



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC.JR.APPL. NO. 17 OF 2017**

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

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF TITLES.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THIKA WAX WORKS LIMITED.....INTERESTED PARTY**

**EX PARTE: BLOCK SEVEN DEVELOPERS LIMITED**

**JUDGEMENT**

**Background.**

At all material times, all that parcel of land known as L.R No. 9042/574, I.R. 67346 situated in Nairobi and measuring 1.017 hectares or thereabouts (hereinafter referred to only as “the suit property”) was registered in the name of the interested party, Thika Wax Works Limited as the leasehold proprietor thereof from the Republic of Kenya for a term of 99 years with effect from 1<sup>st</sup> December, 1994. On 27<sup>th</sup> May, 2008, the City Council of Nairobi instituted a suit against the interested party at the Resident Magistrates Court at Nairobi City Court namely, *Civil Suit No. 11 of 2008, City Council of Nairobi v Thika Wax Works Limited* (hereinafter referred to only as “the City Court suit”). In the City Court suit, the City Council of Nairobi (hereinafter referred to only as “the council”) sought the recovery of a sum of Kshs. 2,804,938.00 from the interested party on account of outstanding rates together with accrued interest as at 2008. The suit was not defended. On 5<sup>th</sup> August, 2008, judgment was entered against the interested party in favour of the council in the sum of Kshs. 2,877,413.00 inclusive of costs and a decree was issued accordingly for execution.

On 16<sup>th</sup> October, 2008, the suit property was attached by the council through a prohibitory order of the same date issued by the City Court for the recovery of a total sum of Kshs. 2,949,588.00. On 16<sup>th</sup> December, 2008, the suit property was sold by the council by public auction through Ideal Auctioneers in execution of the said decree. At the public auction, the ex-parte applicant, Block Seven Developers Limited (hereinafter referred to only as “the applicant”) was the highest bidder having placed a bid of Ksh. 2,810,000/- and was declared the purchaser of the property. On 10<sup>th</sup> March, 2009, the City Court issued an order vesting the title of the suit property in the applicant. Both the prohibitory order and vesting order were registered against the title of the suit property on 11<sup>th</sup> December, 2008 and 15<sup>th</sup> April, 2009 respectively.

In the meantime, the interested party filed a suit at the High Court of Kenya in Nairobi, Environment and Land Division, on or about 28<sup>th</sup> February, 2008, namely, ELC No. 68 of 2008 against the squatters who had invaded the suit property. The interested party filed the suit (hereinafter referred to only as “the High Court suit”) through the firm of Lutta & Company Advocates who were subsequently replaced by the firm of King’oo-Wanjau & Company Advocates. The interested party amended its plaint in that suit pursuant to the leave that was granted by the court on 18<sup>th</sup> December, 2008 to add to the suit some of the directors of the applicant herein namely, Lameck Omondi, Kepha Oriosa, Fredrick Mwendwa, Jenniffer Kimuge and George Onyango. In the High Court suit, the interested party claimed among others possession of the suit property.

The interested party somehow learnt of the judgment that was entered against it in favour of the council by the City Court. On 27<sup>th</sup> February, 2010, the interested party through the advocates who were representing it in the High Court suit, King'oo-Wanjau & Company Advocates filed an application in the City Court to set aside the judgment that was entered against it in favour of the council. The interested party's application was dismissed by the City Court thereby confirming the judgment in favour of the council. There is no evidence on record that the interested party sought the review of that order dismissing its application or appealed against the same.

Following the vesting of the ownership of the suit property in the applicant, the City Court Executive Officer executed a transfer of the property in its favour on 18<sup>th</sup> August, 2016. The said transfer was registered on 14<sup>th</sup> September, 2016. On or about 23<sup>rd</sup> September, 2016, the applicant applied for a provisional certificate of title for the suit property on the ground that it purchased the suit property at a public auction and as such the registered owner of the property did not surrender the original certificate of title to it. The application was gazetted on 7<sup>th</sup> October, 2016 with a corrigendum on 14<sup>th</sup> October, 2016 to correct the error in the acreage of the property in the first gazette notice. The applicant is yet to be issued with a provisional certificate of title.

