



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civil Appli. 1011 of 2005

REPUBLICAPPLICANT

V E R S U S

CHIEF LAND REGISTRAR/PRINCIPAL

REGISTRAR OF GOVERNMENT LANDS..... 1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

PERMANENT SECRETARY MINISTRY

OF LANDS & HOUSING.....3RD RESPONDENT

KARIANGO INVESTMENTS.....4TH RESPONDENT

EX-PARTE

ALI NOOR ABDI

STANDARD CHARTERED BANK LIMITED ... INTERESTED PARTY

J U D G M E N T

This is a Notice of Motion dated 20th July, 2005, and filed on the same date by M/s Machira & Company advocates on behalf of the ex-parte applicant named as **ALI NOOR ABDI**. The respondents are named as **CHIEF LAND REGISTRAR/PRINCIPAL REGISTRAR OF GOVERNMENT LANDS, COMMISSIONER OF LANDS, PERMANENT SECRETARY MINISTRY OF LANDS & HOUSING and KARIANGO INVESTMENTS**. The orders sought are that-

1. A writ of certiorari do issue quashing the decision/declaration of the Chief Lands Registrar/Principal Registrar of the Government Lands purporting to declare null and void the Deed of Indemnity in favour of the Government, the Indenture executed in favour of ALI NOOR ABDI by KARIANGO INVESTMENTS LIMITED and the Charge in favour of the Standard Chartered Bank Kenya Limited, in respect of L.R. No. 36/VII/498, Eastleigh.

2. A writ of certiorari do issue quashing the decision/declaration of the Chief Land Registrar/Principal Registrar of the Government Lands purporting to cancel the said Deed of Indemnity in favour of the Government, the said indenture executed by KARIANGO INVESTMENTS LIMITED in favour of ALI

NOOR ABDI and the Charge in favour of the Standard Chartered Bank Kenya Limited, in respect of L.R. No. 36/VII/498, Eastleigh.

3. A writ of Prohibition do issue prohibiting the Chief Land Registrar/Principal Registrar of the Government Lands, Ministry of Lands and Housing, from declaring null and void and canceling the said Deed of Indemnity in favour of the Government, the Indenture executed in favour of ALI NOOR ABDI by KARIANGO INVESTMENTS LIMITED and the Charge in favour of the Standard Chartered Bank Kenya Limited, in respect of L.R. No. 36/VII/498, Eastleigh.

The application was filed with an affidavit supporting the facts relied on sworn by the ex-parte applicant **ALI NOOR ABDI** on **20th July, 2005**. The application is grounded on the **STATEMENT** filed with the application for leave as well as the **VERIFYING AFFIDAVIT** also filed with the application for leave, sworn on the **1st July, 2005** by the ex-parte applicant **ALI NOOR ABDI**. The verifying affidavit depones to the fact that the facts given in the **STATEMENT** are true.

The said **STATEMENT** gave the name, description and address of the applicant. It also listed the grounds of relief sought, as well as the reliefs sought. The grounds of reliefs sought are as follows-

1. Since 14th December, 2004, the ex-parte applicant has been the registered proprietor of all that parcel of Land known as L.R. No. 36/VII/498 Eastleigh, situated within the City of Nairobi measuring approximately 0.239 ha, under the provisions of the Government Lands Act, Cap 280.

2. The ex-parte applicant obtained the aforesaid

parcel of land through a valid sale transaction whereof a Sale Agreement dated 10th June, 2004 was executed between the 4th Respondent as the vendor and the Ex-parte applicant as the Purchaser and whereof the firm of D. Ndung'u & company advocates were acting for the 4th Respondent and the firm of Wetangula & Company advocates were acting for the Ex-parte Applicant.

3. During the Sale transaction, the Ex-parte

Applicant negotiated with the 4th Respondent the terms of the sale, and both parties agreed that the purchase price of the said property would be Kshs.29 million.

4. Immediately after signing the Sale Agreement

on 11th June, 2004, the Ex-parte Applicant paid the sum of Kshs.2.9 million to the 4th Respondent's Advocates in the Sale transaction being 10% of the agreed purchase price and in accordance with the terms of the Sale Agreement.

5. To facilitate the purchase of the property, the

Ex-parte Applicant charged the suit property to M/s Standard Chartered Bank Limited for a loan of Kshs.20 million and which mortgage was subsequently registered on 16th November, 2004 alongside the Indenture executed by the 4th Respondent in favour of the Ex-parte Applicant.

6. On 9th December, 2004, upon completion of the

Sale transaction and after paying the full purchase price of Kshs.29 million, the 4th Respondent gave the Ex-parte Applicant vacant possession of the suit premises after which the Ex-parte Applicant took vacant possession of the same.

