



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL CAUSE NO 169 OF 2010

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE REGISTERED LAND ACT

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

LIVINGSTONE KUNINI NTUTU.....APPLICANT

AND

THE MINISTER FOR LANDS.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR- NAROK.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

COUNTY COUNCIL OF NAROK.....1ST INTERESTED PARTY

OLKIOMBO LIMITED.....2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. Pursuant to an *ex parte* Chamber Summons expressed to be under Order 53 Rule 1 (2) and (4) of the *Civil Procedure Rules, 2010* filed on 30th April 2010, the Applicant filed a Notice of Motion application under Order 53 Rule (3) (1) of the *Civil Procedure Rules, 2010* in which he sought for orders **THAT:-**

a. An Order of *Certiorari* to remove into the High Court and quash the decision of the 1st Respondent announced through a press statement dated 11th February 2010 directing that Title No CIS. Mara/ Talek/ 155 “be revoked and land be reverted back to the trusteeship of Narok County Council.”

b. An Order of *Certiorari* to remove into the High Court and quash the decision of the Government of Kenya conveyed through the 2nd Respondent and contained in Kenya Gazette Number 2934/2010.

c. An order of Prohibition prohibiting from cancelling the Applicant’s title deed, evicting, trespassing or otherwise interfering with the Applicant’s quiet occupation and enjoyment of this registered parcel of land.

d. An Order of *Mandamus* compelling the 2nd Respondent to restore in the Land’s Register and all other relevant documents held at Narok Land Registry the entry that the Applicant is the registered absolute proprietor of Title No CIS. Mara/ Talek/ 155.

e. THAT costs of this application be paid by the Respondents in any event.

2. The Applicant relied on several grounds to support his application which are summarised as follows:-

a. THAT the 1st and 2nd Respondents acted without jurisdiction when they cancelled the title deed issued under the provisions of the Registered Land Act.

b. THAT in cancelling or revoking the Applicant’s Title, they acted *ultra vires* and in excess of their jurisdiction.

c. THAT the 1st and 2nd Respondents contravened the Constitution of Kenya and the Registered Land Act in purporting to take away the proprietary interests of the Applicant.

d. THAT the 1st and 2nd Respondents denied the Applicant a right to a hearing thereby infringing on his right to natural justice.

e. THAT the 1st and 2nd Respondents acted unreasonably, irrationally, unprocedurally and in bad faith in arriving at the said decision to cancel and/or revoke the Applicant’s Title, which decisions were tainted with illegality and impropriety.

f. THAT unless the stay of the decisions of the 1st and 2nd Respondents was granted, the Applicant was at a real risk of being deprived of his property.

THE APPLICANT’S CASE

3. On 27th April 2010, the Applicant swore an Affidavit and lodged a Statement and Verifying Affidavit in support of his application in which he set out the grounds on the face of his application *in extenso*. He added that he was the registered proprietor of the parcel of land known as Title No **CIS. Mara/ Talek/ 155** (hereinafter referred to as “the suit property”) and was issued with a Title Deed on 4th February 2000.

4. It was his contention that there had been lengthy litigation over the suit property which resulted in a decree being issued in his favour in **HCCC No 1565 of 2000**. He also stated that the decree was upheld in judicial review proceedings in **HC Misc Civil Cause No 1271 of 2002** that had been instituted by a company known as **Olkiombo Limited**, the 2nd Interested Party herein, a fact the 1st and 2nd Respondents did not take into account when they cancelled and/or revoked the said Title.

5. The Applicant contended that he became aware of the revocation of his Title through the media. He

took the view that the issuing of a press statement by the 1st Respondent was unreasonable and made in bad faith as it was aware of the long protracted litigation over the suit property.