On or about 9<sup>th</sup> December, 2016, one of the interested party's directors, one Bhagesh Chandaria made a report to the police and recorded a statement to the effect that all the proceedings at the City Court were conducted and orders issued without the involvement of the interested party. The said director of the interested party also reported that the interested party was not involved in the registration of the said orders from the City Court against the title of the suit property. The said director of the interested party told the police that the interested party had paid rates to the council faithfully particularly the rates for 2010 and 2011. He claimed that the interested party had discovered that the City Court suit was a fraud against the interested party that was perpetrated by the employees of the council with the alleged consent of one of the interested party's directors. The said director of the interested party told the police that the transfer of the suit property to the applicant was fraudulent and that police action was needed to deal with the matter. He mentioned in his statement that the interested party was looking for the Chief Land Registrar so that he could cancel the alleged fraudulent transfer in favour of the applicant.

Following this report to the police by the interested party, the Directorate of Criminal Investigations (DCI) wrote the Chief Land Registrar, the 1<sup>st</sup> respondent herein on 15<sup>th</sup> December, 2016 on what it referred to as "Forged Court Order fraudulent vesting transfer on LR. 9042/574 IR.67346". In the letter, the DCI reiterated what the interested party's director had told the police more particularly the fact that the order vesting the ownership of the suit property in the applicant was "fake". The DCI informed the 1<sup>st</sup> respondent that part of its investigations on the fraud would focus on why the 1<sup>st</sup> respondent's office relied on the said court order without verifying its authenticity. The DCI stated as follows in part:

**"The transfer in favour of M/s Block Seven Developers Ltd is fraudulent and as is provided by the said land registration act, should be cancelled and all the transfer instrument including the said fake court order handed over to the police..."**

The letter from the DCI was received by the 1<sup>st</sup> respondent on the same day namely, 15<sup>th</sup> December, 2016. On the same day, the 1<sup>st</sup> respondent wrote to the applicant with a copy to the firm of Kamunye Gichugi & Company Advocates and the interested party. In the letter, the 1<sup>st</sup> respondent referred to "Cancellation of fraudulent transfer on LR 9042/574, I.R.67346." In the letter, the 1<sup>st</sup> respondent informed the applicant that it had received information from the interested party that the interested party had not executed the transfer dated 18<sup>th</sup> August, 2016 in favour of the applicant neither was it aware of any suit that had been filed against it by the council. The 1<sup>st</sup> respondent added in the letter that:

**"the matter had been subjected to investigation by the criminal investigation department who have also confirmed that the document was not signed by the executive officer of the 1<sup>st</sup> class magistrates court in Nairobi. Further the land Registrar who is purported to have signed the second entry one, F.I.Lubulela on 15<sup>th</sup> April, 2009 has denied the same."**

In the letter, the 1<sup>st</sup> respondent demanded that the applicant surrenders the original grant registered as I.R 67346 to the Chief Land Registration Officer within 14 days from the date of the letter in default of which the 1<sup>st</sup> respondent would proceed to cancel the same without further reference to the applicant. There is no evidence on record as to how the letter was served upon the applicant and the firm of Kamunye Gichugi & Company Advocates which I believe was acting for them at that particular time. The 1<sup>st</sup> respondent appears not to have received any response from the applicant. On 17<sup>th</sup> January, 2017, it proceeded to cancel the registration of transfer of the suit property in favour of the applicant purportedly pursuant to sections 14 and 79 of the Land Registration Act, 2012.

After the cancellation of registration of the transfer in favour of the applicant as aforesaid, the 1<sup>st</sup> respondent wrote to the Director of Legal Services, County Government of Nairobi on 10<sup>th</sup> March, 2017 asking him to confirm whether an order vesting the ownership of the suit property in the applicant was issued by the City Court. The 1<sup>st</sup> respondent also asked the said Director of Legal Services, County Government of Nairobi to confirm whether the suit property was auctioned by the council for failure by Thika Wax Works Limited, the interested party to pay rates.

On 20<sup>th</sup> March, 2017, the Director of Legal Services, County Government of Nairobi wrote to the 1<sup>st</sup> respondent with a copy to the DCI and the applicant in response to his inquiry. In the letter, the Director of Legal Services, County Government of Nairobi confirmed to the 1<sup>st</sup> respondent that indeed the council had filed a suit at the City Court against Thika Wax Works Limited, the interested party herein, for the recovery of rates and that judgment was entered against the interested party which was executed by the council by attachment and sale of the suit property. The Director of Legal Services, County Government of Nairobi confirmed further that the suit property was sold by public auction and that the applicant was the highest bidder. He confirmed further that a vesting order was subsequently issued in favour of the applicant by the City Court on 10<sup>th</sup> March, 2009 and that the vesting order dated 10<sup>th</sup> March, 2009 was genuine.

