REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

JUDICIAL REVIEW MISCELLANEOUS APPL. NO. 17 OF 2010

IN THE MATTER OF: AN APPLICATION BY YASIN FAHIM TWAHA AND YASIN TWAHA ABDULLA FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE GOVERNMENT LANDS ACT CAP 280

AND

IN THE MATTER OF: TRUST LAND ACT CAP 288

AND

IN THE MATTER OF: GAZETTE NOTICE NO. 5564 VOL. CXII NO. 53 DATED 21 MAY 2010 IN ACCORDANCE WITH SECTION 8 AND 9 OF THE

LAW REFORM ACT CAP 26 AND ORDER LII RULES 1, 2, 3, AND 4 OF THE CIVIL

PROCEDURE RULES

1. FAHIM YASIN TWAHA

2. YASIN TWAHA ABDULLA ....APPLICANTS

VERSUS

DISTRICT LAND REGISTRAR - LAMU ....RESPONDENT

RULING

Fahim Yasim Fahim Twaha and Yasin Twaha Abdalla (the 1st and 2nd exparte applicants) filed this Judicial Review by a notice of motion dated 8th June 2010 seeking for orders of certiorari to quash the orders of the District Land Registrar (Respondent) dated 21st May 2010, an which was gazetted in the Kenya Gazette as No.5564 which cancelled and revoked the 1st applicants plots Number Lamu Block IV/126, Lamu Block IV/282 and Lamu Block IV/124 as well as the 2nd applicant`s plot no. Lamu Block IV/128.

Further that orders of mandamus be directed against the Respondent by himself, agents, servants and/or any land officer acting under him to forthwith reinstate the land records of the cancelled and revisited titles of the 1st and 2nd applicants aforementioned plots. The application also seeks for orders of prohibition to prohibit the Respondent by himself, his servants, agents and all other land officer acting under him or through him, from interfering with the first applicants ownership, occupation, use, proprietorship and enjoyment of rights to the aforementioned plots.

The application is premised on grounds that;-

1. The cancellation an revocation of Titles is illegal and wrongful

2. The Respondent has no authority and jurisdiction in law to cancel or revoke the applicants titles to land in issue her

3. The Respondent did not notify the applicants to show cause why their titles were to be cancelled nor were any reasons given for the cancellation and revocation before publishing the said gazette notice in contravention of the rules of natural justice hence denying the applicants their crucial rights to be heard before the drastic action was taken.

4. The actions of the Respondent are ultra vires and unconstitutional with regard to the applicants proprietorship rights and their freedom to own an enjoy land.

5. The ex-parte applicants have developed their land and the respondents action deprives them of their right to life and investment and has cost them irreparable economic loss and damage.

6. The Respondent`s actions are based on irrelevant considerations and are extraneous the legal consideration which the Respondent ought to take in law, in taking the drastic action.

Apart from the orders of certiorari which would quash the contested decision, the exparte applicant pray for the reinstatement of land records of the cancelled and revoked Titles and to prohibit the Respondent and its agent/servants an any other Land Officer acting under him or through him, from interfering with the 1st applicant`s ownership, occupation, use, proprietorship and enjoyment of rights to the plots in issue.

The application is opposed and in the Replying affidavit sworn by Michael Shume Chinyaka (The District Land Registrar, Lamu) in which he states that the Titles were cancelled and revoked because the said lands were irregularly acquired by the exparte applicants since the due legal process which ought to have been followed was not met.

The District Land Surveyor Lamu, is said to have become aware from the records held in the Lands office that from time immemorial, the sand dunes of Lamu have been the sole source of clean, fresh water for Lamu Island, and they had been protected as such, till the exparte applicants purported to illegally and irregularly acquire them this compromising the sand dunes.

The Respondent has also tried to locate any part development plan that led to the creation of the plots cited by the ex-parte applicants either at the District Land Registry or the Physical Planning Office, in vain. The Respondent also checked in the records at the Land Registry and sought to know from the District Physical Planning Officer and found no evidence to show that such part Development plan existed ever. From his long service in the Lands Ministry, the Respondent depones that when plots are created regularly, a Part Development Plan is usually circulated to all interested parties including the National Environment Management Authority(NEMA), the Ministry of Water, the Local Authority, the Provincial Administration, The Public Health Officer, yet in the sudden cropping up of plots numbers without a Part Development Plan (PDP) in relation to Plots attributed to a highly fragile ecological zone as the Lamu sand dunes it is evident that the proper process was not followed in the creation of these plots and they are therefore illegal.

