



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 400 OF 2013**

**IN THE MATTER OF AN APPLICATION BY EZEKIEL MISANGO MUTISYA**

**FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 2, 10,19,20,21,22,23,40,47,64(B) THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA**

**AND IN THE MATER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTIONS 40,41,43(2), 53 AND 78(2) OF THE LAND REGISTRATION ACT, ACT NO. 3 OF 2012**

**BETWEEN**

**EZEKIEL MISANGO MUTISYA.....APPLICANT**

**VERSUS**

**THE NATIONAL LANDS COMMISSION.....1<sup>ST</sup> RESPONDENT**

**CHIEF REGISTRAR OF LANDS.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**AND**

JEREMIAH MATAGARO.....1<sup>ST</sup> INTERESTED PARTY

MALU SORA DIBLOA.....2<sup>ND</sup> INTERESTED PARTY

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 18<sup>th</sup> November, 2013, the *ex parte* applicant herein, **Ezekiel Misango Mutisya**, seeks the following orders:

1. **THAT an order of certiorari to bring into the High Court for purposes of quashing and to quash the Restriction and or decision of the 3<sup>rd</sup> Respondent purporting to restrict any dealing over Title No. Nairobi/Block 112/127.**

2. **THAT an order of Mandamus compelling the Chief Registrar of Lands, the 2<sup>nd</sup> Respondent herein, to remove and or cause to be removed the Restriction entered on Title No. Nairobi/Block 112/127 and on 10/10/13 as entry No. 5 and any other subsequent Restrictions and or Caveat cautions howsoever put on the suit property.**

3. **THAT an order of prohibition prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from making or causing to be made any Restriction, Caution, Caveat encumbrance and or any impediment whatsoever on the sale, Transfer, alienation, leasing, charging and or disposition of the suit property being Title No. Nairobi/Block 112/127 by the Applicant herein and restricting any dealings on the Title No. Nairobi/Block 112/127.**

4. **THAT the costs of this application be provided for.**

5. **THAT any other and further relief that this honourable Court may deem fit and just to grant in the circumstances.**

### Ex Parte Applicant's Case

2. The application is supported by a verifying affidavit sworn by the Applicant on 4<sup>th</sup> November, 2013.

3. According to the Applicant, he is the registered proprietor of the leasehold interest in all that property known as Nairobi/block 112/127 and in possession of a Certificate of Lease for 99 years from 1/01/1989 which lease was issued in his name pursuant to a court order made on 9<sup>th</sup> February 2013 by Hon. Mr. Justice Havelock in Milimani HCCC No. 248 of 2012. According to him, he purchased the property in an auction which he learnt of through an advertisement at page 41 of the Sunday Standard Newspaper of 18<sup>th</sup> November 2012 as well as on page 49 of the People Newspaper of 14<sup>th</sup> November 2012.

4. According to him, he enquired about the conditions of sale and realized from the Notification of Sale dated 25<sup>th</sup> October 2012 that the subject property was being sold pursuant to a court order in satisfaction of a decree in Milimani HCCC No. 248 of 2012 between **Zephar Holdings Limited** as the Plaintiff and **Mimosa Plantation Limited** as the Defendant to which he was not a party.

5. He deposed that the transfer of Lease was executed in his favour on 14<sup>th</sup> December 2012 by the Deputy Registrar of the High Court of Kenya at Milimani and handed over to me. By an application for registration dated 13<sup>th</sup> June 2013, he lodged the instrument of transfer to the lands registry for registration.

6. In the applicant's view, he purchased the subject property in a public auction and the same was transferred to him free from any encumbrances. He was therefore surprised to learn from a Certificate of

Official search dated 23<sup>rd</sup> October 2013 that a restriction has been arbitrarily imposed on the subject property by Respondents restricting any dealings until investigations of the order were finalised.

7. In his view, his Constitutional Rights under Articles 2, 10, 19, 19, 20, 21, 22, 23, 40, 47 and 64(b) have been violated by the arbitrary imposition of a restriction over his said property which was vested in him by a Judicial process which restriction has fettered and or ousted his rights therein by the executive arm without following the due process. The said restriction, he deposed has not been communicated to him by the Chief Land Registrar as required under Article 77(1) of the **Land Registration Act**, 2012 hence he believes the said restriction is unlawful and should be removed by the Chief Land Registrar under Section 78 of the **Land Registration Act** or removed to the High Court and quashed.