7. On or about 25th February, 2005, the 4th

Respondent after giving vacant possession of the said suit premises to the Ex-parte Applicant, filed suit and an Application in court being HCCC No. 219 of 2005, KARIANGO INVESTMENT LTD & WYCLIFFE WAWERU THANDE –VS- ALI NOOR ABDI & D. NDUNG’U & CO ADVOCATES under certificate of urgency to seek inter alia temporary injunction restraining the Ex-parte applicant from allegedly obstructing, interfering, excluding and/or meddling in any way with the Ex-parte Applicant’s (should be 4th respondent’s) use or possession of the suit premises.

8. *The 4th Respondent was granted interim orders*

pending hearing of the Application inter partes on 17th March, 2005.

9. *During the hearing of the 4th Respondent’s*

application on 17th March, 2005, the court through misrepresentation and concealment of material facts by the 4th Respondent, ordered the reinstatement of the 4th Respondent into the suit premises pending the determination of the suit.

10. *Without even attempting to serve the Order of*

this Honourable court of 17th March, 2005, the 4th Respondent through their advocates M/s Khaminwa & Khaminwa advocates on 29th March, 2005 obtained interim orders seeking assistance of Police to enforce the Honourable Court’s Orders aforesaid.

11. *Being aggrieved by the orders of the Honourable*

Justice Ransley of 17th March, 2005, the Ex-parte Applicant instructed his Advocates on record to Appeal, which Notice of Appeal and Letter requesting for proceedings was filed on 30th March, 2005.

12. *The ex-parte Applicant’s advocates on record on*

31st March, 2005, also filed in court under certificate of urgency an application seeking stay of proceedings in the said suit, which interim orders were granted on the same day and orders extended on 12th April, 2005 and 20th April, 2005.

13. *When the parties appeared in court on 20th April, 2005 for the hearing of the Ex-parte Applicants Application for stay of proceedings, this Honourable court ordered the 4th Respondent to serve the plaint and summons upon the Ex-parte applicant’s Advocates within 7 days and the suit be set down for hearing on 28th and 29th June, 2005.*

14. *The 4th Respondent did not comply with the*

aforesaid Orders and instead through their advocates Khaminwa advocates, on 27th May, 2005 filed an Application under certificate of urgency in the Court of Appeal seeking stay of proceedings of the said suit.

15. *The 4th Respondent’s aforesaid Application in*

the Court of Appeal was not certified as urgent and is still pending for hearing before the said Court.

16. *Before the said Application in the Court of*

Appeal could be heard, the 4th Respondent once again on 6th June, 2005 filed yet another Application

under certificate of urgency in the superior Court seeking inter alia a temporary injunction barring the Ex-parte Applicant, his servants and agents from evicting the occupants of the suit premises.

17. *The ex-parte applicant thereafter filed his*

replying affidavit on 16th June, 2005.

18. *On 20th June, 2005, when the 4th Respondent's*

Application was scheduled for hearing inter-partes, the same was not listed and was never fixed for hearing.

19. *On 22nd June, 2005, the 4th Respondent through*

their advocates filed a Notice of Discontinuance

of suit, which Notice was served upon the Ex-parte applicant's advocates on 27th June, 2005, a day before the suit was scheduled for hearing on 28th June, 2005 as ordered by this Honourable Court aforesaid.

20. *When the suit ie. HCCC No. 219 of 2005*

KARIANGO INVESTMENTS LTD & WYCLIFFE WAWERU THANDE -VS- ALI NOOR ABDI & D. NDUNGU & CO. ADVOCATES came for hearing on 28th June, 2005, after hearing the parties, the High Court allowed the 4th Respondent to withdraw the suit, with costs to the ex parte applicant.

21. *On the same day, after the 4th Respondent was*

Allowed to withdraw its suit, the 4th Respondent's Advocates gave the ex-parte Applicant's Advocates a letter addressed to the Ex-parte Applicant, dated 10th June, 2005 and written by the 1st Respondent purporting inter alia to cancel the ex-parte Applicants Titles to the suit premises.

22. *The ex-parte applicant has todate not received*

the said letter, despite the same having been addressed to him.

23. *The contents of the said letter were to the effect*

that the 1st Respondent has purportedly declared null and void and cancelled the Indenture dated 9th August, 2004 executed by the 4th Respondent in favour of the ex-parte applicant, the Deed of Indemnity executed by the Ex-parte Applicant in favour of the Government and the charge in favour of Standard Chartered Bank Limited in respect of the property known as L.R. No. 36/VII/498 Eastleigh, Nairobi.

