



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. JR 115 OF 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL FOR JUDICIAL REVIEW

AND

**IN THE MATTER OF AN APPLICATION BY ISSAC GATHUNGU WANJOHI AND
ISAIAH WAMBUGU MUTONYI FOR LEAVE TO APPLY FOR ORDERS OF
PROHIBITION & CERTIORARI**

AND

IN THE MATTER OF LOCAL GOVERNMENT ACT CAP. 265 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF THE GOVERNMENT LANDS ACT CAP 280 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF REGISTRATION OF TITLES ACT CAP 281 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF REVOCATION OF AUTHORITY FOR GRAVELLING AND CEDAR
POST BARBED WIRE FENCING ON PLOT LR. NO 209/12052 ALONG MOMBASA ROAD
NAIROBI.**

BETWEEN

ISAAC GATHUNGU WANJOHI1ST APPLICANT

ISAIAH KITINDI WAMBUGU MUTONYI2ND APPLICANT

VERSUS

DIRECTOR OF CITY PLANNING,

CITY COUNCIL OF NAIROBI.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 15th January 2009 filed in this Court on 16th January, 2009, the ex parte applicants herein, **Issac Gathungu Wanjohi** and **Isaiah Kirindi Wambugu Mutonyi** seek the following orders:
 1. **That this Honourable court be pleased to issue an order of CERTIORARI to remove to the High Court for the purposes of being quashed, the decision of the Director of City Planning dated 11th December, 2008 withdrawing his authority previously given vide his letter to the Applicants dated 2nd November, 2008.**
 2. **That this Honourable court be pleased to issue an order of PROHIBITION to prohibit the Director of City Planning or any officer under him from interfering with the gravelling and cedar post fencing on L.R. No. 209/12052 Nairobi situate along Mombasa Road which belongs to the Applicants.**
 3. **That the costs of this Application be provided for.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement filed on 23rd December 2008 and the affidavit verifying facts sworn by **Isaac Gathungu Wanjohi**, the 1st parte applicant herein, on 22nd December 2008. To the Notice of Motion itself is annexed a further verifying affidavit sworn by the same applicant on 15th January 2009. I will, however, deal with this affidavit elsewhere in this judgement.
3. According to the deponent, the applicants are the legal owners of L.R. 209/12052 situate along Mombasa Road Nairobi in which they hold a Title Number 61456 granted on 1.11.1993. According to him, the applicants have been paying Nairobi City Council Rates and government land rent from the date of the Grant. On 29.2.2008 the City Council of Nairobi issued a Rates Demand Note to the applicants requiring them to pay to the Council outstanding and unpaid rates of Kshs 175,779.85 on before 31.5.2008 and the applicants paid the said amount on 10.3.2008. On or about 20.11.2008 the Applicants applied for authority for gravelling and fencing their property L.R. 209/12052 and were issued with authority letter Ref. CPD/ENF/209/12052 dated 2.11.2008.
4. However, on 11.12.2008 the Respondent issued "REVOCATION OF AUTHORITY LETTER" reference CPD/DC/007246 revoking the authority granted under letter dated 2.11.2008 with effect from the date of the said letter and required the Respondents to cease working on their land failing which the Director of City Council would take unspecified punitive actions against the applicants. The said letter was, according to the deponent, copied to among others the Officer Commanding Station Embakasi, the Area Chief and the area district Officer probably with instructions to assist the Director of Planning to carry out his illegal and malicious punitive actions against the applicants. It is deposed that after the granting of authority to gravel and fence the property the applicants had purchased and poured gravelling and other fencing materials on site and had gravelled most of the plot and had hired labour who were ready to complete the works on or before 31.12.2008.
5. According to the deponent, the issuance of the Revocation of Authority Notice dated 11.12.2008 and the unspecified threats thereof are illegal malicious, unfair and unjust, on the part of the respondents in that sometime in the year 2001 or thereabouts, the respondent approved and/or allowed the erection of bill boards on the applicants land L.R 209/12052 through collusion with a hostile owner of neighbouring land L.R No. 209/11293/1 who although restrained under Civil Case No 450 of 1995 not to interfere with the applicants land continues to do so with impunity and with the support of the Director of City Planning who has termed the Applicants land a buffer zone. The said hostile owner of L.R. No. 209/11293/1 has in collusion with others wrongfully entered and took possession of applicants portions of L.R. 209/12052 and erected advertisement

