



REPUBLIC OF KENYA

IN THE HIGH COUR OF KENYA AT NAIROBI

(JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC CIVIL APPLICATION JR. NO. 95 OF 2010

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF LAND L.R. NO. 209/13539/111

AND

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

AND

**IN THE MATTER OF KENYA GAZETTE NOTICE VOL. CXII (NO.124) GAZETTE NOTICE
NO.15580 DATED 26TH NOVEMBER 2010**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE REGISTRAR OF TITLES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....INTERESTED PARTY

EXPARTE: DAVID GACHINA MURIITHI

JUDGEMENT

1. On 29th December, 2010, the ex parte applicant herein, **David Gachina Muriithi**, filed a Notice of Motion dated the same day seeking the following orders:

1. **THAT an Order of CERTIORARI do issue to remove into the High Court the 1st**

- Respondent's decision contained in the Kenya Gazette Notice Volume CXII (No.124) Gazette Notice No.15580 dated 26th November 2010 for purposes of quashing the same in so far as it purports to revoke the Applicant's Title Over Land L.R. No.209/13539/111.**
2. **THAT an Order of PROHIBITION do issue prohibiting the Respondents through its Agents, Servants and or persons acting on their behalf from interfering with the Applicant's quiet possession of L.R. No.209/13539/111.**
 3. **THAT Costs of this Application be provided for.**

2. The application was supported by a verifying affidavit sworn by the applicant on 14th December, 2010.
3. According to the applicant, he is the lawful owner of Land Reference No. 209/13539/111 (hereinafter referred to as the suit property) which he was allocated by the City Council of Nairobi on the 8th August 1994 vide a Letter of Allotment dated the same date. He averred that since the said date, he continued paying the required Annual Ground Rent until sometime in the year 1997 when he and the City Council of Nairobi executed a Lease over the said property and upon the payment of the necessary consideration for the said property, the same was transferred to him on 8th September 1999. As per the provisions of the said Lease the applicant was to hold the said property for the residue of the Council's term of 99 years from the 1st day of July 1998.
4. However, the City Council of Nairobi (hereinafter referred to as the Council) has recently caused to be issued a Notice to Vacate despite there being an order restraining them from interfering with the applicant's quiet possession of the suit premises. Further to that, sometime in the year 1998, the Kenya Anti-Corruption Commission (KACC) wrote to the applicant requesting for particulars relating to ownership of Land L.R. No.209/13539/111 which particulars the applicant duly furnished. The said Commission proceeded to file a Civil Case at the High Court of Kenya challenging the applicant's title over the suit property in Nairobi HCCC NO.535 of 2008. According to the applicant, his defence to the said case is water tight and he has a legitimate Title to the said property hence the Court is likely to determine the said Court Case in his favour. However, despite appreciating that there were issues in the said suit which required to be determined by the Court, the 1st Respondent on the 26th November 2010 acting in total contravention of the Law in a clear violation of the applicant's right to ownership of the suit property published and or caused to be Published in the Kenya Gazette Volume CXII NO. 124 Gazette Notice dated No.15580 a Notification which purported to revoke the applicant's Title over the suit property.
5. In the applicant's view, the 1st Respondent herein has no powers to revoke his legitimate Title over the said property as such powers can only be exercised by this Court as opposed to a public official hence the 1st Respondent's action is unfair unreasonable and that the said Respondent has acted *ultra vires* the powers granted to him by the Statue. Apart from that, by the 1st Respondent purporting to revoke the said Title while there is pending court case over the same property, the same action amounts to a breach of the *Sub-Judice* Rule, an affront to the doctrine of Separation of Powers between the Judiciary and the Executive and also amounts condemning the applicant unheard.
6. The applicant deposes that he and his family have lived on the suit property for the last 29 years and have made it their home and if the said revocation was left unchallenged it would prejudice them and leave his entire family homeless.

