



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 43 of 2011

**IN THE MATTER OF AN APPLICATION BY HAMMERHEADS LIMITED FOR ORDERS OF
CERTIRARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF LR NO.209/11851 AND GAZETTE NOTICE NO.15580

AND

IN THE MATTER OF THE COMMISSIONER OF LANDS

AND

IN THE MATTER OF THE REGISTRAR OF TITLES

AND

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

BETWEEN

REPUBLIC.....APPLICANT

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

EX-PARTE

HAMMERHEADS LIMITED

JUDGEMENT

1. By a Notice of Motion dated 27th April 2011 filed on 29th April, 2011, the *ex parte* applicant herein, **Hammerheads Limited**, seeks the following orders:

1. **An order of certiorari do issue to quash the decision of the Registrar of Titles, Nairobi contained in the Kenya Gazette No. 15580 dated 26th November, 2010 revoking the ex parte applicant's title to LR. No. 209/11851.**
2. **An order of mandamus do issue compelling the Registrar of Titles to issue afresh Gazette Notice revoking Gazette Notice No. 15580 of 26th November, 2010 with regard to L.R. No.209/11851.**
3. **An order of prohibition do issue prohibiting the Registrar of titles, Nairobi from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way or manner or at all, of any matter or material which may be construed as being inconsistent with the legality of the registered proprietorship of the ex parte applicant over L.R. No.209/11851.**
4. **The cost of this application be provided for.**
5. **Any other order or relief as the Honourable Court may deem fit and expedient to grant.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 11th April, 2011 and a verifying affidavit sworn on 11th April 2011 by **Duncan Muya**, a director of the *ex parte* applicant. According to the deponent, the applicant is the registered owner of land parcel No. LR No. 209/11851 (hereinafter referred to as the suit property) under a leasehold for a period of 99 years with effect from 1st January 1993. The suit property was transferred to the Applicant by the City Council of Nairobi, which Council has no claim at all over the said property, for a consideration and that Land Rates have always been paid to the Government whenever they fall due. The applicant is however aggrieved by the 2nd respondent's decision of 26th November, 2010 through Gazette Notice No. 15580 by which the 2nd Respondent unilaterally revoked the applicant's title to the suit property. The *ex parte* applicant's contention is that the 2nd respondent acted in total contravention of the Applicant's right to own property as provided for under the Constitution of Kenya and in total disregard of the law hence the applicant's apprehension that the 1st Respondent will proceed and implement the 2nd Respondent's decision and physically take possession of the suit property.

3. In the applicant's view, the 2nd Respondent did not take all the relevant factors before issuing the impugned Gazette Notice. According to the applicant section 23 of the Registration of Titles Act (Cap 281), Laws of Kenya, (hereinafter referred to as the Act) a certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission, by a proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof and that under the Act, the title of that proprietor shall not be subject to any challenge, except on grounds of fraud or misrepresentation on the part of the registered land owner. By purporting to revoke the title to the suit property, the applicant contends that the Respondents have not established any fraud or misrepresentation on the part of the Applicant in acquiring title to the property, as required by the law. Further it is contended that under the Act, any person deprived of land or of any interest in land in consequence of fraud or by the registration of any other person as proprietor of the land or interest, may bring and prosecute an action at law for recovery of damages against the person upon whose application the land was brought under the operation of the Act, or the erroneous registration was made, or who acquired title to the interest through fraud, error or misdescription. Therefore it is contended that the only remedy available in law to any person alleging fraud, error or misdescription is to bring an action for damages against the Applicant and not revocation of the title as the Respondents have purported to do.

4. It is therefore the *ex parte* applicant's position that the 2nd Respondent acted ultra vires the provisions of the Constitution and the said Act in revoking the applicant's title to the suit property and that by revoking the same title without asking the Applicant to show cause why the said title should not be

revoked, the Respondents acted unreasonably and in total failure to observe the principles of Natural Justice. Further, in so acting the Respondents relied on irrelevant considerations in breach of the constitutional right of the applicant to own land anywhere in Kenya. Therefore, it is in the interest of justice for the Honourable Court to intervene and rein in the Respondents who are acting in total disregard of the law and that the Respondent shall not suffer any prejudice if the orders sought are granted.

