



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA (DISTRICT REGISTRY)**

**MISCELLANEOUS CIVIL APPLICATION NO.16 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY ALLADINA**

**PROPERTIES LIMITED FOR LEAVE TO APPLY**

**FOR ORDERS OF CERTIORARI, PROHIBITION**

**AND MANDAMUS**

**AND**

**IN THE MATTER OF: PARCEL OF LAND KNOWN**

**AS MOMBASA ISLAND BLOCK XXVI/869**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, GOVERNMENT**

**LANDS ACT, CAP 280 LAWS OF KENYA, TRUST LAND ACT CAP 288**

**LAWS OF KENYA, THE REGISTERED LAND ACT CAP 300 LAWS OF**

**KENYA AND THE LAND ACQUISITION ACT CAP 295 LAWS OF KENYA**

**BETWEEN**

**ALLADINA PROPERTIES LIMITED.....APPLICANT**

**AND**

**LAND REGISTRAR-MOMBASA.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**MINISTER FOR LANDS.....3<sup>RD</sup> RESPONDENT**

**KENYA ANTI-CORRUPTION COMMISSION....INTERESTED PARTY**

**JUDGMENT**

1. The ex-parte applicant herein is a registered limited liability Company and it is the registered proprietor of parcel no. Mombasa/ Block XXVI/867, a leasehold title, registered under the Registered Land Act. It moved the court by Notice of Motion application dated 11<sup>th</sup> March 2011, seeking the following specific orders:

a. That an Order for Certiorari to remove into this Honorable Court for the purpose of being quashed the decision of the Land

Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein contained in the Gazette Notice No.1519 published in the Kenya Gazette dated 18<sup>th</sup> February, 2011 revoking the Applicants title to the parcel of land known as Mombasa/Block XXVI/867.

b. That an order of Prohibition prohibiting the Land Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein, their servants and/or agents from subdividing, consolidating leasing, alienating, allocating, handing over possession of or vesting the title of all that parcel of land known as Mombasa/Block XXVI/867 or any part thereof to any other person and from having any other dealing with the said properties or taking any further proceedings or action in relation thereto.

c. That an order of Certiorari to remove into this Honorable Court for the purposes of being quashed the decision of the Land Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands to alienate, allocate, vest the title and handover possession of all that parcels of land known as Mombasa/Block XXVI/867 after the said revocation to third parties if they have already done so.

d. That an order of Mandamus directed at the Land Registrar, Mombasa and the Commissioner of Lands, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein compelling them to restore the applicant's title over the parcel of land known as Mombasa/Block XXVI/867 by, inter alia, cancelling any dealings of whatsoever nature of the said property during and thereafter pursuant to the purported revocation of the said title, if any, and reinstating the Applicant's name in the register of the said property as the proprietor of the leasehold interest thereof.

e. That the costs of and incidental to this application be provided for.

2. The application was supported by an affidavit sworn on 24<sup>th</sup> February 2011 by Khimji Shamji Hirani who averred that Peak Batian Investments Limited was granted a lease for Ksh54,000/= for a parcel of land known as Mombasa/Block XXVI/867, which interest on the land was later transferred to the applicant at a cost of Ksh800,000/= and it has developed a block of five flats thereon. The 1<sup>st</sup> respondent acted on instructions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to revoke the title over the suit property on the allegation that it was allocated to a private developer illegally.

3. The applicant also filed a Statement dated 24<sup>th</sup> February 2011 stating that it purchased the suit property on 1<sup>st</sup> December 1999 from Peak Batian whereupon a Certificate of Lease was issued; that it was consequently not an allottee of the suit property but a purchaser; and there was no indication or notice that the parcel of land was reserved for public use; and further that the respondents had no power to revoke the title to land without following the due process.

## **RESPONSES**

4. In response to the application the Headmaster of Mombasa Primary School, Mr. Athman Hamid Abdalla, swore an affidavit stating that the school is a property of the Municipal Council of Mombasa with a staff of 15 teachers and a total number of 537 students. The school sits on a portion of land that was initially part of Mombasa Island Block XXVI/263; that people had grabbed part of the school land, but only Alladina Properties had managed to construct houses on the extreme end of the school. The perimeter wall was being constructed to guard the land. The Initial plot number was 263 and the Survey Report FR NO. 306/1 showed the school name as European school. The layout showed that Mombasa Island Block XXVI/867 was hived off the school land just next to the Headmaster's house. This has blocked the access road that ran between Kaunda Street and the school. The parents and students of the school have demonstrated many times against the grabbing of the school land.

