. The map shows area marked '4/R'. The 4/R is a road reserve. It is true that the bridge was a private bridge but to facilitate the bridge the Government created a road reserve. The 4/R remains the property of the Government after the bridge was demolished. There is procedure for conversion of a road reserve into private property. The notice to vacate the land which is a road reserve. The land belonged to the Government so there is no question of compulsory acquisition as the Government is only taking what belongs to it.

P.33 – the plot 4/6 is different from plot No. 755 which the Government does not claim. There was need to establish the road reserve to facilitate the bridge. When the Concession ended the property remained Government property.

*If the applicant bought the property from Nyali Ltd., it was incumbent for them to establish by search that the property belonged to Nyali Ltd. As Nyali Ltd. had no authority over the road reserve the transfer to the applicant is a nullity. I refer to the authority No. 1, **Scott.v. Brown** (1892) 2 QB 724.*

*In **James Joram Nyaga & Ors. v. AG & Ors.**, Nairobi HC Misc App NO. 1731 of 2004 – A property held in trust remains for public purpose for which it has been set apart. I also refer to the other decisions also showing that the court will investigate title.*

The Government has given notice to the applicant to remove the properties on its land without seeking to cancel titles. We refer to section 85 of the Government Lands Act, section 182 of the Local Government Act that set procedure for decommissioning of a road and for the Local government to take charge of public land.

The title is not valid as the land is public road reserve. We pray that the application be dismissed.

Mr. Odhiambo

Section 85 of the Government Lands Act (GLA) is a provision that protected road reserves should remain free unless altered by competent authority. The GLA does not apply to the suit property as the properties were issued under the Land Titles Act and not subject to a lease that would revert to the Government. They were freehold properties.

Local Government Act section 182, 185 and 192 do not apply to these properties. These provisions merely provide that public streets within local authority are to be maintained by the public authorities. The titles to the properties were issued in 1935 under Land Titles Act. The Local Government Act was enacted after the titles had been issued. The Act cannot act retroactively to take away rights already enjoyed since 1935. The area was a private property. I refer to the supplementary submissions. That is all.

9. After the submissions the Court made orders for site visit as follows:

1. Upon hearing counsel, I take the view that the court should visit the site to observe the suit

property in relation to the other properties shown in the plans. Matter stood over to 20th January 2014 at 2.30pm for the site visit.

2. The County Surveyor or his representative to attend the site visit to assist the court to identify the suit property.

3. The applicant is at liberty to engage the service of a private surveyor to work with the County Surveyor.”

10. On 20th January 2014 the Court visited the site visit upon which the court ordered respective surveyors for the parties to file reports on the visit and construction of the relevant maps, Judgment was reserved.

ISSUES FOR DETERMINATION

11. The following issues arise for determination:

- a. **Whether the court in judicial review proceedings may make findings of facts in dispute between the parties.**
- b. **Whether the Government may without seeking a court order give notice to a registered proprietor of a parcel of land to demolish buildings on the said a piece of land which the Government claims to be on a road reserve.**
- c. **What is the role and impact of public interest in determination of disputes between the Government and private owners of property in litigation before the Court.**
- d. **Whether the Court in judicial review proceedings may take cognizance of fraud in making a decision whether or not to grant the relief sought.**

DETERMINATION

1. Can the judicial review court make findings of facts in dispute between the parties.

12. Scope of judicial review: Can the Court make a fact finding on the existence or otherwise of the road reserve in these judicial review proceedings? Happily the questions raised in this application have recently been resolved by binding Court of Appeal authorities, both on appeal from my decisions, ***Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority [2015] eKLR*** and ***Emfil Ltd v. Attorney General and 2 Ors.***, (2014) eKLR, in which the Court of Appeal has held the scope of judicial review to include illegality irrationality and procedural impropriety and to exclude determination of both of private law disputes between the parties and the merits of the decision challenged by the judicial review proceedings.

13. In ***Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority [2015] eKLR of 12th March 2015***, the court (Okwengu, Makhandia and Sichale, JJA.) on an application by the applicant for mandamus directing the respondent to grant it a lease on a property said:

“In Commissioner of Lands v. Kunste Hotel Limited (1997) eKLR this court held that:

“But it must be remembered that judicial review is concerned not with private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he is subjected.”

14. In ***Emfil Ltd v. Attorney General and 2 Ors.***, supra, the Court cited with approval ***Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*** where it was held:

“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, or contrary to the provisions of a law or its principles are instances of illegality.”