8. To him, the 3<sup>rd</sup> Respondent herein acted contrary to the doctrine of separation of powers when it usurped to itself powers not conferred on it by the Constitution or any other written law when it purported to restrict any dealings in the suit property pending finalization of investigation of the order granted by Hon. Justice Havelock on 6<sup>th</sup> February 2012 in Milimani HCCC No. 248 of 2012. Further, the 3<sup>rd</sup> Respondent has acted in excess of its jurisdiction in purporting to restrict any dealings in Title No. Nairobi/Block 112/127 pending investigation of an order granted by Hon. Justice Havelock on 6<sup>th</sup> February 2013. By failing to give any reasons for the said action, he averred the 3<sup>rd</sup> Respondent acted arbitrarily.

9. Therefore it was his view that unless the orders sought herein are granted, he stands to suffer irreparably hence the orders sought herein.

10. In his further affidavit filed on 21<sup>st</sup> January, 2014, he averred that the suit premises ceased being the property of **Chris Nyakundi** on 2<sup>nd</sup> February 2001 as confirmed by the Green Card so by the time he acquired the same property on the 13<sup>th</sup> June 2013 the proprietary of **Chris Nyakundi** had been expunged from lands office records who consequently had no legal claim to the suit property and therefore his placement of a restriction has no legal basis and its therefore unlawful. Since he acquired this property through a court order if **Mr. Nyakundi** had any issues with the court order he should have applied to set it aside yet he has not done so since placing the restriction on 10<sup>th</sup> October 2013.

11. According to the applicant, at the time he acquired the property, he only found the name of **Mimosa Plantations Ltd** having been entered on 1<sup>st</sup> August 1990 and similarly, the records at City Hall showed that the rate payer was **Mimosa Plantations** in whose name the rates clearance certificates were issued. To him, before **Chris Nyakundi** placed the restriction he should have first had his name reinstated at lands office records.

12. In the applicant's view, having a title means nothing as long as the said title is not reflected in the Green Card and the copies of the titles and transfer annexed were not certified by the Land Registrar and therefore difficult to verify whether they are genuine. He asserted that the application before this court is about the removal of a restriction and not about ownership and there is no dispute that the suit premises is his and **Chris Nyakundi** is a busy body who since the year 2001 has never owned the property.

### **1<sup>st</sup> Interested Party's Case**

13. In opposition to the application, the 1<sup>st</sup> interested party herein, the holder of a power of attorney from **Chris Nyakundi** filed an affidavit sworn on 16<sup>th</sup> January, 2013.

14. According to him, the suit property being title Number NAIROBI/BLOCK 112/127 falling under the **Registered Land Act** regime was first alienated and transferred by way of a lease to **Mimosa Plantations Limited** by the President of the Republic of Kenya on behalf of the Government of the Republic of Kenya on 5<sup>th</sup> July 1990. On 5<sup>th</sup> July 1994 **Mimosa Plantations Limited** transferred the suit property for valuable consideration to **Chris Nyakundi**, and a transfer of lease was duly executed and an application for registration duly lodged. Thereafter a certificate of lease was then duly issued in favour of **Chris**

**Nyakundi.** He deposed that the said **Chris Nyakundi** did not enter into any other sale agreement with respect to the suit property and as at 11<sup>th</sup> of February, 2013 **Chris Nyakundi** was still registered as the bona fide owner of the suit property as evidenced by the information captured on the property rates payment request received by him from the city council of Nairobi.

15. According to the 1<sup>st</sup> interested party, the suit property has been subject to fraudulent and irregular dealings in that on 2<sup>nd</sup> February 2001 an entry was made in the green book showing that **Peter Obiero Bundi** had been issued with a certificate of lease the name of **Chris Nyakundi** had been cancelled without any notification or in pursuit of due process of the law; the cancellation being illegal and fraudulent the matter was reported to the Criminal Investigations Department who then made an entry on the green card indicating that there was a suspicion of fraud and the suit property was under investigation; on 21<sup>st</sup> November 2013 **Chris Nyakundi** was summoned by the District Land Registrar to appear before him for purposed of having the ownership of the suit property proved; the Directorate of Criminal Investigations then wrote a letter on 25<sup>th</sup> November 2013 to the firm of **Rachier & Amollo Advocates** requiring supporting legal documents to investigate the fraudulent entry on the green card.

