



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPL.NO. 114 OF 2015

**IN THE MATER OF AN APPLICATION BY NATIONAL MUSEUMS OF KENYA FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI**

AND

IN THE MATTER OF THE ANTIQUITIES AND MONUMENTS ACT (REPEALED)

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT (REPEALED)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

REPUBLICAPPLICANT

VERSUS

THE REGISTRAR OF TITLES

DEPARTMENT OF LANDS1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

NATIONAL MUSEUMS OF KENYA.....EX-PARTE APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND1ST INTERESTED PARTY

EPCO BUILDERS2ND INTERESTED PARTY

JUDGMENT

1. By a notice of Motion dated 24th April 2015 the exparte applicant herein, the National Museums of Kenya seeks from this court Judicial Review Orders of certiorari to remove into this court and

quash the decisions of the 1st respondent, the Registrar of titles to remove a lawful caveat entered on 27th February 2008 by the exparte applicant in respect of property known as LR NO. 209/6439 title No. IR 20287/1; That the court be pleased to grant any other order that it deems fit and just to grant in the circumstances; and that the costs of the application be provided for.

2. The notice of motion which is supported by the statutory statement and verifying affidavit of Metrine Wakhungu filed on 4th April 2015 together with an application for leave lodged on 14th April 2015 is predicated on the leave to apply granted on 14th April 2015 by Honourable Mumbi J and the grounds, which form the exparte applicant's complaint that:

3. The property described as LR NO. 209/6439 title No. IR 20287/1 was declared a National Monument vide Gazette Notice No. 976 dated 6th March 1998 under the Antiques and Monuments Act, Cap 215 Laws of Kenya, which was repealed by the National Museums and Heritage Act No. 6 of 2006 as shown by exhibit NMK1, and that there was no objection from such gazette. That vide letter dated 27th October 2007 the then Minister of State for National Heritage Honourable Suleiman R. Shakombo, addressed to the General Director of the National Museums of Kenya, the Minister advised for degazette of the said property following recommendation made by Public Investments Committee of Parliament as per its 14th report as shown by exhibit NMK2;

4. That the National Museums of Kenya Board of Directors declined to consent to revocation of the said Gazette Notice on the grounds that the monument held heritage value, and communicated that decision to the Director General Dr Idle O. Farah as shown by exhibit NMK3;

5. That even the Solicitor General did advise vide letter dated 15th February 2008 against sale and degazette of the said property;

6. That vide letter dated 3rd December 2014 the Registrar of Titles issued a letter to the applicant giving notice to withdraw caveat from the title register within 45 days failure to which the caveat would be removed unless extended by an order of the court, which was a procedure provided for under Section 57(6) of the now repealed Registration of Titles Act as shown by exhibit NMK5;

7. It is averred that removal of the said caveat pursuant to Section 57 (6) of the Registration of Titles Act was illegal as the Act was repealed and that its provisions are inconsistent with the Land Registration Act, 2012 Section 73(2) –(4) thereof;

8. That despite the objection to the removal of the caveat vide the applicant's letter dated 23rd January 2015 through its advocates Kithi & Company Advocates, the 1st respondent has not replied to the said letter(see exhibit NMK6);

9. That a reminder dated 25th March 2015 exhibit NMK 7 has not elicited any reply and that upon conducting a search of the property it was discovered that the property was transferred to EPCO Builders Ltd by NSSF for a consideration of shs 305,375,000 on 6th November 2012 while there was a valid caveat registered on 27th February 2008 and that the caveat was removed on 3rd December 2014 the same day when the 1st respondent purported to issue notice to the applicant to remove it within 45 days from 3rd December 2014. Exhibit NMK8 is copy of letter dated 6th January 2015 seeking to know the status of the property in issue.

10. It is therefore averred that the removal of the caveat by the Registrar of Titles was unprocedural, biased, self serving, unconstitutional and subjects the gazette property of great monumental value to a great danger of being misused and destroyed to the detriment of the great public interest hence the decision to remove the caveat should be quashed.

11. The respondents who are the Registrar of Titles and the Attorney General neither entered an appearance nor filed any response to the application. The 2nd interested party EPCO Builders Ltd, too did not respond to the motion, despite service being affected upon them.