RESPONDENTS' CASE

5. In opposition to the application, the respondents filed the following grounds of opposition dated 2nd March 2011 on the same day:

- a. **That the application is inept, incompetent and a gross abuse of the court process.**
- b. **The application lacks merits.**
- c. **By section 60 of the Registration of Titles Act, the Registrar is repositied with sufficient powers to cancel an irregularly issued title.**
- d. **The title the subject of this application was issued irregularly.**
- e. **The application is brought mala fides.**

6. The application was prosecuted by way of written submissions.

APPLICANT'S SUBMISSIONS

7. On behalf of the ex parte applicant it was submitted while reiterating the contents of the supporting affidavit and based on **Republic vs. The Public Procurement and Administrative Review Board and Others ex parte Zhongman Petroleum and National Gas Group Company Ltd, Nairobi Misc. Civil Application No. 53 of 2010**, that the remedy of judicial review is radically different from those of review and appeal since it is not an appeal from a decision, but a review of the decision making process and the legality of the decision itself. Conversely in Judicial Review the court's exclusive concern is with the legality of the administrative act or decision in question. Thus, instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court in an application for judicial review is concerned only with the question as to whether or not the action under attack is lawful and should be allowed to stand or be quashed. Since the Respondents have not filed any replying affidavit, it is submitted that the facts are not in dispute.

8. Further *Mandamus*, *Certiorari* and *Prohibition* are writs issue in the name of the Republic to control inferior tribunals from exceeding their powers whose purpose according to **Ambrose O. Weda & Others vs. The Council for Legal Education, Nairobi Misc. Application No. 5 of 1993** is to ensure that the individual applicant is given fair treatment by the authority to which he has been subjected.

9. Since the decision to revoke the ex parte applicant's title was made in breach of the rules of natural justice which require that a party be afforded a hearing before any decision affecting his or her rights is reached contrary to Articles 47 and 50 of the Constitution, it is submitted that the 2nd Respondent ought to have give the ex parte applicant an opportunity to state its case before reaching the decision to revoke the said title. It is further submitted that the right to own land is protected under section 60(1) of the Constitution and therefore the 2nd Respondents' action is contrary to the ex parte applicant's constitutional right to protection of its property. Since the Government has benefited by collection of rates and other levies since the purchase of the suit property, it is submitted that it is estopped from denying the property was in fact properly acquired and that the least that the Government can do is to compensate the applicant in the event of compulsory acquisition under Article 40.

10. Under section 23(1) of the Act, it is submitted that a certificate of title is conclusive evidence of ownership while section 24 thereof outlines the procedures to be followed by a person deprived of land or

of any interest in consequence of fraud or through the bringing of that land under the protection of the Act. It is submitted that it is only the High Court that can inquire into the validity or otherwise of a title issued under the Act and that this inquiry can only be undertaken where there is an allegation of fraud or misrepresentation on the part of the registered land owner. However, even if there was fraud or misrepresentation in alienating the suit land to the original proprietor, the ex parte applicant lawfully acquired the suit premises from the City Council of Nairobi and for a consideration and the case of **Kuria Greens Limited vs. Registrar of Titles & Another [2010]** is relied upon in support of this line of argument.

11. With respect to reliance on section 60 of the Act by the Respondents, it is submitted that the Registrar is required to summon the person to whom it has been obtained or is retained, to deliver it up for the purpose of being corrected and not to cancel an irregularly issued title as alleged by the Registrar. It is further submitted that there is no provision under the Act or any other Act that bestows on the Registrar of Titles or the Commissioner of Lands or the Government power to revoke a registered title in the absence of a court order to that effect and reliance is placed on **Republic vs. Kisumu District Lands Officer & Another, Miscellaneous Application No. 80 of 2010**. Therefore in purporting to revoke the title to the ex parte applicant's parcel of land, the Respondents acted ultra vires, in total disregard of the law and in breach of the rules of natural justice.

RESPONDENTS' SUBMISSIONS

12. On behalf of the Respondents, it is submitted that since the property in question is registered under the said Act, section 60(1) thereof deals with wrongful and fraudulent entries. Section 65 of the Act, it is submitted, provides for the powers of the Registrar of Titles and that in addition to those provided for under other sections, the powers include; to call for documents relating to land, to summon witnesses to appear before him, to administer oaths, affirmations or declarations in lieu thereof, to make corrections on documents relating to title, to dispense with production of certain instruments, to cancel determined entries, to destroy documents, to require maps of properties, to demand and receive fees and keep accounts.

