



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL, JUDICIAL REVIEW DIVISION
JR MISC. APPLICATION NO. 11 OF 2010

NAIMISHA SOMCHAND SHAH.....APPLICANT

VERSUS

1. THE RESIDENT MAGISTRATE, MOMBASA.....RESPONDENTS

AND

1. JUMA KASSIM MWAMANENO

2. EQUITY BANK LIMITED

3. MWALU INVESTMENTS LTD.....INTERESTED PARTIES

RULING

The Application

1. The application before the court is a Notice of Motion dated 21st March, 2006 and filed herein on 24th March, 2006 by the ex-parte Applicant. The application is filed under the Law Reform Act Cap 26 and Order 53 of the Civil Procedure Rules, and prays for the following orders:

(a) An order of Certiorari to remove into this Honourable Court and quash forthwith the Order dated 8th November 2005 given by the Resident Magistrate in the Land Award No. 3 of 2005 at Mombasa;

(b) An order of Prohibition prohibiting the Land Registrar, Kwale from proceeding in any manner whatsoever with registering any interests in or against title to Kwale/Galu Kinondo/10 except as provided in (c) below;

(c) An order of mandamus to go to the Land Registrar, Kwale directing him to rectify the register to cancel the name of Juma Kassim Mwamaneno as registered proprietor of Kwale/Galu Kinondo/10 and to reinstate the name of Naimisha Somchand Shah as the sole proprietor of the said land.

(d) Costs be provided for.

The Applicant's Case

2. The application is premised on the grounds that the Award, Land Award No. 3 of 2005, is void *ab initio* and a nullity by reason of being *ultra vires* Section 143 of the Registered Land Act (Cap 300) Laws of Kenya; the Land Award No. 3 of 2005, is void *ab initio* and a nullity by reason of being predicated on the decision of the Panel of Elders, Msambweni, early 2005, which decision was in excess of the powers donated to such Panel by Section 3 (1) of the Land Disputes Tribunals Act 1990; that all subsequent proceedings and actions of the Land Registrar, Kwale, pursuant to the *ultra vires* order above are a nullity and illegal.

3. The application is supported by a statement of facts signed by the Applicant on 17th March, 2006. The Applicant states that she is the registered proprietor and holder of the original Title in respect of the suit property.

4. The ex-parte Applicant's case is that sometimes early in 2005, one Juma Kassim Mwamaneno (hereinafter referred to as the "Interested Party") appears to have lodged a claim with the Land Dispute Tribunal at Msambweni (constituted under the aegis of the **Land Disputes Tribunals Act 1990**) in respect of ownership of Kwale/Galu Kinondo/10 (hereinafter referred to as the "*Suit Land*") whose registered proprietor was and still is the Applicant. The Applicant was never served with any notice of this claim. The Tribunal proceeded to hear the claim. However again, as the Applicant was never invited or served with any hearing notice, such proceedings proceeded "*in absentia*". The Panel gave a decision in favour of upholding the claim by the Interested Party. The Applicant contends that such a decision, quite apart from breach of rules of **natural justice**, was a **nullity** and the proceedings preceding it *void ab initio* for the reason that the powers donated to such Panels under Section 3(1) of **Land Disputes Tribunals Act 1990** exclude determination of claims of the nature as the one presented by the Interested Party. The result is that the Panel acted *ultra vires* and *without jurisdiction* from inception. The Interested Party subsequently filed the decision in Chief Magistrate's Court vide Land Award No. 3 of 2005 which award, in the absence of the Applicant, who was **never served**, was adopted by the Resident Magistrate on 9th November 2005. The Learned Resident Magistrate also acted *without jurisdiction* in adopting a decision which was *ultra vires* and a *nullity* as an award of the Court. The Award was then registered against the title by the Land Registrar, Kwale, on 14th December 2005. The Applicant states that she was **not given notice** of the adverse claim being registered against the title. The Land Registrar proceeded to issue new certificates to the Interested Party on the same day **without notifying** the Applicant or requiring her to surrender, as per the Registered Land Act (Cap 300 Laws of Kenya), her certificate. The consequence is that Kwale/Galu Kinondo/10 has two certificates in force. The Applicant also contends that both the Learned Resident Magistrate and the Land Registrar, Kwale failed to appreciate the purport and legal significance of **Section 3 (1) of Land Disputes Tribunals Act** and **Section 143** of the **Registered Land Act**. In addition the Land Registrar, Kwale failed in his duties to invoke the provision of **Section 149 of the Registered Land Act**. The Applicant states that the entire process of the divesture of title above was fraught with *illegalities* from inception by reason of violation of clear statutory provisions and was therefore a *nullity* and *void ab initio*. It is the Applicant's case that the Applicant is a bona fide purchaser for value and that the Interested Party by his *surreptitious actions* wrongfully and *fraudulently* obtained registration of the title in his favour. Finally the Applicant avers that the Land Registrar as the Statutory Custodian of titles was in breach of his *fiduciary duty* to ensure that the Applicant's title to the suit land will not be adversely affected except by the operation of the law.

