



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 23 & 78 of 2010

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

AND

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

REPUBLICAPPLICANT

VERSUS

COMMISSIONER OF LANDS1ST RESPONDENT

THE MINISTER OF LANDS & SETTLEMENT.....2ND RESPONDENT

CHIEF LANDS REGISTRAR.....3RD RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 78 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

**IN THE MATTER OF AN APPLICATION BY LANDHURST LTD FOR LEAVE TO APPLY
FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

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

LANDHURST LIMITED.....APPLICANT

VERSUS

COMMISSIONER OF LANDS1ST RESPONDENT

THE MINISTER FOR LANDS.....2ND RESPONDENT

CHIEF LANDS REGISTRAR.....3RD RESPONDENT

JUDGEMENT

1. This judgement is the subject of Miscellaneous Application No. 78 of 2010 between **Landhurst Limited vs. Commissioner of Lands & 2 Others** on one hand and Miscellaneous Application No. 23 of 2010 between the **Republic vs. The Commissioner of Lands & 2 Others ex parte Landhurst Limited**. These two causes were consolidated by consent order recorded on 21st March 2012.

2. By a Notice of Motion dated 28th April 2010 filed on 29th April, 2010, the *ex parte* applicants herein seek the following orders:

(i) **That Order of Prohibition be granted against the respondents prohibiting them, by themselves, their agents, servants or persons working under them, singularly and/or together from implementing the decision of the 2nd Respondent, the Minister of lands of 2nd February 2010 and/or thereabout directing that the Applicant's Title to L.R. No. 209/13685, Nairobi be revoked, cancelled and further prohibiting the respondents from interfering, evicting the Applicant, revoking, cancelling, alienating, trespassing and/or in any other manner interfering with the Applicant's title, possession, and use of the subject land L.R. No. 209/13685 situated in Upper Hill, Nairobi.**

(ii) **Orders of Certiorari be granted to remove into the High Court and quash the decision and/or directives of the Minister of Lands, the 2nd Respondent issued on 2nd February 2010 or thereabout or subsequent thereto directing that the Applicant's title to the subject property L.R. No. 209/13685 be revoke and/or cancelled and that the land be re-allocated and/or alienated.**

(iii) **Order of Certiorari be granted to remove into the High Court and quash the decision and/or letter of the Commissioner of Lands dated 19th February 2010 purporting to revoke the Applicant's title to the subject property L.R. 209/13685, Upper Hill, Nairobi.**

(iv) **Orders of Prohibition be granted directed to the 1st and 3rd Respondents prohibiting them from cancelling, revoking and/or encumbering the Applicant's title in any manner howsoever without the Applicant's consent and/or application.**

(v) **Order of Mandamus be granted directing the 1st and 2nd Respondent to remove any encumbrances placed on the title by and/or at the behest of the 2nd respondent and compelling them to process and register, dealing and/or transactions that are lodged and presented by the applicant in accordance with the law.**

(vi) **Costs of this application.**

EX PARTE APPLICANT'S CASE

3. The application is based on the Statement filed on 7th April, 2010 and a verifying affidavit sworn the same day by **Peterson Maina**, a Director of the Applicant Company.

4. According to the deponent, the Applicant, **Landhurst Limited**, is the lawful, duly registered owner of the subject property known as LR. No. 209/13685, situated in Upperhill area in Nairobi which it acquired as transferee for value and without notice of any irregularity following due diligence from **Apportex Limited**. The Applicant, it is deposed, has obtained Demand Notes for Rates and Rents from the City Council of Nairobi and also Land Rent form the Ministry of lands, payments whereof have been made and the Applicant has actual possession and use of the subject property which it has developed substantially.

5. However, the Applicant has learnt that in a press statement dated 11th February 2010, the 2nd respondent has directed and/or ordered that 3rd and 1st respondents to cancel, revoke and alienate or transfer the subject property to a third party without following due process and in total disregard of the

constitutional and legal rights of the Applicant in the subject property and according to legal advice received from the Applicant's Advocate the directions and or decisions of the Minister for lands, the 3rd Respondent have been made without jurisdiction, illegally and arbitrary as the respondents have no legal authority or powers to revoke or cancel the Applicant's title to property without following due process. As a consequence of the said directive by the Minister for Lands, the sale transactions by the Applicant have been frustrated as the Commissioner of Lands has written letter dated 19th February 2010 to the Purchasers alleging that the title is under query and/or has been revoked. The Applicant, however, wants to proceed with its transactions and other development activities on the subject properties without interference by the Respondents.