16. According to the 1<sup>st</sup> interested party, despite the Applicant being aware of the interests of **Chirs Nyakundi**, the instant application was not served upon him and neither was he made a Respondent and it is perplexing that the sanctity of title is not jealously safeguarded by the government. He further averred that it is a constitutional norm that no person can be arbitrarily deprived of his property; that the purported court order authorising sale by way of public auction of the suit property made in Civil Number 248 of 2012 between **Zephir Holdings Limited** versus **Mimosa Plantation Limited** is void, illegal and irregular since it touched and directed action on registered property not in the name of the parties to the proceedings and neither party having any legal or beneficial interest in the suit property; that the attachment of this suit property was done in execution of the said order, which execution was effected on property not owned by Mimosa Plantation Limited who had sold and transferred this suit property to **Chris Nyakundi** in 1994 whereas the attachment was made against Mimosa and the suit property wrongfully identified as property belonging to Mimosa hence its attachment; that the end result was **Chris Nyakundi** was arbitrarily deprived of the suit property in total breach of the principles of natural justice and equity; that the said attachment of the suit property was made in ignorance of the legal principle of *nemo dat quod non habet*; that there was neither basis nor justification to attach the property of a third party to effect execution of a decree against the judgment debtor. This court should not countenance these actions.

17. The 1<sup>st</sup> interested party asserted that it is also the *grundnom* that the right to property does not extend to any property found to have unlawfully acquired and to him, the applicant has not challenged the authenticity of **Chris Nyakundi's** title hence the applicant could not have and has not acquired the suit property legally.

18. In the 1<sup>st</sup> interested party's view, he dispute that has now arisen is the creation of and a matter that ought to be put squarely at the doorstep of the Chief Land Registrar, 2<sup>nd</sup> Respondent since all documents leading to the issuance of title are not prepared, kept nor issued by any other party other than the office of the 2<sup>nd</sup> Respondent. To him, section 23 (1) of the repealed **Registered Land Act** under which the suit property was registered gave an absolute and indefeasible title to the owner of the property, **Chris Nyakundi** whose title not having been challenged remains the lawful registered proprietor. Further, the first in time prevails so that in the event such as the one arising out of the instant application two titles in respect of the same parcel of land apparently and on the face of them issued regularly and procedurally, then the first in time must prevail. This according to the deponent, is because without cancellation of the original title, it retains its sanctify. Whereas the first title cannot be challenged, the applicant's title can be challenged since it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy of the applicant hence, lies elsewhere.

19. He insisted that the 2<sup>nd</sup> Respondent proceeded to issue title to the suit property to the Applicant wrongly assuming that **Mimosa Plantations Limited** was its registered proprietor not bothering to

conduct due diligence and inquire from its records the true ownership of the suit property. He therefore sought declaratory orders that **Chris Nyakundi** is the bona fide owner of the suit property since greater injustice has been imposed on **Chris Nyakundi** having been arbitrarily deprived of the suit property as a result of gross acts of incompetence and negligence on the part of 2<sup>nd</sup> Respondent.

### 2<sup>nd</sup> interested party's case

20. The 2<sup>nd</sup> interested party in opposition to the application filed an affidavit sworn on 5<sup>th</sup> February, 2013.

21. According to him, Article 66 of the Constitution and Section 76-78 and **Land Registration Act** No. 3 of 2012 empower the registrar to put a restriction on the property which according to him is a statutory and constitutional function of the registrar contrary to what is alleged by the Applicant and the same can not be inhibited. The Honourable Court can also not prohibit the 3<sup>rd</sup> and 4<sup>th</sup> Respondent from investigating the Applicant a suspect land fraudster.