The Response

5. The application is opposed by the 2nd Interested Party vide Preliminary Objection dated 2nd June, 2010 and Grounds of Opposition filed on 1st March, 2016, in which the 2nd Interested Party states that the court lacks jurisdiction to grant any and all of the Judicial Review orders sought in the Notice of Motion since the leave to seek the Judicial Review orders was granted after six (6) months from the date of the decision complained of hence without jurisdiction. In so far as the decision of the Resident Magistrate made on 8th November, 2005 is concerned, the 2nd Interested Party states that the same is merely an adoption of the decision of the Land Disputes Tribunal made on 14th June, 2005 therefore inseparable from each other,

and that any attempt to quash the decision of the 1st Respondent only would still leave a decision made by the Land Disputes Tribunal on 14th June, 2005 thus negating the efficacy of the Judicial Review order of certiorari. Further, it is stated that the order of mandamus against the 2nd Respondent cannot lie since there is no specific statutory duty requiring the 2nd Respondent to rectify the register where there is registration by virtue of a court order. The 2nd Interested Party's case is that Section 142(1) of the Registered Land Act Cap 300 (repealed) only provides three scenarios for rectification which the current case does not fit. In any event, the Judicial Review orders being discretionary, should not issue in the circumstances because:

(a) The suit property has since changed hands to other proprietors who acquired it bona fide and without notice. Granting the orders sought will effectively divest title without satisfying the conditions under Section 28 of the repealed Registered Land Act Cap 300 or Section 26 of the Land Registration Act No. 3 of 2012.

(b) Granting the order for rectification of the suit property will effectively be in contravention of Section 143(1) of the Registered Land Act Cap 300 (repealed) since the court cannot in the present proceedings be satisfied that there is fraud, misrepresentation or mistake.

(c) In any event, allegations of fraud cannot be proved by way of affidavit evidence without the benefit of cross examination.

6. Secondly, the application is opposed by the 1st Interested Party's replying affidavit sworn on 18th April, 2013. The 1st Interested Party's case is that the orders being sought in the said application are stale and not tenable in that an order of prohibition cannot issue to quash a decision which is already made as it can only prevent the making of contemplated actions or omissions. Again the order cannot correct the cause of practice over a wrong decision on the merits of Judicial Review proceedings. An order of certiorari is obtained where an inferior tribunal or court has acted without jurisdiction or authority and the same cannot issue against the Land Registrar since the decision he made is not capable of being quashed. An order of mandamus cannot issue to compel the Land Registrar to rectify the register to cancel name as the registered proprietor of the suit property since it is not the mandate of the Judicial Review court to substitute the decision of a body authorized to statutorily make such decisions with its own decisions. Further, the 1st Interested Party states that the legality of the transfer of the suit property in these proceedings can only be determined in a formal court proceeding and not through Judicial Review proceedings and that a Judicial Review court has no jurisdiction to deal with matters regarding ownership in the absence of a case challenging the same. The 1st Interested Party states that the application herein is devoid of any merits and should be dismissed.

7. The 3rd Interested Party also opposed the application vide a replying affidavit of Judith W. Kibaki sworn on 9th July, 2010.