24. *In the said letter the 1st Respondent purported*

to cancel and declare null and void the aforesaid entries allegedly pursuant to Section 121, 122 and 126 of the Government Lands Act, Cap. 280 Laws of Kenya.

25. *The 1st Respondent did not under the said*

provisions or under any other written law have jurisdiction to cancel or declare null and void any entries or Documents concerning the said property particularly so while the matter was still pending before this Honourable court.

26. *The 4th Respondent could not wait for the*

outcome of the said suit they filed in court and instead lobbied by using Administrative and Political influence to deprive the ex-parte Applicant of his aforesaid property.

27. *The 1st Respondent acted arbitrarily and in excess of his powers in that he purported to cancel and declare null and void the entries involving the said property without considering that the matter was still pending for determination before this court.*

28. *The 1st Respondent acted with bias and*

prejudice by making decisions involving the Ex-parte Applicant over the said property and without even affording the ex-parte Applicant an opportunity to present his case, worse, while there was a suit pending before this Honourable Court.

29. *The 4th Respondent having instituted this suit*

has been abusing the court's process with impunity by filing various applications both in this court and in the Court of Appeal and not prosecuting them.

30. *On 23rd June, 2005 when the ex-parte*

Applicant's guards were still recuperating from injuries, the 4th Respondent with approximately 20 of their agents, once again invaded the suit premises causing damage to the property and loss of the Applicant's personal effects.

31. *The matter is still pending with the Pangani*

Police Station for investigation on the destruction of property and violence on the suit property.

32. *At all material times, the 4th Respondent has*

been using various authorities, giving them one sided picture without the Ex-parte Applicant being accorded an opportunity to present his side of the story.

33. *None of the Respondents have either the powers or the jurisdiction to purport to cancel or declare null and void the Indenture, Deed of Indemnity and the charge in favour of Standard Chartered Bank Limited at least without following due process.*

34. *The 1st Respondent's decision therefore is not only illegal, unlawful but the same is biased and highly oppressive in that the ex-parte Applicant stands to lose an astronomical sum of Kshs.29 million as consideration for the suit premises, besides loss of investments.*

35. *The said decisions of the 1st Respondent would constitute a serious and flagrant breach of the Rules of Natural Justice, the Constitution, and all statutory provisions of law.*

On 16th January, 2006 the 4th respondent (**KARIANGO INVESTMENTS LTD**) through their advocates M/s Mbugua Mureithi & Company advocates filed a Notice of Preliminary Objection. The objections were two in number as follows-

(i) *That both the ex-parte application for leave and the substantive application by Notice of Motion filed herein are incurably and fatally defective both in form and substance.*

(ii) *That there is no evidence properly before the court in support of either the ex-parte application*

for leave or the substantive application by way of Notice of Motion filed herein.

On 23rd February, 2005, the Attorney-General filed Grounds of Opposition on behalf of the 1st, 2nd and 3rd Respondents. The ground is that-

The Notice of Motion is fatally and incurably defective as it is not supported by any evidence.

On 9th March, 2006, the 1st Respondent (***through the Attorney-General***) filed a replying affidavit to the Notice of Motion sworn by **ROSINA MULE** a Senior Registrar of Titles on the same date.

On 9th June, 2005, the ex-parte applicant, through their counsel Machira & Co. advocates filed written submissions in response to the objections filed by respondent as well as the replying affidavit sworn by **ROSINA MULE**.

On the 23rd August, 2006, the 4th Respondent filed a replying affidavit to the application, sworn on 15/8/2006 by **HANNAH WAIRIMU NJUGUNA**, described as the Managing Director of the 4th Respondent.

The replying affidavit sworn by **ROSINA MULE**, on behalf of the Principal Registrar of Lands and that sworn by **HANNAH WAIRIMU NJUGUNA**, deponed to a forgery.

It is deponed in the affidavit sworn by **ROSINA MULE**, on behalf of the Principal Registrar of Lands that on 2nd November, 2004, an indenture between Kariango Investments Ltd. and **ALI NOOR ABDI** in respect of the land reference No. 36/VII/498 dated 9th August, 2004 was presented for registration at Nairobi Central Registry and was given day book No. 163 of November, 2004. It is deponed that the parties did not produce the previous indent, and that the current practice was for vendors to produce the previous indenture or to give a deed of indemnity in favour of the Government. It is deponed that the deed of indemnity was approved by the Principal Registrar of Titles on 5/11/2004 and thereafter registered. On 26/11/2004 a mortgage in favour of Standard Chartered Bank for Kshs.20,000,000/= was registered against the property. It was deponed that on 4th of April, 2005 a complaint of forgery was received through Khaminwa & Khaminwa advocates on behalf of Hannah Wairimu Njuguna. It was also deponed that as a result of investigations carried out by the CID, one Daniel Ndung'u who acted as advocate for the vendors was charged in criminal case No. 293 of 2005 on allegations of forgery. It was further deponed that the Principal Registrar of Government Land being satisfied of the forgery and lack of the previous indenture, proceeded to expunge the indenture, the mortgage and the deed of indemnity from the registry and records in terms of section 121, 122 and 126 of the Government Lands Act Cap. 280, and that the ex-parte applicant was so informed vide a letter dated 10th June, 2005. It is deponed that the Principal Registrar acted within his legal powers, and also that the Notice of Motion was fatally defective as it was not supported by any evidence and should be dismissed.

