



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW MISC. CAUSE NO. 11 OF 2008

IN THE MATTER OF: AN APPLICATION BY MWAI LIMITED,

JAMES MATHENGE MWAI, GRACE GACHEKE MWAI AND CATHERINE WANGUI MUIGAI

(as Administrator of the estate of ISIAAH MWAI MATHENGE AND SIMON NYAGA MATHENGE)

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT (CAP 281 LAWS OF KENYA)

THE RATING ACT (CAP 267 LAWS OF KENYA)

AND

1. MWAI LIMITED JAMES MATHENGE MWAI, GRACE GACHEKE MWAI AND

CATHERINE WANGUI MUIGAI as Administrator of the Estate of

2. ISIAAH MWAI MATHENGE

3. SIMON NYAGA MATHENGE.....APPLICANTS

VERSUS

1. MUNICIPAL COUNCIL OF MOMBASA G.K. MEENYA & M.N. KIRIMA T/A

2. MEENYE KIRIMA ADVOCATES

3. MOUNT HOLDINGS LIMITED

4. THE HONOURABLE ATTORNEY GENERAL

5. CHIEF MAGISTRATE'S COURT MOMBASA

6. REGISTRAR OF TITLE MOMBASA.....RESPONDENTS

RULING

1. Pursuant to leave granted on 22nd May, 2008, the *ex-parte* Applicants filed on 6th June, 2008, a Notice of Motion of even dated (the Application) and sought the following orders:-

“(a) **THAT** an order of certiorari do issue removing into the High Court for purposes of quashing the decision of the Mombasa Chief Magistrate’s Court in Civil Case No. 362 of 2007 delivered and dated the 12th February, 2008 vesting the title to L.R. No. Mombasa/VI/Mainland/911 and Mombasa/VI Mainland/2960 in favour of the Third Respondent herein, Mount Holdings Limited.

(b) **THAT** an order of certiorari do issue removing into the High court for purposes of quashing and/ or cancellation of the purported public auction of 17th January, 2008 wherein the 3rd Respondent was declared the purchaser to L.R. No. MOMBASA/VI/MN/911 and Mombasa/ VI/MN/2960 respectively.

(c) **THAT** an order of certiorari do issue removing into the High Court for purposes of quashing the decision of the Mombasa Chief Magistrate’s Court in Civil Case No. 362 of 2007 delivered on 19th March, 2008 directing the Senior Registrar of Titles, Mombasa (6th Respondent) to open skeleton files in respect of Titles Numbers Mombasa/VI/MN/911 and Mombasa/VI/MN/2960 and issue the purchaser of both properties namely MOUNT HOLDINGS LIMITED with provisional certificates of title to both properties forthwith without having to advertise the same in the Kenya Gazette.

(d) **THAT** an order of certiorari do issue removing into the High Court for purposes of quashing the decision of the Mombasa Chief Magistrate’s Court in Civil Case No. 362 of 2007 delivered on the 28th March, 2008 ordering the court bailiff Mombasa to remove any squatters or any other persons in possession of the subject property namely L.R. No. MOMBASA/VI/MN/911 and Mombasa/VI Mainland/VI/MN/2960 and do put the purchaser Mount Holdings Limited into possession.

(e) **THAT** an order of certiorari do issue removing into the High Court for purposes of quashing and or cancellation of the provisional certificate of title No. C.R. 7361 issued by the 6th Respondent on the 20th March, 2008 and also cancellation of provisional certificate of title No. C.R. 2703 issued by the 6th Respondent on the 20th March, 2008.

(f) **THAT** costs of this application be borne by the Respondents.”

2. The Application was supported by the Statement of Facts and the Affidavit Verifying the Facts attached to the Chamber Summons (the application for leave) dated 15th May, 2008, and the grounds set out in the Notice of Motion aforesaid reiterating the Statement of Facts. To understand the **fons et origo** of the Application herein it is necessary to describe both the parties herein, and their roles in relation to the matters antecedent to the Application.

THE PARTIES

3. The First Applicant is by virtue of its name, a limited liability company, and is described in the Plaint, in Mombasa CMCC No. 362 of 2007, (the civil suit) as the registered owner of the parcel of land known as Mombasa/VI/MN/911. The Second Applicants are the administrators of the Estate of the late Isaiah Mwai Mathenge by virtue of a Grant of Letters of Administration made to them at High Court Nyeri Succession Cause No. 380 of 2006 of 29th November, 2006. The late Isaiah Mwai Mathenge was the registered owner of the parcel of land known as Mombasa/VI/MN/2960, and together with one Simion Nyaga Mathenge, were owners of the parcel of land known as Mombasa Block XX/40.