- bill boards on the property with the approval of the director of City planning yet under special conditions of the Grant Number I.R 61456 land Reference Number L.R. 209/12052 the use of the land is limited to “Inoffensive light industrial purposes with ancillary offices and stores” and is not a buffer zone and the applicants are using the land exactly as allowed in the grant.
6. In the deponent’s view, the activity of gravelling and fencing land is consistent with any land use including a buffer zone, which the applicants land is not and the Director of City Planning’s withdrawals of authority is biased and malicious against the applicants. The Respondent conduct, according to him, amounts to abuse of office and the discretion accruing thereon and further perpetrating ill motive and malice against the applicants from his privileged platform. Further, he avers that the Respondent acted ultra vires and unlawful in declaring L.R. No 209/12052 owned by the applicants a buffer zone as he has no authority under The Government Lands Act or Registration of Tiles Act or any other written law to declare private property a buffer zone.
 7. By reason of the Respondent’s unlawful acts of aforementioned, it is averred that the plaintiffs’ rights to their property L.R. No. 209/12052 have been greatly prejudiced occasioning them great financial loss, damage and embarrassment and this court in its judicial review jurisdiction has power to grant the orders sought in the present suit.

INTERESTED PARTY’S CASE

8. In opposition to the application, **Rosaline Njeri Macharia**, the interested party herein, swore a replying affidavit on 9th March 2009 in which she deposed that she is the registered proprietor of all that piece of land namely L.R. No. 209/11293/1 measuring 4.05 hectares or thereabouts situate at the junction of Mombasa Road and Embakasi Road while the Applicants herein, **Isaac G. Wanjohi** and **Isaiah Kirindi Wambugu**, are the purported proprietors of L.R. 209/12052 situate in Nairobi at the corner of Mombasa Road and Embakasi Road which land property however was declared a buffer zone by the Nairobi town Planning Liaison Committee Report of the sub-committee on the said Mombasa Road dated May 1995. The said Report, according to her, recommended the nullification of the allocation of L.R. Number 209/12052 to the applicants because it did not meet the minimum distance required for an access road located so immediately at the junction of trunk road (Mombasa Road/Old airport road). By a letter dated 16th November 1995 addressed to the Applicants herein from the Commissioner of Lands, the Department of lands had identified an alternative plot of equivalent size which plot was to be allocated to the Applicants. She avers that by reason of the manner of the allocation of the said L.R. 209/12052 in a Buffer Zone, she has been hindered from full utility of her property and enjoying the frontage to Mombasa road and as a consequence the value of her property has diminished considerably and its full potential cannot be attained. By a letter dated 11th December, 2008 from the City Planning Department to the Applicants herein L. R. No. 209/12052 was confirmed to be a buffer zone and any intended or ongoing works were to cease immediately. Given differences over utility of her property and L.R Number 209/12052 the applicants moved to court vide High court Civil Case 450 of 1995 - **Isaac G. Wanjohi & Isaiah Kirindi Wambugu Mutonyi vs. Rosaline Macharia** - concerning boundary ownership and access over her said property L.R. 209/11293/1 and L.R Number 209/12052, which case is pending in the High court and is yet to be concluded.
9. According to legal advice from the interested party’s advisers, the institution of the instant proceedings is an abuse of judicial process because to the extent that L. R. No. 209/12052 was declared a Buffer Zone and which fact was communicated to the Applicants by the Commissioner of Lands and reiterated by the City Planning Department of the City Council of Nairobi, the applicant have no right to enforce over L.R. No. 209/12052. Further the decision of the City Planning Director sought to be quashed herein is a subordinate decision and must necessarily conform to the decision of the Liaison Committee declaring L.R. No. 209/12052 a buffer zone, to the extent that the applicants do not seek to quash the said decision of the Liaison Committee, any orders herein given will be ineffectual because L.R. No 209/12052 will continue to be a buffer zone and incapable of alienation. Additionally, the decision of the Director of City Planning sought to be quashed and the prohibition sought was made procedurally and in conformity with law since the Director of City Planning has no jurisdiction to issue permission for private appropriation or workmanship over a buffer zone. In her view, the Applicants obtained leave to commence proceedings for Judicial Review by deliberate concealment and or suppression of