The replying affidavit of **HANNAH WAIRIMU NJUGUNA** on the other hand, depones that she was the Managing Director of the 4th respondent and was aware of the subject property owned by the 4th respondent. It was deponed that she had proceeded to the USA on 29th October, 2004 to visit her children, only to learn that someone purporting to be herself had purported to sell the property to one Ali Noor Abdi through D. Ndung'u & Company advocates. It was deponed that the deponent returned to Kenya immediately and in December, 2004 reported to CID Headquarters Nairobi and also instructed M/s Khaminwa & Khaminwa advocates to pursue the matter and that Mr. D. Ndung'u advocate was arrested and charged with two counts of forgery, uttering a false document, and procuring the execution of an indenture by false pretences. It is further deponed that upon investigations, the Principal Registrar of Government Land found that the deponent's complaint was *bona fide* and took necessary action by effecting the cancellations. It is deponed that the Principal Registrar of Government Land acted *bona fide* and within the law and that the Notice of Motion is fatally defective. It is also deponed that all the orders sought in the Notice of Motion cannot issue and have to fail. It is also deponed that the ex-parte applicant could not have title from a fraudulent transaction, which cannot be legitimized by quashing the

Registrar's decision. It was lastly deponed that the ex-parte applicant did not stand to suffer any prejudice.

The 4th respondent also filed written submissions on 18th October, 2006, through their counsel Kimathi & Associates Advocates.

It was the thrust of the written submissions that the Notice of Motion was served without the statement accompanying the application for leave as required under Order 53 rule 4 (1) of the Civil Procedure Rules. Therefore, because the requirement was mandatory, the whole application was fatally defective and should be struck out with costs. It was also argued in the written submissions that the application lacked evidence and that there were no grounds to be relied upon by the applicant. Therefore it should be dismissed with costs as the applicant should not be allowed to rely upon the statutory statement, since the said statutory statement merely accompanied the application for leave, not the Notice of Motion. It was contended that the Notice of Motion should have been accompanied by a statement of its own.

The second issue, taken in the written submissions is on interpretation of the stay orders given by Emukule J. on 5/7/2005. Paragraph (c) of the ruling which relates to stay reads as follows-

“(c) Leave granted do operate as a stay in respect of the aforementioned orders for a period of 21 days.”

The above stay orders, it is argued in the written submissions of the 4th respondent, did not mean that the cancellations by Chief Registrar of Government Land was now non-existent. In any event, if the cancellations by the Chief Registrar of Government Lands were removed, the- question will be why could the ex-parte Applicant sustain the present application for the orders sought.?

On the substance of the application, it was submitted in the written submissions of the 4th respondent that the 4th respondent did not, at any time, appoint counsel to represent it in the sale of the subject property and that, in fact, the advocate who purported to act for the 4th respondent had already been charged in criminal case No. 293 of 2005 on the complaint of the Managing Director of the 4th respondent Hannah Wairimu Njuguna, and that the criminal case was pending in court. Therefore, the sale transaction on L.R. No. 36/VII/498 was void *ab initio* and tainted with fraud and therefore, the Chief Land Registrar's decision was lawful under Section 121, 122 and 126 of the Government Lands Act, especially section 121.

It was argued in the written submissions that it was not true that the 4th respondent, at any time, misrepresented facts to the Honourable court as alleged by the applicant. This position, it was contended, could be verified from the court's record (*of the withdrawn case*). It is contended that as the subject case No. 219 of 2005 was withdrawn, it could not be true that there was an appeal of the 4th respondent pending in the Court of Appeal. It is contended that the 4th respondent's case HCCC No. 219 of 2005 was withdrawn after of the Chief Land Registrar's action in lawfully canceling the subject suspect transactions.