4. The First Respondent, is the rating authority under the Rating Act, (Cap 267, Laws of Kenya), and is purported to have claimed in the civil suit rate arrears of Kshs. 23,540,921/40 from the persons under whom the Applicants claim.

5. The Second and Third Respondents are respectively a firm of Advocates and a private limited liability company. These parties are erroneously called “*Respondents*” though they may have issues to respond to, the primary focus in judicial review is against the decision-maker(s). Because the decision in judicial review may affect the rights of third parties such as the Second and third “*Respondents*” in this case, they are enjoined under Order 53, rule 3(2) as persons who “*shall be directly affected*” with the ultimate decision of the judicial review court. Their proper appellation in our practice is to call, or refer to them in the proceedings, as “*Interested Parties*”. [I notice that under Rules of Supreme Court of England 2002 they are referred to as Respondents]. To avoid confusion I shall refer to them as Second and Third Respondents. The Attorney- General is enjoined as a Respondent merely by virtue of being the principal legal advisor to the true Respondents, the Fifth and Sixth Respondents whose actions and decisions are being questioned in the Judicial Review Application. Having laid down the position of each of the parties, I now turn to the respective claims, starting with that of the Applicants.

THE APPLICANTS’ CASE

The Applicants case may be divided into two parts, the determination of Mombasa CMCC No. 762 of 2007 and the process thereafter.

6. Firstly, the Applicants contend that they were condemned unheard in Mombasa CMCC No. 362 of 2007 because the Affidavit of Service by the Process Server sworn on 8th May, 2007 was sent by registered post to among others, Isaiah Mwai Mathenge the Second Defendant in the said suit who was already deceased by the time the suit was filed. The said Third Defendant in whose names the suit properties were registered had died in Nyeri on 18th January, 2006. The First Respondent could not therefore sue a deceased person. As for the First Defendant (Mwai Limited), service is required under Order 5 rule 3 of the Civil Procedure Rules to its secretary, Director or other principal officer of the corporation, or leaving process at its registered address and not merely a postal address; and that the interlocutory Judgment was entered on the basis of an irregular affidavit of service.

7. Secondly, by an Application dated 25th April, 2007, and heard on 26th April, 2007, the Applicants were granted a stay of execution of the interlocutory Judgment pending the hearing of that application on 9th May, 2007. However by a consent letter dated 30th April, 2007, between counsel for the Applicants and the Second Interested Party, (Respondent) the hearing date for the said application was adjourned to 8th June, 2008 and orders against execution were extended accordingly.

8. Thirdly, in the meantime, the First Respondent obtained approval for waiver of the interest on rates and the Applicants paid the rates for the suit properties and obtained clearance certificates therefor on 2nd November, 2007 in respect of the suit properties (Mombasa/VI/MN/911 and Mombasa/VI/MN/2960).

9. Fourthly notwithstanding that the Applicants had settled the rate arrears the Second Respondent went ahead and had the Applicants’ application fixed for hearing on 13th day of December, 2007 at 9.00 a.m. and sent a Hearing Notice to the Applicants’ Advocates dated 5th December, 2007, and had the Applicants’ application of 25th April, 2007 dismissed.

10. Fifth since the Applicants had cleared the rates by 2nd November, 2007, and even if the alleged sale by public auction had taken place by 17th January, 2008, any vesting order made subsequent to the 2nd November, 2007 was both fraudulent and in bad faith.

11. Sixth, in perpetuating that fraud, the Second Interested Party (Respondent) filed an application before the 5th Respondent purporting that the subject files on suit properties were missing and sought orders for creation of provisional certificates.

12. **Seventh**, in perpetuation of that fraud, the Sixth Respondent by letter dated 7th March, 2008 purported to confirm to the Second Interested Party that the subject files were missing, and that Provisional Certificates ought to be issued.

13. **Eighth**, the Second Interested Party (Respondent) and Fifth Respondent irregularly and fraudulently went ahead and allowed the application for creation of a provisional certificate, *ex parte*, without service upon the Applicants.

14. **Ninth**, the Fifth Respondent without jurisdiction to deal with matters of title under the Registration of Titles Act, (Cap 281, Laws of Kenya) purported to issue orders allowing the creation of Provisional Title.

15. **Tenth**, the Vesting Orders made pursuant to the Second Interested Party's application dated 14th March, 2008 were made *ex parte*, without Notice to the Applicants, contrary to the rules of natural justice, and without any instructions from the First Respondent.