material facts, namely that the Nairobi Town Planning Liaison Committee Report of the Subcommittee on Mombasa Road dated May 1995 did declare L.R. No. 209/12052 a buffer zone and recommended nullification of the title and that the Commissioner of lands did by letter of 16th November, 1995 advise the Applicants of the same and recommended alternative allocation of land. Apart from that, there subsists **HCCC NO. 450 OF 1995 Isaac G. Wanjohi & Isaiah Kirindi Wambugu Mutonyi vs Rosaline Macharia** which case is still pending. In any case, the Commissioner of lands did acknowledge that the allocation of L.R. No. 209/12052 to the Applicants plot was irregular, illegal and contrary to established Toad Planning conventions, urban planning conventions and the Nairobi City Planning by Laws. It is therefore her view that the application as drawn and filed egregiously contravenes law order LIII Rule 1 for want of a statement and that the issuance of the orders prayed for herein will adversely affect her interests over L.R Number 209/11293/1.

APPLICANT'S FURTHER AFFIDAVIT

10. On 23rd March 2009, the 1st applicant filed a further verifying affidavit. The document that was filed in court was, however, undated. In the said affidavit, the deponent averred that the interested party's action to seek to be enjoined (sic) in this case is an abuse of the judicial process because the materials she relies on are the same as in HCC No 450 of 1995 filed in court in February, 1995 between the applicants and the interested party. While admitting that the interested party is the registered owner of L.R. No 209/11293/1 and that she was registered as owner on 27.4.1995, the deponent, avers that the Applicants were registered as proprietors of L.R. 209/12052 as tenants in common in equal shares on 7.1.1994. It is denied that L.R. 209/12052 not been declared a buffer zone by any competent authority and that document entitled "Report of the Sub-Committee on Mombasa road Buffer Zone" is a useless evidential document well known by the Interested party because after **Hon Justice Bosire** examined it in HCCC 450 of 1995 in his ruling stated that the same had no evidential value. The deponent further denied that the letter from the Commissioner of lands had anything to do with any decision by the said Commissioner to declare L.R. 209/12052 a buffer zone as such decision has never been communicated to the applicants and it is further denied that L.R 209/12052 was allocated in a buffer zone because the special condition No. 5 state user as Industrial purposes with ancillary offices and stores. According to her the allegation that the ownership of the property by the applicants has in any way diminished the value of L.R. No 209/11293/1 belonging to the interested party is untrue and further state that the interested party acquired rights of ownership on 27.4.1995 when she was registered as owner whereas the applicants were registered as owners much earlier on 7.1.1994. The deponent avers that when seeking to acquire L.R. No 209/11293/1 the interested party was aware that it was neighbouring L.R. 209/12052 and should have taken any diminished value then into account in determining the price she paid for the property and any future use of the property. The deponent, however, admits that the controversy between the Interested party and the applicants concerns the boundary between L.R. 209/12052 owned by the applicants and L.R. No. 209/11293/1 owned by the Interested Party and that the court in Civil Case No. 450 of 1995 issued an order injuncting the interested party from undertaking any construction, erection of any structures or other work of whatever nature in the said plot until the determination of this suit or further orders of this Honourable Court which order still subsists. However, in breach of the said order, the Interested Party has encroached on L.R. 209/12052 by directing and/or allowing three of her tenants to install billboards on L.R. 209/12052 belonging to the applicants instead of L.R. No 209/11293/1 which belongs to the Interested party and charging and collecting rent in respect of the billboards, erected on the applicants' land a fact which the deponent states has led to institution of various cases. In the deponent's view, the granting of orders sought would not affect the interests of the Interested Party save in so as the Interested Party will be stopped from illegally enriching herself from rent of billboards installed on the Applicants' property.