12. The 1st interested party, (NSSF) entered an appearance through Ochieng, Onyango, Kibet and Ohaga advocates vide a notice of appointment of advocates dated 18th December 2015 and filed on the same day. They also filed written submissions dated 25th April 2016 on 29th April 2016 .
13. The ex parte applicant filed their submissions dated 2nd November 2015 and urged the court to determine the sole issue of whether the removal of the caveat was lawful. It was submitted by the ex parte applicant through his counsel Mr Kithi that the removal of the caveat by the Registrar of Titles was not only unlawful but unconstitutional in that the Fourth Schedule to the Constitution recognizes ancient and historical monuments of National importance as Kenya's heritage. Further, that the ex parte applicant has a statutory mandate under the National Museums and heritage Act No. 6 of 2006 to among others, identify, protect, conserve and transmit the cultural and natural heritage of Kenya on behalf of the public for the benefit of the present and future Kenyan generations.
14. That the 1st respondent by removing the caveat exposed the gazetted monument to imminent risk of destruction which is an affront to the ex parte applicant's constitutional mandate to recognize and protect ancient historical monuments of national importance as Kenya's heritage.
15. In addition, it was submitted that the 1st respondent denied the ex parte applicant an opportunity to be heard on an application for removal of the caveat, which violates the ex parte applicant's right to a fair hearing as guaranteed under Article 50 of the Constitution.
16. Further, it was submitted that the actions of the 1st respondent are manifestly unfair, unreasonable, and unconstitutional and contravenes Article 47 of the Constitution which guarantees the right to fair administrative action that is reasonable, efficient, expeditious, lawful and procedurally fair.
17. The ex parte applicant also submitted that the actions by the 1st respondent is in breach of the statutory procedure provided for under Section 57(b) of the Registration of Titles Act (Repealed) on removal of caveats, which provisions went with the repeal of the said Act and replaced with Section 5 of the Land Registration Act No. 3 of 2012.
18. In addition, that even if the repealed provisions of the Registration of Titles Act were operational, they provided for 45 days notice to the ex parte applicant to respond to the application by the 1st interested party herein NSSF to remove the caveat but that instead, the same day that the notice was written, is the same day that the caveat was removed, even before the said notice reached the ex parte applicant. It was further submitted that Section 73(2) (3) and (4) of the Land Registration Act No. 3 of 2012 requires that the 1st respondent gives any objector a chance to show cause why a caveat/caution should not be removed. That despite objections having been filed, the 1st respondent ignored to respond. Reliance was placed on Municipal Council of Mombasa Vs Republic and Umoja Consultants Ltd CA 185/2001 where the Court of Appeal described the duty to comply with the procedure leading to the making of a decision.
19. The ex parte applicant further submitted that the 1st respondent's decision to remove the caveat from the property title was biased and unfair in that the removal was devoid of according the ex parte applicant an opportunity to be heard . Reliance was placed on Kadamas & Another V Municipality of Kisumu[1985] e KLR where the Court of Appeal, restating Lord Diplock's paraphrase of Lord Atkins' seminal statement in The Electricity Commissioners case held that decision by a statutory body is amenable to Judicial Review for error of law, unfairness and bias on the part of the decision maker.
20. The ex parte applicant further submitted that the decision to remove the caveat was unreasonable in that the 1st respondent pretended to notify the ex parte applicant of the intention to remove the caveat when, in fact, the caveat was no longer lodged. Reliance was placed on the decision in Pastoli V Kabale District Local Government Council and Others [2008] 2 EA 300 as cited with approval in Rahab Wanjiru Njuguna Vs Inspector General of Police & Another [2013] e KLR, on what the applicant is expected to demonstrate to the court in order to succeed in an application for Judicial Review in the submissions filed by the 1st interested party on 29th April 2015, it is submitted

that it acquired the property LR 209/6439 on 8th January 1996 and on 6th March 1998 vide gazette notice No. 976 the government declared the structure on the property a national monument under the Antiquities and Monument Act (now the National Museums and Heritage Act 2006). That on 21st August 2010 the 1st interested party sold the property to the 2nd interested party at a consideration, and that the said sale was subject to the Acts, covenants and stipulations that were set out in the title documents and that upon conclusion of the sale, the transfer was effected and registered on 6th November 2012 in favour of the 2nd interested party EPCO Builders Ltd.

21. The 1st interested party denied that it was or at all involved in the degazettement of the gazette notice and that neither were they party to the removal of the caveat on 3rd December 2015 long after it ceased to have an interest in the property. Consequently, it was submitted on behalf of the 1st interested party that it was wrongly enjoined in the proceedings.

22. Further, that in any event, the transfer of the property took effect in 2012 whereas these proceedings were instituted in 2015 way after the lapse of 6 months limitation period for applying to quash the action or decision contrary to the express provisions of Order 53 Rule 2 of the Civil Procedure Rules.