## **Interested party**

5. The Interested Party responded by a replying affidavit sworn on 16<sup>th</sup> June 2011 by Dedan Ochieng' Okwama who averred that he was an investigator working with the Kenya Anti-Corruption Commission; that Mombasa Primary School is a public school within the Municipal Council of Mombasa; and that it is a public property formerly known as European School whose land was surveyed and parts of it hived out. An apartment known as Waaledain had been constructed on the disputed land Mombasa Island Block XXVI/869. The Municipal Council had advertised for the cancellation of the title by Gazette Notice No. 1519 of 18<sup>th</sup> February 2011 including other five parcels. A search at the Municipal Council of Mombasa records shows that rates have been paid by Alladina Properties Limited for plot No. Mombasa Island Block XXVI/867.

## **SUBMISSIONS**

### **Ex-parte submissions**

6. The ex-parte applicant filed its submissions on 13<sup>th</sup> December 2011. They urged the court that it was the registered proprietor of the parcel of land known as Mombasa/ Block XXVI/867. The property was purchased on 1<sup>st</sup> December 1999 from Peak Batian Investments Limited at a cost of Ksh 800,000/= and a Certificate of Lease was issued. There was no encumbrance registered against the title. There has been no decision from the Court declaring the title as illegal and unconstitutional. They were entitled to be heard before the title could be revoked. The acts of the respondents amounted to compulsory acquisition of land by the Government of Kenya without following the due procedure. Thus acting *ultra vires* the powers conferred upon them.

7. The respondents' decision was in breach of the legitimate expectation that the Government having granted a lease over the suit property would not revoke or cancel such a lease without giving a rational ground therefor and the titleholder an opportunity to be heard. The Attorney General filed Grounds of Opposition stating that the respondents acted in accordance with the law, therefore the application dated

11<sup>th</sup> March 2011 is not opposed. Counsel referred to section 27(a) of the Registered Land Act stipulates which stipulates as follows:

*a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging to or appurtenant thereto.*

*b) The registration of a person as the proprietor of a Lease shall vest in that person the leasehold interest described in that lease, together with all implied and express rights and privileges belonging or appurtenant thereto subject to all implied and express agreements, liabilities and incidents of lease.*

8. Counsel also referred to Section 28 of the Registered Land Act which defines the rights of a proprietor as follows:

*“The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever.”*

9. In addition to the above, they urged that rectification could only be ordered upon application by a person seeking to rectify the register and the court being satisfied that the registration was made or omitted by fraud or a mistake as provided in Section 143(2) of the Registered Land Act which states as follows:

*“The register shall not be rectified so as to affect the title of a proprietor who is in possession and has acquired title and, lease or charge for valuable consideration unless such proprietor had knowledge or the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his acts, neglect or default.”*

10. Article 40 of the Constitution provides for every person has the right to property either individually or in association with others to acquire and own property and the respondents breached this Article by revoking the title. Further Article 47 provides for a fair administrative action; Article 47(2) provides as follows:

*“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”*

Counsel submitted that the applicant was never given any reason for the revocation of title. The rules on natural justice were breached relying on a Court of Appeal decision in **Oloo v. Kenya Posts and Telecommunication Operations, Civil Appeal No. 56 of 1981** where it was held that:

*“The respondent should have invited the appellant to give an explanation for his acceptance for the new appointment or to show cause why he should not be recalled with the consequence of having his pension suspended if he did not do so. The respondent had failed to observe the rules of natural justice whereby a fair opportunity must be given to contradict any statement prejudicial to the view of the defendant must be given to contradict any statement prejudicial to the view of the defendant was contravened and the Appellant did not sufficiently know what was the case against him at that stage.”*

11. The Counsel also relied on **John v. Rees (1970) Ch. 345, 402** where Megarry J. the court emphasized the importance of the rules of natural justice by stating that a person has to be afforded an opportunity to influence the cause of events and in **Onyango v. Attorney General** the Court of Appeal at Nairobi Civil Appeal No. 52 of 1986, where it was held that:

*“The principles of natural justice apply where ordinary people would reasonably expect those making decisions which could affect others to act fairly. In that particular case the judges of Appeal set aside and quashed the decision of the commissioner dated 17<sup>th</sup> February 1983 to deprive the Appellant of his remission and it ordered the Commissioner to follow rules of natural justice by giving the Appellant a full opportunity of hearing what was alleged against him and of presenting his own case by doing the acts enumerated.”*

