



**Republic v County Land Registrar, Kisumu County & another; Onditi & another (Interested Parties); Ojwang (Exparte Applicant) (Judicial Review E003 of 2022) [2024] KEELC 6499 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6499 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
JUDICIAL REVIEW E003 OF 2022  
SO OKONG'O, J  
OCTOBER 3, 2024  
IN THE MATTER OF AN APPLICATION BY JACOB OWINY  
OJWANG FOR ORDERS OF CERTIORARI, PROHIBITION AND  
MANDAMUS**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY LAND REGISTRAR, KISUMU COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**FUNIKE VUGUZA ONDITI ..... INTERESTED PARTY**

**ELI ALEX OMONDI ..... INTERESTED PARTY**

**AND**

**JACOB OWINY OJWANG ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Pursuant to the leave granted on 5<sup>th</sup> September 2022, the Ex parte Applicant, Jacob Owiny Ojwang (hereinafter referred to only as “the Applicant”) brought this judicial review application by way of a Notice of Motion dated 21<sup>st</sup> September 2022 which was amended on 27<sup>th</sup> February 2023. In the application, the Applicant sought the following orders:



1. That an order of Judicial Review in the nature of certiorari do issue removing into this court for purposes of quashing the decision of the 1<sup>st</sup> Respondent to revoke registration of land title No. Kisumu/Kogony/6110 in the name of the Applicant and restoring the same in the name of the previous owner, Funike Vuguza Onditi, 1<sup>st</sup> Interested Party herein as the proprietor.
  2. That an order of Judicial Review in the nature of Mandamus do issue compelling the 1<sup>st</sup> Respondent herein to reinstate the Applicant as the duly registered proprietor of land title No. Kisumu/Kogony/6110.
  3. That an order of Judicial Review in the nature of prohibition do issue directed at the 1<sup>st</sup> Respondent prohibiting it from revoking the registration of the Applicant as the proprietor of land title No. Kisumu/Kogony/6110 without following the due process.
  4. That the costs of and incidental to the application be provided for.
2. The Applicant averred that at all material times, he was the registered proprietor of all that parcel of land known as title No. Kisumu/Kogony/6110 (hereinafter referred to only as “the suit property”). The Applicant averred that the suit property was a subdivision of land title No. Kisumu/Kogony/1746, and that he purchased the same in good faith for valuable consideration. The Applicant averred that sometime in July 2022 he conducted a search on the title of the suit property and discovered that his title had been revoked by the 1<sup>st</sup> Respondent over allegations of fraud.
  3. The Applicant averred that he was never informed of the decision to revoke the said title and was never accorded an opportunity to defend the said allegations of fraud. The Applicant averred that the 1<sup>st</sup> Respondent’s action of revoking the title was unconstitutional as it violated the Applicant’s right to property guaranteed under Article 40 of *the Constitution*. The Applicant averred that the 1<sup>st</sup> Respondent had no power to revoke or cancel a registered title to land and as such its decision to do so was null and void. The Applicant averred that the decision of the 1<sup>st</sup> Respondent to revoke the Applicant’s title was unfounded, malicious and had no basis at all.
  4. The Application was supported by a verifying affidavit of the Applicant dated 29<sup>th</sup> August 2022, a statement of facts of the same date and a supporting affidavit also of the Applicant sworn on 27<sup>th</sup> February 2023, in which the Applicant annexed a copy of the agreement for sale dated 27<sup>th</sup> March 2013 between him and the 2<sup>nd</sup> Interested Party from whom he purchased the suit property, a copy of a title deed for the property in his name, a copy of the extract of the register for the property showing the expunged entries, and a certificate of official search dated 15<sup>th</sup> June 2012 in respect of land title No. Kisumu/Kogony/1746.
  5. The application was opposed by the Respondents and the 1<sup>st</sup> Interested Party. The Respondents opposed the application through grounds of opposition dated 25<sup>th</sup> April 2023 and a replying affidavit sworn by Felix Maura on 6<sup>th</sup> February 2023. The Respondents averred that the application had no merit, was bad in law and amounted to an abuse of the court process since the 1<sup>st</sup> Respondent acted within its mandate in revoking the Applicant’s title. The Respondents averred further that the application was premature and that it would serve the interest of justice if the orders sought were denied. In their replying affidavit, the Respondents averred that the suit property was created following the subdivision of land title No. Kisumu/Kogony/1746 (hereinafter referred to only as “Plot No. 1746”). The Respondents averred that Plot No. 1746 was at all material times registered in the name of the 1<sup>st</sup> Interested Party. The Respondents averred that the suit property was registered in the name of the Applicant on 28<sup>th</sup> March 2014, and on 8<sup>th</sup> December 2014, a restriction was registered against the title on application by the 1<sup>st</sup> Interested Party. The Respondents averred that following that restriction,