23. That there is no blame attributed to the 1st interested party who is a stranger to the facts set out in the application as it was not at the material time the owner of the subject property. Reliance was placed on *Trusted Society of Human Rights Alliance V Mumo Matemo and 5 Others [2014] e KLR SC* wherein an interested party was defined as one who has a stake in the proceedings and who will be affected by the decision of the court when it is made either way. Further reliance was placed on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules on the power of the court to strike out from the proceedings any party who is improperly enjoined as was interpreted in *Noordin Adamah & Another V Sunshine Supermarket Ltd & 4 Others [2014] e KLR*. And as to proper parties to a suit, reliance was placed on *Apex International Limited & Anglo leasing & Finance International Limited V Kenya Anti Corruption Commission [2012] e KLR* citing with approval the case of *Goodwill and Trust Investment Ltd and Another V Will and Bush Ltd* that proper parties must be identified before the action can succeed.

24. Therefore it was contended by the 1st interested party that no rights and obligations arise from the cause of action with regard to the 1st interested party and therefore that there was no basis for it to be enjoined to these proceedings and therefore it should be paid costs.

25. On whether any liability lies with the 1st interested party it was submitted on its behalf that it enjoys constitutional rights under Article 40 as well as Under Section 25 of the Land Registration Act to the extent that as the proprietor of the suit property, it cannot be arbitrarily deprived of the same and further, that Section 34 of the National Museums and Heritage Act does not provide for restriction of the right to transfer property. In addition, that the declaration of the subject property to be a protected area within the meaning of the Act did not amount to compulsory acquisition of the same and that since the 1st interested party remained the proprietor thereof, it had the right to transfer the property.

26. On whether the exparte applicant has made a case for grant of the Judicial Review orders against the 1st interested party, it was submitted that from the pleadings filed, there is no allegation of breach of natural justice or unreasonableness or partiality or illegality or irrationality against the 1st interested party and that no case has been made for Judicial Review Order to issue hence the application against the 1st interested party should be dismissed with costs.

DETERMINATION

27. I have carefully considered the exparte applicant's notice of motion together with the supporting documentation which are the statutory statement, the verifying affidavit and exhibits. I have also given equal consideration to the 1st interested party's submissions and the submissions by the exparte applicant. In my humble view, the issues that flow for determination are:

- 1) Whether the 1st interested party is a proper party to these Judicial Review proceedings.
- 2) Whether the application for leave was made outside the statutory 6 months period from the date of the decision which is impugned.
- 3) Whether the removal of the caveat was unlawful.
- 4) Whether the Judicial Review Order of certiorari lies in the circumstances of this case.
- 5) What orders should this court make.
- 6) Who should bear the costs of the Judicial Review proceedings.

28. On the 1st issue of whether the 1st interested party is a proper party to these Judicial Review proceedings, it was submitted on its behalf that having relinquished its rights to the property in 2012 by way of sale and transfer to the 2nd interested party, then the 1st interested party was wrongly enjoined and therefore based on the Apex Finance International Ltd & Another (supra) case as well as the provisions of Order 1 Rule 10 of the Civil Procedure Rules on proper parties to suits, this court should dismiss the application for Judicial Review. It will however be noted that the issue that the Apex Finance case dealt with was that the purported applicants were shadowy, faceless, nonexistent and ghost companies deficient of any capacity or any legal capacity to enjoy or law any claim or constitutional rights envisaged under Article 22(1) of the Constitution. The authority is therefore not relevant since the 1st interested party is not claiming to be shadowy non-existent faceless and ghost entity. On the authority of Trusted Society of Human Rights Alliance Vs Mumo Matemu & 5 Others (supra) the objection related to Law Society of Kenya's attempt to be enjoined to the proceedings as an intervener and what would be the role of an intervener interested party and as soon as the Supreme Court found that the Law Society of Kenya had a partisan support for the 1st respondent, the court found that it was improper for it to be enjoined as an interested party and much less, as amicus.

29. In these proceedings, it is clear that the 1st interested party was made a party by the exparte applicant and the main reason, from the pleadings is that the property in question which was gazetted as a national monument and heritage was initially registered in the names of the 1st interested party. That being the case, it is my humble view that it was proper for the exparte applicant to be enjoined as a party since the orders of the court affecting that title would in my view, affect the 1st interested party in the long run.

30. The basis for my above finding is that although Article 40 of the Constitution protects and guarantees the right to own property, but it is clear from the 1st interested party's submissions that it sold that property subject to the acts, covenants and stipulations that were set out in the title document. It is not denied that at the time of such sale and transfer, there was a gazette notice protecting the buildings on the named land as a National Monument and Heritage and further that the title had a caveat thereto. For any transfer to be effected there must be lifting of the caveat first and from the exparte applicant's exhibit No. NMK5, which is a letter dated 3rd December 2014 from the respondent to the exparte applicant, it is clear that:

“.....I have honour to advise you that an application has been received from the advocates of the caveatee to remove the caveat lodged by you at 1.40 hours on 27th February 2008 and registered as number 11220287/6.....”