RESPONDENTS' RESPONSE

7. In response to the application, the respondents filed the following grounds of opposition:
 1. **THAT the application is premised on a misconception of the law governing Judicial Review application.**
 2. **THAT the Rules of Natural Justice and the Law were complied with in reaching the decision of the Respondent.**
 3. **THAT the application is bad in law.**

INTERESTED PARTY'S CASE

8. On the part of the interested party, a replying affidavit sworn by **Nzioki Wa Makau**, its attorney and investigator sworn on 8th May, 2012 was filed.
9. According to the deponent, he personally conducted the investigations into the allocation and sale of the Woodley Estate Houses, one of which is House No.37/(108) off Suna Road, Nairobi situated on L.R. No.209/13539/111 (herein after referred to as “the suit property”). In his view, the applicant is not the lawful and/or legal owner of the suit property as the same was acquired without the consent of the Minister of Local Government (herein after referred to as “the Minister”), contrary to the **Local Government Act**. His further investigations revealed that the said allotment letters were illegally issued as the requisite consent from the Minister had not been sought, making the allocation null and void *ab initio* thus it had no legal consequence in terms of conferring legal interest of the suit property on the applicant. Due to the lack of the requisite ministerial consent, it was averred that the subsequent documents that were executed between the applicant and the council, were of no legal effect as they were all based on an illegal allocation. Subsequently the Council realized the oversight on their part, it went ahead to nullify the alleged sale in a meeting on 14th September 1999 by a resolution which was brought to the attention of the applicant by **J. M. Mbugua**, the then Town Clerk through a letter dated 30th September 1999 and later through a Public Notice that was published by the Council on 19th July 2002. To the deponent, it is the aforesaid notice and advertisement that prompted the applicant council & **J. M. Mbugua**, seeking *inter alia* an Order to quash the resolution of the council cancelling and/or nullifying the sale of the suit property as well as an Order for Mandamus directing the council and its former Town Clerk to cease the cancellation of the allocation of the suit property. Pursuant thereto, the applicant was granted leave to institute Judicial Review proceedings and the said leave was to operate as a stay and under the provisions of the Civil Procedure Rules, the applicant was required to file his substantive Motion within 21 days from the date of the order for stay, which in this case was 11th July 2003. The applicant has to date, however, never filed the substantive Motion as expected under the law and his inaction prompted the Council through its advocates to file an application seeking to vacate the stay Order on 23rd July 2007. According to the deponent, this material information was not disclosed to this Honourable Court and it is hence clear that since the aforesaid application was not determined, the resolution of the Council revoking the sale of the suit property due to an illegality in the process of allocation was never quashed thus still stands.
10. It is this, the deponent contends, that was the reason why the applicant opted to institute parallel Judicial Review proceedings hence the present application is a clear abuse of the Court process and the applicant is not entitled to the orders sought. As a consequence of the resolution and subsequent advertisement of the public notice, many persons who had purchased the houses falling under the Woodley Estate surrendered the leases and those that had innocently made the requisite payments were refunded by the council. The deponent reiterates that the Council was properly issuing a notice as its resolution remains un-quashed by a Court of Law and the applicant cannot hold on to a lease that does not confer any legal rights upon him. To him, the “lease” held by the applicant is a mere paper and has no legal effect.
11. He averred that save that the Interested Party wrote to the applicant requesting for particulars and surrender of some documents, it is not true that the applicant supplied them as alleged therein.
12. In his view, the applicant cannot pre-empt the Judgment of the Honourable Court in HCCC No.535 of 2008 based on his advocate’s advice that his Defence is “water tight” as alleged in paragraph 11 of the affidavit and save that the Interested Party filed a Reply to Defence as provided for in the Civil Procedure Rules in response to issues raised in the applicant’s Defence, it did not set out issues that need to be determined by the Court yet the **Civil Procedure Rules** specifically provides for provisions on how parties to a suit identify issues that need to be determined by the Court and filing a Reply to defence is not the procedure as alleged by the applicant in paragraph 12 of his affidavit.
13. To him, there was no title as the Council had nullified the whole process as the proper consent

was not obtained; the Minister was simply affirming that which had been resolved by the Council, a decision that was not quashed by the Court and that the council, being the vendor, can rescind the contract and it did. Through a Council resolution, the Council declared the sale a nullity due to illegalities, and a notice to this effect was made thus the applicant is not a *bonafide* purchaser for value without notice. In his view, a title cannot be revoked twice and the Minister for Lands acted reasonably under the circumstances with the interest of the public being prime since the suit property is public property hence his act was not unreasonable under the circumstance and any person acting in his/her capacity as such would have taken the same action thus the Minister's action passed the test in the Wednesbury principle. According to him, the rescission of the contract that would have conferred proprietary interest of the suit property to the applicant was not quashed and as such he does not hold any such rights other than tenancy rights under a tenant/landlord relationship. He further deposed that the applicant has been abusing the Court by filing multiple applications for review and not pursuing them after a stay has been granted thus is not entitled to the Orders sought for material non-disclosure. If the applicant, as he alleged has been in possession of the suit property for 29 years as alleged, it is deposed that he was in such possession as a tenant and not the legal and/or lawful owner and it is clear that the Notice to Vacate that was issued by the Council was so issued due to non-payment of rent and the threat of eviction will only manifest if the applicant failed to pay the rent arrears, which is the Law.