12. In addition, Counsel urged that judicial review is a process which is not concerned with the private rights or the merits of any decision being challenged but wholesomely with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected. This position was taken in **Commissioner of Lands v. Kunst Hotel Limited Case No. 234 of 1995 [1995-1998] EA** where the court referred to the English case of **Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155** by Lord Hale of St. Mary Lebole where it was held that:

*“The purpose of judicial review is to ensure that the individual received fair treatment and not to ensure that the authority after according fair treatment 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.”*

13. In **Ocean View Plaza Limited v. Attorney General Civil case No. 527 of 2001 KLR [E & L] 1 475**, Onyancha J. stated that an allotment of land to a citizen or to others is protected under the Constitution and where there is compulsory acquisition, procedure should be applied uniformly and without discrimination against all the parties concerned. Further in the case of **Republic v. The Registrar of Titles, Nairobi & 3 Others, Ex parte; Caroget Investments Limited Misc. Appli. No. 30/2009 [unreported]** it was observed that the court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law, where it has failed to observe the rules of natural justice or where the authority has acted unreasonably. In such circumstances then the court will call for a decision for purposes of quashing it by orders of certiorari. The person summoned should be given a hearing, if not then that would amount to breach of rule of

natural justice.

14. In **Fahim Yasin Twaha and Yasin Twaha Abdulla v. District Registrar- Lamu** where the court stated that the function of a judicial review was simply to control powers, functions and procedures of administrative authority through court process where the court reconsiders or re-examines the matter in which a decision was made and the reliefs available are certiorari (to question the decision), prohibition (to quash the action) and mandamus (to compel an action).

15. It was their further submission that the respondents acted *ultra vires* by going beyond the powers accorded to them, there was jurisdictional error since they did not have jurisdiction to revoke and cancel the title and there was an issue of natural justice. In **Kuria Greens v. The Registrar of Titles and Commissioner of Lands**, Musinga, J (as he then was) gave options on how land should be seized from an individual as follows:

- a. By initiating the process of compulsory acquisition of the suit land and thus paying full and prompt compensation to the petitioner.
- b. File a suit in the High Court challenging the Petitioner's Title and await its determination one-way or the other.

In **Azania Holdings Limited v. The Land Registrar Mombasa Misc. applic no. 130 of 2010**, H.M Okwengu, J. (as she then was) held that in purporting to revoke the applicants title without following the rules of natural justice or any due process the respondents acted without jurisdiction thus their acts were *ultra vires* which called for intervention by the courts.

16. The respondents did not file submission in the matter.

### **Interested party's submission**

17. It was their submission that one of their functions was to investigate the extent of liability for loss or damage to any public property and to institute civil proceedings in court for purposes of recovery or protection of public property under section 11(1)(k) of the Ethics and Anti-corruption Commission Act. The land in question was known as Mombasa Block XXVI/867 measuring 0.0552 Hectares which was excised from Mombasa Island Block XXVI/263. It was alienated government land and therefore it could not be sold, leased or dealt with by any person. The sale of any asset of Municipal Council is under section 145(f) of the Local Government Act, section 144 whereof empowers the authority to sell any land belonging to it which is not required for the purpose for which it was acquired, in this instant case no land holding Mombasa Primary school has ever been sold.

18. It was their submission that the court has a role to protect public interest as seen in **Kenya National Examinations Council v. Republic, ex-parte Kemunto Regina**, Nairobi Civil Appeal No. 127 of 2009 where exams were cancelled and the court stated that public interest came first in order to restore public confidence and integrity. See also **Kenya power & Lighting Co. Ltd v. NMG Co. Ltd** and **East African Cables Ltd v. The Public Procurement Complaints Review and Appeals Board**.

19. The applicant's title was cancelled since the registration was void as was held in **Macfoy v. United Africa Co. Ltd**. [1961] 3All E.R 1169 that when an act is void then in law it is a nullity and every proceeding which is founded on it is also bad and incurably bad. The respondents were regularising the position by revoking the title. See also **National Bank of Kenya Ltd v. Wilson Ndolo Ayah**. The courts should not aid in the perpetuation of illegalities. In **Republic v. Kenya Anti-Corruption Commission & 4 others exparte Jackson Gichohi Mwangi & 5 others** [2010] eKLR where the court held that the only orders that can be sought in a judicial review application were: Certiorari, Mandamus and Prohibition. The applicant however has sought for an order in the nature of an injunction and thus prayer 5 should fail.