6. In his Further Supplementary Affidavit sworn and filed on 8th January 2013, he questioned the authenticity of the letter by the Chief Lands Registrar as it had no Coat of Arms and that neither signed nor certified as a true copy. He was categorical that the physical count of the parcels of land showed that there were 155 parcels of land and that the 1st Interested Party did not have authority to lease land that did not belong to it. He said that he was vindicated of forgery charges in **Criminal Case No 2157 of 2013** relating to the said suit property as he was not found guilty.

7. In his skeleton written submissions dated 29th November 2010 and filed on 3rd December 2010, the Applicant relied on several cases where the common thread was that an order of *certiorari* can be made to quash a decision where such a decision had been made without or in excess of jurisdiction. He also argued that the **Registered Land Act** Cap 300 Laws of Kenya (now repealed) (hereinafter referred to as the said Act) had a self-contained code providing for both procedural and substantive law and that the Respondents did not have jurisdiction to revoke and/or cancel his title.

8. He averred that Section 27 of the said Act provided that the registration of a person as proprietor of land vested in that person absolute ownership of that land together with all rights and privileges appurtenant thereto and that Section 28 of the said Act provided that the rights of a proprietor acquired on first registration, subsequent registration or by an order of the court could not be defeated except as provided under the said Act.

9. It was his further contention that Article 40 of the **Constitution of Kenya, 2010** provided for the protection of individuals' properties and if the Respondents desired to acquire the suit property, they ought to have followed the laid down procedures. In this regard, he relied on **Misc Appl No 1441 of 2002 Brooke Bond Kenya Limited vs The Chief Lands Registrar & Others** where **Ojwang, J** (as he then was) held:-

“...I hold the 1st Applicant's rights to enjoy and dispose its property to be a “fundamental right” both under S. 75 of the Constitution, and at common law; and Mr Githii was in serious error when he purported to take away that right...”

10. On the issue of violation of rules of natural justice, he referred the court to several cases where the holdings were that before a public body or official makes a decision or takes action adversely affecting another, it ought to give that person a chance to be heard and not condemn him unheard.

11. In response to the Respondents' case, he submitted that none of them had demonstrated that they had legal authority or power to cancel title deeds. He asserted that it was not for this court to determine whether the decision to cancel the title was merited or not or whether or not the suit property was properly acquired but rather its mandate was limited to reviewing the decision making process.

THE RESPONDENTS' CASE

12. The Respondents filed a Replying Affidavit sworn by **Cyrus Ngatia**. It was the Respondents' case that there was no adjudication process in respect of the suit property as set out in the **Land Adjudication Act** before its registration under the said Act thus rendering the title an invalid document. They contended that the suit property was outside Talek Cessation Area and formed part of the Masai Mara.

13. They referred the court to the case of **Republic vs Registrar of Titles & Another Ex parte David Gachina Muriithi [2014] eKLR** where **Odunga J** declined to issue the orders sought as the issue of the validity of the applicant's title would remain unresolved. They also relied on other cases where the holdings were that no court ought to enforce illegal contracts or where the title did not exist at all as this could have the effect of confirming the validity of an applicant's title when the same was contested or an issue in dispute.

14. It was the Respondents' case that the order of *certiorari* was a discretionary remedy which the court could refuse to grant even where requisite grounds existed. They relied on the case of **Misc Appl No 1535 of 2005 Peter Bogonko vs NEMA** (unreported) in this regard and urged the court to dismiss the Applicant's application.

THE 1ST INTERESTED PARTY'S CASE

15. On 8th September 2010, the 1st Interested Party filed a Replying Affidavit through **Gabriel Kenaya**, its Clerk, Chief Executive and Administrative Officer. The 1st Interested Party also swore another Replying and a Further Replying Affidavit through **Pius Mwinzi Mutemi**, also its Clerk and Chief Administrator on 23rd February 2013. The same was filed on 25th February 2013.

16. Its case was that the suit property, was obtained fraudulently as it was never adjudicated upon under the ***Land Adjudication Act*** as land that was set aside for adjudication only consisted of 154 parcels of land. It was therefore its contention that the 1st and 2nd Respondents acted correctly in the public interest when they revoked or cancelled the Applicant's title.