14. To the deponent, the failure on the part of the applicant to lodge the application for stay on the already existing review proceedings, Misc. Application No. 679/03 is itself mischievous and formulated to confuse the Court into making a decision that favours him since the applicant is well aware that the Court would have questioned his failure of not pursuing the earlier application that was similar to this one having obtained a stay 9 years ago hence this is blatant abuse of Court process. In his view, the applicant does not deserve the Order sought herein for material non-disclosure and blatant abuse of Court process.

APPLICANT'S SUBMISSIONS

15. On behalf of the *ex parte* applicant it was submitted that the respondents lacked the capacity both in law to revoke or cancel or purport to cancel the applicant's title thus acted ultra vires the powers bestowed upon them. To the applicant, revocation of title can only be done through a legal. It was further submitted that the said action was done contrary to the rules of natural justice as the applicant was never accorded an opportunity of being heard hence the decision is in bad faith, actuated by improper motives and is unreasonable within the meaning of Wednesbury Rule. Both prior to and after revocation of the applicant's title there was and there has never any communication from the respondent to the applicant. With regard to the suit property. In the applicant's view the respondent's action amounts to taking the applicant's property without compensation and in violation of Articles 40 and 47 of the Constitution.
16. It was contended that under the Registration of Titles Act, the respondent has no power to revoke the applicant's title and reliance was placed on **Republic vs. Kisumu District Lands Officer & Another [2010] KLR; Kuria Greens Ltd vs. The Registrar of Titles High Court of Kenya Nairobi Petition No. 107 of 2010, Samuel Murimi Karanja 2 Others vs. Republic HCCC Criminal Application No. 412 of 2003; and Joseph Arap Ng'ok vs. Justice Moiwo Ole Keiwua Nai Civil Application No. 60 of 1997.**

INTERESTED PARTY'S SUBMISSIONS

17. On behalf of the interested party, it is submitted that despite the notification nullifying amongst others the applicant's title, the registration of the lease relied upon the applicant was done on 16th September 1999, two days after the said nullification after ignoring the said notice. Although the applicant commended judicial review proceedings vide Misc. Application No. 679 of 2003 – **David Gachina Mureithi vs. Nairobi City Council & J M Mbugua**, the applicant has never filed the substantive motion despite having been granted leave to do so hence the nullification of the applicant's title stands unchallenged.
18. It is submitted that since the applicant did not at the time of seeking leave disclose that he had filed earlier proceedings in which he sought and obtained leave to commence judicial review

- proceedings which proceedings were, however, not commenced, the Court should decline to grant the orders sought without going into the merits. In that matter the application seeking vacation of the order of stay is still pending. In support of this submission the respondent relied on **R vs. The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex parte Princess Edmond De Polinac [1917] 1 B 486**, **Francis Gichuki Macharia vs. Senior Resident Magistrate Karatina & Another [2008] KLR**, **KFC vs. Econnet Wireless Kenya Ltd [2005] 1 KLR**.
19. It is submitted that since it is trite that leave ought to be obtained within 6 months of the decision challenged, the application for leave ought to have been dismissed for being misconceived and **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others [1995-1998] 1 EA 194** and **Odinga & Others vs. Nairobi City Council [1990-1994] EA 482** were relied on in support of this contention.
20. Since the transaction from which the applicant claims interest was nullified, it was submitted that no interest can be passed to the other party and the transaction was null and void *ab initio*. Since the transaction was done without the consent of the Minister as required by the Local Government Act, the only available remedy is that of restitution. It was therefore submitted that the 1st respondent's action was not ultra vires and the interested party relied in **Macfoy vs. United Africa Co. Ltd [1961] 3 All ER at 12**.
21. Since the lease was registered after the nullification of the transaction, it was submitted that the Court should not be used to rubberstamp an illegality. According to the interested party section 23 of the Registration of Titles Act only protects the proprietor to whom a certificate of lease had been issued. In this case, the applicant only relies on agreements for lease without exhibiting the lease itself hence section 60 of the Act which deals with cancellation of grant, Certificate of Title or other instrument, does not apply. In the interested party's view a while relying on **Milankumar Shah & 2 Others vs. City Council of Nairobi & 2 Others**, it is possible to nullify a title where public land has been illegally alienated.
22. It was further submitted, on the authority of *Halsbury's Laws of England*, Vol. 9(1) paragraph 870, that a contract prohibited by state cannot be enforced by either party. On the same vein it was submitted that under Article 40 of the Constitution the protection of the right to property does not extend to any property that has been illegally acquired.
23. Apart from that it was contended that the Court ought to decline to issue the orders sought and in exercising its discretion ought to consider that public interest outweighs the applicant's individual interest. In the interested party's view, the disputed land was set aside for common good of the citizens of Kenya but was illegally allocated to individual and in support of this submission reliance was placed on **Peter Bogonko vs. National Environment Management Authority High Court Misc. Application No. 1535 of 2005**.