22. According to him the suit property was bought for him in 1994 by his late son **Noor Sora Bibloa** from Mimosa Plantation Limited but was to follow up on the completion of the whole transaction. However shortly afterwards he died in 1994 and the 2<sup>nd</sup> interested party continued living on the suit property to date well believing all the documentation were finished. Due to appreciation of property in Nairobi and Runda in particular his property was a target of opportunists, fraudsters and agents keen on commissions and sale of the same such as the Applicant and the 1<sup>st</sup> interested party. Sometime in 2011 the Applicant, a land agent and his advocate **Mr. Mungala** approached him to sell the property on his behalf which he refused and chased them and despite his being relentless the 2<sup>nd</sup> interested party stayed put. He deposed that the visits started when his son gave the papers to **Mr. Mungala** Advocate to scout for the property and on discovery of the defect in registration.

23. He further deposed that he was mysteriously arrested over trumped up allegations of trespass on the suit property and was booked at Gigiri Police Station but was released after protesting and surrendering his documents which arrest he suspects was instigated by the applicant and his advocates. He later came to realize that the Applicant mysteriously came to be registered as the owner of the property sometime 2013 and upon investigation it was been revealed that the Applicant and his advocates used fictitious and unregistered companies to bring a fraudulent, false and concocted claim against **Mimosa Plantation Limited** in a Nairobi High Court Civil Suit 248 of 2012 being **Zephir Holding Limited vs. Mimosa Plantation**. However the 2<sup>nd</sup> interested party deposed that it has been established by Registrar of Companies that the said **Zephir Holding Limited** does not exist and a nonexistent company could not transfer any right of property to the applicant.

24. According to him, investigation of the matter revealed further that there was no any real transaction that took place during the alleged public auction and that such a property of high value could not have been advertised in two lines in the Dailies and that the same was not in open market and only meant to deceive the court. He averred that the Honourable Court was grossly misdirected to issue the orders to register the property under the names of the applicant therefore legitimizing the Applicants fraud. To him, this was just a transaction on the table and no money exchanged since the applicant is a man of straw and of very little means and ought to be put to strict proof that he paid Kshs. 18 million cash on the property as a highest bidder as alleged.

25. To further the cement the fraud the file in Nairobi HCC 248 of 2012 was severely defaced, mutilated and documents plucked out to conceal the trail of ex-parte proceedings and applications brought by the applicant and his advocates and agents to acquire the property.

26. He averred that it was further confirmed by Mimosa Plantations that no one person including the 1<sup>st</sup> interested party as he alleges has ever been sold the property except the 2<sup>nd</sup> interested party hence the alleged title and documents of the 1<sup>st</sup> Interested Party and their authenticity is suspect since he does not

explain the disability why he has a power of attorney for **Chris Nyakundi** or his whereabouts and he cannot act in himself yet investigations reveal that **Chris Nyakundi** is an innocent Kenyan plying his trade in Kisii town as a shoe hawker; the said power of attorney is mutilated cancelled and it is not a proper document; the alleged power of attorney is dated 18<sup>th</sup> July 1994 while the lease was issued on 5<sup>th</sup> of July 1994 and signed by **Jeremiah Matagaro** and the lease yet the said power of attorney does not confer retrospective powers; the addresses of the said **Chris Nyakundi** are very different in the alleged lease and agreement; the lease and the documents displayed by the 1<sup>st</sup> Interested Party are also fraudulent as **Mimosa Plantation Limited** confirms that neither **Chris Nyakundi** nor **Jeremiah Matagaro** has ever transacted with them on the suit property; and that it is also unbelievable that the 1<sup>st</sup> Interested Party could buy the land pay rent advances on property he has never set eyes on in over 20 years.

27. The interested party asserted that the applicant and the 1<sup>st</sup> interested parties' have in themselves exhibited their fraud before court and how their purported rights of the suit property are fraudulent tainted with illegality and misplaced and that it is in the interest of justice that **Mimosa Plantations Limited** be enjoined in this suit to shed the light on the matter.