The said Director of Legal Services, County Government of Nairobi informed the 1<sup>st</sup> respondent that the interested party, Thika Wax Works had made an application in 2010 to set aside the judgment that was entered against it in the City Court and that its application was dismissed.

In the said letter to the 1<sup>st</sup> respondent, the Director of Legal Services, County Government of Nairobi enclosed for the 1<sup>st</sup> respondent's information, copies of the pleadings that were filed in the City Court by the council and the decree and orders that were issued by that court. Even after confirming that the ownership of the suit property was regularly vested in the applicant, the 1<sup>st</sup> respondent did not reverse its decision to cancel the registration of the suit property in the name of the applicant. The 1<sup>st</sup> respondent also refused to issue the applicant with a provisional certificate of title for the suit property. It is the foregoing decisions by the 1<sup>st</sup> respondent that gave rise to the present application for judicial review.

#### The application before the court.

Following the cancellation of its registration as the proprietor of the suit property and the refusal by the 1<sup>st</sup> respondent to issue it with a provisional certificate of title for the suit property, the applicant sought and obtained leave on 29<sup>th</sup> September, 2017 to apply for orders of Certiorari, Prohibition and Mandamus against the respondents. The applicant brought the application for judicial review by way of Notice of Motion dated 17<sup>th</sup> January, 2018 in which it sought the following reliefs;

1. That the honorable court be pleased to grant an order of CERTIORARI to remove into this court for the purposes of being quashed the entire decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents made on 17<sup>th</sup> January, 2017 determining Title No. I.R 67346 for L.R No. 9042/574 registered in the name of the applicant and cancelling/revoking the transfer, registration and ownership thereof contained in entry No. 5 dated 17<sup>th</sup> January, 2017.
2. That the honorable court be pleased to grant an order of PROHIBITION to remove into this court and quash(sic) the entire decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, its servants, agents or in any other manner whatsoever from revoking Title No. I.R 67346 for property L.R No. 9042/574 registered in the name of the applicant in reliance upon the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents made on the 17<sup>th</sup> January, 2017.
3. That this honourable court be pleased to grant an order of MANDAMUS to compel the 2<sup>nd</sup> respondent to issue the applicant with a provisional certificate of title for Title No. I.R 67346 for property L.R No. 9042/574 registered in the name of the applicant.
4. That the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents made on 17<sup>th</sup> January, 2017 determining the title for Title No. I.R 67346 for property L.R No. 9042/574 registered in the name of the applicant be declared invalid, ultra-vires, void and of no effect.
5. That this honourable court be pleased to grant any other order that it deems fit in the circumstances.
6. That the cost of the application be provided for.

The application was brought on the grounds set out on the face thereof and on the verifying affidavit and further affidavit sworn by Lameck Omondi Ondiek on 14<sup>th</sup> June, 2017 and 18<sup>th</sup> December, 2018 respectively and the Statutory Statement dated 14<sup>th</sup> June, 2017. The verifying affidavit and statutory statement had been filed in support of the application for leave. In summary, the applicant averred that it was at all material times the registered proprietor of the suit property having acquired the same at a public auction. The applicant averred that the suit property was registered in its name on 14<sup>th</sup> September, 2016 through entry No. 4 in the register of the suit property. The applicant averred that on 17<sup>th</sup> January, 2017, the 1<sup>st</sup> and 2<sup>nd</sup> respondents made a decision to cancel the registration of the transfer of the suit property to the applicant. The applicant averred that through entry No. 5 in the register of the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> respondents cancelled the said registration purportedly pursuant to sections 14 and 79 of the Land Registration Act, 2012.

The applicant averred that it was not notified of any complaint if there was any concerning its title to the suit property so that it could respond to the same neither was it given a hearing before the decision to cancel its title over the property was made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The applicant averred that the decision to cancel its title was made by the 1<sup>st</sup> and 2<sup>nd</sup> defendants without jurisdiction in that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had no power to determine the legality of a title which power is reserved for the Environment and Land Court under Article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act, 2011.