It is emphasized in the submissions that the Chief/Principal Lands Registrar had the powers especially under Section 121 of the Government Lands Act (**Cap. 280**) to cancel the documents and entries as he did. It is argued that if the applicant was sincere that he had lawfully bought the land, then he should have gone to the Registrar of Lands to explain how he acquired the land. It was contended that there was ample evidence of forgery and fraud that justified the Registrar of Lands to take the action he took, and that section 122 was complied with. The emphasis was that the Registrar of Lands acted within the provisions of the law especially the powers conferred on him under section 121 of the Act. It was urged that the application be dismissed.

Though the Standard Chartered Bank Ltd. is said to have been served, and is listed as an interested party, it is not clear whether they filed written submissions. I did not see any in the file, though they appear to be represented by M/s Hammilton, Harrison & Mathews Advocates.

At the hearing of the application, Mr. Machira appeared for the ex-parte applicant, Mr. Cherogony appeared for the 1st, 2nd and 3rd respondents, Mr. Kuloba and Mr. Wata appeared for the 4th respondent, while Ms. Munyaka appeared for the interested party.

Mr. Machira highlighted the written submissions and authorities relied upon by submitting that the applicant was seeking for three substantive orders in his application. Two of the requested orders were for certiorari and one was for prohibition. Counsel submitted that the Principal Registrar of Lands did not have jurisdiction or powers to do what he did. Counsel submitted that the 4th respondent, after filing a case HCCC No. 219 of 2005 and that case having been certified to be heard on priority, went to the Registrar of Lands with his counsel, and without the applicant and the interested party being informed or heard the Registrar of Lands cancelled the documents registered in the Lands Office as well as the transfer of the subject property to the applicant. Thereafter, the 4th respondent withdrew the civil case No. 219 of 2005. Counsel argued that the Registrar of Lands did not have such powers under the Government Lands Act. Counsel argued that the first prayer was for quashing of the of the declaration of the Principal Registrar of Lands, the Second prayer is for quashing the cancellation of the documents and entries, and the third prayer is for prohibition.

Counsel argued that the facts were not in dispute as shown by the documents filed by the ex-parte applicant and those filed by or on behalf of the respondents. The only thing in contest was that the respondents state that the action of the Registrar was justified and was also lawful, while the applicant maintains that the actions of the Registrar were not justified or lawful.

Counsel contended that section 99 of the Government Lands Act (**Cap. 280**) required that certain transactions be registered, and once so registered, those documents were valid and could not be cancelled without due process. Counsel contended that cancellation could only be effected through a court order or orders emanating from a suit. Counsel emphasized that under section 100 of the Act, it is provided that no evidence could be rendered in court in respect of a transaction unless the same is registered. Counsel submitted that under Section 199 of the Act, the Registrar could only decline to register documents before registration. In our present case however, the documents were registered, in compliance with the Stamp Duty Act, and the property conveyed and the date of registration was clearly shown as 2/11/2004.

In addition, Kshs.20 million was borrowed by the applicant from the interested party on the strength of the documents registered and entries made. There was no dispute on this as shown in the affidavit of **ROSINA MULE**.

However, it is purported by the respondents that there was good reasons for the Registrar of Lands to take the action he took as provided for under Section 121 of the Act. Counsel contended that the said section only related to documents whose validity had been determined. In any-event, even under that section there was a requirement that the ex-parte applicant should have been given a notice, which was not done in the present case. Even the mortgagees (***the interested party***) were not notified. Consequently, counsel argued, the Registrar of Lands exceeded his powers. Also Counsel referred me to Section 122 of the Act and emphasized that the Registrar of Lands did not carry out enquiries as required by law. Counsel contended that Section 126 of the Act was a saving section and was irrelevant. Counsel contended that the Registrar of Lands erred in two respects. Firstly, he exceeded his powers. Secondly, he failed to give the ex-parte applicant and the interested party a notice and a hearing. Counsel stated that there was in fact no error that was to be corrected by the Registrar of Lands. Counsel emphasized that the substantive law governing the Registration of Titles Act, (**Cap. 281**) and the Government Lands Act, (**Cap.280**), was the Transfer of Property Act which did not confer the powers herein purported to have been exercised by the Registrar of Lands.

On the authorities relied upon, Counsel emphasized the decision in the case of **COMMISSIONER OF LANDS –VS- KUNSTE HOTEL LTD (1995-1998) IEA**. 1, in which he contended that the court decided that Judicial Review was concerned with the process, not the rights of parties. Counsel contended that the failure of the Registrar of Lands to give the ex-parte applicant a hearing called for this court to issue orders of certiorari and prohibition.

Counsel also cited the decision in the case of **RE KISIMA FARM LTD (1978) KLR 36** and submitted that prohibition orders are available in our present case. Counsel contended that the decision of the Registrar of Lands had a continuous effect, and therefore prohibition orders should be issued.