Further that the current Commissioner of Lands informed the Respondent that the subject land has never been available for alienation to the applicants, as it was Government Land reserved for public purposes as per bundle of letters annexed and marked “A”. The land is said to be of considerable value to shipping and Ports Authorities in their maritime operations, and with the expansion of the Lamu Port, the land will be of greater use to those agencies. The Respondent is shocked that the 1st exparte applicant who is the area Member of Parliament is using his high political position to endanger the environment, to the detriment of his constituents pointing out that under the Constitution, of Kenya, protection of the individual rights to real property does not extend to land which was illegally or irregularly acquired especially where the land is intended for public purposes. It is deponed further that under the Constitution of Kenya, the Government has a mandatory obligation to protect the environment as well as land long reserved for public purposes. That the Government, through the activities of NEMA and the National Museums of Kenya has to safeguard the fragile environment and this had led, to among other things, cancellation of the exparte applicants titles.

It is also deponed that it is not only the exparte applicants title which have been cancelled, nor is it an isolated case, as there have been several cancellation and allocation of Public, as set in copies of gazette notices No.5563, 5565.

Further that Judicial Review is not the appropriate avenue for obtaining remedy in such a situation and the prayers sought should be refused. Counsel in this matter agreed to dispose of the same by way of written submissions. The Ex-parte applicants` counsel Mr Kilonzo submitted that the exparte applicants were never given a hearing, and the claims that they illegally and irregularly acquired the plots cannot be true because they purchased the same from the registered proprietors for value.

In the joint verifying affidavit by the exparte applicants, they state that they purchased the plot from the first registered proprietors and annexed true copies of the leases of the previous owners of the said land and copies of the transfer of leases in favour of 1st and 2nd applicants. These are annexed and marked as C1-7 and D1-7. These are all certificates of lease form the Government of Kenya and transfer documents involving different individuals.

By a letter dated 19th September 2005, the Lamu Land Registrar alleged that these very plots and others were within the Gazettement of the National Heritage, which is a protected area and required the applicants to surrender their leases for revocation to which the Respondent responded by a letter dated 6th September 2005(E1-2) in which they contested any attempts at having them surrender their titles – the

letter was written by their Advocate, Fadhili and Kilonzo.

In 2004, Kenya Ports Authority attempted to block the applicants from developing the lands, with the consequences that the applicants moved to court and obtained orders of injunction restraining the Kenya Ports Authority (KPA) from interfering with the said Developments as per the copies of Plaint, Defence and Ruling which are annexed.

Prior to the said litigation, Kenya Ports Authority had requested the Commissioner of Lands and the Government of Kenya to compulsorily acquire the applicants plots and restrict developments thereon, but the Government declined on the basis that the leases were sacrosanct and were private property, which if Kenya Ports Authority wished to have would have to deal with the private owners. The applicants insist that their plots are not within the gazzetted water catchment area. A letter dated 16th May 2007, signed by G K Konde, District Surveyor Lamu, addressed to the Director of Surveys, Nairobi stated that the plots in issue were outside the water catchment area. The same was repeated by a letter dated 3rd May 2007 signed by T. N. Mburu, on behalf of the Chief Land Registrar and addressed to the Chief Land Registrar Lamu. Another letter dated 9th June 2009, signed by the District Commissioner Lamu, addressed to the Director General of NEMA stated that the plots in issue did not fall within the gazette water catchment areas by a letter dated 19th September 2005, the Lamu District Land Registrar had written to the exparte applicant requiring him to surrender the title for cancellation on grounds that the plots were within the area gazette as a Natural Heritage and therefore a protected area.