16. **Eleventh**, by an application dated 28th March, 2008 the Second Respondent (Interested Party), without instructions from the First Respondent (Interested Party) and without serving it upon the Applicants obtained *ex parte* mandatory orders against the Applicants, without affording them an opportunity to be heard.

17. **Twelfth**, the Second Respondent (Interested Party) acted in conflict of interest to represent the Third Respondent (Interested Party) while being or purportedly to be on record for the First Respondent.

18. **Thirteenth**, the 5th Respondent exceeded its jurisdiction by granting an order for issue of a Provisional certificate of Title, granting a Vesting Order and granting a mandatory injunction contrary to the Registration of Titles Act which reserves issues of title to be dealt with by the High Court, and contrary to the rules of natural justice and denying the Applicants an opportunity to be heard.

THE FIRST RESPONDENT'S CASE

19. The essence of the First Respondent's case is set out in the Replying Affidavit of Tubman Otieno sworn on 3rd September, 2008 and filed on 31st October, 2008. The First Respondent avers on oath that it never did at any time procure or seek the services of the firm of Meenye Kirima Advocates, the Second Respondent (Interested Party) nor did it instruct any of the said firm's partners either directly or indirectly to act on its behalf with respect to the civil suit, (Mombasa CMCC No. 362 of 2007) or any other matter. The deponent explains in paragraphs 4, 5 and 6 of the Replying Affidavit that it advertised the tenders in respect of Legal Services for the year 2007/2008 and carried the procurement exercise in accordance with the provisions of the Public Procurement and Disposal Act 2005 (No. 3 of 2005) and the Second Respondent/Interested Party's firm did not apply, and it was therefore not selected nor awarded a contract for said services.

20. The First Respondent therefore contends that to the extent the Second Respondent purported to act for the First Respondent without legal authority of the First Respondent in accordance with the Local Government Act (Cap 265, Laws of Kenya), all the transactions and all pleadings filed by the Second Respondent/ Interested Party should be pronounced and held to be null and void and of no legal effect in law.

21. The First Respondent acknowledges that it advertised for and appointed the company known as Geographical Information Services Systems (G.I.S.) Limited to specifically facilitate and streamline the collection of revenue of the First Respondent by providing technical assistance especially in the realm of collecting, collating and maintaining data through a system called Global Positioning System (GPS). The First Respondent however contends that the said agreement did not confer upon **G.I.S.** the mandate and/or authority to source for an Advocate or legal counsel for and on behalf of the First Respondent, as that would be contrary to the provisions of the Local Government Act aforesaid.

22. Being of that view, the First Respondent published a disclaimer in the local Daily Newspapers of 1st February, 2008 informing rate payers that it did not engage the services of the Second Respondent/Interested Party. This deponent also contended that the fact that some of its junior employees colluded with the Second Respondent/Interested Party and misinformed and misled his successor **ROBA DUBA** (then in-Coming Town Clerk) into believing that the Second Respondent/Interested Party was acting within its mandate and caused the said Town Clerk to append his signature to some court documents, did **not** give legitimacy to the said Second Respondent/Interested Party's filing suit against the Applicants.

23. The deponent further contends that even if such appointment had been ratified, the Applicants had already cleared their rates by the time the purported auction was conducted, and that the said auction was therefore out of order and was held in **bad faith**.

24. The deponent also contended that proceeds of the purported auction have never been forwarded to the First Respondent and that no proper accounting to it has ever been made by the Second Respondent/Interested Party or its agents.

THE SECOND RESPONDENT'S CASE

25. Though the Second Respondent neither filed a Memorandum of Appearance nor took any part in these proceedings, it is however its actions that led to Third Respondent's/Interested Party's purported purchase of the suit properties.

26. The Second Respondent's answer to the Application and to the first Respondent's case is to be implied and found in a letter dated 23rd January, 2006 (Ref. No. 1512) by GEOMAS (Geoinformation Services) to the Second Respondent as Advocates to:

“undertake the recovery of outstanding arrears of rates on the ground that it (Geomas) had as lead consultant the authority of the First Respondent to hire professionals to undertake the technical aspects of the exercise.”

27. The question whether or not the contract between the First Respondent and Geomas allowed the consultant to hire Advocates as technical personnel is not however an issue to be answered in these proceedings.

THE THIRD RESPONDENT'S CASE

28. The Third Respondent on its part through the Replying Affidavit of Ashok Doshi sworn on 26th November, 2014 contends that the court erred in granting leave to institute judicial review proceedings for an order of certiorari against it as a private company and yet the court is not seized of jurisdiction to restrain the Third Respondent/Interested Party by way of judicial review.

