REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NARIOBI

MISCELLANEOUS CIVIL APPLICATION NO.504 OF 2003

IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION

BETWEEN

REPUBLIC .....APPLICANT

AND

THE PERMANENT SECRETARY

MINISTRY OF PUBLIC WORKS & HOUSING .....RESPONDENT

SUBJECT

TOM MALIACHI SITIMA

JUDGEMENT

1. By a Notice of Motion dated 10th June, 2003 filed the same day, the *ex parte* applicant herein, **Tom Maliachi Sitima,** seeks the following orders:

a. **An order of Prohibition do issue prohibiting the Respondent from demanding the payment of rent by the applicant for the suit premises known as Land Reference No.209/13764.**
b. **An order of Prohibition do issue prohibiting the respondent from carrying out the eviction of the applicant from the said suit premises, or in any other way howsoever interfering with the applicants right, title to and quit possession of the suit premises presently and at any other time whatsoever.**
c. **The costs of this application be in the course (sic).**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 16th May 2003 and affidavit verifying the same statement sworn by the applicant on 16th May, 2003.
3. According to the applicant, he was employed by the Government of Kenya, as a School Teacher on the 1st day of January 1958, and thereafter rose through the ranks to the post of Chief Inspector of Schools, which post he held for an unparalleled record of 13 years till his retirement on the 31st day of March 1995 at which time he was still residing in a Government Quarter then known as House No. HG 695A situated in Kileleshwa along Kandara Road, where he had been residing since the year 1983. On the 19th January 1995, he made an application to the Commissioner of Lands to be allowed to purchase the said house, which application was approved by the then

President on the same date pursuant to which the office of Commissioner of Lands wrote to the respondent's office on the 14th February, 1995 confirming the said approval for allocation of the House. While awaiting the letter of allocation, the applicant was requested by the respondent to produce and show to him the letter of allotment along with his employment letter and payslip, for the purpose of regularizing the respondents' records, which letter was dated the 18th September 1996.

4. Sometime between September and November 1996 the applicant was informed by the respondents office that the respondents office had requisitioned for a valuation of the House, and upon such valuation had advised the Commissioner of Lands that the House would be valued and the applicant would have to pay not just the standing premiums to the Government, but also a purchase price for the property and on the 5th of December 1996, the applicant received a 'Letter of Allotment' wherein the Commissioner of lands on behalf of the Government of Kenya offered him a Grant of the House subject to the payment of the sum of Kshs.494,850/= within 30 days which sum the applicant duly remitted on the 20th December 1996. Upon acceptance of the said offer, and payment of the said amount, the applicant received a Grant of the House, now known as Land Ref. No. 200/13764 for the term of ninety nine (99) years from the 1st day of December 1996 and has since been residing in the said property.
5. According to the applicant, he not since the issuance to him of the Grant, received any demand for the revocation of his Grant to the land by the Commissioner of Lands and was not in his application for the Grant a party to fraud or any irregularities whatsoever. Neither is he aware that the Commissioner of Lands or any other party was guilty of fraud or any other irregularities in the issuance of the Grant and no proceedings have been brought by any other party regarding the Grant or the issuance thereof.
6. Despite that he received a demand from the Respondent to vacate the premises or pay rent for the same within 30 days from 28th April 2003. Despite him being the lawful and registered Grantee of the suit property, which according to him is indefeasible.

RESPONDENTS' CASE

7. In response to the application, the Respondent on 2nd July, 2003 filed a replying affidavit sworn by **Engineer Erustus Mwongera**, the Respondent herein, on 2nd July, 2003.
8. According to the respondent, he is aware of House No. H.G. 695A along Kandara Road, Kileleshwa Nairobi, which house is one of the houses in the Kileleshwa Pool Housing Phase 1, which were constructed by the Kenya Government through the National Construction Corporation as the Contractors, between 30th June 1979 and 12th April 1983 at a cost of Kshs.616,922.00 per unit to facilitate housing to its Senior Civil Servants within Nairobi. The said house was accordingly entered into the Government Register of Buildings and houses to form part of the Government Stock of Properties. It was deposed that the Nairobi Super-scale Housing Committee allocated the house to the Applicant for his occupation as a Civil Servant on 19th February 1991. On 18th June 1996 the respondent wrote to the Applicant requesting him to supply them with information on rent payment required for verification of the respondent's records and the Applicant replied on 23rd September 1996 claiming to have an approval from **H. E. Daniel Arap Moi** the former President of the Republic of Kenya to purchase the plot and house within it.
9. It is the respondent's position that the Government has set out clear procedures and guidelines to be followed in the disposal of Government houses, assets and property and that there are no provisions for request to purchase a house by a private individual and/or company. These procedures and guidelines, it is deposed, are aimed at protecting public property, ensuring transparency, accountability to the public in the management of the public property and assets as set out in Chapter 19 of the Government Financial Regulations and Circular No.2/58 dated 1st March 1958 which was adopted and enforced by the independent Government. The said Regulations require a Board of Survey, initiated by the Officer in charge of Buildings to be constituted before disposal of any Government House/Building. However, the Board of Survey, which is constituted by a chairman and three members, a Senor Office from the Department requesting for the Board of Survey and Medical Officer nominated by the Director of Medical