6. According to the deponent, the respondents are acting in contravention and breach of constitutional rights of the Applicant under the constitution of the republic of Kenya and the registration of titles Act, among other laws and that their decisions, conduct and intentions of the respondents are illegal, unreasonable and has been arrived at without any reference to the Applicant whatsoever. To the applicant, it is an absurdity and illogical for the respondents to issue Title to the Applicant only to turn around thereafter and purport to revoke, cancel the Title without following the Law of the land. The Applicant has further learnt that the Respondents have started to implement the aforesaid directive of the Minister for Lands and unless this Honourable Court intervenes to uphold the rule of law, sanctity of Title to land and stop the imminent revocation of the Applicant's Title and alienation of the subject land the Applicant stands to lose its land, property, grave injustice and deprivation of the possession, use and enjoyment thereof.

7. The deponent is further advised by the Applicant's Advocates that the respondents are acting in excess of their powers, maliciously and unconstitutionally in attempting to revoke the Title lawfully issued by themselves and that previous attempts by the Respondents to repossess and or revoke, cancel, titles issued to private individuals have failed as this Honourable Court has issued orders stopping the governments from repossessing/revoking and/or illegally acting in breach of due process hence this Honourable Court is urged to grant the orders sought as the respondents should not be allowed to trample upon the rights of the Applicant in total disregard of the law which they are bound under the constitution to uphold at all times.

8. There is a further affidavit sworn by **Joseph Muia**, a Court process Server on 18th July 2011.

8. According to him, on or about 11th February, 2010, on instructions from Robson Harris & Co. Advocates, he was directed to attend the Government Printer Office/Library on a weekly basis to obtain and peruse all the Kenya Gazette and in particular to check for any mention and/or reference to the property known as L.R. No. 209/13685 belonging to **Landhurst Limited** as the Minister for land issued a Press Statement on 11th February, 2010 in which he directed the Commissioner for Lands and the Registrar of Lands to revoke titles. Despite attendances to the Government Printer, he never found any Gazette Notice in which the subject property was mentioned or reported and that as at 7th April, 2010, the subject property L.R. No. 209/13685 never appeared in the Kenya Gazette and no reference whatsoever was made to it. Despite numerous attendances and check-ups, there was no special issue of the Kenya Gazette available at the Government Printers as at the time of filing of HCCC Miscellaneous Application No. 23 of 2010: **Landhurst Ltd vs The Commissioner of lands & Minister of lands** on 7th April, 2010. However, after filing the said HCCC Misc No. 23 of 2010 and on appearing before the **Honourable Mr. Justice Dulu**, on 8th April 2010, the Application was certified urgent and the Court directed that the application be served upon the respondents immediately, and fixed the matter for hearing on 13th April, 2010. He deposes that he immediately served the respondent as Ordered, the Commissioner for Lands, Minister for Lands and the Chief land Registrar on 8th April, 2010. On 13th April, 2010 the application was listed before Hon. **Justice Khaminwa**, when the hearing proceeded. **Mr. Muiruri** State Counsel and **Miss Mbilo** also a Senior State Counsel appeared on behalf of the Attorney General together for the respondents and were heard by the Court while **Mr. Ashford Muriuki Mugwuku** appeared for the Applicant. It is deposed that the said two State Counsel **Mr. Muiruri** and **Miss Mbilo** who appeared did not mention the existence of any Kenya Gazette Notice in which the subject property was mentioned or otherwise revoked and the Court heard all parties and proceeded to make a Ruling and issued the attached

Orders. Subsequently, on or about June 2010, the Nairobi City Council purported to issue a Notice to Vacate and/or demolish structures on the subject property to which there was attached a copy of a special issue of the Kenya Gazette Notice No. 3460 dated 1st April, 2010 which notice was given to the Applicant's employees who are site at the subject property.