17. In its submissions dated 6th March 2013 and filed on 7th March 2013, the 1st Interested Party contended that the suit property had by virtue of Section 18 (3) of the ***Wildlife Act*** become a national reserve which was subject to the provisions of Sections 7 and 8 of that Act. It argued that the suit property was public utility and could not pass to private ownership.

18. It further contended that the requirements of Section 23(2)(c) of the ***Land Adjudication Act Cap 295*** (Laws of Kenya) (now repealed) were not adhered to and the Adjudication Record for the area numbered 155 dated 25th June 1997 was not an adjudication record pursuant to Section 23 of the said Act. It was therefore its submission that the purported registration under the ***Registered Land Act Cap 300*** (Laws of Kenya) (now repealed) was null and void, was of no legal effect and consequently, no rights or privileges could be conferred in relation to the area numbered 155.

19. Being part of Masai Mara, it argued, the suit property was community land as described under Article 63(2)(d) of the ***Constitution of Kenya*** and it therefore held the said land as trust land on behalf of the residents of County Government of Narok.

20. It averred that the court could not issue an order of Prohibition as what was to be prevented from being done had already been done. It relied on the case of **Joseph Mosasi & 2 Others vs Kajiado Central Land Dispute Tribunal & 2 Others [2013] eKLR** where the court referred to the observation made in **Civil Application Nai No 73 of 2001 Republic vs University of Nairobi [2002] 2 EA 572** that a judicial review order of prohibition was pre-emptive in nature and urged this court not to grant the same. It therefore prayed that the Applicant's application be dismissed as it was only meant to divert the court from dealing with the substantive issues herein.

THE 2ND INTERESTED PARTY'S CASE

21. The 2nd Interested Party swore a Replying Affidavit through its shareholder, **Kevin Alan Tucker** on 12th July 2011 in which he deposed that the decree in HCCC No 1565 of 2000 exhibited by the Applicant was not genuine, having been obtained fraudulently.

22. In his view, the part of the decision by the Minister for Lands in which he had stated that the suit property was irregularly carved out of the Masai Mara Game Reserve was correct as the suit property was not adjudicated upon. It was his averment that the Applicant could not obtain any title since the 2nd Interested Party's lease was subsisting for 33 years with effect from 1st July 1984 to 2017.

23. **Moshe Ole Keiwua**, a director of the 2nd Interested Party also swore a Replying Affidavit on 28th January 2013. It was filed in court on the same date. The said affidavit primarily dwelt on the procedural

modalities of how the Applicant purportedly acquired the suit property, which he contended was outside the provisions of the law, and also reiterated the issues that had been raised by **Kevin Alan Tucker**.

24. In its written submissions dated 24th January 2013 and filed on 29th January 2013, the 2nd Interested Party reiterated the 1st Interested Party's arguments relating to the **Wildlife Act** and the fact that the suit property was outside the Talek Cessation area.

25. It distinguished the holding in **Benjoh Amalgamated Limited vs Kenya Commercial Bank Limited [2006] eKLR** relied on by the Applicant on the ground that this matter could not be said to have been *res judicata*. It pointed out that it had challenged the consent recorded by the Applicant and the 3rd Respondent herein in HCCC No 1565 of 2000 as it was excluded when the same was entered into.

26. It challenged the Applicant's submission that he was vindicated in the criminal case and averred that the Applicant was acquitted, not on merit, but rather due to the failure by the Prosecutor to prosecute the case.