20. Further, that the revocation of the title was not outrageous. In **Scott v. Brown** [1892] 2QB 724, Lindley J. held that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. In **Somken case** the court declined to issue judicial review orders for the reason that the transaction was tainted with fraud. In **Milankumar Shah & 2 Ors v. City Council of Nairobi** and in **Kenya Guards Allied Workers Union v. Security Guards Services & 38 Ors** the court emphasized the importance of public interest, which has to be given priority over any other interest.

21. The case in **Peter Bogonko v. National Environment Management Authority (NEMA)** [2006] eKLR where the court was reluctant to issue an order for certiorari after taking into account the fact that the public interest involved outweighed the applicant's individual rights, this was because an order of certiorari is a discretionary remedy which the court may refuse to grant. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. It was urged that the applicant cannot enjoy immunity from rectification of the register under the Registered Land Act, as there was no proper sanction in the alienation of the school land.

22. The decision in **John Peter Mureithi & 2 Ors. v. A.G & 4 Ors** [2006] eKLR the court examined the doctrine of public interest vis a vis the alienation of public land for private purposes. The Sovereign for the benefit of the public held the Mombasa school in trust therefore such property may not be sold or converted to other kinds of use. In reference to **M.C Mehta v. Kamal Nath & Ors** where the court opined that some resources are very vital to the public, the doctrine of public trust serves as a remedy to perpetual protection to public land.

23. Counsel urged the court to refer to **Lazarus Estates Ltd v. Beasley** [1956] 1Q.B where the court held that fraud vitiates everything. The court was asked not to restrain the respondents from acting in the public interest. The unfairness and inconvenience if any that has been caused to the applicant can be compensated through a refund of the purchase price. Further, the order for prohibition should not be granted since the title over Mombasa Primary attracts speculators and potential land grabbers. It shall not serve any useful purpose to grant the orders of certiorari to reinstate the applicant on the register since all the titles over the Mombasa school ought to be cancelled so that the school uses the land.

24. In **Africa Line Transport Co. Ltd v. Attorney General** HCCC 276 of 2003 it was held that Commissioner may only exercise delegated

powers under the Government Lands Act under the express authority of the President. In the instant case no powers were delegated in the excision of this property and thus the applicant cannot claim ownership on the basis of the illegal alienation of the school land. **R v. Monopolies and Mergers Commission and Anor, ex-parte Argyll Group** [1986] 2 ALL E.R it was held that a good public administration requires a proper consideration of the legitimate interest of individual citizens. Finally, the counsel urged the court not to dignify grabbing of public land and to dismiss the application with costs to the interested party.

### **Issues for determination**

25. The court has considered the pleadings, affidavits and written submissions by the ex-parte applicant and the Interested Party. The respondents did not file submissions. The Court has narrowed down to the issues for determination as follows:

- a. Whether the Respondents had the power to revoke the ex-parte applicant's title.
- b. Whether the applicant can be granted the orders sought.

### **Whether the respondents have the power to revoke the title**

26. The ex-parte applicant herein averred that the suit property in question was registered in their name and not Mombasa Primary School as alleged by the headmaster in his replying affidavit. The applicant has constructed flats on Mombasa / Block XXVI/867, which the headmaster of Mombasa Primary School alleges, was hived from the school land. The initial plot number that holds the school is Plot no.263 as shown in the RIM for Block XXVI. The court has had an opportunity to refer to this document. The right to own property is provided in Article 40 of the Constitution, which is subject to Article 65. An individual or association with others can acquire and own property. The applicant urged the court to refer to that Article and find that the respondents had breached the same.

27. Further Article 47 provides for fair administrative action. It provides as follows:

- (1) *Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

I would agree with the sentiments in **Onyango v. Attorney General** (supra) that a person against whom a decision is to be taken must be given an opportunity to be heard on what is alleged against him so that he can present his own case. See also **Oloo v. Kenya Posts and telecommunications Operations** (supra) whereby the principle of natural justice was emphasized. The Constitution recognizes that all people are equal before the law and even a wrong doer has an equal protection under the right to fair hearing to be heard as provided in Article 50(1) which provides as follows:

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

28. The Interested Party is of a different view. They urged the court to find that the applicant had acquired the title illegally and the court should not aid them. They relied on **Macfoy v. United Africa Co. Ltd** where delivery of a statement of claim was made in the long vacation and it was held as a nullity and not just a mere irregularity. The court held:

*“If an act is void, then it is in law a nullity. It is not only bad, but also incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it, is also bad and incurably bad.”*

In reference to the above, it is clear that the applicant herein bought land and acquired title, which was annexed. At no point did they find out that the transaction was irregular thus making it void. They did not fall short of any compliance or due diligence to render the whole transfer and title void. They knew they had a clean title.