- all the entries that led to the creation of the suit property were expunged from the register and Plot No. 1746 was restored in the name of the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Respondent averred that the Applicant's title to the suit property was regularly revoked in compliance with the 1<sup>st</sup> Respondent's mandate.
6. The 1<sup>st</sup> Interested Party filed a replying affidavit dated 9<sup>th</sup> September 2023. The 1<sup>st</sup> Interested Party averred that the application concerned a non-existent piece of Land. The 1<sup>st</sup> Interested Party averred that Plot No. 1746 had been and was still registered in the name of the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Interested Party averred that there had never been any subdivision of Plot No. 1746. The 1<sup>st</sup> Interested Party averred that she acquired Plot No. 1746 during land adjudication in 1983 following objection proceedings and that the property was registered in her name as the first registered owner thereof. The 1<sup>st</sup> Interested Party averred that it was mysterious how Plot No. 1746 was transferred from her, got subdivided and a portion thereof sold to the Applicant without her knowledge. The 1<sup>st</sup> Interested party averred that the documents presented to the court by the Applicant in proof of his case were fraudulent. The 1<sup>st</sup> Interested Party averred that she had never subdivided Plot No. 1746 nor sold the same. The 1<sup>st</sup> Interested Party averred that prior to the cancellation of the Applicant's title, the Applicant was summoned for a hearing at the office of the 1<sup>st</sup> Respondent but failed to attend leading to the cancellation of his title. The 1<sup>st</sup> Interested Party averred that the orders sought by the Applicant were equitable and that whoever approaches the seat of equity must come with clean hands. The 1<sup>st</sup> Interested Party averred that the 1<sup>st</sup> Respondent had the power to rectify and correct entities in the register procured in the manner the Applicant did with the suit property. The 1<sup>st</sup> Interested Party averred that the Applicant could not enforce rights in respect of a non-existent piece of land procured in a manner unknown to law.
  7. The 1<sup>st</sup> Interested Party averred that judicial review was not appropriate for determining the dispute between the parties and that the Applicant should have come to court through a normal land claim. The 1<sup>st</sup> Interested Party averred that the procedure adopted by the Applicant was intended to shield him from being put to task to prove the origin of his interest in the suit property.
  8. The Application was argued by way of written submissions. The Applicant filed submissions dated 27<sup>th</sup> December 2023. The Applicant submitted that he was an innocent purchaser of the suit property for value without notice of any defect in the title that was held by the 2<sup>nd</sup> Interested Party. The Applicant submitted further that it had not been demonstrated that he was involved in fraud in the acquisition of the suit property. The Applicant submitted that in any event, the 1<sup>st</sup> Respondent had no power to revoke a title. In support of his submissions, the Applicant relied on several decided cases including; Thika E.L.C Suit No.40 of 2019, Harrison Kiambuthi Wanjiru and another v. District Land Registrar and 3 others and Katende vs Haridar & Company Limited (2008) 2 E.A. 173. The Applicant submitted that he was never given an opportunity to rebut the allegations of fraud that he was being accused of as he was not notified of the intention to revoke the title by the 1<sup>st</sup> Respondent. The Applicant submitted that the court should find that the 1<sup>st</sup> Respondent's action of cancelling the Applicant's title to the suit property was ultra vires and was contrary to the provisions of section 79 of the [Land Registration Act, 2012](#).
  9. The 1<sup>st</sup> Interested Party filed submissions dated 27<sup>th</sup> February 2024. The 1<sup>st</sup> Interested Party submitted that the Applicant acquired the suit property illegally, fraudulently and unlawfully. The 1<sup>st</sup> Interested Party submitted that the burden was on the Applicant to demonstrate that he acquired the suit land legally and that he failed to discharge that burden. The 1<sup>st</sup> Interested Party submitted that there was no evidence of how the 2<sup>nd</sup> Interested Party came to own the suit property. The 1<sup>st</sup> Interested Party submitted that the Applicant did not produce the transfer forms, receipts evidencing the payment



of stamp duty, and title processing fee receipts. The 1<sup>st</sup> Interested Party submitted that the manner in which the Applicant came to own the suit property raised more questions than answers. The 1<sup>st</sup> Interested Party submitted that she had demonstrated that the purported acquisition of the suit property was irregular and fraudulent. The 1<sup>st</sup> Interested Party submitted that she was the first registered proprietor of Plot No. 1746 from which the suit property was alleged to have originated following a subdivision. The 1<sup>st</sup> Interested Party submitted that the purported subdivision would not have occurred without the consent of the 1<sup>st</sup> Interested Party.