29. The Third Respondent also objected to an order of prohibition being sought in the substantive Notice of Motion as it was neither sought nor granted at the leave stage.

30. The Third Respondent therefore claims that it is an innocent purchaser for value without notice, at a public auction and devoid of any shenanigans that have bedevilled the proceedings in Mombasa CMCC No. 362 of 2007

“and that the court should strive to protect its interest at every turn.”

31. The Third Respondent therefore sought an order of dismissal of the Notice of Motion with costs to it.

THE SUBMISSIONS

32. Pursuant to orders of court, counsel for the Applicants, the First Respondent and Third Respondents

filed their respective written submissions and lists of authorities on 2nd March, 2015 and list of authorities on 26th February, 2015 for the First Respondent, 23rd March, 2015 for the Third Respondent, and the First Respondent also filed its submissions on 23rd March, 2015.

33. Before considering the respective submissions I will highlight albeit briefly the basis or foundations of the orders of certiorari. No prayer for an order of prohibition was sought as claimed by the Third Respondent and is not in issue.

34. Judicial precedents are agreed that judicial review is concerned not with the merits of the case but with the decision-making process. **Republic vs. Kenya Revenue Authority, ex parte Yaya Towers Limited [2008] eKLR.**

35. The grounds upon which the court exercises its judicial review jurisdiction have been restated in many cases. For instance in **REPUBLIC VS. THE CHIEF MAGISTRATE & 2 OTHERS, ex parte Michael W. Mwangi & 3 others [2004] eKLR**, the court cited with approval, the cases of **Re an APPLICATION by BUKOBA GYMKHANA CLUB [1963] E.A. 439**, **COUNCIL OF CIVIL SERVANTS UNIONS VS. MINISTER FOR THE CIVIL SERVICE [1985] AC2**, and **PASTOR VS. KABAWE DISTRICT LOCAL GOVERNMENT & OTHERS [2008] E.A. 300**, where the court *inter alia* 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. It is for example an illegality where a Chief Administrative Officer or a District Administrator (officer) interdicts a public servant on the directions of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission. Irrationality is when there is gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision is normally in defiance of logic. Procedural irregularity is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice, or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

36. This listing, is not exhaustive as it was acknowledged by Nyamu J in **REPUBLIC VS. THE COMMISSIONER OF LANDS,ex parte Lake Flowers Limited (Nairobi HCMisc. Application No. 1235 of 1998)** where the learned Judge said:-

“...Availability of other remedies is no bar to the granting of the judicial review relief, but can be an important factor in exercising the discretion whether or not to grant the relief... Although judicial review has been bequeathed to us with defined interventions namely, illegality, irrationality and impropriety of procedure, the intervention has been extended using the principle of proportionality. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations, in decision-making or take into account irrelevant considerations or act contrary to legitimate expectation,judicial review is a tool of justice which can be made to serve the needs of a growing society on a case-by case basis.....”

37. Following the same narrative of expansive judicial review jurisdiction, in **KURIA & 3 OTHERS VS. ATTORNEY GENERAL [2002] 2KLR**, the court rendered itself as follows:-

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good

governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligations to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions. ...This therefore implies that the limits of judicial review should not be curtailed, but rather be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the applications for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach than envisaged in civil law.”

38. Likewise in **Re: BIVAC INTERNATIONAL S.A. (Bureau Veritas) [2005], EA.A., 43**, the court compared the growth of judicial review to the Biblical “mustard seed” –

“which a man took and sowed in his field which is the smallest of all seeds but when it grew up, it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches of illegality, irrationality, impropriety of procedure (the “3 i’s”) and has become the most powerful enforcer of constitutionalism, promoter of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **DONOGHUE VS. STEVENSON [1932] ALL ER 1, (1932) AC (562) of the last century.**

39. Having set out the scope of judicial review I will now deal with the issues of **locus standi**, the illegality of the decision by the 5th and 6th Respondents, the question of legitimate expectation by the applicants, abuse of the rules of natural justice and abuse of the court process and the consequences thereof, and final orders.

OF WHETHER THE APPLICANTS HAVE LOCUS STANDI

40. The first *ex parte* Applicant, MWAI LIMITED is described as a limited liability company duly incorporated under the Companies Act, (Cap 486, Laws of Kenya). It brings the actions as a Rates payer and registered proprietor of LR No. Mombasa/VI/MN/911 before the actions of the Second, Third and Sixth Respondents being impugned in these proceedings, purport and do deprive it of suit property.