31. The caveatee in this case as at 27th February 2008 whom the exparte applicant had notice of was the 1st interested party herein since the caveat was clear that:

“unless the transaction be expressed to be subject to the claim of the caveator.”

32. In addition, even the transfer of 6th November 2012 by the 1st interested party in favour of EPCO Builders Limited for shs 305,375,000 was and is clearly stipulated to the “subject to No. 6

above.” Entry No. 6 is the caveat lodged by the ex parte applicant made on 27th February 2008 claiming interest vide Kenya Gazette Notice No. 975 of 6th March 1998. Accordingly, I find that the 1st interested party herein is a necessary party to these proceedings and I would not belabour venturing into the provisions of Order 1 Rule 10 of the Civil Procedure Rules which, in any event are directory and not mandatory.

33. Furthermore, as to whether or not a party is a necessary party to proceedings is for the court to determine, on the material placed before it. Under Order 1 Rule 3 of the Civil Procedure Rules.

“ All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or services of acts or transactions is alleged to exist, whether jointly severally or in the alternative where if separate suits were brought against such persons any common question of law or fact would arise.”

34. In *Amon Vs Raphael Tuck & Sons Ltd* [1956] 1 ALL ER 273 the court held that:

“The party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party? The only reason which makes a person a necessary party to an action. Is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party.....the person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally.....”

35. In my humble view, the pleadings herein point to the 1st interested party as a transferee of an interest in the property to the 2nd interested party. Noting that there was a valid gazette notice declaring the building on the land as National Monuments and Heritage, and noting that the 1st interested party had been involved in seeking to have the degazettement of the property as per exhibits NMK3 dated 7th January 2008 and NMK3 dated 27th October 2007, I have no doubt in my mind that if any suit was to be filed by any person having an interest in the property LR 209/64 39, the 1st respondent would be a necessary party. I say so because the advisory by the Solicitor General Mr Wanjuki Muchemi dated 15th February 2008 copied to the 1st interested party is clear that should NSSF wish to sell the property it may need to engage in further consultations with the Ministry of State of National Heritage and the National Museums of Kenya and seek a solution.

36. Noting that the definition of land does not exclude buildings in the land, I hold that the inclusion of the 1st interested party to these proceedings was proper in order to accord it an opportunity to be heard. Under Order 1 Rule 4 of the Civil Procedure Rules,

“ judgment may be given without amendment.

a.....

b Against such one or more of the defendants as may be found to be liable according to their respective liabilities under Rule 5 it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him

37. Again under Order 3 Rule 7 of the Civil Procedure Rules.

“ where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendant in order that the question as to which of the defendants is liable, and to what extent, may be determined between all the parties.”

38. In this case, it is worth noting that the court shall not be determining the merits of the transfer of land but I have no doubt in my mind that any orders that the court may make, if they are in favour of the applicant, will have a long term effect on the 1st interested party’s interests as well since it is

the beneficiary of the entry No. 7 in the title.

39. Accordingly, I reject the submission by the 1st interested party as to its place in these proceedings.

40. The second most important issue to be determined is whether the application for leave to apply for Judicial Review Order of certiorari was filed outside the statutory limitation period as stipulated in Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

41. The 1st interested party submitted that as it effected transfer of the property in favour of the 2nd interested party in 2012, the application for leave was made in 2015 which was outside the 6 months period hence the Judicial Review motion herein does not lie.

42. It is not an undisputed fact that the application for leave was lodged on 14th April 2015. The only question is whether the said lodgment was made outside 6 months period stipulated in Section 9 of Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

43. To answer that question, I must go back to the decision that is impugned. In this case, the application for leave is clear that it is for purposes of challenging the decision made by the respondent to remove a lawful caveat entered on 27th February 2008 by the applicant to property LR 209/6439 IR 20287/9.

44. From exhibit No. NMK 8 which is the copy of the original title to the property, entry No. 8 dated 3rd December 2014 vide presentation No. 362 is "Removal of caveat No. 6 above". The caveat No. 6 was placed on 27th February 2008 by the exparte applicant vide representation No. 2385. From 3rd December 2014 when the caveat was removed to 14th April 2015 when the application for leave to challenge removal of the caveat is 4 months and 12 days to be precise. It is therefore not correct to state, as the 1st interested party wished this court to believe, that the transfer of the property was finally concluded and registered on 6th November 2012 hence the application was filed after 6 months.