EX PARTE APPLICANTS' NOTICE OF PRELIMINARY OBJECTION

11. On 2nd March 2010 the ex parte applicant filed a notice of preliminary objection containing the following issues:

1. **The Interested Party has no right of audience in this Honourable Court on the ground that the Interested Party has wilfully refused, declined or otherwise failed to comply with and obey the order made by the Honourable Mr Justice Bosire on 24th July, 1995 in Civil Case No. 450 of 1995 and currently subsisting restraining by injunction the Interested party from being or remaining on plot known as L.R. No. 209/12052 Nairobi, and from undertaking any construction, erection of any structures of other work of whatever, nature in the said plot until the determination of this suit or further orders of this Honourable court.**
2. **The Interested party has directed and allowed her Tenants to install billboards on L. R. No. 209/12052 belonging to the Applicants instead of L.R. No. 209/11293/1 which belongs to the Interested Party and continues to collect rent from the Applicants' land thus violating the Court order issued on 24th July, 1995.**
3. **The applicant's application dated 9th March, 2009 is an abuse of the process of court, frivolous, incompetent and vexatious.**

INTERESTED PARTY'S GROUNDS OF OPPOSITION TO THE PRELIMINARY OBJECTION.

12. In reaction to the said preliminary objection, the interested party filed grounds which grounds were, in my view, unnecessary. A party who intends to oppose a preliminary objection is not obliged to file grounds of opposition in respect thereof. The filing of grounds of opposition to a preliminary objection, in my view, has the effect of unnecessary clogging the proceedings and may at times confuse issues. The grounds filed were as follows:

1. **That the preliminary objection is bad in law, misconceived, fatally defective, incompetent, an abuse of the court process and is intended to defeat the interested party's constitutional right of access to Court.**
2. **That the Ex parte applicants have no locus standi in these proceedings in light of the decision of Honourable Justice Majanja delivered on 30th March, 2012 in High Court Constitutional Petition No. 154 of 2011 Isaac Githungu Wanjohi & Another versus Attorney General and 6 Others.**
3. **That the said Preliminary Objection raises to point of law and is an affront to a well established principal in Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696**
4. **That the current Objection is suspect, mischievous and an attempt by the Ex parte applicants to subvert the judicial process in light of its timing.**
5. **That the Ex parte Applicants cannot raise issues relating to High Court Civil Case No. 450 of 1995 in the current proceedings since they are different proceedings seeking different reliefs.**
6. **That the Ex parte applicants are misguided or ill advised in raising issues relating to High Court Civil Case No. 450 of 1995 in the current proceedings since this Honourable Court has jurisdiction which is separate and distinct from that applicable to High Court Civil Case No. 450 of 1995.**
7. **That the preliminary objection is untenable, ill advised, mischievous and a scheme employed by the Ex parte Applicant to waste time and should be dismissed with costs.**

SUPPLEMENTARY AFFIDAVIT BY THE INTERESTED PARTY

13. On 3rd December 2012, the interested party filed a supplementary affidavit sworn on the same day. According to the said affidavit, though the reliefs sought by the Applicants were based on the ground that they were the owners of Land parcel No. 209/12052, the **Honourable Justice Majanja** delivered a ruling on 30th March, 2012 in High Court Constitutional Petition No. 154 of 2011 **Isaac Githungu Wanjohi & Another versus Attorney General and 6 others** wherein the said parcel of land was found to be a buffer zone and what was left for determination was revocation of the Title by the Government as the previous one was found to have been irregular. According to the deponent, it is now clear that the Applicants are not the owners of the said parcel

of land on which the government has proceeded to construct a by-pass and based on the advice from her legal advisers, the orders currently being sought if granted will be in vain and the same will conflict with the said decision thus leading to embarrassment of the Judicial process. In her view, by granting the orders sought by the applicant, this Honourable Court will bestow ownership of the said parcel of land on the applicants and empower them to demolish the already constructed by pass against the aforesaid Court Order and the public interest.

INTERESTED PARTY'S PRELIMINARY OBJECTION.