Visit to the site

15. Although the court is not required to go into the merits of the decision challenged in a Judicial review proceedings, there are instances where the court is required to establish the existence of facts that may or may not justify the making of a decision under the reasonableness test of judicial review. While considering a similar issue of the need to make a finding as to the existence of a road reserve to support a demand for demolition of a gate on a registered proprietor's suit property, in **Republic v. The Ministry Of Roads and Anor., Ex Parte VIPINGO RIDGE LIMITED and Anor.**, Mombasa HC Misc. Civil Application No. 42 of 2011 of 30th March 2015, I found in the disputed fact of the existence of a road reserve a justification for allowing an application for cross-examination of a deponent of the Respondent's replying Affidavit filed in support of the Respondents' case as follows:

“Without there being a road reserve, the 2nd respondent's decision and threatened action would be irrational and unsupported by law unless it be a compulsory acquisition of private property which has not been suggested in this case. The fact of existence or otherwise of a road traversing the ex parte applicant's road is at the core of the suit herein as shown in the grounds upon which the relief is sought set out in the Statement filed in support of the application....Clearly, a finding of fact as to the question of the existence of the road is crucial for the determination of the judicial review proceedings herein and, in view of the diametrically opposed positions of the parties in that regard, there exists, in my view, exceptional circumstances as to justify the cross-examination of the deponents of the various affidavits on the matter.”

16. In an attempt to establish the positioning and existence of the road reserve as alleged by the Respondents, the Court made a visit to the suit properties and following on the decision of the Court of Appeal for Eastern Africa in **Mohamedali Premji Samji Boghani v. Rex** (1951) 18 EACA 152 on the procedure at visit by court to locus that –

“The object of a view is to enable a judge or jury in a difficult case to understand the evidence by an actual inspection of the terrain, it should not be made the occasion for carrying out investigations. In rare cases it may be that the Judge or Magistrate may think it essential that certain tests should be carried out to elucidate issues in doubt arising out of the nature of the terrain, in such cases the judge must be careful to see that such tests are conducted by persons who will be in a position to give evidence as to their nature and character on his return to the Court.”

the Court asked the parties' respective surveyors to make reports to the court and to have each respond to the other's report. Thereafter, the parties agreed to the adoption and admission of the Reports without calling their makers as witnesses.

17. The Court of Appeal in **Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another** [2015] eKLR of 12th day of March, 2015 approved the procedure of Court visit to the site in appropriate Judicial Review cases when it went on site visit itself, as observed in the Judgment, as follows:

“The initial site visit and subsequently ours revealed that the plot had increased in size due to reclamation works by the 1st respondent and that the part demarcated for a bridge landing was not the same as the portion negotiated in year 2002. The appellants are simply crying wolf. Besides, they had taken far too long to react on their perceived right based on the 2002 negotiations to declare that they had legitimate expectation. We would therefore agree with the finding of the High Court that legitimate expectation was not established.... [T]he trial court did

pay a visit to the site and made a finding that the area that the 2nd respondent was permitted to work on was not the same part of the plot destined for the appellants in 2002. This Court is bound by this finding of fact and should not interfere unless there are irrelevant facts considered or the relevant facts have been left out. See **Peter v Sunday Post Ltd.** [1958] EA 424. **This Court also had an opportunity to visit the site. However, it left there feeling that the exercise was futile and not worth the effort since there were deliberate efforts to mislead it by the parties. Each party and their advocates were out to hoodwink the court by stating and pointing out the landmass that supported their case. We would prefer to go by the position of the trial court since during the visit it was accompanied by professionals alongside the parties unlike us who had only the presence of the parties and their respective advocates.”**

18. During the site visit herein the court observed that a termination stump of the remnant of the old Nyali bridge was preserved on the suit plot and that a restaurant and two blocks of apartments in perpendicular relation and a car park occupied the suit plot, with a road access to the main road.

2. Can the Government without court order require title holder/registered proprietor of land to demolish buildings the land which it consider to a road reserve.

19. While the court does not pronounce on the right of the Government to require persons who have built on gazette road reserves, the inquiry herein is the right of the Government to require demolition, or to demolish in default, of structures built on a parcel of land claimed by Government to sit on road reserve but for which a private person has title deed as registered proprietor.