Submissions

8. Parties filed submissions which were highlighted in court. Mr. Khagram for ex parte Applicant submitted that having purchased the suit property from one **Japheth Galagari Shamala** in January 1990, the question that remains to be answered is whether the ex-parte Applicant's title could be defeated and/or revoked in such manner as was the position in the instant case and if not, whether the ex-parte Applicant is entitled to the relief sought. Counsel cited the case of **MUNICIPAL COUNCIL OF MOMBASA AND THE REPUBLIC AND UMOJA CONSULTANTS LTD [2002] eKLR** where the Court of Appeal stated:-

'That is the effect of this court's decision in the KENYA NATIONAL EXAMINATION COUNCIL case as the court has repeatedly said, judicial review is concerned with the decision making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so, so that in this matter, for example, the court would not be

concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e. the jurisdiction to make it? Were the person affected by the decision heard before it was made?..."

9. Mr. Khagram submitted that firstly, there is no doubt from the evidence placed before this court that the ex-parte Applicant's right to natural justice was violated. Neither was she served with any process nor was she heard in the proceedings before both the Msambweni Land Tribunal as well as the subordinate court which resulted in the revocation/cancellation of her title deed relating to the suit property. Mr. Khagram quoted Odunga J, in the case of **Republic vs. Chief Magistrate Commercial Court & 2 Others – ex-parte Violet Ndanu Mutinda & 5 Others [2014] eKLR** where the learned Judge considered a number of authorities and held quoting the case of **Republic vs. Secretary of State for Education & Science – Ex-Parte Avon County Council [1991] 1 ALL ER 282** and holding that the purpose of Judicial Review “... is to ensure that the individual is given fair treatment by the authority to which he has been subjected to...”

10. Mr. Khagram submitted that the ex-parte Applicant cannot be said to have been subjected to fair treatment in the instant case. Counsel submitted that an application for Judicial Review shall succeed if it is shown that the decision making body acted illegally, irrationally, procedurally, improperly, without jurisdiction (*ultra vires*), unreasonably or unfairly and in contravention of the rules of natural justice. Quoting **Odunga J.** in above case Mr. Khagram submitted that to recognize, based on Judicial Review ‘... has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghise vs. Stephenson** in the last century.’

He went on to hold that “... **a hearing cannot be said to have been fair when final orders are granted against the party without hearing the party...**”

Mr. Khagram submitted that based on this principle alone, the ex-parte Applicant urges this Court to grant the prayers sought. Counsel further invited this court to hold that the Msambweni Land Dispute Tribunal as well as that of the subordinate court had no jurisdiction to entertain and decide a dispute that concerned a beneficial interest in a registered land. The second interested Party appears to rely on the case of **CHEGE MACHARIA VS. FRANCIS KIMANI KIRIMIRA [2015] eKLR** for the proposition that it is not open to a Magistrates court to question an award received from a District Land Tribunal and that it is under a statutory compulsion to enter Judgment once received from the Chairman of the Tribunal. However, Mr. Khagram submitted that the caveat that the Court of Appeal placed to this was that the court had to be satisfied that the “... **award was on the face of it issued by a proper Tribunal and not a nullity ...**” Counsel submitted that in the present case, the award of the Msambweni Land Tribunal was a nullity not only for want of jurisdiction but also for infringing upon the Ex-parte Applicant's rights and could not thus be made a judgment of the court capable of enforcement – this equally being a nullity too.

11. On the question of time, Mr. Khagram submitted that this can only run as against the Applicant from the date the decision came to her notice but in this case, the leave to quash the decision of the first Respondent was granted well within the statutory time limit and cannot be said to have been granted without jurisdiction. Mr. Khagram submitted that the other Interested Parties cannot claim any interest in the property and none could have arisen as these would equally be a nullity.