The applicant averred further that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' decision was procedurally unfair, unlawful and unconstitutional in so far as it was made without giving the applicant a hearing contrary to the rules of natural justice, Article 47 of the Constitution and the provisions of the Land Registration Act, 2012. The applicant averred that the decision was also made in breach of the applicant's legitimate expectation that it will not be deprived of its property save through due process. The applicant averred further that the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated its right to property and that their decision was arbitrary as there were no grounds or reason warranting the same. The applicant averred further that after making an application for a provisional certificate of title no reason had been given by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for not issuing the same. The applicant averred that it was in the interest of justice and fairness that the orders sought in the application be granted.

The application was opposed by the respondents and the interested party. The respondents opposed the application through a replying affidavit sworn by Edwin Munoko Wafula 6<sup>th</sup> February, 2019. In summary, the respondents contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents cancelled the registration of the transfer of the suit property in favour of the applicant because of a letter that was addressed to the 1<sup>st</sup> respondent by the Directorate of Criminal Investigations(DCI) on 15<sup>th</sup> December, 2016 in which the DCI informed the 1<sup>st</sup> respondent that the order that had been registered against the title of the suit property vesting the ownership of the property in the applicant and the instrument of transfer that conveyed the property to the applicant were fake. The respondents contended that they acted on the recommendation by the DCI that the transfer of the suit property to the applicant that had been effected on the strength of the said fake court order be cancelled. The respondents averred that upon being alerted by the DCI of the apparent fraud in the transfer of the suit property to the applicant, the 1<sup>st</sup> respondent wrote to the applicant on 15<sup>th</sup> December, 2016 under section 79(2) of the Land Registration Act, 2012 giving it 14 days to

surrender the title for the suit property that it had obtained fraudulently.

The respondents averred that section 79(2) of the Land Registration Act, 2012 gives power to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to rectify the register or a document where registration or a document has been obtained by fraud. The respondents averred that the applicant's case was a classic example of a registration obtained by fraud. The respondents contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were entitled under section 79(2) of the Land Registration Act to rectify the register of the suit property. The respondents averred that when the applicant did not respond to the notice that had been given to it by the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent cancelled the transfer in its favour pursuant to sections 14 and 79(2) of the Land Registration Act aforesaid. The respondents averred that all the documents that were relied on by the applicant to obtain registration as the proprietor of the suit property were fraudulent and as such the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted within the law in cancelling the fraudulent entries from the register. The respondents contended that if the applicant was aggrieved by the cancellation of its title, it should have filed a substantive suit to reinstate its fraudulent title.

The interested party opposed the applicant's application through a replying affidavit sworn by Rohin Chandaria on 14<sup>th</sup> June, 2018. The interested party averred that it was at all material times the registered owner of the suit property and that in 2004, the applicant entered the property without its permission and occupied the same. The interested party averred that after the applicant failed to vacate the property despite several demands, the interested party filed a suit against it in the High Court (the High Court suit) for eviction. The interested party averred that in a rather strange turn of events, on 10<sup>th</sup> March, 2009, the City Court issued a vesting order vesting the ownership of the suit property in the applicant following a decree that was made against the interested party in the City Court suit for alleged nonpayment of rates. The interested party averred that the said vesting order was allegedly issued after the suit property was sold at a public auction in which the applicant was the highest bidder. The interested party averred that the suit property was registered in the name of the applicant following the said vesting order.

The interested party averred that following a report that the interested party made to the DCI, the investigations by the DCI revealed that the transfer of the suit property to the applicant was obtained through a fake court order and that the DCI recommended the cancellation of the transfer. The interested party contended that the vesting order of 10<sup>th</sup> March, 2009 was not issued by the City Court and that in any event, such order could only have been issued by the Environment and Land Court. The interested party averred that in the circumstances of the case, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were entitled to cancel the transfer in favour of the applicant.

The application was argued by way of written submissions. The applicant filed its submissions on 19<sup>th</sup> December, 2018 and supplementary submissions on 3<sup>rd</sup> April, 2019. The respondents filed their submissions on 11<sup>th</sup> February, 2019 while the interested party filed its submissions on 19<sup>th</sup> June, 2019. I have considered the applicant's application together with the affidavits filed in support thereof and the annexures thereto. I have also considered the replying affidavits filed by the respondents and the interested party together with the annexures thereto. Finally, I have considered the written submissions filed by the respective advocates for the parties and the authorities cited in support thereof.