29. Indeed, the Interested Party indicates that it had no problem with the ex parte applicant but only with its predecessor in title. In **Gordon v. Metropolitan** [1910] 2 K.B 1080, Lindley J. held that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. In **National Bank of Kenya v. Wilson Ndolo Ayah** where it was emphasized as public policy that courts should not aid in the perpetuation of illegalities, this was a case where an Advocate who had not taken out a practicing certificate drew conveyance instruments.

30. Be that as it may, the judicial review court shall not go into the merit of the title being valid or having been obtained in an illegal manner as submitted by the interested party.

### **What is the purpose of judicial review?**

31. Is the Judicial Review Court entitled to consider the merits of the dispute and, consequently in this case, to go behind the ex parte applicant's title to investigate how it acquired title to the land as urged by the Interested Party? Should the Court in these proceedings find, **as a matter of law**, on the facts that the initial allocation of the land, under which the ex parte applicant derives title, was a nullity because the land belonged to Mombasa primary school and as alienated public land set apart for a public purpose, the said land could not be re-allocated

to the ex parte applicant's predecessor in title, and that, consequently, the Registrar could on the logic of ***once a nullity always a nullity***, revoke the ex parte applicant's title to restore the position as regards the ownership of the land as it ought to be, and that the revocation of a null and void title cannot be ***ultra vires***?

32. At the outset the English Court of Appeal in ***R v. Minister of Defense ex-parte Smith*** [1996] 2 WLR 305 has held that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is ***unreasonable*** in the sense that it is beyond the range of responses open to a reasonable decision maker.

33. Further, as held in ***Kunste*** the test for any judicial Review is in the decision making process and not with the merits of the decision itself. It deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence or an error of law, and prohibition restrains abuse or excess of power.

#### ***Whether the Land registrar has power to revoke title to land***

34. The applicants urged that the registrar did not have the power to arbitrarily deprive a person of property by revoking the title. It would be a breach of Article 40 of the Constitution, which provides that:

*"The state shall not deprive a person of property of any description or any interest in, or right over, property of any description unless the deprivation-*

*a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

*b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament.*

The respondents had a duty to investigate the matter at hand before issuing the Gazette notice.

35. The Registrar did not have the power to revoke title to land. Section 27 of the Registered Land Act gives the effect of Registration, as follows:

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto*

*(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*

36. Further Section 28 provides that, *"the rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims."* The applicant's title has not been affected by any method stated in the above clause.

37. The power of the Registrar had been provided in section 142 of the Registered Land Act which provides as follows:

*"(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 persons interested*

*c) Where upon resurvey a dimension or area shown in the register is found to be incorrect but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.*

38. The power to rectify the register of titles for reason of fraud or mistake is the preserve of the Court under section 143 of the Registered Land act which provided as follows:

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

*(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.*

These clauses show that the only occasion in which the Registrar could have interfered with the titles was where there was an error or omission not materially affecting the interest of any proprietor.

39. The Land Registrar of Mombasa had no power to revoke the applicant's title.

40. Indeed, section 28 of The Registered Land Act does not give any powers to the respondents to revoke titles in case of an illegal allocation or fraud or nullity if at all it is established. The title can only be declared null and void by a court of law after determination.

41. The Court finds that the Gazette Notice No.1519 and published in the Kenya Gazette on 18<sup>th</sup> February 2011 purporting to revoke the applicant's title to the suit property was made without jurisdiction and it was **ultra vires** the applicable law, the Registered Land Act cap 300 Laws of Kenya (now repealed).

#### **Public interest.**

42. The Interested Party has strongly submitted that the land holds a public school, that is in public interest and therefore it ought not to grant the orders since it shall be aiding the applicant. I would agree with the holding in **Azania Holdings** (supra) that where land is required for public purposes, the procedure has to be followed and the registered proprietor be given an opportunity to be heard before the title to the property can be taken away regardless of whether the registered proprietor has a freehold interest or a leasehold interest.