41. The Second Applicants Grace Gacheke Mwai and Catherine Wangui Muigai are the Administrators of the Estate of Isaiah Mwai Mathenge who was the registered proprietor of the parcel of land known as LR No. Mombasa/VI/MN/2960. The Third Applicant is the registered proprietor of the parcel of land known as Title Number Mombasa/Block 20/40 jointly with the late Isaiah Mathenge and that the rates of this plot were settled by a consent Judgment in Mombasa HCCC No. 147 of 2009 paid in full, and is not in dispute in these proceedings.

42. The question of **locus standi**, is now settled in this country, and cannot be a subject of dispute in these proceedings. But if there was any doubt, (in 1976) about thirty four years before the promulgation of the Constitution of Kenya, 2010, Lord Denning in **REGINA (R) VS. GREATER LONDON COUNCIL ex parte Blackburn [1976] 3 ALL ER 184**, said –

“I regard it a matter of high constitutional principle that if there is a good ground for supposing that a Government Department or public authority is transgressing the law, is about to transgress it in a way that affects and injures thousands of her Majesty’s subjects, then anyone of those subjects or injured can draw it to the attention of the court of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate.”

43. In this regard, I adopt and endorse the view eloquently expressed by Muriithi J in **Republic vs. County Government of Mombasa, ex parte Outdoor Advertising Association of Kenya [2014] eKLR** where the learned Judge said:-

“On locus standi, as a constitutional principle of public law and for promotion of access to justice, the law makes generous provisions on standing over and above personal standing interest in interest of enforcement of public law duties. That is clear from Articles 22 and 258 of the Constitution of Kenya. The Constitution thus recognizes the right of association to litigate questions of fundamental human rights, and interpretation of the Constitution on behalf of its members. It should not matter that such questions of fundamental rights or interpretation of the Constitution arise in judicial review proceedings. In these proceedings, the issue of the *ex parte* applicant’s constitutional right to fair administrative action is at the centre of its claim on legitimate expectation and right of being heard before the impugned decisions were taken.”

44. Any contrary view on the question of **locus standi** has neither constitutional nor common law basis, and is of no avail to the Third Respondent.

OF WHETHER THE DECISION OF THE FIFTH RESPONDENTS WAS ILLEGAL

45. The Applicants acknowledge that they are the registered and ratable owners of the subject suit property, and also acknowledge the jurisdiction of the subordinate court in terms of section 17(1) of the Rating Act (Cap 267. Laws of Kenya) and Judgment for the First Defendant in the sum of Kshs. 23,540,821.40. The Applicants also acknowledge the discretion of the Fifth Respondent to dismiss an application for non attendance. The Applicants however contend that it was illegal for the Second Respondent to instruct an auctioneer to conduct a public auction on 17th January, 2008. The Second Respondent also moved the subordinate court *ex parte* when it made orders declaring the auction absolute and vested the suit property to the Third Respondent. The Applicants contend that the Second, Third, Fourth, Fifth and Sixth Respondents actions were totally Illegal, irrational and procedurally improper and **ultra vires** to section 17(1) of the Rating Act which provides:-

“17(1) – (5)

(6) A decree granted by a subordinate court in favour of the rating authority plaintiff under this section may be enforced by any mode of execution authorized under any rule under the Civil Procedure Act, and if any sum due under the decree is secured by a charge on the land by virtue of section 19, the Decree Holder may apply to the High Court by Originating Summons to order the sale of such land in enforcement of such charge, and the High court may make such order directing the sale of such land subject to such conditions with all such directions usual to the nature of such summons.

And section 19 of the Rating Act provides:-

“19. Any rates due together with interest thereon calculated in accordance with section 16 shall be a charge against the land on which the rates were levied and where the title to such land is registered under any law relating to the registration of title to land, the rating authority may deliver a notification of such charge to the Registrar who shall register it against the title to that land, and the charge shall take priority in accordance with the law.”

46. The suit property was registered under the Registration of Titles Act (Cap 281, Laws of Kenya), and the decree having been obtained, the First Respondent’s obligation was to have the decree for rates registered against the title, and upon any sale the rating authority’s charge for rates, would take priority over any other claim(s).

47. The proviso to section 71 of the Registration of Titles Act which donates to the Registrar (of Titles), power to issue Provisional Certificates of Titles on grounds inter alia of loss of original title, provides that

at least ninety (90) days notice in the Gazette be given of his intention to issue a provisional certificate.