10. The 1<sup>st</sup> Interested Party submitted that the Applicant was not a bona fide purchaser of the suit property for value without notice. The 1<sup>st</sup> Interested Party submitted that the Applicant was not diligent enough to be deemed a bona fide purchaser for value without notice. The 1<sup>st</sup> Interested Party submitted further that the 1<sup>st</sup> Respondent acted within the powers bestowed upon it under Section 79(2) of the [Land Registration Act](#), 2012 in cancelling the Applicant's title to the suit property. The 1<sup>st</sup> Interested Party submitted that the Applicant was duly served with a notice prior to the cancellation of his title to the suit property. The 1<sup>st</sup> Interested Party submitted that the Applicant's claim if any, lied against the 2<sup>nd</sup> Interested Party or the Respondents.
11. The 1<sup>st</sup> Interested Party submitted that the Applicant had not met the threshold for granting of the orders sought. The 1<sup>st</sup> Interested Party submitted that the 1<sup>st</sup> Respondent acted within its powers and as such its decision cannot be quashed. The 1<sup>st</sup> Interested Party submitted further that the Applicant could not be reinstated as the owner of the suit property since he was a beneficiary of an unlawful and illegally acquired title. The 1<sup>st</sup> Interested Party submitted that in that regard, an order of mandamus could not be issued. The 1<sup>st</sup> Interested Party submitted further that an order of prohibition could not be issued in favour of the Applicant because he had no valid title over the suit property. The 1<sup>st</sup> Interested Party cited several authorities in support of her submissions.

### **Analysis and determination**

12. I have considered the Applicant's application together with the statutory statement and the affidavits filed in support thereof. I have also considered the grounds of opposition and the replying affidavits filed by the Respondents and the 1<sup>st</sup> Interested Party. Finally, I have considered the submissions by the advocates for the parties. In my view, the only issue arising for determination in this application is whether the Applicant has made a case for the grant of the orders of judicial review sought.
13. In *Dande & 3 others v. Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4(E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), the Supreme Court stated as follows on judicial review:

“76. We note that judicial review was introduced to Kenya from England in 1956 through Sections 8 and 9 of the [Law Reform Act](#), Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law.

77. Prior to the promulgation of [the Constitution](#) in 2010 there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan Courts found in Sections 8 and 9 of the [Law Reform Act](#) Cap 26, which constituted the substantive basis for judicial review of administrative actions



on the one hand, and, Order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.

78. However, the entrenchment of judicial review under *the Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, Article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
81. The entrenchment of judicial review in *the Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opines that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.
85. It is clear from the above decisions that when a party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision per se.”
13. In *Municipal Council of Mombasa v. Republic & another* [2002] eKLR the Court of Appeal stated as follows concerning judicial review:
- “... And as the Court has repeatedly said, judicial review is concerned with the decision - making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over the decision 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 – and that, as we have said, is not the province of judicial review...”
14. In *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v. Public Procurement Administrative Review Board Kenya & 2 others NRB CA 28 of 2016*, [2017] eKLR, the Court of Appeal stated as follows:
- “The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That the purpose of judicial review is to ensure that a party receives fair treatment in the hands



of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters”.

15. In the book, H. W. Wade and C. F. Forsyth, *Administrative Law*, 10<sup>th</sup> Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

“The quashing order and prohibiting order are complementing remedies, based upon common law principles....A quashing order issues to quash a decision which is ultra-vires. A prohibiting order issues to forbid some act or decision which will be ultra-vires. A quashing order looks to the past, a prohibiting order to the future.”

16. In *Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996*, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land....Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

17. In *Halsbury’s Laws of England*, 4<sup>th</sup> Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

“The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leave discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”



18. In *Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others*(supra), the court stated as follows on the remedy of Mandamus:

“What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

19. In the book; *Public Law in East Africa* published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues *ex debito justitiae* on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

20. In *Republic v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd* [2015] eKLR, the court dealing with a similar issue stated as follows:

“26. As was held in *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354:

“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.”

27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words, in judicial review applications the Court’s jurisdiction is to determine 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 with an intention of securing a determination on 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.”

21. In *Republic v. Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another* [2020] eKLR the court stated as follows:

“56. It is elementary law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the above facts to be proved or disproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions. This position has been upheld by our superior courts on numerous occasions. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* (2015) eKLR it was held: -

55. ... 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. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. 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.” (Emphasis supplied)



57. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.
59. I am fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* [2014]eKLR which held that: -
- “...Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since 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....” (Emphasis added)
60. Also relevant is *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR which held that: -“...where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. ...”(Emphasis added)
61. The above excerpts illuminate the legal position with sufficient clarity and settle the issue at hand. In *Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others* [2016] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact. On this ground alone, the applicant’s case collapses.”