20. It is today accepted by numerous court decisions have that the Government through the Land registrar or Registrar of Titles had no power to revoke title lies with the court. See also **Kuria Greens v. Registrar of Titles and Anor.** [2011] eKLR (per Musinga, J. as the then was) and **Republic v. The Senior Registrar of Titles ex parte Brookside Court Ltd.,** [2012] eKLR per Warsame, J. (as he then was). In the High Court in **Emfill, (Republic v. The Registrar of Titles, Mombasa & 2 Ors ex Parte Emfill Ltd.,** [2012] eKLR) I held, and the Court of Appeal approved-

“For these reasons, I find that the government cannot revoke title to land even “for public need or interest” or for alleged illegality. The Government is obliged to move the Court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the Court in an appropriate case in making an order for cancellation of title or in authorizing, subject to due compensation, the compulsory acquisition or take-over of the private property.”

The Court of Appeal in **Emfil** also approved the High Court’s holding that the Land Registrar or the Government has no authority to revoke titles to land without recourse to the Court.

21. Moreover, it was long held in Court of Appeal decision in **GUSII MWALIMU INVESTMENT CO. LTD & 2 Others v MWALIMU HOTEL KISII LTD** [1996] eKLR – an unwilling trespasser To land is to be removed by court order. Shah JA in the lead judgment said:

“A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession. Even if I were to hold that the tenant was at the material times a trespasser and that it had not pleaded holding over I would not sanction a situation such as in this case, that is, obtaining possession without a court order.”

3. Role and impact of public interest in disputes between the Government and private Parties

22. Public interest considerations and its limits. The **Emfil** appeal Court discussed the impact of public interest in litigation as follows:

“27. On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively, if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the Constitution and the Land Acquisition Act to acquire the land. The Government chose to follow none of these processes but acted in clear violation of the law. It is in public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the Court with judicial power. The remedy of judicial review of administrative action is intended to check excesses of power to ensure that the rule of law prevails.”

23. The public interest that private person registered as proprietors of land should enjoy their rights as such unless fraud in acquisition of title is proved to the required standard. I so held in a recent case, MOMBASA HC J.R. No. 36 OF 2012, **Republic v. The Land Registrar, Taita Taveta and Anor.** of 13th March 2015 and observed that:

“34. The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:

“26. **Certificate of title to be held as conclusive evidence of proprietorship**

(1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) on the ground of fraud or misrepresentation to which the person is

proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

3.5 Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a), of the Land registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised, acquire the suit property for the purposes of use by the public school, the Interested Party herein.”

24. The respondents have a just motivation in public interest to build a bridge and on the other hand the applicants as registered proprietor of the suit property have a public interest protection for enjoyment of their parcel of land unless it can be shown that their title is tainted with illegality and fraud in which they are implicated.

4. Can the judicial review Court take cognizance of fraud in decision to grant the relief.

25. The principle of Scott v. Brown. The Court should not enforce an illegality is a principle of judicial

policy which has been well taken by courts, and I should not hesitate to apply it in any case where the illegality is proved. I agree with the principle enunciated by Lindley, L. J. in **Scott v. Brown, Doering, McNab and Co.**, (1892) 2 QB 724, quoted in (*R v. The Commissioner for Lands ex p. Somken Petroleum Company Ltd.* Nairobi HC Misc. Appl. 807 of 2004) 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 plaintiff proves the illegality, the Court will not assist him."

26. However, as fraud is a serious matter which requires proof on a standard higher than the civil standard of balance of probabilities, the court must require such a high degree of proof before acting on allegations of fraud. In **Republic v. The Land Registrar, Taita Taveta and Anor., supra**, I pointed out that

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

27. The determination of the question of proof of fraud must be made in appropriate proceedings because as the Court of Appeal held **Commissioner of Land v. Kunste Hotel Ltd.**, it is trite that in Judicial Review, the Court does not deal with the merits of the case but only process of administrative decision making:—

*"Judicial review is not concerned with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected (**Republic v. Secretary of State for education and Science ex parte Avon County Council** [1991] 1 ALL ER 282 and **Chief Constable of the North Wales Police v. Evans** [1982] 1 WLR 1155 adopted)."*

FINDINGS

28. There is no dispute that the Ex-parte Applicant is the registered proprietor of the suit property, only allegations of fraudulent dealings in the creation of the parcel of land were made on the basis that the property had been preserved for use as a road. Subject to proof of fraud the the Ex-parte Applicant is entitled to the rights of a registered proprietor in accordance with section 26 of the Land Registration Act cited above. The Government Lands Act therefore, does not apply to the suit property.

29. Even if the Government Lands Act applied - according to the Respondents' submissions that **"Section 85 of the Government Land Act protects proclaimed and reserved roads, thoroughfares and out spans and stipulates that they shall remain free and uninterrupted unless closed and altered by a competent authority"** - there must be conclusive evidence that the suit parcel of land had been reserved as a road and legally registered as such by appropriate surrender to the Government and gazettelement as reserved for such public purposes. Other than conjecture that because of the positioning of the plot on the Survey Maps and Plans and in relation to adjacent plots it must have been reserved for use as a road, there was no concrete evidence of the reservation of the plot as such and there was no evidence of its fraudulent creation, as alleged by the 1st Respondent.