14. As if not to be outdone, the interested party similarly filed preliminary objections on 29th November 2012 in which the following issues were raised:

1. **That the Ex parte have endorsed on their documents a fictitious law firm by the name Munyu Waiganjo & Company Advocates contrary to Section 35 (1) of the Advocates Act.**
2. **That Mr Samuel Wamutu waiganjo Advocate be cited for contempt of court for knowingly endorsing documents with a fictitious law firm by the name Munyu Waiganjo & Company Advocates contrary to section 35 (1) of the Advocates Act.**
3. **That all documents purportedly drawn and filed by the said fictitious firm of Munyu Waiganjo & company Advocate on behalf of the Ex parte applicants be struck out.**
4. **That Mr Samuel Wamutu Waiganjo be compelled to personally bear the Interested Party's costs.**

FURTHER AFFIDAVIT BY THE EX PARTE APPLICANT

15. On 10th February 2013, the 1st ex parte applicant filed a further affidavit sworn on 18th February 2013 in which he deposed that this case was filed by his advocates trading under the firm name "**Munyu Waiganjo and Company Advocates**" on 23.12.2008 and that the case has not been finalized and is continuing. However, the firm "**Munyu Waiganjo and Company Advocates**" ceased to carry on business under the same name and were issued with a "Notice of Cessation of Business" as from 31.12.2009 save for the purposes of winding up the said business in accordance with section 42 of the Partnership Act which provides as follows. According to him, the Advocate then and now handling the case is **Samuel W. Waiganjo** who is in the roll of Advocates. Contrary to what is deposed by the interested party, the deponent states that LR No. 209/12052 is two decimal nought three seven (2.037) hectares parcel of land (5.0415) and that it is only a small portion of the said LR No. 209/12052 which has been encroached upon by the state. She, however, reiterates that in the ruling in Petition 154 of 2011 the **Honourable Justice D. S Majanja** stated that the Applicants are the owners of L.R. No 209/12052 who are entitled to the protection of their rights and privileges given in the constitution. It is therefore his view that as his case was filed before cessation of business trading under the firm "**Munyu Waiganjo and Company Advocates**" and the law allows continuation of the use of business name for the purposes of winding up.

EX PARTE APPLICANT'S GROUNDS OF OPPOSITION

16. In opposition to the preliminary objection by the interested party the applicants on 19th February 2013, filed the following grounds of opposition:

1. **That the preliminary objection is misconceived, is an abuse of the process of court, frivolous, incompetent and vexatious and should accordingly be struck out with costs.**
2. **That the interested party has not shown the particular documents which have been endorsed by a fictitious law firm contrary to section 35 (1) of the Advocates Act.**
3. **That English pocket dictionary defines fictitious as imaginary, unreal and not genuine and the Interested party has not submitted evidence that the firm of Munyu, Waiganjo and Company was imaginary, unreal and not genuine when they filed documents related to this case or when they were issued with a Notice of Cessation of Business.**
4. **That the Notice of cessation of Business issued by the Registrar of Business Names is specific**

- on the business which can be carried on by a firm which has been issued with a NOTICE OF CESSATION OF BUSINESS. Further Section 42 of the partnership Act provides for the rights and obligation of partners to continue notwithstanding the dissolution of partnership, so far as it may be necessary to wind up the affairs of the partnership and to complete transaction begun but unfinished at the time of dissolution.
5. That Samuel W. Waiganjo practicing in the partnership of Munyu Waiganjo and Company Advocates prepared Chamber Summons application dated 22.12.2008 and this Honourable court issued orders on 30th December granting leave to the applicant to apply by way of judicial review for orders of Certiorari to remove to the High Court and quash the decision of the Director of City Planning and issue a prohibition to the Director of city Planning not to interfere with the gravelling and cedar post fencing on L. R. No. 209/12052 Nairobi situate along Mombasa road which belong to the applicants.
 6. That further Samuel W. Waiganjo prepared and signed the Notice of Motion dated 15th January, 2009 which is yet to be heard and determined.