12. **Mr. Kiarie Kariuki** for the 1st Interested Party opposed the application and submitted that even if the Judicial Review orders herein are granted the decision of the Kwale Land Disputes Tribunal would still remain intact as there is no prayer by the ex-parte Applicant that the said Judgment or determination be set aside and or quashed. Mr. Kariuki submitted that the matter in issue is not the order of the 1st Respondent or what the 2nd Respondent will do with the same, but the Judgment or determination of the Kwale Land Disputes Tribunal. The application for Judicial Review ought to be directed at the said Judgment or determination as it is the said Judgment or determination in which the Tribunal found that

the Suitland, Kwale/Galu/Kinondo/10 belongs to the 1st interested party and not the ex-parte Applicant. The Judgment of the Kwale Land Disputes Tribunal was made on the 14th June 2005. Counsel submitted that the provisions of Section 9(3) of the Law Reform Act Chapter 26 Laws of Kenya provided clearly with respect to Judgment, decree, conviction or other proceedings that the application for leave to quash the same must be made within six (6) months of the subject Judgment, order, decree, conviction or other proceedings. Counsel submitted that it would follow that the Judgment of the Kwale Land Dispute Tribunal having been made on 14th June 2005, the application for leave ought to have been made on or before 13th November 2005 and the leave obtained before the said date.

13. Mr. Kariuki further submitted that the ex-parte Applicant has conceded that the property was already registered in the name of the 1st Interested Party by the time the Judicial Review application herein was filed. It is also common ground that thereafter the property was transferred to the 3rd Interested Party, Mwalu Investments Limited and charged to the 2nd Interested Party, Equity Bank Limited. Counsel submitted that in a nutshell the dispute herein is one about ownership or entitlement to the land. Mr. Kariuki submitted that this is a dispute that would require the parties to bring their witnesses to court to testify as affidavit evidence will definitely not suffice in the matter of rival claims for the suit land. Mr. Kariuki cited the Court of Appeal in the matter of **Biren Amratlal Shah & Another vs. Republic & 3 Others [2013] eKLR** in which the Court of Appeal followed their own decision in **Akeba vs. Kenya Ports Authority** when they cited the following paragraph:-

“If the Respondent had been of the view that it had been wrongly deprived of its property, it ought to have sued in the ordinary way so that all the issues could be ventilated before the court. We repeat that Judicial Review is confined to the process of decision making and the mere fact that a public body has made a decision does not necessarily or by itself entitle a party affected by the decision to the remedy of Certiorari”.

The Court of Appeal went on to hold that:-

“The Appellants were in a similar situation to the Respondents in the Akeba case, whereupon the discovery that the suit property was already registered in the name of the 4th Respondent, much as they believed that their “title” was superior, they should have filed suit to determine ownership”.

14. Mr. Kariuki submitted that the ex-parte Applicant herein is in similar position and hence ought to have filed an ordinary suit and not a Judicial Review application. Counsel submitted that it is trite law that Judicial Review will not issue where there exists another remedy. Counsel submitted that ex-parte Applicant’s remedy lies in an ordinary suit. The fact that the Land Disputes Tribunal Act 1990 was repealed by Section 31 of the Environment & Land Court Act 2011 and hence the death of the Kwale Land Disputes Tribunal among others means that the only forum open to the ex-parte Applicant is to file an ordinary suit in the Environment & Land Court. Counsel submitted that the application herein by way of Judicial Review ought to be dismissed with costs to the Respondents and Interested Parties to enable the ex-parte Applicant to file the matter in the right forum.

15. Mr. Sitonik counsel for the 3rd Interested Party submitted that this court is not the correct and lawful forum in which to determine the dispute. Counsel submitted that in prayer (c) of the motion, the Applicant is basically asking the court to determine the ownership of the suit property. Mr. Sitonik submitted that as a matter of law, Judicial Review proceedings are not a forum where disputes on ownership of land can be adjudicated and determined because it is restricted to affidavit evidence while such disputes require *viva voce* evidence and cross examination of witnesses.

16. Further, counsel submitted that this court is the wrong forum because parliament under Section 143 of Cap 300 provides a statutory remedy for the Applicant to challenge the ownership of the 3rd Respondent or that of the 1st Interested party by way of a civil suit under the Civil Procedure Act, for an order for rectification of the Register or cancellation of title by the High Court. Mr. Sitonik cited the case of the **National Assembly vs. James Njenga Karume [1992] eKLR** where the High Court stated that:

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

17. Further, Mr. Sitonik submitted that the present forum causes prejudice to the 1st Interested party’s right to be heard as enshrined in Article 50 and is unduly oppressive and prejudicial to the 1st Respondent because the 1st Interested Party is denied its right to interrogate the Applicant’s allegations of fact in the motion by way of discovery, interrogatories, and all the instrument of defences available in an ordinary civil dispute.