27. It was also its position that the suit property was public land held for the benefit of the public and could not be converted to other uses as this would be detrimental to its own purpose. It referred the court to the case of **Misc Appl Daudi M Mmboroki vs The Chief Conservation of Forests and Minister of Environment and Natural Resources** (unreported) where **Nyamu, J** (as he then was) held that public interest would, in an appropriate case defeat, the defence of an indefeasible title because it was in the public interest that such resources be held in trust. The 2nd Respondent also relied on other cases to buttress its case regarding the challenging of a title on account of public interest as it would be unjustifiable to make certain resources a subject of private property. It concluded by submitting that the Government could only acquire private property for purposes provided in the **Constitution**.

OTHER RELATED CASES

28. The Court wishes to note that the dispute over **L. R. No. CIS Mara/Talek/155** has been the subject of protracted litigation in the corridors of justice. This dispute first entered the corridors of justice vide **Nairobi High Court Civil Case No. 1565 of 2000, Livingstone Kunini Ntutu vs. County Council of Narok & 2 others**. In that case, the Plaintiff who is the Applicant herein sought a declaration that he was the absolute legal proprietor of the parcel of land in question. The Plaintiff and the 1st Defendant who is the 1st Interested Party in these proceedings compromised the matter in favour of the Applicant herein.

29. However, **Olkiombo Limited** the 2nd Defendant in the matter and the 2nd Interested Party herein, was aggrieved by the said consent and moved to Court vide **Nairobi High Court Misc. Application No. 1271 of 2002** seeking among other orders, an order of certiorari to quash the decision of the County Council of Narok made on 10th May, 2002 as recorded in Minute No. 25/2002 authorizing the settlement of **HCCC No. 1565 of 2000**. The judicial review application was dismissed by **Khamoni, J** in a ruling delivered on 8th May, 2009.

30. The third case is **Criminal Case No. 2157 of 2003 R V Livingstone Kunini Ntutu** in which the applicant was charged with forgery and other related offences concerning his acquisition of the documents of title for **L.R. No. CIS/Mara/Talek/155**. The Applicant was acquitted of all charges.

31. At the time of writing this judgment the 1st Interested Party herein had an application pending in **HCCC No. 1565 of 2000** in which it was seeking a review of the consent judgment entered between it and the Applicant herein.

LEGAL ANALYSIS

32. The advocates for all the parties were industrious and came up with several authorities in support of their positions. We thank them for their industry and the hard work. It is however not possible to cite

each and every decision cited by the counsel.

33. We have already reproduced the arguments of the parties in respect of the grounds in support of the application.

34. Before embarking on the detailed analysis of the issues raised herein it is important to reiterate the circumstances under which the three judicial review reliefs are grounded. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** in which the said Court held *inter alia* as follows:-

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

35. The first ground upon which the Applicant faults the decision of the respondents is that the same was made without jurisdiction. The Applicant submitted that as the title was issued under the **Registered Land Act**, any cancellation of the title ought to have been done in accordance with the Act. The Applicant contended that the respondents did not have jurisdiction to revoke the said title under the Act or at all and the decision was therefore a nullity.

36. The Applicant also contended that the decision violated his constitutional rights by purporting to take away his proprietary interests. He submitted that the only way of acquiring private property was through compulsory acquisition and there was a legal procedure yet that procedure was not followed by the Respondents.

37. The Applicant averred that Section 27 of the Act provided that the registration of a person as the proprietor of land would vest in that person the absolute ownership of that land together with all rights and privileges appurtenant thereto. Further, that Section 28 of the same Act provided 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 whatsoever, save for leases and other restrictions shown in the register.”

38. The applicant consequently asserted that the Minister and the District Land Registrar were not clothed with power to cancel or revoke a title deed.

39. It was the Applicant’s case that he was not given a hearing before the decision to revoke his title was made. He contended that the decision was therefore made in clear contravention of the rules of natural justice.

40. Finally, the Applicant submitted that the decision was unreasonable, irrational and made in bad faith. He submitted that the decision was arrived at without due consideration of the fact that there were pending suits in Court in relation to the property.

41. The Respondents and the Interested Parties dwelt at length on the circumstances that led to the issuance of the cancelled title to the Applicant and urged this Court to consider that the decision to cancel the Applicant’s title was made in good faith and done in the public interest.