Counsel also cited the case of **KENNETH STANLEY NJINDO MATIBA -VS- THE ATTORNEY GENERAL-** Civil Appeal No. 42 of 1994 and contended that the principles of natural justice required that a person be heard before condemnation. Counsel submitted that the ex-parte applicant was condemned by the making of adverse orders on his property which was protected under the Constitution. Counsel contended that the facts herein were analogous to those in the case of **REPUBLIC –VS- MINISTER FOR LOCAL GOVERNMENT EX-PARTE MWAHIMA (2002) 2 KLR 557** in which the court held that the Minister did not have the power to suspend a councilor under the Local Government Act (**Cap. 265**)

Counsel contended that the assertion by the 1st, 2nd, 3rd respondents that there were criminal investigations could not give legal justification for the decision of the Registrar of Lands. In addition, the 4th respondent had already filed HCCC 219 of 2005 which was to be heard expeditiously, but then unilaterally the 4th respondent went to the Registrar of Lands and caused the cancellation of the title of the ex-parte applicant.

Mr. Cherogony for the 1st, 2nd and 3rd respondents submitted that they opposed the application based on their grounds of opposition dated 22/2/2006, and replying affidavit sworn on 9/3/2006.

Counsel's first contention was that the application was fatally defective as it did not comply with Order 53 rule (1) (2) of the Civil Procedure Rules, which provided that the verifying affidavit was the only document that should carry the evidence, and the statement should only carry the name of applicant, reliefs sought and grounds for the reliefs.

In our present case, Counsel argued, the affidavit carried only three paragraphs. The evidence purportedly marked in red were documents that were not properly brought to court in any known legal manner. Counsel sought to rely on the Court of Appeal decision in the case of **COMMISSIONER GENERAL KENYA REVENUE AUTHORITY –VS- SYLVANUS OMENA OWAKI** – Civil Appeal NO. 45 of 2000 – in which it was held that the evidence is to be contained in the verifying affidavit, and urged me to dismiss the application.

The other line of argument of the Counsel, was that there was correspondence and documents filed which established that the advocate who conducted the purported sale transaction was implicated in forgery and charged in court. Therefore, after extensive investigations by the Registrar of Lands and the CID, the Registrar of Lands exercised his wide discretion under Section 121 and 122 of the Act. Counsel contended that notice to parties was a discretion of the Registrar of Lands and was not mandatory. The Registrar of Lands acted within the law and therefore the application should fail.

Counsel, thirdly, argued that orders of prohibition should not issue since prohibition looks at the future. What was sought to be prohibited had already taken place. Therefore the prayer for prohibition should fail. Counsel contended that the references to Cap. 300 and Cap. 281 Laws of Kenya was irrelevant, as the land in question was governed by the Government Lands Act (**Cap. 280**)

Mr. Kuloba for the 4th respondent submitted that they filed a replying affidavit sworn on 15/8/2006, and written submissions dated 18/10/06. They relied on them.

In highlighting their arguments, Counsel associated himself with the submissions by Counsel for the 1st, 2nd and 3rd respondents. Counsel emphasized that the Notice of Motion was fatally defective, as it lacked evidence as required by law. Counsel contended that what was referred to as evidence were allegations from the bar, not supported by an affidavit. The purported reference to documents not annexed to the affidavit and marked, offended rules 9 and 10 of the Oaths and Statutory Declarations Rules. The said documents were not produced by the maker.

On the exercise of power by the Registrar of Lands, Counsel contended that under Section 121, 122, and 123 of the Act, the Registrar of Lands “*may at any time*” cancel or withdraw documents or entries. Counsel contended that there was no requirement for any person to go to court for such cancellation or the calling of any of the parties to sit in a mini trial before cancellation by the Registrar of Lands. Therefore, Counsel contended that the Registrar of Lands acted within his powers. Counsel submitted that the 4th respondent refuted the allegation that a transfer was registered in the name of the applicant. Counsel contended that the actions of the Registrar of Lands were within the law, and urged me to dismiss the application.

In response, Mr. Machira submitted that no preliminary objection was raised on the affidavit, and that the said affidavit was in fact competent as it deponed to the documents annexed, and that the facts were true and within the knowledge of the applicant. The other point was that there was no dispute on the facts. Counsel sought to distinguish the case of SILVANO OWAKI (*supra*) in that in that case, unlike our present case, there was a dispute on facts. Counsel contended that what was deponed in the affidavit was adequate and in accordance with legal requirements. In fact, the replying affidavit sworn by **ROSINA MULE** clearly shows all the facts which were not disputed.