18. As for prayer No. 1 for certiorari to quash the order dated 8th November, 2005 given by the Resident Magistrate in the Land Award Number 3 of 2005 Mombasa, Mr. Sitonik submitted that the prayer should not be issued because the effectiveness of the decision that is sought to be quashed was implemented on 14th December, 2005 by registration of the 3rd Respondent as the proprietor. The order has been overtaken by other subsequent Registration and transfers of Title from the 3rd Respondent to the 1st Interested Party. In any event, counsel submitted the decision by the Tribunal was not challenged and will therefore stand despite the order and 1st Interested Party’s title or procedure of obtaining title is not under challenge in the application, and the said title cannot be reversed in the present application.

19. Mr. Sitonik further submitted that prayer No. 3 for an order of mandamus to direct the Land Registrar to rectify the Registrar to cancel the name of **Juma Kassim Mwamaneno** as the registered proprietor Kwale/Galu Kinondo/10 and to reinstate the name **of Naimisha Somchand Shah** as the sole proprietor of the said land is not available because the 1st and 2nd Interested Parties are protected by the provisions of Section 143 (2) because the 1st Interested Party is the registered proprietor of the suit property and is in possession since 7th April, 2009, and he did not have the knowledge of the omission, fraud or mistake in consequence of which the order is sought, and there is no allegation that the 1st Interested Party caused such omission, fraud or mistake or substantially contributed to it by his act, neglect to default, and in any event, the Judicial Review application does not seek to impeach the title of the 1st Interested Party. Second, the 1st Interested Party’s title or procedure of obtaining title is not under challenge in the application. Further, Mr. Sitonik submitted that the court does not have jurisdiction to cancel the 1st Interested Party’s title in Judicial Review proceedings because Article 165(5) and 162 (2) (b) of the Constitution, expressly denies the high Court jurisdiction in respect of matters relating to use, occupation of, and title to land. Further, Article 162(2) (b) vests the jurisdiction in respect of matters relating to environment, use, occupation of, and title to land on the Environmental and Land Court. Section 150 of the Land Act 201 vests in the Environment and Land Court exclusive jurisdiction to hear and determine disputes, actions and proceeding concerning land under the Act. And Section 13 of the Environment and Land Court Act vests exclusive jurisdiction to try matters relating to land and title to land in the environment and Land Court.

20. **Mr. Kongere** counsel for the 2nd Interested Party submitted in concurrence with Merss Kariuki and Sitonik on jurisdiction. Counsel submitted that even though leave was granted way back on 20th March, 2006 by Honourable **Marga J.** (as he then was), it is still within this court’s power to address the issue at this stage without appearing to be sitting on appeal from the decision made by a Judge, then, of a concurrent jurisdiction. Counsel submitted that this point was appreciated by the Court of Appeal in the case of **Henry Njagi Mururariua vs. A. O. Okello, District Commissioner Mbeere District & another [2014] eKLR** where the court stated that:

“ . . .the proper procedure would have been for the learned judge (Karanja, J.) to invite the parties to make submissions on the legality or otherwise of the leave already granted.”

21. Mr. Kongere submitted that in the present case, both parties have an opportunity of submitting on the legality or otherwise of the leave already granted. That is not sitting on appeal for it is an appreciation that leave is ordinarily granted on the basis of a prima facie arguable case and can be set aside on the application of a party (see **Aga Khan Education Service Kenya v Republic Ex parte Ali Seif & 3 others [2004] eKLR**). Counsel submitted that leave ought never to have been granted in the first place.