This being an application for judicial review, what the court is supposed to determine is whether the applicant has established valid grounds for the grant of the orders sought. Judicial review is now both a statutory and a common law remedy. Section 4 of the Fair Administrative Action Act, 2015(the Act) provides as follows:

**“4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

Section 7 of the Act provides as follows:

**“7. (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-**

**(a) a court in accordance with section 8; or**

**(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.**

**(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-**

**(a) the person who made the decision-**

**(i) was not authorized to do so by the empowering provision;**

**(ii) acted in excess of jurisdiction or power conferred under any written law;**

**(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**

**(iv) was biased or may reasonably be suspected of bias; or**

**(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;**

**(f) the administrator failed to take into account relevant considerations;**

**(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**

**(h) the administrative action or decision was made in bad faith;**

**(i) the administrative action or decision is not rationally connected to-**

**i. the purpose for which it was taken;**

**ii. the purpose of the empowering provision;**

**iii. the information before the administrator; or**

**iv. the reasons given for it by the administrator;**

**(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**

**(k) the administrative action or decision is unreasonable;**

**(l) the administrative action or decision is not proportionate to the interests or rights affected;**

**(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.”

Section 11 of the Act provides as follows:

**“11(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-**

**(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**

**(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**

**(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**

**(d) prohibiting the administrator from acting in particular manner;**

**(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**

**(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**

**(g) prohibiting the administrator from acting in a particular manner;**

**(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**

**(i) granting a temporary interdict or other temporary relief; or**

**(j) for the award of costs or other pecuniary compensation in appropriate cases.**

**(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-**

**(a) directing the taking of the decision;**

**(b) declaring the rights of the parties in relation to the taking of the decision;**

**(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or**

**(d) as to costs and other monetary compensation.”**

Section 12 of the Act provides that:

**“This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”**

As mentioned earlier in this judgment, the applicant has sought orders of Certiorari, Prohibition and Mandamus. 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 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.”**

In Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, 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.”**

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.”**

In Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njoroge & 9 others (supra), the court explained the principle outlined in the foregoing passage from Halsbury’s Laws of England as follows:

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

From the material and evidence on record, it is my finding that the applicant’s application has merit. It is not disputed that the applicant was registered as the proprietor of the suit property on 14<sup>th</sup> September, 2016. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). It is also not disputed that on 17<sup>th</sup> January, 2017, the 1<sup>st</sup> and 2<sup>nd</sup> respondents purported to cancel the registration of the applicant as the owner of the suit property. The cancellation according to entry No. 5 in the register of the suit property was undertaken under sections 14 and 79 of the Land Registration Act, 2012. Section 14 of the Land Registration Act, 2012 that repealed among others the Registration of Titles Act, Chapter 281 Laws of Kenya provides as follows:

**“14. The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—**

- (a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;**
- (b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;**
- (c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;**
- (d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and**
- (e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.”**

Section 79 of the said Act on the other hand provides as follows:

**“79. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—**

- (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;**
  - (b) in any case and at any time with the consent of all affected parties; or**
  - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.**
- (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.**
- (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.**

**(4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—**

**(a) the process of investigation including notification of affected parties;**

**(b) hearing of the matters raised; and**

**(c) the criteria to be followed in coming up with the decision.”**

It is clear from the foregoing that under section 79(2) of the Land Registration Act, 2012, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have power to rectify a register of land or lease where registration has been obtained by fraud. It is also clear from section 79(4) of the Land Registration Act, 2012 that it was the intention of the legislature that before a decision is made to rectify a register, an investigation must be carried out into the circumstances under which the registration sought to be rectified was effected and the registered proprietor of the land or lease as the case may be must be given a hearing. Even in the absence of the regulations or guidelines provided for under section 79(4) of the Land Registration Act, 2012 that were not in place at the time, the applicant was entitled to a fair administrative action guaranteed under Article 47 of the Constitution and section 4(1) of the Fair Administrative Action Act, 2015 before its registration as the owner of the suit property was cancelled.

From the record, it appears that the 1<sup>st</sup> respondent received information about the alleged fraud from the DCI and subsequently from the interested party's advocates. There is no doubt from the evidence on record that the 1<sup>st</sup> respondent did not carry out any investigation of its own before reaching a conclusion that the applicant had procured registration as the proprietor of the suit property using a fake court order. The 1<sup>st</sup> respondent relied entirely on the alleged investigation by the DCI which in its part did not also carry out any investigation. It is also clear from the evidence on record that the 1<sup>st</sup> respondent made a decision that the applicant had been registered as the proprietor of the suit property fraudulently before giving the applicant a hearing. It is regrettable that even DCI did not give the applicant a hearing before condemning it as a fraudster.