42. In response thereto, the Applicant urged the Court to find that public interest could not be allowed to trample the Applicant’s constitutional and legal rights. In support of this argument the decision of the Court of Appeal in **Christopher Ndarathi Murungaru v Kenya Anti-Corruption commission & another [2006] eKLR** was cited. In that case the court rendered itself thus:-

“Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the courts because of applications like the one we are dealing with. Our short answer to Professor Muigai is this. We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court’s decisions. Occasionally, those who have been mighty and powerful are the ones who would run to seek the protection of the courts when circumstances have

changed. The courts must continue to give justice to all and sundry irrespective of their status or former status.”

43. The Respondents referred us to decisions where the courts have held that where the validity of title was in dispute judicial review is not the most efficacious remedy. One such decision was that of **Odunga, J**, a member of this panel, in **Republic v Registrar of Titles & Another ex-parte David Gachina Muriithi [2014] eKLR** where he stated that:-

“.....even if I were to grant the orders sought herein, the issue of validity of the applicant’s title would remain unresolved and since there is already in existence civil proceedings revolving around the suit property substantially between the parties herein, it is my view that the issue ought to be determined before that forum in which *viva voce* evidence will be taken so that appropriate declaratory orders can be made and the matter brought to a finality. To grant the orders sought without determining the ownership of the suit land would in my view be an exercise in futility.”

44. At paragraph 45 of the same judgement the learned Judge explained the reason why judicial review was not appropriate in that case as follows:-

“Whether the allocation was illegal or not is, in my view, a matter beyond the scope of this determination. However, it is not an issue which can be wished away as inconsequential. There are in my view issues which ought to be properly investigated and evidence adduced. They are not matters which can simply be determined based on the grant possessed by the applicant which grant according to the Constitution is simply *prima facie* evidence of title which title can be challenged if found to have been unlawfully acquired.”

45. The species of jurisprudence propagated by **Odunga, J** in the above cited case is not alien to us. We would align ourselves with this school of thought which holds that judicial review is not the most efficacious remedy where the process under which a title was obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy.

46. Looking at the material placed before this Court, we are of the view, that judicial review is not the most efficacious remedy where what is in contention is the ownership of the suit property. On the other hand, there is clear evidence that the decision to revoke the Applicant’s title was not backed by the law. The same was illegal and indefensible.

47. We note that the Applicant had voluntarily submitted himself to the Court on the issue of the legality of his title by filing a civil case. At the time his title was cancelled there was a consent order validating his title although the 1st Interested Party had challenged that consent. The Respondents knew or ought to have known of the existence of that case. They nevertheless went ahead and revoked his title. In other words, at the time of the cancellation of the Applicant’s title there was no dispute as to the ownership thereof and therein lies the distinction between this case and **Republic v Registrar of Titles & Another ex-parte David Gachina Muriithi** (supra).

48. Whereas we are aware that the 2nd Interested Party had filed an application seeking to set aside that order, the respondents were alive to this fact when they decided to revoke the Applicant’s title. That is the height of impunity. The mighty and the powerless in this country seek refuge in the courts. The **Constitution** has given the courts the mandate to settle disputes. It is an abuse of power for a party to bypass the courts and use its might to determine its case against a powerless opposite party. The state is all powerful. Everybody shakes in its wake. The courts will however not lack one last arrow in its quiver for slaying the state’s impunity. That is what is required in this case.

49. Therefore whilst we have noted that the 2nd Interested Party pointed out that it had challenged the said consent order on the ground that it was not present at the time the same was recorded, the same remains firmly in place until the same is vacated and/or set aside having been issued by a court of competent jurisdiction.