Determination

22. I have carefully considered the application. I will address all the issues raised by the parties together.

23. Background Events

- a. On 15/11/1974, **Julius Muturi** Nganga was registered as the proprietor of the suit property
- b. On 16/12/1974, a Land certificate was issued for suit property. However, the entry on the Title does not indicate the name of the person issued with the certificate.
- c. On 20/5/1975 **Japheth Galagat Shamala** was registered as the proprietor of the suit property.
- d. On 16/07/75, a land Certificate was issued for suit property. However, the entry on the title does not indicate the name of the person issued with the certificate.
- e. On 31/3/1988, rights under section 70 of the RLA reserved. The entry does not indicate the name of the person in whose favour the rights were reserved.
- f. On 22/1/1990, **Naimisha Somchad Shah** was registered as the proprietor of the suit property.
- g. On 23/01/1990, a Title deed was issued. However, the entry on the Title does not indicate the name of the person issued with the certificate.
- h. On 14/12/05, **Juma Kassim Mwamaneno** was registered as the proprietor of the suit property through a court order in land case number 3 of 2005.
- i. On 14/12/05, a title deed was issued.
- j. On 12/11/07, restriction was registered under section 136 (1) of CAP 300.
- k. On 26/09/2008, restriction of 12/11/07 was removed vide a court order dated 15/08/2008.
- l. On 15/10/2008, Court order dated 23/03/2006 restraining any further dealings, entries or transactions or disposal of the suit property known as **KWALE/GALU KINONDO/10** until further order the court was registered.
- m. On 7/04/2009, Court order dated 23/10/2008, lifting the court order dated 23/03/2006 restraining any further dealings, entries or transactions or disposals of the suit property known as **KWALE/GALU KINONDO/10**
- n. On 7/4/2009 **Mwalu Investment Limited** was registered
- o. On 7/4/2009, title deed issued
- p. On 7/4/2009, registration of rights under section 70 of RLA
- q. On 7/04/2009, registration of the charge dated 30/03/2009 in favour of **Equity Bank Limited**.

24. I refer to paragraph 3(xi) of the Statutory Statement of the ex parte Applicant where she states that the transfer of the suit property was done in a surreptitious and fraudulent manner. To resolve the issue of fraud, it has been stated severally that allegations of fraud cannot be dealt with by affidavit evidence. The particulars of that fraud must be pleaded and proved at a hearing with cross examination. I agree with submissions of Mr. Kongere, who in support cited the case of **Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others [2015] eKLR** where the court stated as follows of fraud and affidavit evidence:

“We would also wish to point out, as this court stated in WESTMON POWER KENYA LIMITED VS. FREDERICK & ANOTHER/A CONTINENTAL TRADERS & MARKETING [2003] KLR 357, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence.”

25. The court again reiterated those sentiments in the case of **Mirko Blaeterman (suing through his power of Attorney – Shabir Hatim Ali) & another vs. David Mwangi Muiruri & 2 others [2015] eKLR** where it stated that *“It must also be remembered that allegations of fraud must be strictly proved, so that whilst a standard of proof beyond reasonable doubt is not required, nevertheless a standard more than mere balance of probabilities is called for”*. (In **R. G. PATEL VS. LALJI MAKANJI [1957] EA** court observed that allegations of fraud can hardly be satisfied solely by contested affidavit evidence, which has not been subjected to cross-examination.

26. Clearly, the application contains raft of disputed facts. These include the ex parte Applicant’s claim that he was never served with a hearing notice to attending the proceedings before the Tribunal and the Resident Magistrate’s court. He has in fact at paragraph 11 of the Affidavit contested service of process on him despite the existence of service made under oath. Whether the ex parte Applicant was served with a hearing notice to attend either the Tribunal or the Resident Magistrate court is a matter of fact. It becomes an even more serious disputed matter of fact when one person has sworn an affidavit stating service and the other has sworn an affidavit disputing service. A resolution of that dispute obviously requires the court to avail the two deponents to court, subject them to cross examination and determine who to believe of the two. That is a serious fact finding mission that borders on condemning one party to have committed perjury. That fact finding mission can be carried out by the court in an ordinarily civil dispute but the Judicial Review court is, without a doubt, ill-equipped to embark on that course. See the case of **Republic vs. Land Registrar Taita Taveta District & Another [2015] eKLR** where the court stated that:

“The judicial Review Court is particularly ill-equipped to deal with disputed matters of fact where, as in this case, it would involve fact finding on an issue of fraud which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation.”