13. Since section 60(1) uses the word "may" it is submitted that the section does not impose a mandatory obligation on the Registrar of Titles to call for the delivery of a certificate of title, grant or other instrument for cancellation, if satisfied that the same has been obtained by fraud hence the Registrar does not have to summon a person registered as the interest holder in the said documents to show cause why the same should not be cancelled. So it is only in cases where the Registrar exercises the option to summon the holder thereof to deliver the same for cancellation is he bound to proceed to court.

14. It is further submitted on the authority of **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** 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.

15. According to the Respondents, under section 40(6) (sic) of the Constitution, a property that has been acquired irregularly cannot be afforded the protection under the Bill of Rights since it is not in the public interest to issue orders sought where the property is acquired from the public in a manner that does not inspire confidence. The public interest, it is submitted overrides individual rights in this matter hence private interests must bow to public interest. Citing **Republic vs. Kenya National Commission on Human Rights ex parte Hon. Uhuru Kenyatta**, it is submitted that the Court has the task of maintaining the balance between public and individual interests hence the Court ought to decline the exercise of its discretion to issue the orders sought in the public interest and the application should be dismissed with costs.

DETERMINATION

16. Having considered the foregoing it is clear that the factual basis of the ex parte applicant's case is not challenged in light of the fact that the Respondents have opted not to controvert the same by way of affidavit evidence.

17. The determination of the court will largely depend on the interpretation of the effect, tenure, intent and meaning of the letter dated 13th April 2010 from the Respondent to the Applicant. Section 23(1) of the repealed Registration of Titles Act provide as follows:

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

18. Section 23 of the Registration of Titles 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 Figueiredo 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 a charge created by such a proprietor is 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.**

19. 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.”

20. It is not disputed that vide Gazette Notice No. 15580 dated 26th November 2010, one of the land titles which were revoked on the authority of the District Land Registrar, Kajiado was LR No 209/11851. By a Grant dated 15th February 1993, Nairobi City Commission was given a lease in respect of the said land for a period of 99 years from 1st January 1993. However, on 8th March 1993, the said leasehold was transferred to the ex parte applicant herein by way of Transfer dated 5th March 1993 for a consideration of Kshs 45,000.00.

21. The Respondent's contention is that the ex parte applicant acquired the title to the said property irregularly as the same was public land and that therefore under Article 40(6) of the Constitution the ex parte applicant's title thereto is not protected. No doubt under the provisions of Article 40(6) of the Constitution, 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 crucial words in the said Article are **“found to have been unlawfully acquired”**. Therefore there must be a finding that the property in question was unlawfully acquired. Whereas the transfer of the property in the sum of Kshs 45,000.00 may raise eyebrows in certain quarters, there must be a finding that the said transaction was unlawful. Who then is empowered to make this finding? That the disputed land fell within the legal regime of Registration of Titles Act is not disputed.

Section 60 of the Registration of Titles Act states as follows:

(1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may 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.

(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.

22. The foregoing provision 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 obligated 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 ought to be very clear that the Registrar requires that the Grant, certificate or instrument be delivered for the purpose of being corrected. Therefore 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. Section 61 of the Act then provides as follows:

Upon the appearance before the court of any person summoned or brought by virtue of a warrant the court may examine that person on oath or affirmation, and may order him to deliver up the grant, certificate of title or other instrument, and, upon refusal or neglect to deliver it up pursuant to the order, may commit him to prison for any period not exceeding six months, unless the grant, certificate of title, or instrument is sooner delivered up; and in that case, or where the person has absconded so that a summons cannot be served upon him as hereinbefore directed, the court may direct the registrar to cancel or correct any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute and issue such certificate of title or other instrument, or make such entry, as the circumstances of the case may require.

24. These strict provisions clearly recognise 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 or the Government before the due process is adhered to for the revocation of a person's title.

25. 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.

26. 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.

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

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

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

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

(c) the nature and extent of the limitation;

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

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

28. It is therefore clear that under both 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. The Respondents' position that the Registrar has the option of cancelling the same without affording the proprietor an opportunity of being heard even if he had such powers would fly in the face of the express constitutional provisions and even if the interpretation adopted by the Respondents of section 60 of the Act was correct I would have no hesitation in declaring the same to be ineffectual on the ground of its being ultra vires the express provisions of the Constitution. However, I disagree with the Respondent's interpretation that the Registrar has any such powers.