EX PARTE APPLICANTS' SUBMISSIONS

17. In support of their case, it was submitted on behalf of the ex parte applicants that since LR No. 209/12052 belongs to the applicant and has a title, the Respondent or any of his officers do not have any powers either under the *Government Lands Act* Cap 281 or the *Registration of Titles Act* Cap 280, *The Local Government Act* or any other legal instrument to declare the said land a buffer zone which was the effect of the Respondent's letter to the applicants. To the applicant this action was beyond the jurisdiction of and *ultra vires* the powers of the Respondent and in support of this submission the applicant relied on Republic vs. Judicial Commissioner of Inquiry into the Goldenberg Affair and 3 Others [2004] eKLR. According to the applicants they are using the land in accordance with the conditions spelt out in the title hence the decision is unfair and unreasonable and was a misuse of authority.
18. In their view, *Registration of Titles Act* in section 23 caters for security of tenure whose effect was to declare the title of the registered proprietor of land conclusive and indefeasible hence the title takes precedence over all the alleged rights any other person may claim over the said property. Since the documents relied upon by the interested party in High Court Case No. 450 of 1995 were rejected as having no evidential value, the replying affidavit by the interested party herein is an abuse of the process of the Court. In authorising the interested party to erect billboards on the applicants' property, it was submitted the respondent acted with malice, unfairness and unjustly. Whereas the applicant has instituted legal proceedings against the interested party for recovery of what is being paid by the interested party to the respondent, the respondent has connived with the interested party to declare the applicants' property a buffer zone. Since the Respondent has acted without jurisdiction, it was submitted that based on Wade's *Administrative Law*, 8th edn. certiorari lies to quash the decision. Further reliance was placed on Kadamas vs. Municipality Council of Kisumu Civil Appeal No. 109 of 1984; Rutto & 11 Others vs. Ainabkoi Land Control Board Eldoret Misc. PPL. No. 34 of 1990.
19. It was further submitted that in HCCC No. 450 of 1995 in which the interested party challenged the legality of the said land claiming it was a buffer zone but the Court found that the land exists and an injunction was issued against the interested party restraining him from trespassing on the land which order has not been varied. Despite that the interested party as in contempt of the order erected billboards on the said land with the authority of the respondent. In the applicant's view the interested party is in contempt of court and ought not to be given audience and relied on Ponangipalli Venkata Ramana Rao & 2 Others vs. MRC Nairobi & 3 Others [2008] eKLR.

According to the applicants, cedar fencing and gravelling of land are normal activities consistent with the land use and do not require notification of approval, refusal or deferment of development in terms of section 33 of the *Planning Act* and hence the Respondent's letter was illegal, intimidating and a misuse of power. In communicating its decision, it is submitted that Respondent failed to use the prescribed forms under section 31(1) and 33(1)(a) of the *Physical Planning Act* No. 6 of 1996. INTERESTED PARTY'S SUBMISSIONS

21. On behalf of the interested party, it was submitted that the Certificate of Lease contained certain conditions specified under the ***Physical Planning Act*** Chapter 286 as well as Special Conditions contained in the lease, which conditions import into operation and subject enjoyment of the land to plan made by the relevant Committees under the ***Physical Planning Act***. It was submitted that the land in issue being situated in Nairobi, the applicant had to seek and obtain an approval from the Director of City Planning before any lawful developments could commence and or be sustained and any approval given by the Director of City Planning had to accord with all City Plans Nairobi. While conceding that the Director of City Planning gave consent on 2nd November, 2008, it was submitted that the same consent was subsequently withdrawn since it went contrary to plans as the land in issue had been declared a Buffer Zone a fact which was communicated to the applicants.
22. It was therefore submitted that the applicants are seeking an order quashing a lawful decision by the said Director and that the fact that an erroneous approval had been given did not legitimise it.
23. It was further submitted that there is a pending suit in which there is a contest whether the access road the subject of these proceedings belongs to the applicants or the interested party which dispute is yet to be determined hence these proceedings are an abuse of the Court process.
24. According to the interested party by the applicant only seeking an order quashing the decision denying them approval by the Director without quashing the declaration that the applicant's property is a buffer zone, will not solve the issue since the property will still remain a buffer zone and incapable of development and construction.
25. It was therefore submitted that the Respondent has jurisdiction to interfere with the applicant's enjoyment of the suit property. In the interested party's view, adjudicating the Motion in favour of the applicants will unfairly and even unlawfully pre-empt and determine the issues of fact before the High Court in High Court Civil Case No. 450 of 1995.