As I stated earlier in this judgment, the interested party made a report to the DCI about the alleged fraud on or about 9<sup>th</sup> December, 2016 and recorded a statement on the same date. In about a week's time; that is on 15<sup>th</sup> December, 2016, the DCI wrote to the 1<sup>st</sup> respondent claiming that the applicant had procured registration as the owner of the suit property using a forged court order and demanded the cancellation of the same. The last paragraph of the letter from DCI left no doubt that they had not carried out any investigation on the issue. One wonders how it came to the conclusion that the registration was fraudulent before even visiting the land registry and taking the statements from the officers who registered the transfer in contention. The evidence on record points to the fact that the DCI had not even bothered to go to the City Court to find out whether it issued the order that the DCI had declared fake.

The DCI took what it was told by the interested party as the gospel truth. The DCI had the audacity of demanding the cancellation of the registration of the transfer in favour of the applicant as it continued with investigations. The 1<sup>st</sup> respondent who had a statutory duty to carry out independent investigation into the alleged fraud also adopted the same approach; cancel first and then investigate. I have no hesitation in stating that the interested party engaged in an abuse of the criminal process to achieve what it failed to obtain through the adoption of the civil procedure rules. As I have stated earlier in this judgment, the interested party was aware at least by 2010 that a judgment had been entered against it in favour of the council at the City Court for outstanding land rates and that the suit property had been attached and sold by public auction to recover the said land rates that it owed the council. The interested party was also aware that a vesting order had been issued by the City Court vesting the ownership of the suit property in the applicant. The interested party made an application to the City Court to set aside the said judgment and its application was dismissed.

It was after this that it went to lodge a complaint against the applicant with the DCI. If the proceedings before the City Court and the orders made therein were fake and fraudulent I wonder why the interested party bothered to move that court to set the same aside. The interested party did not mention in the statement that was recorded by its director at the DCI that it had unsuccessfully attempted to set aside the said judgment and subsequent orders that were made by the City Court. As mentioned above, the DCI did not also bother to go to the City Court to verify if the vesting order that the interested party claimed to be fake was issued by that court before writing to the 1<sup>st</sup> respondent demanding the cancellation of the applicant's registration as the proprietor of the suit property. I wish to point out that the DCI had no power or authority to demand that the registration of any dealing with land be cancelled. The DCI had no interest in the suit property. Its mandate was limited to investigating the alleged acts of fraud that were reported to it. Its demand that the registration in favour of the applicant be cancelled amounted to abuse of power and the 1<sup>st</sup> and 2<sup>nd</sup> respondents erred in taking instructions from it.

About three months after writing to the applicant claiming that its registration as the proprietor of the suit property was fraudulent and that it should surrender the title that it had acquired fraudulently for cancellation and about a month after cancelling the registration of the transfer in favour of the applicant, the 1<sup>st</sup> respondent decided to undertake investigation on whether the order that vested the ownership of the suit property in the applicant was indeed fake. On 10<sup>th</sup> March, 2017, the 1<sup>st</sup> respondent wrote to the council to confirm that it had filed a suit against the interested party at the City Court, obtained judgment and sold the suit property by public auction to the applicant. The council wrote a detailed letter in response to that inquiry on 20<sup>th</sup> March, 2017 in which it did not only confirm that a suit was filed against the interested party, judgment obtained and the suit property attached and sold by public auction to the applicant but also provided all the pleadings filed in the City Court, the decree of the court and the order vesting the ownership of the suit property in the applicant. This letter that was attached to the applicant's further affidavit sworn on 1<sup>st</sup> April, 2019 was copied to the DCI. This letter was not mentioned by the respondents or the interested party in their replying affidavits. The interested party which claimed to have paid all the rates to the council did not also tender any evidence showing that as at 2008 there was no rates outstanding. The letter left no doubt, that the applicant acquired the suit property through a lawful judicial process that had not been challenged as by law provided. The letter laid it bare that the claim by the DCI that the applicant acquired the suit property through a fake court order was baseless. Since the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the alleged investigation and findings by the DCI in concluding that the registration of the transfer of the suit property in favour of the applicant was procured by fraud, their conclusion was similarly unfounded. In the circumstances, there was no basis upon which the 1<sup>st</sup> and 2<sup>nd</sup>

respondents could act under section 79(2) of the Land Registration Act.