50. Whereas the legal process is sometimes slow and time consuming, that does not give an excuse to anybody and particularly those given the responsibility of leadership to take the law into their hands. In such circumstances judicial review must come to the aid of the aggrieved. The **Land Acquisition Act** provided a detailed code of how the Government could compulsorily acquire private land for public benefit and the mode of compensation of land owners once the acquisition was done.

51. The suit property herein was not compulsorily acquired by the Government of Kenya but rather the Applicant's title was revoked. In the Press Statement attached to the Applicant's application, the Minister for Lands directed that the title be revoked and the same be re-issued to the Permanent Secretary as trustee for the Ministry of Housing.

52. Therefore, in answering the issues raised by the Applicant, this court has found it necessary to look at the provisions of the **Registered Land Act** as the revocation of the Applicant's title squarely lay in this Act. Section 143 (1) of the said Act stated that a court could order rectification by directing that any registration be cancelled or amended where it was satisfied that any registration (other than a first registration) had been obtained, made or omitted by fraud or mistake. This provision is, however, not pertinent in the proceedings herein as this court has not been called upon to cancel or amend the title on account of the title being obtained by fraud or mistake. In this regard, the Interested Parties' submissions on the issue of how the Applicant obtained the title, though noted by this court, will be disregarded as they do not address the legality or otherwise of the process of the revocation through the Press Statement of 11th February 2010 or Gazette Notice Number 2934/2010.

53. It is evident from the provisions of the Act that granting a hearing to a person whose interest will be affected by cancellation or amendment of the title is very critical. Section 142 (c) of the said repealed Act provided that a Registrar could rectify the register where upon resurvey, a dimension or area in the register was found to have been incorrect, but in such case, he was required first give notice to all persons appearing in the register to be interested or affected of his intention to rectify.

54. Under Section 154 (1) (c) of the said Act, a party was deemed to have been given an opportunity of being heard if he had been notified of the thing to be done and appointing a day and time to be heard.

55. It is clear from the provisions of the said Act that being given an opportunity to be heard is a fundamental issue. The Minister for Lands was therefore required to ensure that rules of natural justice were strictly adhered to while implementing the Government's policies to recover land it purported was irregularly acquired.

56. The importance of giving the Applicant an opportunity to be heard was important for the reasons shown hereinbelow.

57. Firstly, the Applicant's title was shown to have been issued on 4th February 2000 while that of the County Council of Narok was issued for a term of 99 years from 1st February 2008. There is nothing placed before this court to suggest that the Applicant's title was subsumed by the subsequent title or that it ceased to exist.

58. Secondly, it is not clear from the documentation presented before this court to whether or not by the time the Applicant was issued with the title herein in 2000, the suit property was within the area envisioned in Gazette Notice Number 145 dated 20th January 1984. In the absence of any evidence to the contrary, the only inference that this court can draw is that the suit property was not within the contemplated area. However, this court wishes to caution that it remains merely as an inference as there is no evidence before it showing how the Applicant acquired the suit property and which this court had pointed out is not within its purview of determination in the proceedings herein. The process of revocation of the said title is to be dealt with in another forum other than this.

59. Thirdly, the sanctity of the Applicant's title was further strengthened by the fact that in the proceedings in **HCCC No 1565 of 2000**, the decree issued on 24th November 2005 shows that the 3rd

Respondent herein discontinued its Counter-Claim dated and filed on 30th October 2001.

60. We are however well aware of the parameters of judicial review. The same were reaffirmed by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

61. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***

62. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and held:

“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 or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a 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 is 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 have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a 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-observance 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.”

63. We have not at any moment pretended to be capable of determining the legality of the Applicant’s title. What we have only done is to restore the Applicant to the position he was in prior to the cancellation of his title so that the Environment and Land Court can have the opportunity of making a pronouncement on the legality or otherwise of his title since the concern of this court is to establish whether or not the process of revocation and cancellation of the Applicant’s title adhered to the laid down procedures of the law. The question before this court is not whether or not the suit property was regularly obtained and the parties’ submissions as regards the ***Land Adjudication Act*** and ***Wildlife (Conservation and Management) Act***, though noted, will not form the basis of the decision herein.