In addition, Counsel emphasized that someone’s title to land should not be cancelled by the Registrar of Lands without giving the registered owner a right to be heard. Counsel contended that the Registrar of Lands did not have the powers to do what he did.

Counsel stated that the report to the CID and investigations, was no basis for cancelling registered documents and a title which were protected by law under the Government Lands Act, the Transfer of Property Act, and the Registered Land Act and the Constitution. Counsel emphasized that the documents herein registered in the transaction involving the applicant were properly registered under Section 99 and 100 of the Government Lands Act (**Cap. 280**).

I have considered the application, documents filed, and submissions of counsel, as well as the authorities cited to me.

The first issue for my decision relates to the competency or validity of the application. It is contended by Counsel for the four respondents that the application is fatally defective as it does not comply with the requirements of law, in that no facts as required by law were disclosed to support the application. Reliance has been placed on the provisions of rules to Order 53 of the Civil Procedure Rules, and the case of COMMISSIONER GENERAL –KENYA REVENUE AUTHORITY -VS- SILVANO OWAKI (*supra*)

An application for Judicial Review orders can only be filed after leave is granted by the Court. Rule 1 (2) of Order 53 provides that the application for leave has to be filed with a **STATEMENT** and a **VERIFYING AFFIDAVIT** . It provides-

“1 (2) An application for such leave as aforesaid

shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, impose such terms as to costs and as to giving security as he thinks fit.”

The statement and the affidavits appear to be the documents to be relied upon in the hearing of the main motion in terms of rule 4(1) of Order 53 of the Civil Procedure Rules. The statement is required to contain the description of the applicant, the reliefs sought and the grounds on which the relief is sought. The affidavit is to verify the facts relied upon.

In our present case, the statement is quite lengthy listing under the grounds of the application, the events and incidences giving rise to the application. The verifying affidavit is quite short, and it depones in its relevant paragraph-

“That I have read the statement to be filed with the said Application above mentioned and state that the facts therein are true to my own knowledge and I verify the same.”

This has been challenged as an incurable defect. Reliance was placed on the Court of Appeal decision in the case of **COMMISISONER GENERAL KENYA REVENUE AUTHORITY –VS- SILVANO OWAKI** (*supra*). Indeed, in the above case, the Court of Appeal cited with approval a passage from the English Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7 which states-

“The application for leave ‘by a statement’ – The facts relied on should be stated in the affidavit (see Republic -Vs- Wandsworth JJ. ex p. Read [1942] I.K.B. 281). The statement’ should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by affidavit.”

The Court of Appeal dismissed the application on the basis of the decision in the **Wandsworth** case. I will distinguish the above Court of Appeal decision from our present case. Firstly, the decision in the **Wandsworth** case was based on disputed facts where the court had to go to the verifying affidavit to verify the facts relied upon. In our present case the facts or events giving rise to the motion do not appear to be disputed by the parties at all. The affidavit of the 1st to 3rd respondents sworn by **ROSINA MULE** in fact gives all the undisputed facts relied upon and their justification. Therefore this court is not called upon to determine what the facts are, but the effects of the events and actions which are not in dispute. Secondly, the Court of Appeal’s decision arose from a challenge or appeal from the ruling granting leave. In our present case, there was no appeal from the decision granting leave. Therefore, in my view, the scenario here is quite different, as we are dealing with the substantive motion, on which the facts do not appear to be disputed, and are amplified by none other than the respondents themselves. I overrule the contention that the application is fatally defective. I find that the application is not defective.

The second issue regards the legality of the actions of the Chief/Principal Land Registrar. There is no dispute that some documents were registered on the subject land in favour of the ex-parte applicant in October, 2004. It is not in dispute that some entries were made in the register in favour of the ex-parte applicant on account of a sale of the subject land in October, 2004. It is also not in dispute that the sale was between the then proprietor of the subject land, a company, and the ex-parte applicant. It is not in dispute that a mortgage was registered in favour of Standard Chartered Bank Ltd. (***the interested party who has not filed any documents herein***) for a loan of Kshs.20,000,000/= advanced to the ex-parte applicant on the strength of the title to the subject land. It is not in dispute that the **HANNAH WAIRIMU NJUGUNA** was the Managing Director of the 4th respondent Kariango Investment Limited (***Vendor***) and complained to the CID respecting the sale transaction, which she claimed to have been fraudulent. It is not in dispute that after investigations, the advocate who acted in the transaction a Mr. D. Ndung’u was charged in court with several counts ranging from forgery to uttering false documents.

It is not in dispute that the Chief /Principal Registrar of Lands cancelled the documents in respect of all the above transactions and the transfer of the land to the ex-parte applicant without calling the applicant to avail him an opportunity to be heard.