RESPONDENTS' CASE

9. The Respondents neither filed grounds of opposition nor a replying although submissions were filed on their behalf.

APPLICANT'S SUBMISSIONS

10. On behalf of the *ex parte* applicant it was submitted, while citing **Power Technics Limited vs. The Registrar of Titles & 2 Others High Court Petition No. 178 of 2011**, **Sound Equipment Limited vs. Registrar of Titles High Court Petition No. 106 of 2010** and **Kuria Greens Limited vs. The Registrar of Titles & Another High Court Petition No. 107 of 2010**, that the Registrar of Titles is bereft of any legal authority to revoke a registered title which legal authority is exclusively conferred upon a competent court.

11. While reiterating the facts of the case, it is submitted based on **R vs. Commission for Racial Equality Exp Hillington LBC [1982] QB 276** that exercisable powers of statutory bodies must be invoked and applied within the scope of the governing statute.

12. It is submitted that when the Registrar of Tiles registered the instrument of transfer in its favour, as specified by the Registration of Titles Act (now repealed) the applicant obtained an absolute and indefeasible title to the suit land as stated in section 23(1) of the said Act. This indefeasibility of title, it is submitted, is supported by prolific judicial precedents including **Nairobi Permanent Society & 11 Others vs. Salima Enterprises & 2 Others Civil Appeal No. 185 of 1997**.

13. It is therefore submitted that the Minister of Lands has not been conferred any statutory duties in respect of the registration and revocation or cancellation of titles to land and hence his decision was arbitrary, *ultra vires*, void *ab initio* and of no consequence. Citing Power **Technics Limited vs. The Attorney General** (supra), it is submitted that the powers of the Registrar under section 60 of the **Registration of Titles Act** are limited to correcting errors and misdescription of land or boundaries or where entries or endorsements to any grant or certificate of title are made in error or are fraudulent but does not include cancellation of titles. It is submitted that the power to cancel the registration of titles is bestowed upon the High Court under section 64 of the said Act.

14. It is further submitted that the Registrar of Titles did not summon the applicant for the purposes of raising any issue respecting the applicant's title in contravention of Article 40 of the Constitution as well as section 23 of the said Act hence the applicant was not heard before the said administrative action was taken in violation of Article 47 of the Constitution. The applicant relies on **Cooper vs. Wandsworth Board of Works [1863] 14 CB (NS) 180**. In the result the applicant prayed that the Motion dated 28th April 2010 be allowed.

RESPONDENTS' SUBMISSIONS

15. On behalf of the Respondents, it is submitted that the Minister directed the Registrar of Titles to revoke the titles issued to private developers who were allocated LR No. 209/13685 which was public land allotted to private owners and pursuant to the said directive the Registrar through gazette notice revoked the said title. It is submitted that the suit property is a road reserve set aside by the government so as to provide access to the Milimani Law Courts and adjacent Government Offices hence the same is not available for alienation to a private owner. The order sought, it is submitted if granted will deny access to judiciary staff, litigants and the public at large access to the court premises leading to obstruction of access to justice. It is submitted that if the applicant had been diligent enough at the time of the acquisition of the land, it would have through its surveyors realised the land had been set aside as a road

reserve and the applicant cannot therefore argue that the land was available for alienation. It is therefore submitted that the Court ought to maintain a balance between public and individual rights and that private rights should be limited in order to protect public interest as public interest in this instance overrides individual rights in a classic interest where private rights have to bow to public interest. In line with Article 24(1) of the Constitution, it is submitted that in the exercise of its discretion the court ought to decline the issue of the orders sought in the wider interest of justice and public interest and policy.

16. Since the property was a road reserve not available for alienation, it is submitted that under Article 40(6) of the Constitution where a property has been acquired irregularly, it cannot be afforded protection under the Bill of Rights and reference is made to **Fahim Twaha & Another vs. District Land Registrar Lamu, Malindi High Court Misc No. 17 of 2010.**

17. Since the issue of ownership cannot be determined in these proceedings, it is submitted that the judicial review remedies are not the most efficacious remedies in these circumstances and reliance is placed on **Republic vs. National Environmental Management Authority Civil Appeal No. 84 of 2010** and **Republic vs. Attorney General & Another ex parte Samuel Kazungu Kambi [2012] eKLR.** Citing **Republic vs. Judicial Commission ex parte Pareno [2004] 1 KLR 203-209,** it is submitted that even if a case falls into one of the categories where judicial review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary, what order(s) the court will make depends upon the circumstances of the case. Based on Halsbury's Laws of England 4th Edn. Vol. II page 805 paragraph 1508, it is submitted 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 being a judicial discretion must be exercised on the evidence of sound legal principles.