Naturally the exparte application objected to the request and instructed their advocates Fadhili & Kilonzo to respond by a letter dated 06/12/05 in which it was pointed that they would not oblige because in their view, the Registrar`s demand had no legal basis. Curiously enough just the year before that that in 2004, the Kenya Ports Authority (KPA) attempted to block the applicants from developing the lands, with the consequence that applicants moved to court and obtain orders of Injunction restraining the Kenya Ports Authority from interfering with the developments – A copy of the ruling delivered by Hon. Lady Justice Khaminwa on 8th June 2005 is annexed and marked F-3. In that ruling, involving FAHIM YASIN TWAHA AND YASIN TWAHA ABDULLA V KENYA PORTS AUTHORITY, the learned Judge stated as follows;-

"***I find that the land being the property of plaintiff who wants to develop the same at his expense, he has shown a prima facie case with a chance of success, considering the guaranteed rights to property under the constitution. It is for the Defendant to prove that it has a right to interfere with the Plaintiff`s rights……..***

Incidentally, prior to that litigation, the Managing Director of Kenya Ports Authority had requested the Commissioner of Lands and the Government to compulsory acquire the applicant`s plots and restrict the developments but this was declined on the basis of sanctity of property. The various correspondences confirming that, are annexed as G1-3. The first letter dated 26th September 2002 was written to Mr. S. Mwaita, then Commissioner of Lands by Vincent M. Kyande on behalf of the Managing Director of Kenya Ports Authority. It stated in part that Kenya Ports Authority required to establish a number of flotation aids to navigation for the safe navigation of ships along the Kenyan Coastline and in the approaches to Seaports under its jurisdiction, so as to keep in line with the International Convention for safety of life at Sea and also the United Nations Law of the Sea. The request and application on;-

"The Kenya Ports Authority navigational lighthouse which stands on Government land at Shella, Lamu. However the beach line of sight is being obstructed by any development that may come on the plots shown in the attached sketch. We have information that the land in question was recently allocated to other parties. We request that a restriction be place on the height of any proposed development"

Another letter dated 27th November 2002 to the said Commissioner of Land, this one written by Brown Ondego (then Managing Director, Kenya Ports Authority) revisited the said request and urged the Commissioner to;-

"Commence the process of compulsory acquisition of the said plot for public purposes, in accordance with Land Acquisition Act cap 295 of the Laws of Kenya" This letter was more specific and pointed out that the area of interest was the one owned by Mr. Fahim Twaha. Finally, the Commissioner, Mr. S. K. Mwaita responded by a letter dated 30/09/02 stating as follows;-

"The identified plot LR Nos. Lamu Township/Parcels 126/127, 129 and 282 are private property registered in favour of Fahim Yasir Twaha…….whereas parcel 128 is registered in favour of Yasir Twaha Abdalla…….This being private property, the request to restrict the ….of the proposed developments should be taken up with the plot owners and the Local Authority.

There were correspondences from the Government (marked H1-5) indicating that the plots were not within the water catchment area. A letter dated 16th May 2007 by the District Surveyor Lamu, one G. K. Kondeh, written to the Director of Surveys stated in part;-

"As evidenced by the copies of PDP and Gazette notice and Survey Plan hereby attached, registered parcels Nos. Lamu/Block IV/124, 125, 126, 127, 128, 129, 28 and others are outside the Water catchment area.

Another letter dated 3rd July 2009 by T.N. Mburu the Acting Chief Land Registrar stated;-
"It has been confirmed that the above parcels do not fall within the protected area as indicated earlier. You may therefore remove the said restrictions."

There was also a letter signed by S.Ikua (Lamu District Commissioner) in his capacity as Chair of the District Environment Committee and H. Menza (in his capacity as Secretary to the same committee), dated 9th July 2009, where they reiterated the position that the plots did not fall within the sand dunes areas"

Nonetheless, the Lamu District land Registrar acting on behalf of the Government purported to revoke an cancel the exparte applicant`s Titles.

The exparte applicant's contention is that a Gazette Notice has no legal basis and cannot take away legal rights guaranteed under the Constitution without following the due process of law and legal decisions in respect of revocation of Titles then the action especially with regard to Title issued under the Registered Land Act (Cap 300) is ultra vires, as such power is exclusively vested in the court.
They also lament that they were not given a right to be heard.

Mr. Kilonzo for the exparte applicants submits that they are the legal owners of that land and that the Government has acknowledged through the District Commissioner S. Ikua that the gazette notice affecting the applicants land is irregular. The letter marked J is addressed to the Permanent Secretary Ministry of Lands and is dated 25th May 2010 in which he repeated that the area is outside the gazette water catchment area and he suggested that an independent team headed by the Permanent Secretary`s office devoid of National Museum and Lamu County Council make a physical visit of sites and assess the situation.

It is Mr. Kilonzo`s contention that there is sufficient documentation to show that the exparte applicants have legal title to the land and that under section 39 (1) of the Registered Land Act(RLA).