43. The interested party urged the court to find that the suit land had been hived from Plot 263. The land in question was unalienated Government Land. Section 3 of the Government Land's Act defines it as government land, which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Indeed, the Court in **Milankumarn Shah v. City Council of Nairobi** that where land had been alienated and designated for a particular purpose then it was not open for the commissioner of Lands to re-alienate the same. As I said above this court would not get into the issue on how the ex-parte applicant became the registered owner and if the transaction was null and void. The Interested Party can lodge a complaint with the National Land Commission which was established by Article 67 of the Constitution to initiate investigations on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress as provided in Article 67(2) (e). This is because the public interest doctrine rested on the principle that certain resources have great importance to the public as a whole that it would be wholly unjustified to make them a subject of private ownership.

44. The public interest herein being the public primary school and the private interest being the ex-parte applicant's title are in conflict. The interested party urged the court to refer to **Kenya Guards Allied Workers Union v. Security Guards Services & 38 Others H.C MISC 1159 of 2002** where it was held that where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability.

45. **Public interest** in the due process of the law is as important as that of provision of land for purposes of the primary school. In balance public interest concerns, the Court of Appeal in **Emfil Limited v Registrar of Titles Mombasa & 2 others** [2014] eKLR, (Okwengu, Makhandia and Sichale, JJA) considered public interest in the context of the competition between public and private interests in land in judicial review proceedings as follows:

*“[27] On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, **the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the Constitution and the Land Acquisition Act to acquire the land. The Government chose to follow none of these processes but acted in clear violation of the law. It is in the public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the court with judicial power. The remedy of judicial review of administrative action is intended to check the excesses of power to ensure that the rule of law prevails.**”*

46. Whatever the merits of the government's public interest pursuit it is obliged in accordance with the Rule of Law itself one of the national values and principles of Governance under Article 10 of the Constitution, to follow due process of the law by filing appropriate legal proceedings for that purpose.

47. The scope of the Judicial Review was emphasized in **Makupa Transit Shade Limited & another v. Kenya Ports Authority & another** [2015] eKLR (Okwengu, Makhandia & Sichale, JJA) as follows:

*“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and **order 53** of the Civil Procedure Rules. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under **Article 23** of the Constitution that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. One cannot come to Court vide Judicial review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.”*

48. In the same **Makupa Transit Shade** case, the principle that Judicial Review looks at the process rather the merits of the decision was emphasised as follows:

“It should also be noted, that judicial review remedies cannot be used to assert private law, the very issues the appellants are attempting to do by trying to force a crystallisation of the 2002 negotiations into a formal lease agreement. In Commissioner of Lands v. Kunste Hotel Limited [1997] eKLR this Court held that:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”

49. It is now trite that Judicial Review deals with the legality of the process of decision-making rather than the merits of the decision of the administrative or quasi judicial body. In this case, it matters not the strength of the argument in opposition of the applicant’s ownership of the suit property, as the forum for determination is wrong. It is also now established that where a procedure for determination of a dispute has been provided for under the constitution or statute, the same must be strictly followed. See The Speaker of the National Assembly v. Karume [2008] KLR (EP) 425. The procedure for rectification of the register of titles under section 143 of the Registered Land Act is by an order of the Court, and the respondents were obliged to bring a suit in that behalf (now section 26 of the Land Registration Act 2012).

50. In the Voi case of Republic v. Land Registrar Taita Taveta District & another [2015] eKLR, this Court observed as follows:

34. “The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is

proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised, acquire the suit property for the purposes of use by the public school, the Interested Party herein.”

See also Franns Investments Limited v. The Registrar of Titles, Mombasa & 2 Ors. Mombasa Petition No. 63 of 2012.

51. The primary question in this judicial review proceedings before this court must accordingly be settled on the basis that the Registrar has not power to revoke title to land and that should the government consider that the title is a nullity having been obtained by fraud or mistake, it must take due process steps for the revocation of title in accordance with the procedure set out in the relevant statute. Anything short of this is without jurisdiction and ultra vires.

#### Grant of Reliefs

52. In view of the foregoing, the ex parte applicant has made out a case for the grant of the judicial reliefs sought. However, in view of the public nature of the action challenged by the judicial review proceedings herein, the Court does not make any order as to costs.

#### Orders

53. Accordingly, for the reasons set out above, the Court makes the following orders:

a) The judicial review application herein dated 11<sup>th</sup> March 2011 is allowed as prayed.

b) There shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JUNE 2018.**

**E. OGOLLA**

**JUDGE**

**Appearances:**

Mr. Pheroze Nowrojee, with Mr. Oloo, for the Ex Parte Applicant.

Mr. Kagucia for the Interested Party and Holding Brief for the Respondents.