45. The exparte applicant by these proceedings has not sought deregistration of the transfer of the property made on 6th January 2012 but claims that the removal of the caveat on 3rd December was unlawful and unprocedural hence the decision to remove the said caveat by the Registrar of titles should be removed into this court and be quashed.

46. Accordingly, I find that the objection raised by the 1st interested party as to statutory limitations has no merit and the same is disallowed.

47. On the third issue of whether the removal of the caveat was unlawful, the court notes that the 1st interested party submitted on whether liability lies against it. However, the court in Judicial Review proceedings does not examine the merits of the decision but the procedure through which that decision was arrived at to remove the caveat, which caveat was removed by the respondent and not the 1st interested party, even if the 1st interested party was the applicant for removal thereof which, from the exhibits 2,3,4 and 5, is clear that the 1st interested party had been seeking for the degazettement of the suit property as a national monument heritage.

48. The court therefore declines to determine any merits of the decision to remove the caveat and proceeds to determine whether the removal of the caveat was lawful.

49. The 1st interested party submitted that the applicant did not allege of any breach of natural justice or unreasonableness or partiality or illegality or irrationality against the 1st interested party and that therefore no case has been made out for a Judicial Review order to issue against it and that therefore the court should dismiss the notice of motion with costs.

50. However, as earlier stated, this court has not been asked by the exparte applicant to issue any orders respecting the direct actions of the 1st interested party with regard to the removal of the caveat

from the title by the respondent. Accordingly, I find the submission by the 1st interested party irrelevant and ignore it all together .

51.The ex parte applicant claimed that the respondent in removing the caveat acted unconstitutionally, illegally, breached procedure; was biased, was unfair and that she/he acted unreasonably. I have in this ruling reproduced particulars of each of the above grounds as pleaded in the statutory statement of facts dated 13th April 2015 filed by the ex parte applicant on 14th April 2015.

52.The general principle of law is that courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impinging on legally recognized interests. Powers must be exercised fairly; and must not be exceeded. Moreover, the repository of a statutory power or duty will be required to discharge its functions when occasion for their performance has arisen. If an inferior body, or person or authority exceeds its powers or acts without jurisdiction, or fails to act fairly, or in accordance with the rules of natural justice, or if it commits an error of law in reaching a decision, its decision may be prohibited from violating the conditions precedent to a valid adjudication before it has made a determination. A tribunal wrongfully refusing to carry out its duty to hear and determine a matter within its jurisdiction may be ordered to act according to the law.

53.On an application for Judicial Review, the court has power to grant a quashing order (certiorari) a prohibiting order (prohibition) or a mandatory order (mandamus). Article 47 of the Constitution which espouses the right to fair administrative action as implemented by the Fair Administrative Action Act, 2015 expands the remedies for Judicial Review to include Declarations, and injunctions. A court will intervene to ensure that the powers of public decision making bodies are exercised lawfully. Such a body will not act lawfully if it acts Ultra vires or outside the limits of its jurisdiction or statutory mandate or having such mandate, to act, it abuses its power, acts in a manner which is procedurally. Irregular, or unreasonable or commits any other error of law.

54.According to Halsbury's Laws of England Fourth Edition Volume 1(1) 2001 Reissue.

“There is a presumption that the acts of public bodies, such as orders decisions and bye laws, are lawful and valid until declared otherwise by the court. An act which has been declared by the court to be unlawful whether on procedural or substantive grounds, is a legal nullity (see Padfield V Minister of Agriculture, Fisheries and Food[1968] AC 997 at 1032-1033 in Pastoli V Kabale District Local Government Council and Others(supra) as adopted in Rahab Wanjiru Njuguna Vs Inspector General of Police & Another (supra) where the court made it clear that:

“ in order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....illegality is when the decision making authority commits an error of law in the process of taking, the subject of the complaint or making the act. Acting without jurisdiction or ultra vires, or contrary to the provisions of the law or its principles are instances of illegality. It is for example , illegality where the chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District service Commission.....Irrationality is when, there us such gross unreasonableness in the decision taken or act done that no reasonable authority , addressing itself to the facts and the law before it, would not have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

.....procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non compliance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

55. Applying the above authoritative decision and legal principles to the instant motion, the ex parte applicant's exhibit No. NMK1 shows Gazette notice No. 976 dated 6th March 1998 issued pursuant to the Antiquities and Monuments Act Cap 215 (repealed), declaring, in exercise of powers conferred by Section 4(3) of the Antiquities and Monuments Act, the Minister declaring the buildings specified in the schedule thereto which he considered to be a cultural and historical interest to be monuments within the meaning of the Act. The declaration also called for any objections to the declaration to be lodged with the Minister within one month from the date of publication of the notice. The declaration was in respect of Former Parklands Railways Staff Quarters on LR 209/6437 and 209/6439 formerly known as Junior Europeans Staff Quarters situate along Ojijo Road, Taarifa Road and Sports Avenue, Parklands Nairobi. The Declaring Minister was Honourable William Ole Ntimama, Minister for House Affairs and National Heritage.