"39 (1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:-"

a) To inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous property was registered;- or

b) To see to the application of any consideration of any party thereof.

His argument is that the applicants being bona fide proprietors of the parcels in question have a fundamental right as enshrined in the Constitution of Kenya to own property and enjoy protection of the same under section 40 (2). That section provides as follows;-

"Parliament shall not enact a law that permits the State or any person

a) Be arbitrarily deprived of property of any description or of any interest in or right over, any property of any description,

Mr. Kilonzo further invokes the provisions of Article 40 (3) if the Constitution to state that the Respondents action infact amount to violation of that provision which prohibits arbitra….deprivation of property. His contention is that even if the Respondent were to argue that the parcel are for public use, then applicant`s sought to be offered compensation as stipulated under section 3 of the Land Acquisition Act. In this instance, Mr. Kilonzo submits that the Respondent contravened all Law and did not follow any procedures laid down by Law, thus rendering his action ultra vires ab nitio. Further that the Respondent`s action exceeded his powers as he has no jurisdiction (original or delegated) to revoke or cancel Titles issue under the Registered Land Act &am p;nb
sp;

Mr. Kilonzo invited this court to consider the provisions of the Registered Lands Act regarding the powers of the Registrar and to note that nowhere in that Act, is the Registrar given authority to cancel a Title once it is issued.

Lest we lose focus, the issue here is not as regards the merits of the decision, but the procedure used in arriving at that decision. The issue for determination is simply this;

(a) Did the District Lands Registrar Lamu have authority/jurisdiction to revoke and cancel tile issued under the Registration of Lands Act.

(b) Were the principles of Natural Justice adhered to, in exercising that decision?
Under section 4 of the Registration of Lands Act, no other written law, practice or procedure related to land, shall apply to land registered under the Act in so far as it is inconsistent with the Act. It is in this context that Mr. Kilonzo urges this court to consider the provisions of section 28 of the Registration of Lands Act which provides that:
"The rights of a proprietor, which acquired on first registration or whether acquired subsequently for valuable consideration, or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all principles and apportenances belonging thereto."

It is on account of this that Mr. Kilonzo submits that the Act does not permit the respondent to cancel a title, as the same is not vested in the respondent by the Act.

Mr. Kilonzo refers to section 14 and 143 of the Registered Lands Act –
"142 (1) The Registrar may rectify the register or any instrument presented for registration in the

following cases;
(a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor"
He submits that anything else done by the Registrar which adversely affects Title, such as his actions here are definitely in excess of his powers.

As regards the indefeasibility of the Title and the fact that applicants bought it as bona fide purchases for value and their exercise of due diligence, my view is that these are issues Mr. Kilonzo could only raise if we were dealing with an appeal, so as to determine the merits of considerations made by the Registrar before cancelling Title – here the focus is on the procedure adapted.

Since the respondent's Counsel Mr. Njoroge from the Attorney General's Chambers did not file written submissions, I can only rely on the replying affidavit sworn by MICHEAL SHUME CHINYAKA from which I understand him to defend his action as an administrative action taken to curb the impunity of yesteryears by persons of powerful political inclinations. His affidavit does not seem to suggest that he was instructed by anyone to revoke and cancel the file, so that his action seems to have stemmed out of his own discretion.

The exercise of that discretion affected the legal rights and interests of the exparte applications and therefore a subject of Judicial Review over administrative actions and which then demands that the legality and propriety of the procedure he adopted be placed under scrutiny. The function of Judicial Review is simply to control powers, functions and procedure of administrative authorities through court process where the court reconsiders or re-examines the manner in which a decision is made, and the reliefs available are certiorari (to question the decision), prohibition (to stop the action) and mandamus (to compel an action). It is therefore out of place for the respondent to depone that the reliefs sought in this matter are inappropriate – they fall squarely within the purview of Judicial Revision.

At chapter 5 of the Legal Text by PLO Lumumba and PO Kaluma, "JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS IN KENYA:- Law and Procedure" page 76, it is noted that the norms which form grounds of Judicial Review include;

a) The *ultra vires* rules

b) Abuse of power

c) Relevant/irrelevant considerations

d) Reasonableness/unreasonableness

e) Bad faith

f) Procedural impunity

g) Error of law on the face of records

h) Jurisdictional error

i) Non-disclosure

j) Legitimate expectations

k) Natural justice

From the applicant's motion and verifying affidavit as well as statement, the following are identified as the grounds raised;

(a) Respondent acting *ultra vires* his powers – i.e going beyond the powers accorded him under the Registered Lands Act.