Services or the Provincial Medical Office and an office of Ministry of Roads, Public Works and Housing above the rank of Inspector Building nominated by the Provincial Works Officers concerned cannot be initiated by any other party other than the authorized officer i.e. the Permanent Secretary who is the Officer capable of determining the condition of the Building after the receipt of inspection report from the technical staff. Its proceedings and recommendations are record on Form F.O. 58 and sent to the Accounting Officer together with the inspection report which are forwarded to the Permanent Secretary, Treasury for his approval and it is only after the approval that the Building/House is deleted from the Register and the Controller and Auditor General informed accordingly.

10. It is contended that the house in dispute has never been boarded, nor has any Board of Survey been constituted to recommend for its disposal and deletion from the Government Register approved by the Permanent Secretary, Treasury hence the demand for payment of rent contained in the letter of 28th April 2003 is valid and it is within the respondent's authority as the Accounting Officer in charge of all Government Houses to demand rent from the occupant of the Government House in line with the Government Policy on payment of house rent on all Government owned houses.
11. The deponent, however, denied that his office did in September 1996 request the Commissioner of Lands for valuation of the said house.
12. According to him, the alleged approval of the allocation of plot and house, by **H.E. Arap Moi** the former President of the Republic of Kenya is invalid and void *ab initio* as neither the President nor the Commissioner of Lands have any authority to alienate Government Houses or Buildings without following laid down procedures and approval from the Treasury. Further, the request from the Commissioner of Lands dated 14th February 1995 for a Board of Survey is a nullity as the house in dispute did not belong the Commissioner of Lands and it contravened laid down procedures for Board of Survey and the Grant issued to the Applicant having been issued without proper authority in law is invalid and void *ab initio* and does not grant the applicant absolute rights over a Government house that has not been properly disposed off.

APPLICANT'S SUBMISSIONS

13. On behalf of the applicant it was submitted that the applicant is not a tenant of the government of Kenya and since the applicant has the title document in his favour, he is a buyer of the suit premises from the government of Kenya for a consideration. It is submitted that the Commissioner of Lands has not todate summoned the applicant to deliver up his title document for correction or cancellation hence the respondent cannot abrogate those powers.. Since the Commissioner of Land's powers to issue and rectify the title is delegated to him by the President, he has no powers to sub delegate the same to the respondent. It is therefore submitted that the respondent's directive to demand rent and or threaten eviction of the ex parte applicant is ultra vires and he has no authority in law or otherwise to effect his whimsical demands.
14. It is the applicant's contention that the title having been issued by the Registrar of Lands to the applicant, it is incumbent upon anyone challenging the title to allege fraud and further that the applicant was a party to any such fraud or misrepresentation which averment has not been made.

RESPONDENT'S SUBMISSIONS

15. On behalf of the respondent, it was submitted that the rights in the property described as LR 209/13764 vests in the Respondent under the ***Government Lands Act*** and that the same have at no time been relinquished, divested or in any other manner whatsoever disposed of or transferred by the Respondent to the Applicant or any other person. According to the respondent the issue of ownership of land is an issue within the civil jurisdiction of the court and cannot be the subject of judicial review proceedings. According to him the respondent having demanded the rent prohibition cannot issue without an order quashing the said demand.
16. To the respondent, the transaction in question having been concluded or purported to have been concluded in disregard of the ***Government Lands Act*** Cap 280 Laws of Kenya and the Government Financial Regulations is void *ab initio* hence of no consequence. As the house has neither been transferred nor disposed of, the respondent contends that he is the rightful and legal

proprietor thereof hence the relationship of landlord and tenant exists between the applicant and the respondent and the respondent is entitled to rent.