48. In this case, the Registrar, the Sixth Respondent does not give loss of original title as reason for the issue of the Provisional Certificate, but rather an order of court **“extinguishing the original title”**. For an order of court to extinguish title or right of a previous owner, the court must be competent or have jurisdiction or is subject of a compulsory acquisition under Article 40(3) of the Constitution. For acquisition under Articles 40 of the Constitution, there must be due process prescribed by the Constitution for extinction of title by an order of court, the court must have jurisdiction. Jurisdiction is conferred by the Constitution or statute. The Registration of Titles Act, (now repealed) did not confer upon the subordinate court, the Fifth Respondent jurisdiction to make order vesting the suit property upon the Third Respondent or any other party, neither did the Fifth Respondent have jurisdiction to order the Registrar of Titles, the Sixth Respondent to issue Provisional Certificate of Title, and consequently the Registrar of Titles had no power to issue such a certificate upon orders that were patently illegal, and therefore null and void.

OF WHETHER THE THIRD RESPONDENT WAS AN INNOCENT PURCHASER FOR VALUE WITHOUT NOTICE

49. **Firstly**, every person is presumed to know the law that is the injunction of section 7 of the Penal Code (Cap 63, Laws of Kenya):-

“7. Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.”

“8. A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by him with respect to the property was done in an honest claim or right and without intentions to defraud.”

50. **Secondly**, who is a purchaser for value without notice. In American jurisprudence, according to **Black’s Law Dictionary**, he is referred to as a **“bona fide purchaser, one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects or infirmities, claims, or equities against the seller’s title, he is one who has in good faith (bona fide), paid valuable consideration for property without notice of prior adverse claims.”**

51. Generally, a bona fide purchaser for value is not affected by the transferor’s fraud against a third party and has a superior right to the property as against the transferor’s creditor to the extent of the consideration that the purchaser has paid. In short a purchaser for value is also referred to as:-

“a bona fide purchaser for value, good faith purchaser, purchaser in good faith, an innocent purchaser for value.”

52. Notice is either express, actual, or constructive. **Actual notice** is where notice is given directly to, or received personally by a party. **Constructive Notice** is notice arising from presumption of the law, from existence of facts and circumstances that a party had a duty to take notice of, such as a registered title, or a pending law suit, it is a notice presumed by law to have been acquired by a person, and is thus imputed to that person.

53. The question which therefore begs an answer is whether the Third Respondent herein was a bona fide or innocent purchaser for value and without notice? With profound respect to the Third Respondent’s director’s protestations, the Third Respondent was not an innocent purchaser, without notice or for value. These are my reasons.

54. **Firstly**, there was the First Respondent’s advertisement in the Daily Nation of 24th October, 2007 inviting rate payers to take advantage of a waiver of interest period to pay all outstanding rates. Though the advertisement was directed at rate payers, it also served as general information. The Third

Respondent ought to have inquired from the First Respondent whether the owners of the suit properties had taken advantage of the waiver and paid their rates. As a purchaser for value it ought to have sought confirmation from the First Respondent. It did not.

55. **Secondly**, the First Respondent also advertised in the Daily Nation of 4th February, 2008 informing the public that they did not engage the services of the Second Respondent in Mombasa CMCC No. 362 of 2007 amongst others and would not take liability for his actions. The Third Respondent was aware of this information.

56. **Thirdly**, contrary to the ethics of the legal profession on the part of the Second Respondent, and good business sense on the part of the Third Respondent, the Third Respondent engaged the services of the same counsel in filing applications on 8th February, 2008, and for Vesting Orders made on 12th February, 2008, without any Gazette Notice as required by proviso to section 71 of the Registration of Titles Act.

57. **Fourthly**, the Vesting Order alleged that the auction price of parcel No. Mombasa/VI/MN/911 was Kshs. 11,400,000/= and parcel No. Mombasa/VI/MN/2960 was Kshs. 7,600,000/= totaling Kshs. 19,000,000/=, the Third Respondent has not indicated in his Replying Affidavit that the said sums of money were paid to the First Respondent or how and where they were allegedly paid.

58. **Fifth**, the Third Respondent's Director's affidavit does not say where, how, and by whom the purported auction was conducted. It leads this court to conclude that the purported auction was merely a "*paper auction*" where the Second Respondent and Third Respondent or their agents merely exchanged an "*auction*" and "*sale*" papers.

59. **Sixth**, in light of all the facts and circumstances it behoved the Third Respondent to have made inquiries **first** as to whether the owners of the subject properties had taken advantage of the waiver of interest and paid the due rates, whether indeed the First Respondent had not given any instruction to the Second Respondent to institute Mombasa CMCC No. 362 of 2007. It could neither assume these matters, nor could it act like a purchaser pursuant to a chargee's or mortgagee's sale in exercise of its statutory power of sale, where the purchaser under section 69 C of the Transfer of Property Act 1882 as amended in 1959, by Amendment Act of the same name, is not required to inquire, into whether the exercise of such power is due or not, or to the application of the purchase moneys.