(b) Jurisdictional error – that he had no jurisdiction to even revoke and cancel the titles.

(c) Natural justice – i.e the right to be heard based on the ***"Audi Alteram Parten"*** principles (no man shall be condemned unheard) yet his title was cancelled and revoked unilaterally without being given a chance to be heard.
The Land Registrar Lamu justified his actions on grounds that he was protecting what was from time immemorial sand dunes of Lamu. However he did not annexe a single document to support that position, and even if that were the case, and that his action stemmed from the desire to protect what was really a public utility, then of course the question to ask is where did he draw such powers from?

Section 28 and 29 of the Registration of Lands Act addresses the issue of sanctity of Title, and once one is a holder of title under the Registration of Lands Act, then the District Land Registrar is restricted by section 142 (1) in dealing with the registration. Moreover section 143 of the Registration of Lands Act is clear, where it is believed or contended that an individual obtained title through irregular or mischievous means.

"143 (1) subject to subsection (2) the court may order rectification of the register by directing hat any registration be cancelled or amended where it is satisfied that any registration (other than a first registration has been obtained) made or omitted by fraud or mistake

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or instance in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act or negligence. Clearly then, the power to adversely deal with the title so as to cause rectification by revocation and/or cancellation, has with the court, and not the District Lands Registrar, and to that extent he acted in excess of his powers and ultra vires the provisions of the Registration of Lands Act."

It is rather unfortunate that the Replying affidavit by Michael Shume Chanyaka is just filled with blanket statements with nothing to back them, he refers to the sand dunes of Lamu and says the plots fall within the water catchment area, he refers to attempts to trace records at lands registry and with the District physical Planner, yet not a single document of correspondence except a letter issued in 2005 which required the plots to have a restriction placed over them, which restriction was later lifted by subsequent correspondences which applicants have annexed. At paragraph 12 he refers to the Government's mandatory obligation to protect the environment and the applicant's abuse of power through their positions of influence. Some of the matters he deposes to border an alleging criminal conduct on part of the exparte applicants, such as abuse of office, which is not something one just depones in one paragraph in an affidavit with no tangible evidence support it. But I suppose his intention is to demonstrate that the property had to be acquired for public use – which may very well be reasonable, in line with the provisions of the Constitution of Kenya which provides as follows;

Article 40(3)

"The shall not deprive a person of property of any description or of any interest in, or right over property of ….UNLESS the deprivation.

(b) Is for public purpose or in the public interest and CARRIED OUT IN ACCORDANCE WITH THE Constitution AND ANY Act of Parliament that

(i) requires PROMPT payment in full, or just compensation to the person

(ii) allows any person who has an interest in or right over, that property a right of access to a court of law"

So the respondent may justify his actions based on the above provision, and it may well be that all that records which favoured the exparte applicants were doctored to fit in with the interests of the applicants, and that respondent has now made this amazing realization BUT it cannot be a realization based simply on sweeping blanket statement without an iota of evidence, and without observing what sub Article 3(b)(1) and (ii) contemplate. Where is the Gazette Notice which gazetted the parcels as water catchment areas?

In any event, even if this was a compulsory acquisition, then under the Land Acquisition Act (Cap 295) a section 3, the power lies with the Minister and the Commissioner, to this effect:

"Whenever a Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette and shall deliver a copy of the notice to every person who appears to him to be interested in the land."

Section 6 of Cap 295 refers to:

"where the Minister is satisfied that any land is required for the purposes of a public body, and that-

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public healthy, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land."

In the present instance, the notice was by the District Lands Officer who seems to have acted out of his own discretion. His action was therefore, substantive ultra vires. As Mr. Kilonzo put it, even if the respondent had the power to cancel or revoke the titles, then natural justice demands that the exparte applicants be given a hearing before such action could be taken.