DETERMINATIONS

24. It was contended that these proceedings have been instituted in utter abuse of the process of the Court in that the applicant having instituted Nairobi High Court Miscellaneous Application No. 679 of 2003, seeking similar orders against the Council and **J M Mbugua** abandoned the same midstream after securing leave on being notified that his application might be caught up by limitation. Although a copy of the ruling arising from the said matter was exhibited, the application itself was not with the result that this Court cannot gauge the nature of the orders which were being sought. It is not in every case that a party files proceedings against the same or similar parties that the law mandates the existence of the earlier suit to be disclosed and that the failure to do so would call for the setting aside of the orders granted earlier on. What is material and what is not must depend on the particular circumstances of the case. Whether or not the disclosure of the existence of the earlier proceedings are material to these proceedings can only be determined when the nature of the proceedings are before the Court. Otherwise the person raising the issue of non-disclosure will similarly be guilty of non-disclosure of material facts. The issue of the applicability of the non-disclosure rule was deliberated upon at length in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated:

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus penitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed... In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the

learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted”.

25. In the premises I do not have sufficient material on the basis of which I can find that the applicant is guilty of material non-disclosure. Whereas he may well be guilty of non-disclosure, whether or not that non-disclosure is material is another matter altogether.
26. It is not disputed that the legal regime under which the titles to the disputed parcels of land fell was the **Registration of Titles Act**. Section 23 of the said Act is based on the Australian Torrens system of registration and its prime principle is the sanctity of the register. See **Popatlal vs. Visandjee [1960] EA 361, 365; [1959] EA 372, 376 (PC); Souza Figueredo vs. Moorings Hotel [1960] EA 926; Cross vs. Great Insurance Company Limited of India [1966] EA 94**. The title of a person appearing on the register as proprietor is, as against third parties, conclusive of that fact and is *prima facie* valid notwithstanding a defect in title. Indeed, it has been held that were it otherwise the principle object of the **Registration of Titles Act**, which is founded on the said system of land registration, would be defeated. See **Govindji Popatlal vs. Nathoo Visandji [1962] EA 372** at 376 and **Dinshaw Byramjee & Sons Ltd vs. The Attorney General of Kenya [1966] EA 198**.
27. Dealing with the provisions of section 23 aforesaid **Kimaru, J** in **Punda Milia Co-Operative Society vs. Savings & Loan (K) Limited Nairobi HCCC No. 273 of 2008** expressed himself as follows:

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

28. Article 40 of the Constitution protects proprietary rights. However the said rights are not, under the present Constitutional regime absolute and can be limited and one of the limitations appears in Clause (6) of the same Article under which property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The said Article however employs the use of the words **“found to have been unlawfully acquired”**. Therefore there must be a finding that the property in question was unlawfully acquired.
29. Section 60 of the **Registration of Titles Act** sets out the steps the Registrar is to take if he deems that there is an error or mistake in the Grant or Title or where the Grant or Title for reasons disclosed therein ought not to have been issued. He is enjoined to summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected. The summons, in my view, must expressly require that the Grant, certificate or instrument be delivered for the purpose of being corrected. At that stage the issue of revocation of the title does not arise. In default of honouring the summons the Registrar then moves to the next stage which is to apply to the Court for the issuance of summons to issue to the person why the same cannot be delivered for correction. It is only in default of honouring the Court summons that the warrants are issued for the persons to be apprehended for examination.
30. In my view what these provisions of sections 60 and 61 of the said Act are intended for is that before a person is deprived of his title to property the due process which includes an opportunity to be heard must be followed. There is no power, however, conferred upon the Registrar of Titles to revoke a registered proprietor’s title before the due process is adhered. The power to direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register is conferred on the Court under section 64 of the said Act.
31. 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.