56. Later on 26th October 2007, the Minister of state for National Heritage Honourable Suleiman R. Shakombo wrote to the Director General of National Museums of Kenya Dr Idle O. Farah notifying him that the 14th report of the Public Investment Committee on the Accounts of State Corporations VOL 1 of 2007 regarding "degazettement of Former Parklands Railways Staff Quarters, LR No. 209/6439 had recommended the degazettement thereof hence, the ex parte applicant herein was being asked to consider the matter and thereby make recommendations for the degazettement of the property as required under the National Museums of Kenya and Heritage Act 2006.

57. On 7th January 2008 the ex parte applicant's Director General wrote back to the Minister notifying him that the full board meeting of the ex parte applicant held on 6th December 2006 (sic) had deliberated on the issue as per letter of 26th October 2006 (sic) by the minister and "....." Resolved not to consent to the revocation of gazette." Resolved not to consent to the revocation of gazette."

58. The solicitor general Wanjiku Muchemi vide his letter dated 15th February 2008 to the Permanent Secretary Ministry of state for National Heritage and copied to the 1st interested party's Managing Trustee Mrs Rachael Lumbasyo made it clear that "should NSSF wish to sell the property, it may need to engage in further consultations with the Ministry of state for National Heritage and the National Museums of Kenya and seek a solution, while also cautioning that ".....The NMK has declined to consent to the revocation of the above gazette notice. The implication then is that NSSF cannot sell the property that has been gazetted as a National Monument."

59. From 15th December 2008, everything went quiet until 3rd December 2014 when the Registrar of titles wrote to the ex parte applicant giving 45 days notice to withdraw the caveat failure to which the said caveat will be removed by her/him at the expiry of the said 45 days, unless the said caveat is extended by an order of the court as provided by the Act that is, Section 57(6) of the Registration of Titles Act Cap 281 (repealed) and Section 73(2) of the Land Registration Act, 2012.

60. Therefore, on whether the removal of the caveat was illegal, the court notes that on the same date 3rd December 2014 when the letter/notice was being written by the Registrar of Titles giving the ex parte applicant herein 45 days to remove to caveat, there is an entry No. 8 vide presentation No. 362 of 3rd December 2014 to the effect that: "Removal of caveat No. 6 above". That entry, nonetheless, is not signed by the Registrar of titles. The court was also not shown whether the degazettement of the property was ever effected or not.

61. Nonetheless, it is clear that Section 57(6) of the Registration of Titles Act Cap 286 had been repealed and therefore inapplicable in the removal of the caveat. However, the relevant provisions are Section 73 of the Land Registration Act, 2012 which provides that:

1) "73 A caution may be withdrawn by the cautioner or removed by order of the court or subject to Sub section (2) by order of the Registrar.

2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

3)If a cautioner has no raised any objection at the expiry of the time stated, the Registrar may remove the caution.

4)If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs

5).....

6).....

62.From the above provisions of the law as it was and as it is today, it is clear to my mind that the Registrar responsible for registration of titles by whatever name has the power to remove a caution or caveat lodged on the title on application of any person. Further, that it is in the discretion of the Registrar to issue Notice to the cautioner of such intention to remove a caution.

63.However, the moment the Registrar exercises the discretion to issue notice to the cautioner, specifying the intention and time frame within which the objection should be lodged, he/she must give the parties an opportunity to be heard before making any order or decision as he considers fit.

64.The section does not permit the Registrar to make a unilateral decision to remove the caution once he notifies the cautioner of the intention to remove the caution.

65.In the present case, the Registrar's letter/notice dated 7th December 2014 clearly relied on Section 73(2) of the new Land Registration Act and exercised the discretion to notify the caveator of the intention to remove the caveat following an application by an unnamed caveatee. And on the same day made an effective entry removing the caveat but nonetheless failed to sign that entry.

66.Clearly, on the face of it, this court has no difficulty in finding that the decision to remove the caveat by the Registrar even before effecting service of Notice to show cause as issued upon the applicant, and before giving the ex[parte applicant an opportunity of being heard was not only illegal and in violation of the above cited provisions of Section 73(4) of the Land Registration Act but that the decision was also made/taken with procedural impropriety.