28. According to him, all parties were summoned by the registrar after which the orders were granted hence the application herein is mischievous and presumptuous and ought to be dismissed in the 1<sup>st</sup> instance since the acts of the applicant betray him and does not endear him to the remedies sought as he has not come to court with clean hands. By seeking the orders and purporting to gag the 1<sup>st</sup> to the 5<sup>th</sup> Respondent from performing duties given by law through respective statute he seeks to escape the due process of the law to which he is being subjected. In his view, the Registrar of Title acted in just faith and in his statutory mandate to put a restriction on the suit property until thorough investigations are complete against the applicant and the 1<sup>st</sup> interested party and it is therefore for the greater justice for the restriction to stay on the land until investigations are completed and culprits booked, otherwise the suit property will be transferred to 3<sup>rd</sup> parties and applicants disappear making litigation complex and expensive and will be tantamount to awarding impunity and fraud.

29. The 2<sup>nd</sup> interested party further deposed that he had instructed his lawyer to institute proceedings to reverse orders fraudulently procured in Nairobi HCC 248 of 2012 - Zephir Holdings Limited vs. Mimosa Plantations and have the property revert to him. In his view, the orders sought are in vain and the application ought to be dismissed with costs and contempt it deserves.

### **Ex parte Applicant's Submissions**

30. It was submitted on behalf of the Applicant, while reiterating the contents of the Motion, the Statement and the affidavits, that pursuant to Article 40(1) of the Constitution and section 26(1) of the **Land Registration Act, 2012**, the Applicant having acquired the property through legal means, he should not be made to suffer for a mistake he was not a party to. Since the Applicant did not acquire the property through fraud, the 3<sup>rd</sup> Respondent's decision to restrict the Applicant's use and enjoyment of his property is therefore contrary to his right to own property. Based on **Kent Libiso and Another vs. Cirkon Trust Co. Ltd & 2 Others ELC Civil Suit No. 288 of 2011** and **George Njuguna Kinunu vs. Njeri Kibui ELC 228 of 2011**, the Applicant prayed that the decision to place the said restriction be declared unconstitutional and be quashed to enable the applicant enjoy the property he acquired legally and owns.

31. According to the Applicant the fact that the 1<sup>st</sup> interested party alleges that the name of **Chris Nyakundi** was cancelled does not in any way affect the rights of the Applicant in relation to the suit property as he did due diligence and purchased the property in a public auction free from any encumbrances. As for the 2<sup>nd</sup> interested party's claim the applicant submitted that the 2<sup>nd</sup> interested party has no proof of ownership and has no evidence to support his allegations. Since the applicant acquired the suit property pursuant to an order of this Court it was submitted that the interested parties' only option is to appeal against the decision. **1<sup>st</sup> Interested Party's Submissions**

32. While reiterating the contents of the replying affidavit, it was submitted on behalf of the 1<sup>st</sup> interested

party based on Gitwany Ivestment Limited vs. Tajmal Limited and 3 Others [2006] KLR and Dr Joseph N K Ng'ok vs. Justice Moiwo Ole Keiwua and 2 Others Civil Appeal No. 60 of 1997 that section 23(1) of the repealed *Registered Land Act* under which the suit property was registered gave absolute and indefeasible title to the owner of the property which title was only subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. It was submitted that the dispute that has now arisen is the creation of and a matter which ought to be put squarely at the door step of the Chief Registrar, the 2<sup>nd</sup> Respondent.

33. It was submitted that the 1<sup>st</sup> interested party has shown good cause as to why the restriction ought not to be removed pending the investigations relating to the dealings over the suit property.

### **Determinations**

34. In determining the issues raised herein the Court must always be alive to the scope of judicial review jurisdiction.

35. As was held in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:

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

36. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. It 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 Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.

37. Therefore, in this application the Court is not concerned with the determination of the ownership of the suit property. To determine that issue would necessarily require the parties to call witnesses whose evidence would be subjected to cross-examination before the Court would be in a position to resolve the parties' rivalling contentions some of which touch on fraud. It follows therefore that where the determination 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. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. 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 the 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. See Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.

38. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts in order to have the merits of the dispute resolved, the Court would not have jurisdiction in judicial review proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in an ordinary civil suit.