60. In light of all these facts and circumstances, prudence, and good business sense and practice, dictated that the Third Respondent inquire into these matters. It failed to do so, and it cannot be regarded as an innocent purchaser for value without notice.

61. Before concluding this Ruling there are other issues which would make the Ruling incomplete without dealing with them, and these are –

1. Whether the First Respondent at any time procured the services of the Second Respondent;
2. What are the consequences of the actions of the Second Respondent if the First Respondent did or did not procure the services of the Respondent;
3. Whether the signature by the in-coming Town Clerk to any of the suit documents amounted to ratification of the actions of the Second Respondent as counsel for the First Respondent;
4. Whether actions of the Second Respondent were abuse of the process of court;
5. What are the final orders?

OF WHETHER THE FIRST RESPONDENT AT ANY TIME PROCURED THE SERVICES OF THE SECOND RESPONDENT

62. This question is relevant only from the point view of the process which led to the ultimate purported sale through a purported auction of the suit property. Under the Advocates Act, (Cap 16, Laws of Kenya), "*a client*" includes:-

“any person who, as principal or on behalf of another, or as a trustee or personal representative or in any other capacity, has power, express or implied, to retain or employ, and retains and employs, or is about to retain or employ an Advocate and any person who is or may be liable to pay to an Advocate any costs.”

63. Under the contract for services, dated 5th January, 2005 between the Municipal Council of Mombasa (the First Respondent) and one LENNY IVUTI trading as GEOMAPS a business name registered under the Registration of Business Names Act (Cap 499, Laws of Kenya), GEOMAPS was employed as a consultant to provide the “services” described as

“technical, logistical, management and operational services to be provided by the consultant to the Council to supply, install, customize, integrate, make operational and maintain the system further details of which are set out in the project Document and Technical Details.” “System” was described as “Geographical Information System: as more particularly described in the Project Document and the Technical Details.”

64. Under Clause 5 of the said Contract one of the consultants’ obligations was:

“(d) to provide and employ at the cost of the consultant such technical personnel who are skilled, experienced and of high integrity in their respective callings and supervisory staff who are competent to adequately implement and operate the system (such personnel and staff hereinafter referred to as the “consultants Staff”).”

65. In the letter dated 23rd January, 2006, by the Consultant appointing the Second Respondent to be an employee of the Consultant, the Consultant made it clear -

“(e) You will be entitled to utilize the services of the client’s process servers, revenue and security officers with prior arrangement with the client through us.”

66. Contrary to Second Respondent’s assertion in his Affidavit dated 25th April, 2008 and filed on 28th April, 2008 there is no material showing that the Second Respondent sought through the Consultant, arrangement for the use of the client’s process servers, revenue and security officers with the prior arrangement with the consultant. What is on record is the disclaimer by the client, (the First Respondent) that it never procured or employed the services of the Second Respondent. The disclaimer is dated 1st February, 2008. The action of the Second Respondent on 12th February, 2008 in obtaining a Vesting Order upon the Third Respondent was an abuse of the process of the court. Likewise it was an abuse of the process of court to apply for and obtain orders for issue of a Provisional Certificate of Title issued and registered on 20th March, 2008. The Second Respondent ought to have downed its tools the moment the disclaimer was published on 1st February, 2008. It failed to do so. It would be both illegal and unjust to validate the actions of the Second Respondent.

67. The answer to the second issue, what are the consequences of the Second Respondent’s actions if the First Respondent did not procure its services has already been given. It was an abuse of the court’s process for an Advocate to proceed with applications purportedly on behalf of the client, who had already disowned the actions of the Advocate.

OF WHETHER THE SIGNATURE BY THE IN-COMING TOWN CLERK TO ANY OF THE SUIT DOCUMENTS AMOUNTED TO RATIFICATION OF ACTIONS OF THE SECOND RESPONDENT AS COUNSEL FOR THE FIRST RESPONDENT

68. The First Respondent has urged that the procurement of services, like that of goods, is subject to the competitive bidding or tendering under the Public Procurement and Disposal Act, 2005 (No. 3 of 2005). For the First Respondent to have ratified the actions of the Second Respondent, it needed to comply with requirements of the said procurement legislation. It needed approval of the Tender Committee, and ultimately the Council itself. No such material was provided by either the Second Respondent or the

Third Respondent, the beneficiary of the Second Respondent's actions. Consequently, any purported execution of any document by the in-coming Town Clerk or any other officer of the First Respondent was unlawful, as it did not have the special or general authority of the First Respondent and consequently aided and abetted the abuse of the process of court.