32. 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.

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

34. The *ex parte* applicants submitted that the rules of natural justice were not adhered to when their title was revoked. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

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

35. In the recent case of **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR, Majanja, J.** on a matter similar to the current one expressed himself thus:

“.....first, the Registrar of Titles has no authority under the *Registration of Titles Act* to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation.”

36. I find the said decision persuasive.
37. In this case, however, it is contended that there was no grant, title or instrument in existence which could be revoked hence section 60 of the **Registration of Titles Act** was inapplicable. The applicant has, however, exhibited a copy of the grant issue in his favour presented for registration on 16th September 1999. Accordingly, I find that the said section 60 applied.
38. In the present case, the respondents contend that the transaction between the Council and the applicant was illegal since it was not sanctioned by the Minister for Local Government. That may be so, however, a grant was issued and whether or not it was unlawfully issued could only be rectified by following the due process of the law as provided under section 60 of the **Registration of Titles Act**.
39. Whereas Article 40(6) expressly excludes the protection of the proprietary rights to properties which have been found to have been found to have been unlawfully acquired, the use of the phrase **“found to have been unlawfully acquired”**, necessarily means that for that protection to be lost there must be a finding that the property in question was **“unlawfully acquired”**. That finding, can only be arrived at where a determination is made as required under the provisions of Article 47 of the Constitution. In other words the *prima facie* proprietor of the land in question must be given an opportunity to be heard before such a decision is made.
40. It is contended that this opportunity was given to the applicant vide a public notice issued by the Council. I have perused the said notice and it is clear that the notice was communicating to the public a **finding** by the council that the affected properties had been transferred irregularly and illegally. Where a finding has been made and what is being transmitted is that the same has been arrived at one cannot say that the public is being offered an opportunity to be heard on the matter. I therefore do not agree that the said public notice amounted to an opportunity to the public, the applicant included of being heard on the matter. The hearing contemplated under Article 47 of the Constitution must precede the finding and not vice versa.
41. I am, however, cognisant of the position stated in **Halsbury’s Laws of England 4th Edition Vol. II page 805 paragraph 1508**, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. 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 judicial review 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. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000**.
42. In this case it is contended that the title which was issued to the applicant was illegally issued since the relevant Minister did not authorise the said transaction. It is further contended that the lease was registered after it had been nullified. Further, it is contended that the said property was public utility property which ought not to have been allocated to individuals.
43. In **Republic vs. Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 Of 2003 [2006] 1 KLR (E&L) 563 Maraga, J** (as he then was) expressed himself as follows:

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefensibility of title deed. It is clear from section 75 of the Constitution that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman

Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”

44. Similarly, Nyamu, J (as he then was) held himself in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443. as follows:

“The President has power to alienate land by way of lease under the *Government Lands Act* which came into force on 18th May 1915. His powers relate to Government land as defined in s 2 of the same Act, this includes the land described in the Kenya Independence Order in Council 1963 by section 204 and 205 of the Constitution (see schedule 2 of the order) and section 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Thus, under s 3 of the Act, the President, in addition to, but without limiting any other right, power or authority vested in law under the Act, may subject to any other written law, make grants or disposition of any estates, interests or rights in or over unalienated Government land. The President’s powers under this section were delegated to the Commissioner in some cases for example in respect of land for religious, charitable, educational or sports purposes and for general purposes of the Government. Unalienated Government land means Government land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment – see s 3 of the Act. The President has powers under s 12 to grant leases of town plots to individual and companies. Under s 19 he has power to alienate land available for agricultural purposes to be surveyed and subdivided into farms. He can direct the Commissioner in this regard. He can grant leases of farms under s 20. His powers under s 3 except as provided, s 12, 20 are not delegable to the Commissioner. Since Kenya is a democracy, pursuant to s 1 and 1A of the Constitution the doctrine of public trust does also apply to public land except where it is excluded by the Constitution because alienating public land is not a practice which is necessary in any democratic state.[I]n all the Acts the President’s powers to alienate are defined and in any event after adjudication and consolidation in the former special areas the effect of registration was to extinguish any clan or tribal interest in the land. The President through the Commissioner does have powers to allocate Government land for the purposes set out in s 3 of the *Government Land Act* which are principally public purposes. To me the doctrine of public trust is implied in the relevant Acts and ought to apply in respect of Government land except the town plots which can be alienated as leases after public advertisement. “Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability.” At the end of the day, we must remember those famous words of a famous jurist – Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the Courts ... Should the *Land Acquisition Act* give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a