64. However, bearing in mind the historical background in this matter, this court is of the view that the Minister for Lands denied the Applicant a right to a hearing when he revoked his title in the Gazette Notice Number 2934/2010 thereby infringing on his rights of natural justice. On this ground, the court is satisfied that the Applicant has demonstrated a good case why this court should quash the said Gazette Notice. To our understanding section 161 of the **Registered Land Act** only saved the rights conferred by any written law. We are not aware of any written law which empowered the Minister to direct the Commissioner of Lands to revoke titles. In our view by so directing the Minister was acting *ultra vires* his powers.

65. Under section 162 of the said Act, the Government is bound by the Act and this in our view includes the sanctity of title unless it is found under Article 40(6) of the **Constitution** that the title was unlawfully acquired which finding in our view can only be made by a Court of law. As was held in **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR**, by **Majanja, J:**

“.....first, the Registrar of Titles has no authority under the *Registration of Titles Act* to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation.”

66. While we appreciate that under Article 68(c)(vi) of the **Constitution** Parliament is empowered to enact legislation to enable review of all grants or dispositions of public land to establish their propriety or legality, such law must comply with the **Constitution** which under Article 40 therein protects a person's right to property unless it has been found to have been unlawfully acquired.

67. We, however, note that the impugned Gazette Notice is not exhibited in the Applicant's application as is mandated under Order 53 rule 7(1) of the Civil Procedure Rules. That omission is not however necessarily fatal though rule 7(1) aforesaid requires that an account be given to the satisfaction of the Court for failure to comply therewith.

68. This Court is well aware of the decision in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, where it was held that the decision to alienate land or to allocate is not formal because the Commissioner of Lands may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision. The question of attacking it under Order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

69. Having considered the application herein, we are of the view that the 1st Respondent's decision was unlawful in the sense that it was made both in breach of the rules of natural justice and *ultra vires* his powers.

70. Accordingly, the decision conveyed through the 2nd Respondent and contained in Kenya Gazette Notice Number 2934/2010 revoking the suit property ought to be quashed and the parties' restored to their position before the impugned decision was made.

DISPOSITION

71. For the foregoing reasons, the upshot of our decision is that the Applicant's Notice of Motion application dated and filed on 3rd May 2010 is allowed save for the prayer that was seeking quashing the Press Statement dated 11th February 201 for the reason that the said Press Statement was not a decision that was capable of being quashed.

72. We must, however, make it clear that in this decision, we have not dealt with the question of whether

or not the Applicant's title to the suit parcel of land was lawful. That is not a question for our determination in these proceedings as that is an issue which ought to be dealt with by ordinary civil litigation rather than in judicial review proceedings.

73. We accordingly make the following orders:

a. We grant an Order of *Certiorari* removing into this Court for the purposes of being quashed the decision of the Government of Kenya conveyed through the 2nd Respondent and contained in Kenya Gazette Number 2934/2010 which decision is hereby quashed.

b. We grant an order of Prohibition prohibiting from cancelling the Applicant's title deed, evicting, trespassing or otherwise interfering with the Applicant's quiet occupation and enjoyment of the suit parcel of land in contravention of the relevant legal provisions.

c. We grant an Order of *Mandamus* compelling the 2nd Respondent to restore in the Land's Register and all other relevant documents held at Narok Land Registry the entry that the Applicant is the registered absolute proprietor of Title No CIS. Mara/ Talek/ 155.

d. THAT costs of this application be paid by the Respondents.

DATED at NAIROBI this 12th day of JUNE 2014

W. KORIR

G. V. ODUNGA

J. KAMAU

JUDGE

JUDGE

JUDGE

Delivered in the presence of

..... for the Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent

.....for the 1st Interested Party

.....for the 2nd Interested Party