67.Article 47 of the Constitution elevated the fair administrative action to a constitutional fundamental right to a fair administrative action. In addition, Article 50(1) of the Constitution also under the Bill of Rights guarantees every person the right to fair hearing by any judicial or quasi judicial authority or any independent tribunal or body.

68.Under Article 47(1) of the Constitution, every person has a 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.

69.Under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or, if appropriate, another independent and impartial tribunal or body.

70.Article 24 of the Constitution gives authority to the courts to uphold and enforce the Bill of Rights and may grant an order of Judicial Review in any proceedings brought under Article 22 of the Constitution.

71.In my humble view, the right to administrative action as stipulated in Article 47 of the Constitution and the right to a fair hearing under Article 50(1) of the Constitution are rights which are enforceable under Article 22 of the Constitution with the remedies provided for in Article 23

which include Judicial Review.

72. It is obvious from the entry of 3rd December 2014 and letter dated 3rd December 2014 that no notice to show cause why the caveat should not be removed was given, and that by the time that letter reached the applicant, the caveat had already been removed which rendered the 'notice' irrelevant and of no effect.

73. That the decision to remove the caveat before elapse of 45 days notice given to show cause was contrary to the provisions of Section 73 of the Land Registration Act and therefore illegal is in the affirmative and that act calls for an order of the court by way of Judicial Review as the decision was made ultra vires the provisions of Section 73 (4) of the Land Registration Act.

74. Further, that the decision to remove the caveat on 3rd December 2014 was made without according the applicant a hearing was not only illegal but also unconstitutional and in violation of the provisions of Article 47 of the Constitution that guarantees the applicant the right to fair administrative action.

75. The procedure provided for removal of the caveat is that notice must be given to the caveator and no decision was expected to be taken before lapse of the 45 days. In my view, the respondent in removing the caveat failed to take into account the ex parte applicant's interests registered in the title and the fact that the 45 days could not lapse on the same day that the notice was issued to the applicant.

76. Furthermore, the respondent failed to consider the fact that Section 73 of the Land Registration Act, 2012 does not require that only the court has the power to extend the caveat. The respondent therefore erred in law in relying on the provision of the repealed Registration of Titles Act that related to removal of the caveat when the new provisions under Section 73 of the Land Registration Act implementing the Constitutional provisions relating to registration of land under Chapter 5 of the Constitution on Land and Environment were in place.

77. In registering a caveat on the title, the respondent knew and ought to have known that although the land in question belonged to the 1st interested party, the applicant had registered an encumbrance which was an interest pursuant to statutory provisions as well as constitutional provisions regarding protection of public land, under Article 62 of the Constitution which stipulates that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

78. The applicant being a public body established under a statute, in placing a caveat on the title in question was acting in accordance with the statutory mandate in identifying and protecting or preserving the national monuments and heritage. The respondent by removing the caveat without according the ex parte applicant an opportunity to be heard on whether or not the caveat should be removed, in my view, acted irrationally and unreasonably. In *Republic Vs Comm of Cooperates Ex parte Kirinyaga Tea Growers* [1999] 1 EA 245 it was held that.....

“It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers power to exercise such power arbitrarily or in bad faith.”

79. In the sense that no reasonable or rational person acting or addressing itself to the facts and the law before it as explicitly stated in Section 73 of the Land Registration Act on the procedure for removal of a caveat would have made such a haste decision of removing a caveat even before the purported notice to remove the caveat had left the office of the respondent, such decision as was made in this case, in my view, fits the description in the *Pastoli V Kabale District Local Government Council* (supra) case where the court held that it defied logic and acceptable moral standards. It was indeed immoral for a whole Registrar of Titles to unilaterally remove the caveat and pretend to issue notice of 45 days to the ex parte applicant to show cause why such caution should not be

removed, within the said 45 days.

80. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [194....] 2 ALL ER 680 it was held that irrationality and unreasonableness is a ground for Judicial Review and that the same encompasses various factors such as bad faith, consideration of extraneous factors and disregard to public policy while making the decision. The court observed thus:

“ Bad faith dishonesty – those, of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have a great deal about the meaning of the word “unreasonable.”

81. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretion often use the word “unreasonable” in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting “Unreasonably.” Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

82. And in *R v Ministry of Planning & Another Ex parte Professor Mwangi HCC Miscellaneous Application No. 1769/2003*, the court quashed a decision of a statutory body for failure to comply with legislative purpose. It stated thus:

“ So where a body uses its powers in manifestly unreasonable manner, acted in bad faith, refused to take relevant factors into account in reaching its decision or based on irrelevant factors, the court would intervene on that ground that the body has in each case abused its powers. The reason why the court has to intervene is because there is a presumption that where Parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular way.”