CONCLUSION

69. Having regard to the fact that the Second Respondent never had any instructions to act for the First Respondent, having regard to the fact that the *ex parte* Applicants had paid outstanding rates and arrears thereof and obtained clearance certificates in respect of the suit properties by the time the purported Vesting Orders were made on 12th February, 2008, the said orders were applied and granted in bad faith, and were not only inherently irregular but also fraudulent upon the *ex parte* Applicants. Fraud vitiates everything including court orders. The purported orders for public auction made on 4th February, 2008 were equally illegal.

FINDINGS

70. In summary therefore I find and hold as follows:-

1. The First Respondent never at any time procured the services of, or instructed the Second Respondent to act for the First Respondent;
2. The signature of the First Respondent's in-coming Town Clerk or any other officer of the First Respondent to or upon any of the suit process documents did not amount to ratification of the Second Respondents' actions or any purported appointment through the First Respondent's Consultants;
3. The *ex parte* Applicants had already paid in full and obtained Rates Clearance Certificates in respect of the suit properties well before the suit properties were sold through a sham "*paper auction*", and abuse of the process of court;
4. The First Respondent never received any proceeds of the purported public auction;
5. The purported sale of the suit properties by a purported public auction on 19th January, 2008 and Vesting Orders made on 12th February, 2008 were fraudulent and are null and void;
6. The Fifth Respondent had no jurisdiction to issue Vesting Orders in respect of the suit properties;
7. The orders obtained on 26th March, 2008 for mandatory injunction to grant vacant possession were issued without jurisdiction, and in breach of the rules of natural justice;
8. The purported orders of eviction were equally without jurisdiction, and illegal;
9. As the First Respondent's Town Clerk never signed the mandatory Notices under section 17 of the Rating Act, the actions of the Second Respondent were without legal foundation or authority and are null and void;
10. The Third Respondent was neither a bona fide, nor an innocent purchaser, nor a purchaser for value without notice;

FINAL ORDERS

71. Having regard to the findings in the immediately foregoing paragraph, there shall issue the following orders:-

1. An order of certiorari removing into this court and quashing the decision of the Mombasa Chief Magistrate's Court in Civil Case No. 362 of 2007, delivered and dated the 12th February, 2008, vesting the title of L.R. No. Mombasa/VI/Mombasa/911 and Mombasa/VI/Mainland/2960 in favour of the Third Respondent, herein Mount Holdings Limited;
2. An order of certiorari removing into this court for purpose of quashing the decision of the Mombasa Chief Magistrate's Court in Civil Case Number 362 of 2007 delivered on 19th March, 2008 directing the Registrar of Titles, Mombasa (the Sixth Respondent) to open skeleton files in respect of titles Numbers Mombasa/VI/MN/911 and Mombasa/VI/MN/2960 and issue the purchaser of both properties namely MOUNT HOLDINGS LIMITED with Provisional

- Certificates of Titles to both properties without having advertised them in the Kenya Gazette;
3. An order of certiorari do issue removing into this court for quashing the decision of the Mombasa Chief Magistrate's Court in Civil Case Number 362 of 2007, delivered on 28th March, 2008, ordering the Court Bailiff Mombasa to remove any squatters or any other persons in possession of the subject property, namely Title Numbers Mombasa/VI/MN/911 and Mombasa/VI/MN/2960 and to put the purported purchasers Mount Holdings Limited into possession;
 4. An order of certiorari do issue removing into for be quashed, and cancellation of the Provisional Certificates of Title Numbers L.R. 7361 issued by the Sixth Respondent on the 20th March, 2008 as well as the cancellation of the Provisional Certificate of Title Number L.R. 2703 issued by the Sixth Respondent on the 20th March, 2008;
 5. An order of certiorari do issue removing into this court for purposes of quashing and cancellation of the purported public auction of 17th January, 2008 wherein the Third Respondent was purportedly declared the purchaser of the parcels of land known as L.R. Numbers Mombasa/VI/MN/911 and Mombasa/VI/MN/2960 respectively;
 6. The Second and Third Respondents shall pay the costs of the *ex parte* Applicants as well as the costs of the First Respondent.

72. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 29th day of May, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Simiyu for Applicants

Mr. Kibara for 1st Respondent

Mr. Oloo for 3rd Respondent

Mr. Ngare for 4th, 5th and 6th Respondents