30. The Final Reports of the Parties' Surveyors upon the site visit and after exchange of individual initial reports left the matter wide open as to a determination of whether the plot existed as a road reserve.

SURVEY REPORT

1. As a bridge existed between Nyali and Mombasa Island, there had to be a road on either side to access the bridge. However, this does not follow that the road passed over a Government road reserve. Survey plan FR 41/98 (surveyed in July 1933) and accepted by the survey Director of surveys in June 1994), and which has been relied on by the Kenya Roads Authority shows DP (deed plan) 33560 entered against plot 4/6. In general road reserves are not given plot numbers, so one would conclude that the access road to the bridge passing over plot 4/6 was privately owned.

2. Survey Plan FR 41/98

The above plan indeed shows the road network to serve the various sub-divisions of original plot MN/1/4. This plan also shows the access to the bridge. However, the dotted line drawn on that plan between beacons Int and 5B indicates that there was an intention to separate what became MN/1/6 from the rest of the road reserves serving the subdivisions.

The access road between plots 1755 and 756 which is shown on the plan served plots 755, 4/2A and 4/4A all of which belong to the Tamarind group, as does plot MN/1/6, and in fact, a proposed consolidation of MN/1/445, 4/6, 4/4A, 444 and 755 was approved by the District Land Officer vide his letter ref. 210 dated 7/2/90/ (copy attached).

3. Surey Plan FR 180/171

All plot numbers are entered on survey plans by Director of Surveys. The number MN/1/6/4 on FR 180/171 is clearly an error by the survey department. The number 4 and 6 have been interchanged. It an be seen clearly by the shape and position on the plan that this plot is 4/6.

FR 180/171 was a survey done using FR 41/98 as datum to demarcate the extent of plot MN/1/4/ as per deed plant No. 33590 which is the plan that backs the title issued for plot MN/1/4/6. The survey was accepted as a re-survey of MN/1/4/6 by Director of surveys and it was authenticated by him.

4. Deed Plan No. 33590

Deed plan 33590 was issued on 3rd December 1934.

Survey plan FR 41/98 was produced on 22nd July 1933.

The fact that a dotted line exists between beacons Int and 5B indicates the intent to excise the portion that is labelled 4/6 thereon, and it is reasonable to assume that this survey plan is indeed the basis on which the deed plant 33590 was produced.

Dated at Mombasa this 13th day of February 2014.

HIME AND ZIMMERLIN LICENSED SURVEYORS

31. For the 1st respondent, the surveyor emphasized alleged fraudulent creation of the suit property as follows:

IMPORTANT ISSUES TO BE NOTED

- F/R 41/98 is a survey plan for subdivision of parcel Nos. 725-833. (**See notes on survey plan**). There is clear cancellations of all other surveys therein except the ones captured

above for subdivision of MN/1/4. Clearly therefore **MN/1/4/6 cannot part of the subdivision** as purported.

- *Then the next important question would be, if at all Deed Plan No. 33590 issued on 3rd December, 1934, from what Survey Plan was it extracted from and what was the basis for its issuance? If the datum for its issuance was F/R 41/98, indeed a deed plan could not have been issued by then on the basis of an intention to survey as proposed but instead it must be supported by executed approved and authenticated survey that is not in record so far.*
- *Deed plan No. 33590 beacon names captured as A, B, C.D.E, F, G, H have no relationship with any survey plan beacon names in record. It neither reflects beacon names from either **FR 41/98 or FR 180/171**. so what is the source of this survey since there is no beacon names to comply with **FR 41/98 or FR 180/171**?*
- *Why are truncations at 5C and at 2Int (normally surrender (s) as road reserve) reversed to form part of a plot, vide 4/6. Is there evidence to this effect? Contrary, on the same survey plan F/R 41/98, truncations on roads are intact and left as road surrenders.*
- *What became of dotted line along Nyali road as marked by III, IV, V, VI, collinear to the Nyali Bridge in survey plan FR 41/98? If the dotted line theory advanced by Tamarind Ltd that the dots connote an intention to separate, is to be believed, then that would mean even the whole of Nyali road fall on this category, which theory is not true since these are always road surrenders for public use after survey.*

In sum the purported survey and deed plan produced by Tamarind Ltd in support of their supposed ownership of what is essentially a road reserve do not find support in surveying practice or even plain conventional wisdom and logic, and cannot therefore be relied upon to defeat public interest. Critically looked these survey and deed plan betray their fraudulent conception and intent.