83. In the instant case, the respondent not only acted unreasonably and irrationally, but illegally, fraudulently and arbitrarily. He/she abused the statutory powers conferred in the office under Section 73 of the Land Registration Act, 2012. He/she acted fraudulently and in an openly deceptive manner by lying to the whole world that he/she had issued a 45 days notice to the applicant to show cause why the caveat could not be removed when she/he knew that there was in fact no such notice as it lapsed the moment and day that it was issued hence there could have been no valid notice capable of being responded to.

84. Furthermore, when the applicant responded to the purported ‘notice’ giving reasons why the caveat should not be removed vide its advocat's letter dated 23rd January 2015 the respondent never bothered to call the applicant for a hearing as stipulated in Section 73(4) of the Land Registration Act and neither did they bother to respond to that letter, which silence denoted guilt and which in my view, amounted to abuse of power vested in that office by law.

85. Article 73 of the Constitutional commands that authority assigned to a state officer/public officer is a public trust to be exercised in a manner that:

- i. Is consistent with the purposes and objects of the Constitution;
- ii. Demonstrates respect for the people;
- iii. Brings honour to the nation and dignity to the office; and

iv.Promotes public confidence in the integrity of the office; and

(b) Vests in the state officer the responsibility to serve the people rather than the power to rule them.

86.Further, Article 73(2) sets out the guiding principles of leadership and integrity which include:

a)Objectivity and impartiality, indecision making, and

b)In ensuring that decision are not influenced by nepotism, favourism, other improper motives or corrupt practices.

c)Selfless service based solely on the public interest, demonstrated by-

i.Honestly in the execution of public duties and

ii.....

d)Accountability to the public for decisions and actions and

e)Discipline and commitment in service of the people.

87.As at 3rd December 2015, Kenya was in its 5th year in implementing the 2010 Constitution. It is disheartening to learn from facts of this case that the Registrar of Titles could exemplify such character of the Lords of impunity and dishonesty and impartiality in the execution of public duty which is contrary to the tenets of leadership and integrity and flying in the face of the National values and principles of governance espoused in Article 10 of the Constitution which include the rule of law(due process) good governance, integrity, transparency and accountability.

88.The deceptive, dishonest and impartial manner in which the decision to remove the caveat was done does not bring any honour to that office and neither does it promote public confidence in the integrity of the office.

89.I am equally satisfied that the Registrar of Titles acted with procedural impropriety when he/she failed to act fairly in the process of making the decision to remove the caveat in that he/she did not observe the rules of Natural justice or with procedural fairness towards the exparte applicant who was affected by the decision to remove the caveat. The Registrar failed to give notice and ensure that notice had been served upon the applicant; he failed to give the applicant an opportunity to respond to the notice; and failed to observe the procedural requirements under Section 73 of the Land Registration Act 2012 for removal of caveats.

90. Accordingly, I find that the respondent acted unfairly in considering only the application by the caveatee to remove the caveat and in failing to give consideration for the caveator to be heard on that application for removal of the caveat which in my view, demonstrates bias on the part of the respondent.

91.Accordingly, it follows that both the decision to remove the caveat and the removal of the caveat entered on LR No. 209/6439/Title No. 1R 201287/1 on 3rd December 2014 vide entry No. 6 presentation No. 362 which is not even signed were nullities. This is so because the maxim *ex nihilo fit applies* – out of nothing comes nothing,” and this court has a supervisory role to play over inferior tribunals and courts/bodies or persons and it would not abdicate its role. The court has power to strike out nullities as was held in *R Vs Attorney General & Golden Berg Commissions Exparte Honourable Mwalulu[2004] e KLR.* (citing with approval in *R Vs Kajiado Land Disputes Tribunal, Senior Resident Magistrate court Kajiado & 3 Others HCC 698/2001.*

92.In the end, I find that the Judicial Review application dated 24th April 2015 is merited and I

hereby proceed to allow it, and grant Judicial Review Order of Certiorari to remove into this court and quash the decision of the Registrar of Titles dated 3rd December 2015 to unilaterally remove the lawful caveat entered on 27th February 2008 by the National Museums of Kenya, the ex parte applicant herein in respect of property known as LR No. 209/6439 title No. IR 20287/1.

93.As both the ex parte applicant, respondent and 1st interested parties are public entities, I order that there shall be no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 5th day of October 2016.

R.E. ABURILI

JUDGE

In the presence of :

N/A for Applicant

Miss Githinji h/b for Mr Oduol for 1st interested party

Mr Munene for the Respondent

N/A for 2nd Interested Party

CA: Adline