DETERMINATIONS

17. The first issue for determination is whether an order for prohibition can issue in the circumstances of this case.
18. In **Republic vs. The Commissioner For Co-Operative Development & Kariobangi Housing & Settlement Co-Operative Society Limited Ex Parte David Mwangi & 15 Others Nairobi HCMCC No. 805 of 1990** it was held that "prohibition, unlike certiorari lies to correct an excess or absence of jurisdiction or to prevent a breach of the rules of natural justice..... It particularly forbids the continuation by a tribunal or any authority of a particular matter it is seized of in excess of its jurisdiction or in breach of the rules of natural justice."
19. The *ex parte* applicant, however, seeks order of prohibition. 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 Figuiredo 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**.
20. 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."**

21. Article 40 of the Constitution protects proprietory 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.
22. 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.
23. 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.

24. 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.***

25. 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.***

26. 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. 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."

27. The *ex parte* applicant contends that being the proprietor of the suit parcel of land, its title is indefeasible. However, under the current Constitutional dispensation a title can be challenged and even revoked if found to have been unlawfully acquired.

28. In this case, the respondent's case is that the title which the applicant is waving was not legally acquired since the former President, **H.E. Daniel Toroitich Arap Moi** had no powers to issue the said grant in breach of the relevant law and procedures. 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 indefeasibility 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."

29. 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."

30.In the same vein in **Chemei Investments Limited vs. The Attorney General & Others Nairobi**

Petition No. 94 of 2005 at para. 64 it was held:

"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra)* where the Court stated as follows, "We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."

31. I am, also 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.**
32. In the present case, the Respondents have raised issues which go to the root of the applicant's grant. It is alleged that the title which the applicant possess is, in effect, just a piece of paper since the respondent's title was never cancelled and there was no transfer of the said land to the applicant. It must be remembered that even under the former Constitution the President was not an imperial president but a Constitutional one bound by the provisions of the Constitution and the laws of the land. In this respect I associate myself with the decision of **Gikonyo, J** in **Julius Nyarotho vs. Atorney General & 3 Others [2013] eKLR** in which he expressed himself as follows:

"Needless to state that, the Presidency is a creature of the Constitution. According to Articles 1(3) (a), 129 and 130, the executive authority is derived from the people and is exercised in accordance with the Constitution. The presidency should adhere to, promote and protect the Constitution, to mention a few say; observe national values and principles of governance (Article 10), observe principles of executive authority, maintain integrity for leadership (chapter six), observe legal requirements, and respect the authority of the judiciary. If the presidency violates the requirements of due process of the law as laid down in Constitution or any statute law, the Constitution is not helpless, as, it is self-referential and does not suffer a wrong without a remedy. Therefore, judicial review will lie against an order of appointment made by a sitting President in contravention of the law. This is a public law remedy which is directed to the state itself as the president exercised executive authority of state. It is a subject that is governed by the public law of the state. A narrow and strict interpretation of Article 143 of the Constitution would offend Article 259 of the Constitution which demands a purposive interpretation in order to give effect to the objects, purposes and values of the Constitution..... According to Article 73 of the Constitution, authority assigned to a state officer is a *public trust.* On this basis, the Constitution installs a responsibility on the executive to serve the people rather than the power to rule the people; be accountable to the people, and respect the rule of law. See Article 129 also. Strict interpretation of Article 143 of the Constitution without regard to the objects, values, purposes and spirit of the Constitution, as

suggested by the Respondents, particularly the Attorney General will; 1) deprive the public the right to demand for public answerability from the office of the president on the exercise of the sovereign authority they have delegated to the executive; 2) disparage the Constitution and promote impunity. These matters are placed in the public law of the state as a deliberate constitutional approach in order to enable the Constitution to avoid an absurd state of affairs that would otherwise be created by a narrow interpretation of Article 143. The courts reconcile the dichotomy of ensuring that there is no violation of the Constitution or the law that goes without a remedy whilst maintaining the integrity of the presidency which is a symbol of the Republic of Kenya by simply upholding and protecting the Constitution. In such suit as this, the Attorney General is the proper party. In countries with robust Constitution, including Kenya, courts have questioned actions or inaction by the President in so far as the deed or omission thereof has violated the law. Although in the instances where courts have invoked judicial review to right the wrongs by the executive have been equated by some pundits to judicial activism, I am convinced, it is simply a judicial path that is permitted by the Constitution itself as a way of attaining checks and balances within the doctrine of separation of powers."

33. Therefore the President had no powers to dish out public land as if it was his private property. Whether this is what actually happened is beyond the scope of this determination. However, it is not an issue which can be wished away as inconsequential. These 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."

34. 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. In my view, that issue ought to be determined before a

proper 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.

35. 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.
36. 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.
37. 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 institute appropriate legal proceedings to determine the issues of ownership of the disputed parcel of land.
38. In the premises there will be no order as to costs.

Dated at Nairobi this 24th day of January 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Senteu for the ex parte applicant.