Dated at Nairobi this 19th day of February, 2014.

Francis M. Kiminza

Manager Survey

KENYA URBAN ROADS AUTHORITY

32. The Provincial Surveyor who visited the site and was supposed to do a joint survey report with the surveyor for the 1st Respondent did not sign the initial report in support of the 1st Respondent's case and he was not a signatory to the response of 19th 2014. The Provincial Surveyor as the local representative of the Director of Surveys is expected to be the custodian of all government maps and plans relating to his particular region. Without his confirmation of the position with respect to the status of the suit property and the lack of material on any consequent surrender of the suit plot by its private owner to the Government for use as a road and registration and gazettelement of the same therefore as a road reserve, there cannot be a basis for declaration of the suit parcel of land as a road reserve.

33. The diametrically opposed views of the two professional surveyors for the applicant and the 1st respondent, as shown above, indicates the lack of unanimity in the understanding of the status of the parcel of land, and the lack of *independent* confirmation of the 2nd respondent's surveyor did not help the matters. In these circumstances, I am unable to accept the submission by counsel for the respondents that

—

“The map shows area marked ‘4/R’. The 4/R is a road reserve. It is true that the bridge was a

private bridge but to facilitate the bridge the Government created a road reserve. The 4/R remains the property of the Government after the bridge was demolished. There is procedure for conversion of a road reserve into private property. The notice to vacate the land which is a road reserve. The land belonged to the Government so there is no question of compulsory acquisition as the Government is only taking what belongs to it.”

As observed by the ex parte applicant’s submissions, that there was a bridge necessitated an access road on both sides of the bridge, that fact alone did not make the road access a public road reserve. There must be registration and gazettelement of the road as a road reserve. It was not a question, as put by the Counsel for the respondents, of conversion of a road into a private parcel of land but of surrender by the applicant’s predecessor of their parcel of land to the Government as a road reserve. Such a disposal of the private property ought to be supported by cogent evidence of surrender and registration of the suit property as a road reserve. With respect, no such evidence was availed.

34. On the basis of the evidence presented before the Court, it was not possible to find that the suit parcel of land was a road reserve or that the creation of the parcel was fraudulent. There was singularly no evidence of fraud, as opposed to generalized assumptions or suspicions, thereof was presented. Fraud must be proved to a standard higher than the civil standard of proof on a balance of probabilities. Accordingly, the Court, though always poised to act on evidence of fraud or illegality, in accordance with the principle of **Scott v. Brown**, supra, has no basis for invocation of the principle in this suit.

CONCLUSION

35. The Government has a public interest justification, and a legitimate and noble object in building a second bridge to offer alternative linkage between Mombasa Island to the mainland in event that the only existing Nyali bridge is for any reason impassable. In the pursuit of this object, the Government is entitled to seek to take over the piece of land the subject of this judicial review proceedings where there once was established the old private bridge owned and run by Nyali Limited, the predecessors in title to the ex parte applicant. However, the Respondents have not conclusively established, and in any event this court is not equipped to investigate and make a finding, that the suit parcel of land variously shown on maps as ‘4/R’ and ‘4/6’ is on a road reserve as no endorsements on title or gazettelement of such setting apart was made in respect to the parcel of land. The Government has no authority to unilaterally revoke titles to land and or to require title holder/registered proprietors to vacate their private property, save in accordance with the constitutional process of compulsory acquisition under the Land Acquisition Act. Accordingly, while the Court approves the public interest object of the Government in the construction of the adjunct second bridge for Mombasa Island, the public interest requirement for observance of the Rule of Law calls for the due process in acquisition of the private property and payment of due compensation. Of course, having regard to the developments on the suit property, adequate period of time for the ex parte applicant to relocate its development upon acquisition would be necessary, pursuant to the principle of fair administrative action.

ORDER

36. Accordingly, for the reasons set out above, Judicial Review Orders of Certiorari, Mandamus and Prohibition will issue as prayed.

37. In view of the public interest aspect of the matter, which the Respondents sought to address, apparently *bona fides*, the court in discretion considers that each party should bear its own costs of the suit. There shall, therefore, be no order as to Costs.

DATED AND DELIVERED THIS 21ST DAY OF APRIL 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Odhiambo for the Ex Parte Applicant

Miss Karuiki for Miss Lutta for the Respondents

Ms. Linda - Court Assistant.