39. Therefore in this case the Court is only concerned with determination of the issue whether the process of registration of the restriction on the suit parcel was illegal in the sense that that the 2<sup>nd</sup> respondent committed an error of law in the process of the said registration or acted without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles; whether in so doing he was irrational in the sense that his action amounted to such gross unreasonableness that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision and hence was in defiance of logic and acceptable moral standards; or whether his action was tainted with procedural impropriety in the sense that he failed to act fairly in the process of taking a decision by either non-observance of the Rules of Natural Justice or to act with procedural fairness towards the Applicant. An instance of such unfairness is failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which the 2<sup>nd</sup> Respondent is enjoined to exercise his jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300; Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**

40. The restriction which is subject of this application was registered on 10<sup>th</sup> October, 2013. The date of commencement of the ***Land Registration Act***, No 3 of 2012 was 2<sup>nd</sup> May, 2012. Therefore the legality of the said restriction must be looked at in the light of the provisions of the said Act. Sections 76, 77 and 78 of the said Act provides:

***76 (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.***

***(2) A restriction may be expressed to endure—***

***(a) for a particular period;***

***(b) until the occurrence of a particular event; or***

***(c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.***

***(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.***

***77. (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.***

***(2) An instrument that is inconsistent with it shall not be registered while the restriction is still registered except by order of the court or of the Registrar.***

***78. (1) The Registrar may, at anytime and on application by any person interested or at the***

***Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.***

***(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.***

41. It is therefore clear that contrary to the position taken by the 2<sup>nd</sup> interested party this Court has the powers pursuant to section 78(2) aforesaid to order the removal of a restriction.

42. It is also clear that before the Registrar registers a restriction on any land he must direct such inquiries to be made and notices to be served and hear such persons as he considers fit. This position was confirmed in **Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140** where it was held that:

***“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented.”***

43. In my view, in exercising his discretion on whom to hear the Registrar must take into account the provisions of the relevant law and the Constitution and with respect to the Constitution Article 47 thereof provides as follows:

***(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.***

44. As discussed elsewhere in this judgement procedural fairness encompasses that an opportunity of a hearing be afforded to the persons who are likely to be affected by the administrative decision. In my view one of the persons that ought to be given an opportunity of being heard before a restriction is registered is the proprietor of the land in question.

45. According to the Applicant he was surprised to learn from a certificate of official search dated 23<sup>rd</sup> October, 2013 that a restriction had been arbitrarily imposed on the property and further that the same has not been communicated to him as required under section 77(1) of the ***Land Registration Act, 2012***. The position taken by the 2<sup>nd</sup> interested party however, is that all the parties were summoned by the Registrar after which the order was granted. However, there is no evidence at all to support this averment. The 2<sup>nd</sup> Respondent who should have shed light on whether the provisions of sections 76 and 77 of the ***Land Registration Act*** were complied with has not sworn any affidavit in these proceedings. As for the Applicant his position was that he was not notified before the restriction was registered. In other words he was asserting a negative and as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:**

***“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises.”***

46. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein**

**Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

47. In this case, in the absence of any evidence that the 2<sup>nd</sup> Respondent complied with the provisions of sections 76 and 77 of the ***Land Registration Act***, this Court has no option but to find that the 2<sup>nd</sup> Respondent's action in placing a restriction on the suit land was tainted with procedural irregularity. It follows that the Applicant's application is merited.

48. However, this Court cannot shut its eyes to the serious allegations made by the interested parties herein.

49. In the result I find merit in the Notice of Motion dated 2<sup>nd</sup> June 2009 which I hereby allow and I direct that an Order of Certiorari do issue to remove to the High Court and quash which I hereby do the Restriction and or decision of the 3<sup>rd</sup> Respondent purporting to restrict any dealing over Title No. Nairobi/Block 112/127. I further grant an order of Mandamus compelling the Chief Registrar of Lands, the 2<sup>nd</sup> Respondent herein, to remove and or cause to be removed the Restriction entered on Title No. Nairobi/Block 112/127 on 10<sup>th</sup> October, 2013 as entry No. 5.

50. I however suspend the implementation of the said orders for a period of 30 days to enable the interested parties take whatever legal options, if any, to protect their interests.

51. The costs of this application are awarded to the applicant to be borne by the 2<sup>nd</sup> Respondent.

**Dated at Nairobi this day 23<sup>rd</sup> day of June, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mung'ala for Mr Mogaka for the Applicant***

***Cc Kevin***