DETERMINATIONS

26. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

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

27. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
28. It must be remembered that judicial review is concerned not with private rights or the 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 has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**
29. The broad grounds, though not exhaustive, on which the Court exercises its judicial review

jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and 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, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction 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 such 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 usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with 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.”

30. Therefore, in this application we are not concerned with the merits of the decision to withdraw the approval which had been given to the applicant with respect to cedar fencing and gravelling of the suit land.

31. It is not disputed by the respondents that the applicants had been given an approval to fence the suit land and gravel the road thereon. What is contended is that the said property having been declared a buffer zone the said approval is inconsistent with the status of the said land as such buffer zone hence the respondents had the right to withdraw the said approval. That the applicants are the registered proprietors of the suit land which land was at the material time under the legal regime of the ***Registration of Titles Act*** is not disputed. Section 23 was the subject of the decision by **Kimaru, J in Punda Milia Co-Operative Society vs. Savings & Loan (K) Limited Nairobi HCCC No. 273 of 2008** in which the learned Judge expressed himself as follows:

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

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

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a

court of law.

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

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

34. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. To do so Article 24(1) provides:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

35. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** 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, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction 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 such 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 usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with 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. It is therefore clear that in order to justify a proprietor of land being deprived of property or interest in land by the State, the deprivation must either result from an acquisition of land or an

interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or must be for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament which act must provide for prompt payment in full, of just compensation to the person and allow the proprietor of the interest in, or right over, that property a right of access to a court of law.

37. Apart from that it must be remembered that under the provisions of Article 40(6) of the Constitution, the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. In arriving at that finding the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard and any purported action which does not comply with the law must be set aside based on the three "I's" aforementioned.
38. Therefore the only issue that the Court would be entitled to determine in this application is whether based on the uncontroverted facts before the Court the decision made by the Respondent in withdrawing the approval earlier given ought to stand and not whether or not the applicant's title is lawful. From the evidence on record, it is clear that the decision to withdraw the said approval was tainted with procedural impropriety and ought not to stand. As was held by **Emukule, J** in **Republic Vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478:**

"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

39. It is however clear from the record that part of the land registered in the applicants' land was affected by the road. In deciding whether or not to grant the discretionary judicial review remedies the Court must take into account whether or not the grant thereof is efficacious in the circumstances obtaining. In **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
40. To grant the orders in the manner sought by the applicants would have the effect of interfering with the road in question thus would not only cause administrative chaos but also cause public inconvenience. The interests of the applicants must in the circumstances be balance with those of the public. This however does not mean that the public interest must always prevail. What is required is that the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**
41. The determination of this matter would have been easier if the Respondent had actively participated in these proceedings. However, this Court has a higher calling of investigating the

truth and since there is no evidence that the whole of the disputed land is required as a buffer zone, the orders that commend themselves to me based on the present status of proprietorship of the suit land which this Court recognises is a subject of a pending civil suit and without determining the issues which are the subject of the said suit, but simply based on the decision making process of the Respondent are as follows:

1. **An order of certiorari is hereby issued removing into this Court for the purposes of being quashed, the decision of the Director of City Planning dated 11th December, 2008 withdrawing his authority previously given vide his letter to the Applicants dated 2nd November, 2008 in so far as it affects the portion of land which is not required as a buffer zone, which decision is hereby quashed.**
2. **I also issue an order prohibiting the Director of City Planning or any officer under him from interfering with the gravelling and cedar post fencing on the portion of L.R. No. 209/12052 Nairobi situate along Mombasa Road not required for the purposes of a buffer zone unless otherwise ordered by a competent court of law.**
3. **The Respondent shall within 30 days file in this court a comprehensive report indicating the particulars of the portion of the suit parcel of land not required for the purposes of a buffer zone.**
4. **For avoidance of doubt, the issue of ownership of the suit parcel of land being outside the scope of these proceedings, the parties are free to pursue the same before the relevant civil courts.**
5. **The Applicants are awarded the costs of these proceedings to be borne by the Respondent. The interested party shall bear her own costs of these proceedings.**

Dated at Nairobi this day 29th day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Waiganjo for the applicant.