The ex-parte applicant contends that the Registrar of Lands did not have legal powers to do what he did under the relevant law. He also contends that even if the Registrar of Lands had those powers, the rules of natural justice would require the Registrar of Lands to have given the ex-parte applicant audience before depriving him of his proprietary rights.

The respondents, on the other hand, contend that the Registrar of Lands acted in compliance with the law and within his powers and that there was no obligation for him to notify the applicant before taking the action that he took.

The section relied upon by the respondents to justify the Registrar’s actions is section 121 of the Act. The section provides-

“121(1) The Registrar may at any time, after

such inquiry and notices, if any, as he may consider proper, and upon production of such evidence as may deem necessary, withdraw from the register by cancellation or otherwise any document or entry which he is satisfied has determined or ceased or been discharged, or for any other reason no longer affects or relates to land registered under this part.

(2) The Registrar may also direct the destruction of any document in his possession or custody which has become altogether superseded by any entry in the register, or has ceased to have any effect.”

The respondents contend that the Registrar of Lands exercised his powers under subsection (1) above. I find no basis for the respondent's arguments. All the terms used in the section to justify the exercise of powers of the Registrar of Lands under the section do not apply to the present case. The words used, that is **“any document or entry which he is satisfied has determined or ceased or has been discharged, or for any other reason no longer affects or relates to land registered under that Part”**- in my view, relate to documents or entries which have outlived their legal usefulness. In our present case, there is no such allegation of the documents or entries outliving their legal usefulness. Even if the said documents or entries had outlived their usefulness, the Registrar of Lands was required to hold enquiries, which, in my view means, the apparent owner or affected party should be given an opportunity to be heard. It is only the mode of inquiry or type of notices on which the Registrar of Lands has a discretion. Otherwise, the inquiry is necessary in all cases, because it is specifically provided that the Registrar of Lands has to base his decision on production of prescribed evidence which, in my view, is a legal requirement which does not give Registrar a discretion but requires the Registrar of Lands to base his decision on that evidence that will come out of the inquiry.

The contention that the Registrar of Lands acted within his powers because a case of fraud was reported to the CID, or that the advocate who conducted the transaction was charged in court, does not fall within the stated powers of the Registrar of Lands conferred under Section 121 of the Act. Therefore the actions of the Registrar of Lands herein were *ultra vires*, illegal, null and void and of no effect. The Registrar of Lands did not act within the powers conferred by section 121 of the Act. I will quash the actions.

As for orders of prohibition, I find no basis for the orders sought. Prohibition is meant to prohibit actions for the future. The Registrar of Lands has not been threatening to do anything unlawful. There is no such allegation from the applicant. I find no basis for this prayer. I will not grant the same.

The applicant has sought for orders described as **“writs.”** Can I grant the orders sought? The ex-parte applicant asks me to issue writs of certiorari and prohibition. Writs cannot be issued in Judicial Proceedings in Kenya. They are prohibited under section 8 (1) of the Law Reform Act (**Cap 26**). Since I have found that the actions of the Registrar of Lands were illegal, null and void, I will grant certiorari orders. As for prohibition orders, I find no basis for this order.

I will award costs to the applicant.

Consequently, I order as follows-

(1) An order of certiorari be and is hereby issued quashing the decision/declaration of the Chief Land Registrar/Principal Registrar of the Government Lands purporting to declare null and void the Deed of Indemnity in favour of the Government, the Indenture executed in favour of ALI NOOR ABDI by KARIANGO INVESTMENTS LIMITED and the Charge in favour of the Standard Chartered Bank Kenya Limited, in respect of L.R. No. 36/VII/498 EASTLEIGH, and the same is hereby quashed.

(2) An order of Certiorari do and is hereby issued quashing the decision/declaration of the Chief Land Registrar/Principal Registrar of the Government Lands purporting to cancel the said Deed of Indemnity in favour of the Government the Indenture executed by KARIANGO INVESTMENTS LIMITED in favour of ALI NOOR ABDI and the Charge in favour of the Standard Chartered Bank Kenya Limited, in respect of L.R. No. 36/VII/498, EASTLEIGH, and the same is hereby quashed.

(3) I decline to grant prohibition orders.

(4) *The four respondents will bear the costs of the application, on equal basis.*

Dated and delivered at Nairobi this 24th day of September, 2008.

GEORGE DULU

JUDGE.

In the presence of-

No Appearance for ex-parte applicant

Mr. Kuloba for 4th respondent

Ms. Mwangi for interested party.

Mr. Gikera for 1st, 2nd, and 3rd respondents entered at conclusion of delivery of Judgment.