I doubt that an illegality or what is deemed as irregular or an act of impunity can be cured by another irregular action or impunity. Just because the epxarte applicants may have obtained the plots using improper process does not mean that the same has to be taken away from them using an equally improper process. As I have already pointed out, the Constitution of Kenya does allow for compulsory acquisition to land, and this provision exists so as to ensure that land which had been set aside for public use, and eventually illegally obtained, does not end up lost forever on account of the technicoloured refrain about sanctity of property. But even in those instances, it must be demonstrated that indeed the land had been set aside as a public utility or preserved through some gazettement. This is why it was easier to reclaim for instance a natural forest, because although persons may have title, the areas had been gazetted as natural forests, and water catchment areas, then the same were by some stroke of pen, degazetted so as to benefit certain individuals. Or instances where a plot has been set aside for a school, a hospital, a cemetery, then an individual moves into occupation – the worst scenario I can think of is for instance someone coming up with a title saying Lake Victoria has been allocated to them and they claim ownership. Such scenario would *ab initio* speak for themselves, and are easily distinguishable from the present scenario where the District Land Surveyor does not have a single document to show that the area

had been gazette as a water catchment area, then perhaps later de-gazetted, so as to justify compulsory recovery. In fact the correspondence presented before this court is simply one letter which is undated, but signed by A.S. Bamusa saying:-

"The allottees and beneficiaries of the plot affected should be notified that the plots are within the gazettement of the National Heritage, which is a protected area. They should therefore surrender their titles for cancellation"

This was a letter which was received on 14th March 2005 and seeks to refer to other letters which are not annexed. The subject plots in this letter are not specified the title of the letter is "LAMU BEACH AND SAND DUNES ALLOCATION"

The other letter sought to be relied on is one written by National Museums of Kenya – it is an incomplete letter with only the first page attached. I is not clear who the author is, it is addressed to the Clerk of County Council of Lamu referring to illegal developments on the Shella – Kipungani Sand Dunes, but again no plot number reference is given, nor is a map attached to confirm that the plots herein are the subject of the letter and it's not clear to me whether the respondent expects the court to try and guess which plots formed the subject of the letter.

I have gone into those details because the applicants have annexed correspondence from various government officers confirming that the area is outside the gazetted water catchment area. Even if public interest was to be used to justify the respondent's action, then the information availed is so weak and scanty, it's like flailing weak arms in the air.

The Constitution of Kenya, which we so joyously promulgated on 27th August 2010 recognizes that all are equal before the law and the wrong doer has an equal protection under that doctrine to be heard. Article 50(1) states:

"Every person has the right to have any dispute that can be resolved by the application of law, decided in fair public hearing, before a court, or if appropriate, another independent and impartial tribunal or body"

The fact that the decision was of an administrative or discretionary nature does not mean that the rules of natural justice do not apply. Indeed as Lord Dipluck stated in **Attorney General v Ryath (1980) AC 718 at page 730'**

"it has long been settled, that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority"

This right to a hearing has been extensively examined by David Foulkes in his book *"Introduction to Administrative Law" 4th Edition at (Buterworths) at page 158,* where he states:

"In a number of cases, Lord Denning has suggested that whether or not a person is entitled to a hearing depends on whether or not he has some right, interest or legitimate expectation of which it would not be fair to deprive him without hearing what he has to say,"

This was even better examined in the case of **DURAYAPPAH V FERNANDO (1967) 2 ALL ER PG**

152 which set down this approach when considering the right to be heard.;

a) the nature of the property or office held or status enjoyed by the complainant

b) the circumstances in which the other, decidendi party is entitled to intervene

c) when that right to intervene is proved, the sanctions he can impose on the complainant.

Applying these criteria, then my finding is that the applicants had property rights (which are protected under the Constitution) and those interests were so adversely affected by the respondents decision, that they had the right to be heard.

It defeats all reason for the District Land Registrar to state in his affidavit that because other persons have been affected by his decision and not just the *e*xparte applicants, then they need not whine. If that kind of approach is allowed to go on unchecked we will end up with a most timorous populace which cannot as much as cough when their rights are affected and I am persuaded that this court has a duty to ensure that respondent refrains from engaging in conduct which results in an individual not being given an opportunity to be heard, and where excesses are allowed, my finding therefore is that the application is merited, the decision was *ultra vires* and also offended the rules of natural justice and the same is quashed by way of certiorari.

If the respondent wishes to challenge the applicant's titles then the proper legal process must be adopted.

The respondent is prohibited by himself, his servants and/or agents from interfering with the applicant's occupation, ownership and use of the property unless of course proper legal orders to the contrary are obtained.

The respondent shall retain the records of the applicants in the Land Registry Records as owners of the said properties until such time that a proper legal process is used to adversely affect them.

Delivered and dated his **17th** day of **March 2011** at Malindi.

H. A. Omondi

JUDGE