18. It is therefore submitted that in the interest of justice the court ought to exercise its discretion and dismiss the proceedings.

DETERMINATION

19. Order 53 rule 7(1) of the Civil Procedure Rules provides:

In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

20. In support of its application, the *ex parte* applicant has exhibited a copy of the press statement attributed to **Hon. James Orengo**, Minister for Lands in which the said Minister is purported to have directed the Commissioner of Lands in consultation with the Registrar of the High Court to revoke the titles mentioned therein. The *ex parte* applicant has also exhibited copies of Gazette Notices but the said Notices are in respect of other parcels of lands other than the subject parcel of land. In the further affidavit sworn by **Joseph Muia**, it is clear that the applicant was unable to obtain any Gazette Notice by which the title to the subject parcel of land was revoked. The same affidavit is in any event incompetent. It contains several averments without disclosing the source of information. In fact one would be attempted to believe that it was being sworn by the *ex parte* applicant's advocate rather than a process server. In it, for example are depositions of what transpired in Court without disclosing whether he was present in court or the source of his information.

21. In my view the Statement attributed to the Minister was not a decision. If there was any decision it would have been the directive to the Commissioner for Lands. On the other hand there is no evidence that the Commissioner acted on the said press release with respect to the suit parcel of land. In **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354,** **Wendoh, J** expressed herself as follows:

“The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application.”

22. In my view the Press Release in question may be termed as mere recommendations to the Commissioner of Lands to take the necessary legal steps for the revocation of the affected titles and was not a basis for the said revocation. The Minister must have known that neither the Commissioner nor the Registrar of the High Court had powers to revoke the said titles. Why for example would the Registrar of the High Court be involved in the revocation of the titles apart from the facilitation of the legal proceedings? Accordingly there is nothing before the Court capable of being quashed. If, on the other hand, there was that decision but the *ex parte* applicant was unable to secure the same, it should have taken the advantage of the provisions of Order 53 rule 7(1) aforesaid and accounted to the satisfaction of the Court its failure to avail the same. This, it has not done and failure to do so renders the prayers for certiorari incompetent.

23. 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 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 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.**

24. 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.”

25. Article 40 of the Constitution protects proprietary rights. However the said rights are not, under the present Constitutional regime absolute and can be limited and one of the limitations appears in Clause (6) of the same Article the rights 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. The *ex parte* applicants submitted that the rules of natural justice were not adhered to when their title was revoked. And relied on the provisions of the Constitution which grant every person right to a fair administrative action and fair hearing respectively. 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.”

32. 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.”

33. I find the said decision persuasive.

34. I am, however, cognisant of the position stated in *Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508*, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. In Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, the court would not grant the order sought even if merited. See Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.

35. In the present case, however, the Respondents have chosen not to file any affidavit but have opted for the unusual procedure of adducing factual matters in the submissions. That kind of procedure is to be deprecated.

36. Nevertheless the issues raised in the submissions are very weighty matters that require investigations. The allegation of acquisition of a public access road to institutions of government ought not to be taken lightly once such an issue is brought to attention of the Court, however irregularly. As was held in Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison (supra):

“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.”

37. Similarly, in this case even if I were to prohibit the actions complained of the issue of ownership would still remain alive issue. That issue ought to be determined before a proper forum in which *viva voce* evidence will be taken so that appropriate declaratory order can be made. To grant the prohibitory orders sought without determining the ownership of the suit land would in my view be an exercise in futility.

38. Judicial review is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held 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.”

39. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.*

40. 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.

41. 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. 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.

42. 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.

43. Accordingly, whereas I find that the Respondents had no powers to take the threatened actions, in the exercise of the discretion conferred upon this Court 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.

44. In the premises there will be no order as to costs.

G V ODUNGA
JUDGE

Dated at Nairobi this day 22nd of April 2013

W K KORIR
JUDGE

Delivered in the presence of: