



Republic v National Land Commission & 2 others; Joyjoa Clearing & Forwarding Limited & 4 others (Exparte) (Environment and Land Judicial Review Case 34 of 2019) [2022] KEELC 2552 (KLR) (12 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 34 OF 2019
SO OKONG'O, J
JULY 12, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

KENYA AIRPORTS AUTHORITY 3RD RESPONDENT

AND

JOYJOA CLEARING & FORWARDING LIMITED EXPARTE

RALISHA INVESTMENTS LIMITED EXPARTE

INTERSPAN LIMITED EXPARTE

REMTONE HOLDINGS COMPANY LIMITED EXPARTE

GANGAPANI LIMITED EXPARTE

JUDGMENT

1. On 30th July 2019, the court granted the Ex-parte Applicants leave to file an application for judicial review against the Respondents herein.
2. The Ex-parte Applicants (hereinafter referred to only as “the Applicants”) brought the application by way of Notice of Motion dated 15th August 2019, in which they sought the following orders;
 - a) That an order of certiorari does issue to bring to this court for the purposes of quashing the decision of the 1st Respondent contained in a letter dated 8th February 2019 addressed to the



2nd and 3rd Respondents and in the Special Edition of the Kenya Gazette dated 15th February 2019 to revoke the Applicants titles namely: -

1st Applicant-L.R No.9052

2nd Applicant-L.R No.9097

3rd Applicant-L.R No.23359/13

4th Applicant –L.R No.23359/10 and 23359/11

5th Applicant-L.R No.9042/67

- b) That an order of prohibition does issue to prohibit and stop the 3rd Respondent from effecting the said decision of the 1st Respondent revoking the Applicants’ said titles to the properties referred to in (a) above.
- c) That an order of prohibition does issue to prohibit the 3rd Respondent from demolishing buildings and structures erected on the said pieces of land.
- d) In the alternative to the prayers in (a), (b) and (c) above, the Honourable Court do issue conservatory orders maintaining the status quo in favour of the Applicants and/or restraining orders prohibiting the 1st, 2nd and 3rd Respondents from jointly or severally interfering in any manner howsoever with the Applicants’ titles and properties namely:

1st Applicant-L.R No.9052

2nd Applicant-L.R No.9097

3rd Applicant-L.R No.23359/13

4th Applicant –L.R No.23359/10 and 23359/11

5th Applicant-L.R No.9042/67

(hereinafter together referred to as “the suit properties”)

- e) Such further and other reliefs that this court may deem just and expedient to grant.
- f) That the costs of and incidental to the Application be provided for.

The Applicants’ case:

- 3. The Applicants’ application was based on the statutory statement and a Verifying Affidavit sworn by Dinah Chelal both dated 5th July 2019.
- 4. The Applicants averred that they were the registered proprietors of the suit properties. The Applicants stated that the suit properties were among the properties that were listed in a newspaper advertisement dated 27th November 2018 by the 1st Respondent and in respect of whose titles the 1st Respondent indicated that it would undertake inquiry and investigation on 5th December 2018 pursuant to the powers that were conferred upon it under section 6 of the *National Land Commission Act 2012*.
- 5. The Applicants averred that they appeared before the 1st Respondent and protested that they had not been supplied with a complaint the subject of the 1st Respondent’s inquiry. The Applicants’ averred that they were subsequently supplied with the complaint after which they were heard by the 1st Respondent on 10th January 2019.



6. The Applicants averred that after the hearing, they were told that a determination would be made on notice before 22nd February 2019.
7. The Applicants averred that there was no notice that was issued to them with regard to the determination by the 1st Respondent but upon visiting the 1st Respondent's office before 22nd February 2019, they were supplied with the 1st Respondent's determination on the inquiry in the form of a letter dated 8th February 2019 addressed to the 2nd and 3rd Respondents together with two reports dated 21st January 2019 in which the 1st Respondent directed the 2nd Respondent to revoke the Applicants' titles and gave liberty to the 3rd Respondent to demolish any structures on the suit properties and/or issue sub-leases in respect thereof.
8. The Applicants averred that the 1st Respondent's power to review grants and dispositions of public land for their propriety that was conferred upon the 1st Respondent under section 14 of the [National Land Commission Act](#) 2012 expired on 2nd May 2017 and as such the 1st Respondent lacked jurisdiction to review grants relating to the suit properties.
9. The Applicants averred that sections 5 and 6 of the [National Land Commission Act](#) 2012 provided for the functions and powers of the 1st Respondent but did not confer upon the 1st Respondent power to review grants and dispositions of public land that was expressly conferred under section 14 of the said Act pursuant to Article 68(v) of the [Constitution](#). The Applicants averred that the purported decision that was rendered by the 1st Respondent pursuant to the purported inquiry that it carried out under section 6 of the Act was illegal, null and void as the same was in excess of its jurisdiction.
10. The Applicants averred that they were subjected to unlawful process by the 1st Respondent contrary to rules of natural justice and Fair Administrative Actions Act 2015.
11. The Applicant averred that the 1st Respondent's direction that their titles be revoked had no basis since the 1st Respondent did not find any fault on their part in the acquisition of the suit properties. The Applicants averred further that the purported inquiry by the 1st Respondent amounted to abuse of power and was riddled with several procedural improprieties. The Applicants termed the decision irrational and absurd.
12. The Applicants averred that the complaints against them were never set out and they were not given reasonable opportunity to respond to the same.

The 1st and 3rd Respondents' case:

13. The 2nd Respondent did not respond to the application. The 1st Respondent filed a replying affidavit sworn by Brian Ikol on 8th March 2021 while the 3rd Respondent filed a replying affidavit sworn by Daniel C Moss on 28th October 2020.
14. The 1st Respondent averred that it was established under Article 67(1) of the [Constitution](#) and operationalised by the [National Land Commission Act](#) 2013.
15. The 1st Respondent averred that in the course of carrying out its constitutional and statutory duties, it received a complaint from the 3rd Respondent to the effect that titles had been created and issued to third parties in respect of its parcel of land known as Plot No. 21919 on which Jomo Kenyatta International Airport is situated.
16. The 1st Respondent averred that in line with its constitutional and statutory mandate of managing public land on behalf of the National and County Governments, it instituted inquiries into the legality of the titles the subject of the 3rd Respondent's complaint.



17. The 1st Respondent averred that it issued necessary notices in the newspapers of its intention to carry out the said inquiries and investigations on 5th and 6th December 2018.
18. The 1st Respondent averred that the applicants appeared before the 1st Respondent during the said inquiries and made presentations and produced documents in support of the legality of their titles.
19. The 1st Respondent averred that it thereafter prepared a report dated January 2019 on its findings on the 3rd Respondent's complaint and recommendations. The 1st Respondent averred that the proceedings that it carried out were not review of grants and disposition of public land proceedings.
20. The 1st Respondent averred that the proceedings were inquiries and investigations that were conducted pursuant to the powers conferred upon the 1st Respondent under section 6 of the [National Land Commission Act 2012](#).
21. The 1st Respondent stated further that it did not revoke the Applicants' titles to the suit properties but only made a recommendation that the long leases held by the Applicants be revoked and the Applicants issued with leases acceptable to the 3rd Respondent.
22. In summary, the 3rd Respondent averred that it was the registered proprietor of all that parcel of land known as L.R No.21919, Grant No. I.R 70118(hereinafter referred to only as "Plot No. 21919"). The 3rd Respondent averred that Plot No. 21919 was allocated to the 3rd Respondent by the Commissioner of Lands through a letter of allotment Ref.182879/2 dated 24th July 1996. The 3rd Respondent averred that it accepted the allotment of Plot No. 21919 which measured 4674.60 hectares and paid a sum of Kshs. 3530/- on 9th August 1996 as conveyancing, registration and approval fees that were required under the said letter of allotment. The 3rd Respondent averred that Plot No. 21919 was subsequently registered in its name on 13th August 1996.
23. The 3rd Respondent averred that Plot No. 21919 was created through Survey Plan No. F/R 265/27 dated 23rd April 1996.
24. The 3rd Respondent averred that the suit properties namely; L.R No. 9057, L.R No. 9079, L.R No. 23359/13, L.R No. 23359/10, L.R No. 23359/11 and L.R No. 9042/671 were created irregularly in that the same fall within and overlaps the Survey Plan for Plot No. 21919 owned by the 3rd Respondent.
25. The 3rd Respondent averred that the suit properties were purportedly created and registered between 20th July 2001 and 21st November 2001 several years after the survey and registration of Plot No. 21919 and by which time the 3rd Respondent had warned the Commissioner of Lands of encroachment on Plot No. 21919.
26. The 3rd Respondent averred that it reported to the Multi-Sectoral Agency Committee on Unsafe Structures about persons who had acquired land within Plot No. 21919 irregularly and illegally and requested that the structures put up on the said parcels of land be demolished as they posed security threats to aircrafts and other aviation facilities.
27. The 3rd Respondent averred that the National Buildings Inspectorate and the Multi-Sectoral Agency Committee on Unsafe Structures on receipt of the said complaint by the 3rd Respondent wrote to the 1st Respondent to seek its advice on the status of the titles for the parcels of land that the 3rd Respondent claimed to have been acquired illegally.
28. The 3rd Respondent averred that the National Buildings Inspectorate Department was established under Executive Order No1 of 2018 to profile unsafe and dangerous buildings and structures and to demolish such structures and others that did not have proper documentation. The 3rd Respondent



- averred that its mandate extended to the demolition and removal of unlawful encroachments on road reserves, riparian land and way leaves for railways, power lines, petroleum and sewer lines.
29. The 3rd Respondent averred that through a letter dated 8th February 2019, the 1st Respondent forwarded a report and recommendations in respect of the inquiries and investigations that it had carried out in respect of the parcels of land that had been created within Plot No. 21919 which report was also published in the Kenya Gazette dated 15th February 2019.
 30. The 3rd Respondent averred that the suit properties form part of Plot No. 21919 owned by the 3rd Respondent and are on the flight path at Jomo Kenyatta International Airport (JKIA) where no development can take place without the approval of the 3rd Respondent on account of security and safety reasons.
 31. The 3rd Respondent contended that the orders sought by the Applicants had no basis. The 3rd Respondent contended that the *Constitution* of Kenya does not accord protection to land that has been unlawfully acquired. The 3rd Respondent averred that the Applicants' titles had already been revoked by the Chief Land Registrar.
 32. The 3rd Respondent contended that the dispute before the court between the 3rd Respondent and the Applicants related to ownership of the suit properties and as such the same could not be determined in a judicial review application but in a substantive suit.

The submissions:

33. The application was argued by way of written submissions. The Applicants, the 1st Respondent and the 2nd and 3rd Respondents filed submissions dated 9th April 2021, 15th November 2021 and 30th September 2021 respectively.
34. The Applicants submitted that the 1st Respondent did not have power under section 6 of the *National Land Commission Act* 2012 to review titles to land and that this fact was conceded by the 1st Respondent in *Kenya Civil Aviation Authority v National Land Commission & 4 others* [2021] eKLR. The Applicants reiterated that the 1st Respondent's power to review grants and dispositions of public land for their propriety was conferred under section 14 of the *National Land Commission Act* 2012 (hereinafter referred to only as "the Act") which power lapsed on 2nd May 2017 after the expiry of the 5 years from the date of the commencement of the Act as provided in Section 14(1) of the Act. The Applicants urged the court to grant the orders sought in their application.
35. The 1st Respondent submitted that it acted within its mandate under section 6 of the Act and that the Applicants had failed to prove that the inquiry was tainted with illegality, irrationality and procedural impropriety and as such the Applicants were not entitled to the orders sought. The 1st Respondent cited Ugandan case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 in support of this submission. The 1st Respondent submitted that it did not make orders or give directives to the 2nd and 3rd Respondents. The 1st Respondent submitted that it only submitted a report in which it had made recommendations. The 1st Respondent submitted that neither the report nor the recommendations contained therein were binding on the 2nd and 3rd Respondents. The 1st Respondent submitted further that the orders sought by the Applicants were discretionary and that the Applicants were not entitled to the same as of right. The 1st Respondent submitted that the Applicants had not persuaded the court that they deserved discretionary orders.
36. The Attorney General (hereinafter referred to only as "the AG") who appeared for the 2nd and 3rd Respondents submitted that the 1st Respondent was established under Article 67 of the *Constitution*



- with one of its key mandates under Article 67(2)(a) being to manage public land on behalf of the National and County Governments. The AG submitted further that Article 68(v) of the Constitution granted the 1st Respondent power to review all grants or dispositions of public land to establish their propriety or legality.
37. The AG submitted that the land owned by the 3rd Respondent was public land and that the key aspect of management of public land function that was conferred upon the 1st Respondent involved protection of proprietary interests in such land and to stop any person or entity from illegally interfering with public land.
 38. The AG submitted that the Constitution of Kenya envisaged a situation where the 1st Respondent could be bound to take actions on behalf of other public bodies in order to protect public land as part of its public land management function. The AG submitted that the 1st Respondent had power both under the Constitution and the Act to hold inquiries, review grants and take any other action for the purpose of protection of public land. The AG submitted that there was no time limit for the exercise of the review powers conferred upon the 1st Respondent under section 6 of the Act.
 39. The AG argued in the alternative that the provisions of Article 68(c)(v) of the Constitution that mandated Parliament to enact legislation that would among others enable the 1st Respondent to review all grants or disposition of public land for their propriety or legality was not time bound. The AG argued that section 6 of the Act granted the 1st Respondent the power to do all that which was necessary to accomplish its objectives and duties prescribed under the Constitution and the Act.
 40. The AG submitted that the 1st Respondent had the power derived from both the Constitution and the Act to carry out the inquiries and to make the recommendations complained of by the Applicants. The AG urged the court to dismiss the reliefs sought by the Applicants on the basis that the 1st Respondent acted ultra vires.
 41. The AG submitted further that the inquiries complained of were carried out with due observance of the rules of natural justice and the provisions of the Fair Administrative Action Act 2015. The AG submitted that the Applicants were accorded an opportunity to respond to the complaints that had been made against them and that they did so. The AG submitted that the Applicants contention that they were not given a hearing had no basis having fully participated in the inquiries.
 42. The AG submitted further that the Applicants only sought the quashing of the decision of the 1st Respondent but not that of the 2nd Respondent of revoking the titles that had already been implemented. The AG submitted that the court could not grant an order that had not been prayed for in the pleadings. The AG submitted that in any event, an order of prohibition could not issue against an act that had already taken place.
 43. In support of this submission, the AG cited Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997]eKLR. The AG submitted that he had placed evidence before the court showing that the titles for the suit properties had already been revoked by the 2nd Respondent and as such the revocation could not be prohibited. The AG submitted further that the action of the 2nd Respondent was rational and reasonable and as such the same could not be reviewed.
 44. The AG submitted further that even if the court was to find merit in the application by the Applicants, the orders sought could not determine the underlying dispute between the parties which was a dispute over ownership of land. The AG submitted that in the circumstances, the orders sought that were discretionary in nature could not issue.



45. What is before the court is an application for judicial review. What the court has been called upon to determine is whether the Applicants have satisfied the conditions for the grant of the orders of certiorari and prohibition sought.

46. 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”.

47. In the book, H. W. Wade and C. F. Forsyth, *Administrative Law*, 10th 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 ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future.”

48. In *Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others* (supra), 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.”

49. 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.”



50. The 1st Respondent was established under section 67 of the *Constitution* of Kenya which also spelt out some of its functions. Article 68 of the *Constitution* directed Parliament to enact legislation providing for among others the review of all grants or dispositions of public land to establish their propriety or legality. The *National Land Commission Act 2012*(the Act) was enacted pursuant to the provisions of Articles 67(3) and 68 of the *Constitution*. Pursuant to Article 68(c) (v) of the *Constitution*, the 1st Respondent was given power under the Act to review grants and dispositions of public land.

Section 14 of the Act provides as follows:

14. (1) Subject to Article 68 (c)(v) of the *Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
 - (2) Subject to Articles 40, 47 and 60 of the *Constitution*, the Commission shall make rules for the better carrying out of its functions under subsection (1).
 - (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
 - (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
 - (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.
 - (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
 - (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.
 - (8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the *Constitution*.
 - (9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).
51. The 1st Respondent's review powers were to last for a period of 5 years from the commencement of the Act pursuant to section 14(1) of the Act. The Act commenced on 2nd May 2012 which means that the 1st Respondent ceased to have power to review grants and dispositions of public land to establish their propriety or legality on 2nd May 2017.
52. In these proceedings, the Applicants have contended that the 1st Respondent purported to review their titles to the suit properties pursuant to a complaint that was lodged by the 3rd Respondent sometimes in 2018. The Applicants have contended that in a report dated January 2019 whose findings and recommendations were published in the Special Issue of the Kenya Gazette of 15th February 2019, the 1st Respondent directed the 2nd Respondent to revoke the Applicants titles to the suit properties and gave liberty to the 3rd Respondent to demolish the structures if any that the Applicants had put up on the suit properties.



53. Under section 14(4) of the Act, the 1st Respondent had power in exercise of its review powers under the said section to direct the 2nd Respondent to revoke any title that upon review was found to have been acquired unlawfully. The 1st Respondent was also given power to regularise any title found to have been acquired irregularly and to make consequential orders. What this means is that the 1st Respondent could only direct the revocation of a title to land in exercise of its powers of review under section 14 of the Act.
54. In response to this claim by the Applicants, the Respondents have contended that the 1st Respondent did not carry out a review of the Applicant's titles to establish their propriety or legality under section 14 of the Act. The Respondents have contended that what the 1st Respondent carried out on a complaint by the 3rd Respondent were inquiries and investigations under the powers conferred upon the 1st Respondent under section 6 of the Act and Article 67(2) of *the Constitution*.
55. The 1st Respondent contended further that its report contained merely recommendations that were not binding. The 1st Respondent contended further that it did not direct the 2nd Respondent to revoke the Applicant's titles but rather recommended that the long leases be revoked and replaced by short leases as may be deemed appropriate by the 3rd Respondent.
56. The complaint that was lodged with the 1st Respondent by the 3rd Respondent is set out in the preamble of the 1st Respondent's report. The 3rd Respondent's complaint was that several leasehold titles had been created illegally within Plot No. 21919 owned by the 3rd Respondent. The 3rd Respondent sought the assistance of the 1st Respondent to have those titles revoked and the land the subject thereof reverted to the 3rd Respondent.
57. After hearing the 3rd Respondent and the Applicants who were the owners of some of the titles (the suit properties) alleged to have been created within Plot No. 21919, the 1st Respondent framed several issues for determination by the 1st Respondent. See page 5 of the 1st Respondent's Report dated January 2019. Among the issues that the 1st Respondent framed for determination were; whether the suit properties were within Plot No. 21919 owned by the 3rd Respondent, whether the allocation of the suit properties to the Applicants by the Commissioner of Lands amounted to illegal and/or irregular allocation of public land, whether the Applicants' titles were acquired illegally and whether the demand by the 3rd Respondent that the said titles be revoked was merited.
58. Among the 1st respondent's findings on the issues that it framed for determination was that the suit properties were within the 3rd Respondent's Plot No. 21919 and that the Commissioner of Lands irregularly and illegally allocated the same to the Applicants.
59. In its report, the 1st Respondent made several recommendations. Among the recommendations by the 1st Respondent were that; the 99 year leases that had been granted to the Applicants by the Commissioner of Lands be revoked and replaced by short term sub-leases on terms approved by the 3rd Respondent and that all developments falling within flight paths, funnels, air side or in any other locations deemed unsuitable be demolished.
60. The 1st Respondent forwarded its report to the 2nd and 3rd Respondents "for your further action". The recommendations in the report were subsequently published in the Special Issue of the Kenya Gazette of 15th February 2019 after which the 2nd Respondent proceeded to act on the same by revoking the Applicants' titles.
61. I am in agreement with the Applicants that what the 1st Respondent engaged in was a review of the grants or titles that were issued to the Applicants by the Commissioner of Lands for their propriety



- or illegality. The 1st Respondent reviewed the said titles and found that the same were irregularly and illegally issued. The 1st Respondent thereafter recommended that the said titles be revoked and forwarded the recommendation to among others the 2nd Respondent for action.
62. The exercise that was carried out by the 1st Respondent could only be undertaken under section 14 of the Act that expressly provided for review of grants and dispositions of public land and the procedure for doing so. I am in agreement with the Applicants that section 6 of the Act that the Applicant purported to rely on in carrying out the alleged inquiries and investigations does not confer upon the 1st Respondent power to review grants or dispositions of public land for their propriety or illegality and to recommend revocation of titles found to have been acquired illegally.
63. I am in agreement with the 1st Respondent that section 6(2)(b) of the Act gives it power to hold inquiries. I am also in agreement that pursuant to such inquiries, the 1st Respondent is at liberty to make reports for use by the national or county governments or any other public entity at whose request it was carrying out such inquiry. However, section 6(2)(b) of the Act or section 6 generally does not confer upon the 1st Respondent power to direct the 2nd Respondent to revoke or to recommend to the 2nd Respondent the revocation of any title.
64. The 1st Respondent's power of review of titles under section 14 of the Act having expired on 2nd May 2017, the 1st Respondent's purported review of the Applicant's titles allegedly carried out under section 6 of the Act was conducted without jurisdiction. While the 1st Respondent had power under section 6 of the Act to conduct inquiries and investigations touching on public land, the power did not extend to making a recommendation for revocation of title to land or for demolition of structures on land perceived to have been acquired illegally. It is therefore my finding that the recommendations made in the 1st Respondent's Report dated January 2019 and published in the Special Issue of the Kenya Gazette dated 15th February 2019 for the revocation of the Applicants titles in respect of the suit properties and demolition of the structures standing thereon was made without jurisdiction and as such null and void.
65. The claim by the Applicants for the reliefs sought is based on the 1st Respondent's lack of jurisdiction and its alleged breach of the natural rules of justice.
66. The Applicants averred that the 1st Respondent failed to accord them sufficient time to respond to the 3rd Respondent's complaint.
67. From the evidence before the court, the Applicants appeared before the 1st Respondent on 5th December 2018 when the meeting was postponed to 19th December 2018. On 19th December 2018, a hearing date for the complaint by the 3rd Respondent was set for 10th January 2019.
68. Having found that the 1st Respondent had no power to review the Applicants' grants, it is not necessary for me to consider whether or not the Applicants were given a fair hearing save to state that if I was to determine the issue, I would have found that the Applicants were given a fair hearing. From the report by the 1st Respondent, I am satisfied that the Applicants were given ample time by the 1st Respondent to respond to the complaints against them and that they did so. There was therefore no breach of the rules of natural justice or the provisions of the *Fair Administrative Action Act* 2015 as alleged.
69. I am in agreement with the Respondents that the orders sought by the Applicants are discretionary. I am also in agreement that judicial review is not an appropriate procedure for determining disputes over ownership of land. The issue was ably articulated in the following cases.



70. In *Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others* [2018] eKLR the court stated as follows:

“In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.

The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings.”

71. In *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison* [2007] 1 EA 354 the court stated as follows:

“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.”

72. This court has not been called upon to determine the ownership of the suit properties. The Applicants came to court to challenge un ultra vires exercise through which the 1st Respondent purported to revoke their titles to the suit properties and to recommend that any developments that they had carried out on the suit properties be demolished. No declaration of ownership of the suit properties was sought



by the Applicants and the court has not been called upon to express itself on the legality of the titles held by the Applicants.

73. The last issue for the court to consider is whether the Applicants are entitled to the orders sought in their application. I have set out at the beginning of this judgment the reliefs sought by the Applicants. From my findings above, I am satisfied that a case has been made out for an order of certiorari to bring into this court and quash the recommendation that was made by the 1st Respondent to the 2nd Respondent to revoke the Applicants' titles. With regard to the order of prohibition sought to prohibit the revocation of the said titles, I have noted from the evidence presented to court by the 2nd and 3rd Respondents which was not controverted by the Applicants that the Applicants' titles have already been revoked. In the circumstances, an order of prohibition cannot be issued against an act that had already taken place.
74. On the prohibition sought to prohibit the 3rd Respondent from demolishing buildings and structures erected on the suit properties, I am of the view that this order cannot also be issued. The evidence on record shows that the suit properties are all undeveloped. It follows therefore that there are no structures or buildings thereon that can be demolished. Court orders are not issued in vain.
75. I have noted that in their application for judicial review, the Applicants had also sought conservatory orders. My view has been and remains that conservatory orders are temporary in nature and are normally sought pending the determination of a dispute by the court. Conservatory orders cannot be issued on a permanent basis. I am of the view that the order sought was overtaken by events when the court granted the Applicants an order for stay of proceedings pending the hearing of the present application.

Conclusion:

76. In conclusion, I hereby make the following orders;
- a) The recommendations made by the 1st Respondent to the 2nd and 3rd Respondents in its report dated January 2019 that was published in the Special Issue of the Kenya Gazette dated 15th February 2019 for the revocation of the titles for L.R No.9052, L.R No.9097, L.R No.23359/13, L.R No.23359/10, L.R No. 23359/11 and L.R No.9042/67 are brought to this court and quashed.
 - b) The Applicants shall have the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Applicants

Ms. Masinde for the 1st Respondent

Mr. A. Kamau for the 2nd and 3rd Respondents

Ms. C. Nyokabi - Court Assistant