title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”.....It is clear from the above constitutional provisions that the doctrine of public trust is recognized and provided for by the superior law of the land i.e. the Constitution and applies in a very explicit way as regards trust land. The doctrine is however not only confined to Trust lands and covers all common properties and resources.....it applies to public land. Although the doctrine had origins in Roman law it is now a common heritage in all countries who adopted the English common law. To many African communities land was owned by the communities or possessed by their community. The doctrine has deep roots in African communities and is certainly not inherited from the Romans. Forests and other common resources have never been individually owned. Its basis was the belief that certain common properties such as rivers, the seashore, forests and the air were held by the State in trust for the general public. Under the English common law ownership of common properties vested in the sovereign and the sovereign could not grant ownership in them to private owners if the effect of such grant was to interfere with the public interest because such resources were held in trust by the sovereign for the benefit of the public, such property may not be sold or converted to other kinds of use.....It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and s 1A of the Constitution or under the doctrine of public trust, a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept.....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in “a democratic society.” This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency.A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view. Sections s 1 and 1A of the Constitution expressed the democratic foundations of this nation and *inter-alia* that the people cannot be prevented from giving birth to a new Constitution because these sections were designed by the framers to secure and preserve avenues for political change and the people could not, in a democracy, be restrained from bringing that change by way of a new Constitution. Any undemocratic practice is therefore challengeable under these provisions.....Under the judicial review jurisdiction the grant of judicial orders is at the end of the day discretionary and watertight reasons for the grant of orders after 40 years would be mandatory, because as stated above, promptness is the hallmark of judicial review proceedings. In addition, in exercising that discretion I would have to take into account the needs of a stable system of land registration. To unravel a system of registration going back almost a hundred years one, must reflect on the hardships and prejudice to third innocent parties. In such situations the virtues of certainty, predictability and stability of the land registration system, do in my view heavily out-weigh the short term individual gains since a compensation fund as recommended above could do the trick in rectifying some of the injustices of the past. The policy makers would have to have regard to the principle of proportionality. Whereas the objective or aim may be legitimate, the means of attaining the objectives must be necessary, reasonable and proportionate. Finally, as is apparent from the facts in this case no evidence has been offered on the method used in the alienation of the three parcels. Each case would have to turn on the evidence offered or not offered and the exercise of discretion has to be on the basis of evidence since discretion cannot be exercised in a vacuum. The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to

public land, forests, wetlands, riparian rights, riverbeds and “*kayas*” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”

45. Whether the allocation was illegal or not is, in my view, a matter beyond the scope of this determination. However, it is not an issue which can be wished away as inconsequential. There are in my view issues which ought to be properly investigated and evidence adduced. They are not matters which can simply be determined based on the grant possessed by the applicant which grant according to the Constitution is simply *prima facie* evidence of title which title can be challenged if found to have been unlawfully acquired. As was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, *mandamus*, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce* evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce* evidence at another forum preferably the Civil Courts.”

46. Similarly, in this case even if I were to grant the orders sought herein, the issue of validity of the applicant’s title would remain unresolved and since there is already in existence civil proceedings revolving around the suit property substantially between the parties herein, it is my view that that issue ought to be determined before that forum in which *viva voce* evidence will be taken so that appropriate declaratory orders can be made and the matter brought to finality. To grant the reliefs sought without determining the ownership of the suit land would in my view be an exercise in futility.
47. 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.
48. It follows therefore that where the resolution of the dispute before the Court requires the Court to

make a determination on disputed issues of fact that is not a suitable case for judicial review.
49. Accordingly, whereas I find that the Respondents' actions are prima facie improper, I decline to grant the orders sought in order for the parties to prosecute the appropriate legal proceedings to determine the issues of ownership of the disputed parcel of land.
50. In the premises there will be no order as to costs.

Dated at Nairobi this 27th day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mrs Shamalla for the Interested Party.