It follows therefore that the rectification of the register of the suit property by cancellation of the registration of the transfer in favour of the applicant was carried out irrationally and arbitrarily. It was also done contrary to the rules of natural justice and in breach of the applicant's right to a fair administrative action. The letter that was addressed to the applicant by the 1<sup>st</sup> respondent on 15<sup>th</sup> December, 2015 did not call upon it to answer the alleged fraudulent registration of the suit property in its favour as the 1<sup>st</sup> respondent would have done pursuant to section 14 of the Land Registration Act upon receipt of the complaint from the DCI. The letter made it clear that investigation had been done on the matter and a decision made that the registration was fraudulent. What the 1<sup>st</sup> respondent sought from the applicant was for it to surrender the original title for the suit property for cancellation. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not place any evidence before the court that even that letter seeking the surrender of the title was served upon the applicant. It is also not clear to me as to the original certificate that the 1<sup>st</sup> respondent was seeking. There is no dispute that the original certificate was with the interested party and that the applicant had applied for a provisional certificate that was yet to be issued as at the time its registration was cancelled.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents made a decision that the applicant had obtained registration of the transfer in his favour fraudulently without giving the applicant a hearing. They condemned the applicant unheard. In Attorney General v Ryath [1980] AC 718 at page 730, Lord Diplock stated that:

**“It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority”.**

In Harlsbury's Laws of England, 4<sup>th</sup> Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

**“Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo iudex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication.”**

The cancellation of the registration of the transfer of the suit property in favour of the applicant was in the circumstances also procedurally flawed. I would add that in the circumstances, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had no power or jurisdiction to rectify the register of the suit property. Their jurisdiction could only arise when fraud was alleged, investigated and established. None of these took place thereby depriving them of jurisdiction under section 79(2) of the Land Registration Act. The 1<sup>st</sup> and 2<sup>nd</sup> respondents power under section 79(2) of the Land Registration Act is not excisable on mere suspicion or allegation of fraud. Fraud that entitles the 1<sup>st</sup> and 2<sup>nd</sup> respondents to act under section 79(2) of the Act must be established through due process that respects the rights of all the parties with interest in the property in dispute to a fair administrative action. Anything short of that deprives the 1<sup>st</sup> and 2<sup>nd</sup> respondents of the right to exercise the powers conferred under that section. Since the 1<sup>st</sup> and 2<sup>nd</sup> respondents purported to exercise power that they did not have, their decision was a nullity.

In conclusion, I am in agreement with the applicant that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted arbitrarily, irrationally and illegally in purporting to cancel its registration as the owner of the suit property. I am also in agreement that the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated the applicant's right to property and fair administrative action. The cancellation of registration of the applicant as the owner of the suit property without following due process was unlawful and unconstitutional. The decision by 1<sup>st</sup> and 2<sup>nd</sup> respondents not to issue the applicant with a provisional certificate of title for the suit property which it acquired lawfully after it had complied with the conditions for issuance of such title without giving any reason was equally a violation of the applicant's right to a fair administrative action and as such unconstitutional and unlawful.

In the final analysis and for the foregoing reasons, the applicant's Notice of Motion application dated 17<sup>th</sup> January, 2018 is for granting. I therefore make the following orders:

1. The decision made by the 1<sup>st</sup> and the 2<sup>nd</sup> respondents on 17<sup>th</sup> January, 2017 to cancel the registration of transfer of L.R No. 9042/574, I.R. 67346 in favour of the applicant through entry No. 5 in the register of the suit property is hereby removed into this court and quashed. For the avoidance of doubt entry No. 5 in the register of the suit property made pursuant to that decision is quashed.
2. An order of prohibition is issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents from revoking the applicant's title over L.R No. 9042/574, I.R. 67346 in reliance on the said decision of 17<sup>th</sup> January, 2017.
3. An order of mandamus is issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to issue to the applicant forthwith a provisional certificate of title for L.R No. 9042/574, I.R. 67346 if the interested party does not surrender to the 1<sup>st</sup> and 2<sup>nd</sup> respondents the original certificate of title for the said property in its possession.
4. The applicant shall have the costs of the application to be paid by the interested party.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of May 2020**

**S. OKONG'O,**

**JUDGE.**

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

Mr. George Gilbert for the Applicant

Mr. Kamau for the Respondents

Mr. Obuya for the interested party

Ms. C. Nyokabi-Court Assistant