29. The *ex parte* applicant submitted that the Constitution and the existing jurisprudence on the subject of natural justice demands that no party should be condemned unheard whenever a decision that is adverse or adversely affects a party is being made. He cited, properly so in my view, Articles 47 and 50 of the Constitution which grant every person right to a fair administrative action and fair hearing respectively. It is therefore the *ex parte* applicants contention that the 2nd respondents decision to revoke his title to L.R. No. 209/11851 was in breach of the aforementioned Constitutional provisions and rules of natural justice.

30. 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.”

31. 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.”

32. I find no reason for diverting from the learned judge’s finding.

33. It has however, been contended on behalf of the Respondents that the decision whether or not to grant the orders sought herein is an exercise of discretion hence where there is a conflict between public and private rights public rights ought to override private rights. I am not convinced that that is the law. That proposition is, in my view, too broad and if taken literally may occasion injustice in certain instances. In my view the correct proposition is that the said interests if in conflict ought to be balanced one as against the other.

34. As was stated by Ojwang, AJ (as he then was) in Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice.

35. I am 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 and that sound legal principles would dictate where to grant the orders of judicial review even if merited is likely to substantially and materially and adversely affect the process, the Court would be reluctant to accede to the applicant’s prayers. See Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203.

36. In the present case, however, there is no evidence before the Court that the ex parte applicant’s title to the suit property was unlawfully obtained since the Respondents opted not to file an affidavit disclosing their factual position. Accordingly, there is no basis upon which this Court can hold that public interests override the ex parte applicant’s interest in order for the Court to decline to grant the undoubtedly discretionary orders sought herein. I must, however, stress that judicial review is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 the Court of Appeal held:

“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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the

decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

37. 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, for example, 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. 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 and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

39. Whereas the respondents contend that the suit property was unlawfully acquired as I have stated hereinabove they did not file any affidavit to dispute the factual allegations made by the ex parte applicant. It follows that the issues of fact raised in the verifying affidavit are largely uncontroverted and in the absence of any affidavit to the contrary the Court would have no basis for finding that the said factual averments are disputed. This is not to say that Registration under section 23 of the said Act or any other provision replacing the said provision but on similar terms cannot be challenged. It must be remembered that under the provisions of Article 40(6) of the Constitution, the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. In arriving at that finding the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard and any purported action which does not comply with the law must be set aside based on the three “I’s” aforementioned. Therefore the only issue that the Court would be entitled to determine in this application is whether based on the uncontroverted facts before the Court the decision made by the Respondent should be allowed to stand and not whether or not the applicant’s title is lawful.

40. In my view the decision of the Registrar or the Government was clearly tainted with irrationality, illegality and procedural impropriety. The said decision was clearly ultra vires the powers conferred by section 60 of the said Act. Since there were no grounds disclosed by the Respondents for taking such an action the said decision was clearly unreasonable. The failure to comply with the clear provisions of section 60 with respect to adherence to the rules of natural justice clearly established the procedural impropriety of the decision making body.

ORDER

41. The only issue that remains for determination is what orders should the Court grant. The ex parte applicant seeks that an order of prohibition do issue prohibiting the Registrar of titles, Nairobi from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way or manner or at all, of

any matter or material which may be construed as being inconsistent with the legality of the registered proprietorship of the ex parte applicant over L.R. No.209/11851. As already held hereinabove, these proceedings are not concerned with the manner in which the ex parte applicant acquired the suit property. To grant the order in the manner in which it is sought will amount to a determination on merits of the legality or otherwise of the ex parte applicant's title. Further it is my view that once the impugned Gazette Notice is quashed there is no need to compel the Respondents to issue another Gazette Notice revoking the quashed Gazette Notice since by quashing the said Notice there will be nothing in existence to be revoked.

42. Consequently, the applicant's Motion on Notice dated 27th April 2011 is merited. Accordingly the same is allowed with the result that:

a. An order of certiorari is hereby issued calling into this Court the decision of the Registrar of Titles, Nairobi contained in the Kenya Gazette No. 15580 dated 26th November, 2010 revoking the ex parte applicant's title to LR. No. 209/11851 for the purposes of being quashed and the same is hereby quashed.

b. An order of prohibition is hereby issued prohibiting the Registrar of titles, Nairobi from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way or manner or at all, of any matter or material which may be construed as being inconsistent with the legality of the registered proprietorship of the ex parte applicant over L.R. No.209/11851 pursuant to the impugned Gazette Notice.

I also award the costs of the Motion to the applicant.

Dated at Nairobi this 18th day of March 2013

G V ODUNGA

JUDGE

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