22. It is on the foregoing principles that the Applicant's application falls for consideration. It is not disputed that the parcel of land, Kisumu/Kogony/6110 (the suit property) is a subdivision of the parcel of land known as Kisumu/Kogony/1746 (Plot No. 1746). It is not disputed that Plot No. 1746 was at all material times registered in the name of the 1<sup>st</sup> Interested Party as the absolute proprietor thereof on 3<sup>rd</sup> February 1992 on first registration. From the evidence before the court, Plot No. 1746 was transferred to the 2<sup>nd</sup> Interested Party on 25<sup>th</sup> June 1999 who caused the same to be subdivided into two portions on 11<sup>th</sup> January 2012. It is this subdivision that gave rise to the suit property. The suit property was transferred to the Applicant by the 2<sup>nd</sup> Interested Party on 28<sup>th</sup> March 2013. Since it was the 1<sup>st</sup> Interested Party who was the first registered owner of Plot No. 1746, the property could only be transferred to the 2<sup>nd</sup> Interested Party by the 1<sup>st</sup> Interested Party. The 1<sup>st</sup> Interested Party denied that she transferred Plot No. 1746 to the 2<sup>nd</sup> Interested Party. The 1<sup>st</sup> Interested Party placed evidence before the court showing that she still held a title to Plot No. 1746 which according to her has never been subdivided. The 1<sup>st</sup> Interested Party has contended that the purported transfer of Plot No. 1746 to the 2<sup>nd</sup> Interested Party, the purported subdivision thereof and the purported transfer of a portion thereof namely, the suit property to the Applicant were fraudulent and conferred no interest in Plot No. 1746 and the suit property upon the 2<sup>nd</sup> Interested Party and the Applicant. The 2<sup>nd</sup> Interested Party did not respond to the application before the court.
23. The Applicant and the 1<sup>st</sup> Respondent did not place before the court any evidence of how the 2<sup>nd</sup> Interested Party acquired Plot No. 1746. The Applicant contended that he was an innocent purchaser of the suit property for value without any notice of defect in the 2<sup>nd</sup> Interested Party's title. The Applicant contended further that the 1<sup>st</sup> Interested Party did not demonstrate that he was involved in the alleged fraud by the 2<sup>nd</sup> Interested Party.
24. Having considered all the material before me, I agree with the Applicant that the 1<sup>st</sup> Respondent did not have jurisdiction to cancel the Applicant's title to the suit property without a court order. I have noted that some form of notice was served upon the Applicant before the said cancellation. The notice in my view did not meet the requirements of Section 79(2)(b) of the *Land Registration Act*, 2012 and part XIV of the Land Registration (General) Regulations, 2017. On the basis of these findings I would have granted an order quashing the revocation of the Applicant's title to the suit property. As was held in the authorities that I have cited earlier in the judgment, orders of judicial review in the nature of mandamus, certiorari and prohibition are discretionary. The 1<sup>st</sup> Interested Party has placed before the court a prima facie evidence that Plot No. 1746 was fraudulently acquired by the 2<sup>nd</sup> Interested Party from her before the 2<sup>nd</sup> Interested Party subdivided the same and transferred a portion thereof (the suit property) to the Applicant. This court cannot determine in this judicial review proceedings with finality whether or not the 2<sup>nd</sup> Interested Party acquired Plot No. 1746 fraudulently and whether the Applicant was involved in the fraud. I agree with the 1<sup>st</sup> Interested Party that these are issues that can only be determined in a normal civil suit. Although the 1<sup>st</sup> Respondent acted without jurisdiction, this court cannot quash its action which will result in the suit property being restored in the name of the Applicant while there is a prima facie evidence before the court showing that the title held by the Applicant for the suit property is a nullity its validity having been vitiated by the fraudulent acquisition of Plot No. 1746 by the 2<sup>nd</sup> Interested Party. The court is also reluctant to issue an order of mandamus reinstating the Applicant as the owner of the suit property. Just as the 1<sup>st</sup> Respondent had no jurisdiction to revoke a title, it similarly has no jurisdiction to reinstate a null and void title in the register. The order of prohibition can also not issue. This is because the Applicant's title has already been cancelled. The 1<sup>st</sup> Respondent cannot be prohibited from cancelling the same.



25. Due to the foregoing, this court will exercise its discretion against granting the orders sought. I would direct the parties to take the dispute to an appropriate forum where the issues that have been raised before me touching on the validity of the Applicant's title can be determined with finality. This can only be done in a normal civil suit filed for that purpose.

### **Conclusion**

26. In conclusion, the Applicant's amended Notice of Motion dated 27<sup>th</sup> February 2023 is dismissed. Each party shall bear its cost of the suit.

**DELIVERED AND DATED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Applicant

Ms. Muthoki for the Respondents

Mr. Otieno Obiero for the 1<sup>st</sup> Interested Party

Ms. J.Omondi-Court Assistant