27. This court also accepts submissions by Mr. Kongere that after the filing of the present proceedings, the court allowed other Interested Parties to join the dispute. One such party was Mwalu Investments Limited which averred that it acquired the property from one **Juma Kassim Mwamaneno**. Mwalu Investments then charged the property to the 2nd Interested Party (Equity Bank Limited). Mwalu Investments has in its pleading stated that it acquired the suit property for valuable consideration without notice of any defects on the title. Mr. Kongere submitted correctly in my view, that whether that is true or not, remains a matter for determination before an appropriate forum. The Judicial Review court cannot be that forum for it is settled law that the title of a registered proprietor for value without notice cannot be defeated without evidence of fraud or misrepresentation to which the party is proved to be a party. This court cannot be asked to issue orders that would in effect cancel the registration of **Juma Kassim Mwamaneno** as the registered proprietor and to restore the ex parte applicant as the only proprietor. Such a prayer fails to consider that the third parties will not have been given an opportunity to defend the legality or otherwise of their titles. See the case of **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand & Allocation Prison [2007] eKLR**, where it was observed that:

“...in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

28. This point becomes even more relevant when it is borne in mind that the proceedings before the

Tribunal show that **Juma Kassim** had complained to the tribunal that he does not understand how title that was in his name suddenly changed hands and ended up with the ex parte applicant. Indeed the Certificate of Title annexed by the ex parte applicant shows that he only became the proprietor following five (5) other entries. It therefore becomes necessary to determine in a full trial what the other five (5) entries were and whether they could properly divest **Juma Kassim** his title and bestow it on the ex parte Applicant. That exercise however cannot be done in the present proceedings but in an ordinary civil suit.

29. Lastly, it is settled law that Judicial Review remedies are discretionary and should be granted where they represent the most efficacious resolution of the dispute. A look at the current proceedings however reveal that the grant of any orders will simply compound the already muddy situation as follows. Firstly, as was stated by the Court of Appeal in **Josphat Kamau Gatimu vs. Peter Gatimu Kanyonyo [2015] eKLR**, the ex parte Applicant can only get what he has specifically asked for. What the ex parte applicant has asked for is a quashing of the decision of the 1st Respondent. If the decision is quashed, it leaves the decision of the Tribunal undisturbed. What then will the parties do with that decision by the Tribunal more so in light of the repeal of the Land Disputes Tribunal Act? Secondly, assuming that the entries in the register are cancelled and the ex parte Applicant restored as proprietor, what happens to the interest of **Juma Kassim, Mwalu Investments Limited and Equity Bank Limited**? How does Mwalu Investments Limited, for instance, recover its expenditure when it cannot get an order for an indemnity in judicial review proceedings? The same applies to Equity Bank Limited, what happens to its charge or will it be told to suffer a wrong with no remedy?

30. These parties will obviously need to file another civil suit to properly address the issue of ownership of the suit property and whether they have any remedies and against who. What happens when evidence in the civil court shows that in fact the ex parte Applicant's title is not lawful yet the Judicial Review court has already cancelled the other entries? That would be anarchy which this court should not permit. As the court in Sanghani Investment Limited (Supra) said,

“Even if the notice under challenge is quashed, the issue over the ownership of the land still stands. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.”

31. From the foregoing, it is the finding of this court that while the ex parte Applicant appears to have real grievances, the Judicial Review forum lacks the legal mechanism to address those grievances. Further, the 2nd and 3rd Interested Parties have raised arguable defence. The totality of this matter is that the parties grievances herein should be addressed holistically to address the issues of ownership and alleged fraud, and also to address the defences put up by the 2nd and 3rd Interested Parties and to provide them with a fallback position should the ex parte Applicant succeed in her claim. It is for these reasons that I direct the ex parte Applicant to file this matter in an appropriate forum. The application is dismissed. Each party to bear own cost.

Dated, Signed and Delivered in Mombasa this 12th day of June, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Khagram for Ex parte Applicant

M/s Kiti holding brief for Makuto for Respondent

Mr. Kongere for 2nd Interested Party

Mr. Kaunda Court Assistant