



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 30 of 2011**

**SIMON**  
**AND PROHIBITION**  
**IN THE MATTER OF: AN APPLICATION BY**  
**KIMONDO**  
**MUBEA FOR ORDERS OF CERTIORARI, MANDAMUS**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9**  
**OF THE LAW REFORM ACT, CAP. 26 LAWS OF KENYA AND ORDER 53 CIVIL**  
**PROCEDURE RULES AND ARTICLES 40, 47, 48, 50 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: GAZETTE NOTICE NO. 15580 DATED 26.11.2010**

**BY THE REGISTRAR OF TITLES, NAIROBI REVOKING THE APPLICANT’S TITLE TO**  
**L.R. NO. 209/13539/20**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA AND REGISTRATION OF TITLES**  
**ACT, CAP. 281 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**COMMISSIONER OF LANDS.....1<sup>ST</sup> RESPONDENT**

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

**EX PARTE: SIMON KIMONDO MUBEA**

**JUDGEMENT**

By his Motion on Notice dated 31<sup>st</sup> March 2011, the *ex parte* applicant, **Simon Kimondo Mubea**, herein seeks the following orders:

- 1. An order of Certiorari to quash the decision of the Registrar of Titles, Nairobi, contained in the Kenya Gazette No. 15580 dated 26.11.2010 revoking the Applicant’s title to L.R. No. 209/13539/20**
- 2. An order of mandamus compelling the registrar of Titles to issue a fresh Gazette Notice**

revoking Gazette Notice No. 15580 of 26.11.2010 with regard to L.R. No. 209/13539/20.

- 3. An order of prohibition prohibiting the Registrar of Titles, Nairobi, from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way of manager or at all, of any matter or material which may be construed as being inconsistent with the legality of the registered proprietorship of the Applicant over L.R. No. 209/13539/20.**
- 4. Costs of this Application be provided for.**
- 5. Any other order relief as this Honourable court may deem fit and expedient to grant.**

The Motion is based on the following grounds:

- i) The 2<sup>nd</sup> Respondent revoked title to the Applicant's property being L.R. No. 209/13539/20 vide Gazette Notice No. 15580 of 26.11.2011**
- ii) The 2<sup>nd</sup> Respondent acted in total contravention of the Applicant's right to own property.**
- iii) The 2<sup>nd</sup> Respondent acted in total disregard of Section 23 (1) of the Registration of Titles Act, Cap. 281 Laws of Kenya.**
- iv) The Respondents acted *ultra vires* the Constitution.**
- v) The decision to revoke the said title is in breach of the Rules of Natural Justice.**
- vi) That the Respondents have no power whatsoever in law or otherwise of revoking any title to any and under the registration of titles Act, Cap. 281 Laws of Kenya; and it is only the High Court of Kenya that has the jurisdiction to make inquiries into any title to land.**
- vii) The Respondents decision aforesaid will occasion the Applicant grave injustice and irreparable loss.**
- viii) No other remedy lies in law to prevent the Respondents from acting illegally and beyond their powers and thus adversely affecting the Applicant's Constitutional rights.**
- ix) That the Respondents will not be prejudiced in any way if the orders prayed for are granted.**
- x) That it is in the interest of justice that the orders prayed for be granted.**

The said Motion is supported by an affidavit sworn by the ex parte applicant on 18<sup>th</sup> March 2011. According to the applicant, he is aggrieved by the 2<sup>nd</sup> Respondent's decision to revoke the applicant's LR No. 209/13539/20 vide Gazette Notice No. 15580 of 26<sup>th</sup> November 2010 an action which the applicant contends was in total contravention of his right to property and in total disregard of the law. The ex parte applicant is hence apprehensive that the respondents will proceed to implement the 1<sup>st</sup> respondent's decision and physically take possession of the suit premises yet the applicant is the bona fide owner of the suit property comprised in a lease registered under the provisions of the Registration of Titles Act, Cap 281 Las of Kenya (the Act) at the Land Titles Registry in Nairobi as Number IR 80461/1.

It is the deponent's contention that by a letter dated 24<sup>th</sup> August 1992, he was allotted by the City Council the premises formerly known as House No. 93 (53/3) off Suna Road, Nairobi for a consideration of Kshs 1,110,000.00 which he duly accepted. Upon allotment of the said house comprised in Woodley Estate, the Council surveyed and did subdivision following which a Deed Plan Number 216455 in respect thereto was issued by the Director of Surveys on 22<sup>nd</sup> January, 1998 and the house was allocated Land Ref.

Number 209/13539/20 after which the applicant paid the said consideration and an agreement was executed between him and the Council on 10<sup>th</sup> March 1998. The applicant subsequently paid the legal fees and disbursements towards the processing of the title and a lease dated 16<sup>th</sup> April 1999 was executed in his favour in respect of the suit premises which was registered at the Land Titles Registry in Nairobi as No. IR 80461/1 on 25<sup>th</sup> May 1999. The applicant contends that he thereby acquired an indefeasible title over the suit premises and hence the respondents cannot impeach the same since he acquired the suit premise legally and for valuable consideration and without notice of any irregularity on the part of the council. His title, according to him, is hence protected under the provisions of Section 23(1) of the Registration of Titles Act and cannot be challenged save on grounds of fraud and or misrepresentation as provided therein.

By purporting to revoke the said title, it is contended, the Respondents acted illegally and unlawfully since no fraud or misrepresentation was established. In the applicant's view, the only remedy available in law to any person alleging fraud, error or misrepresentation is to bring an action for damages and not revocation of the title as the Respondents purported to do. In his view the Respondents acted *ultra vires* the provisions of the Constitution and the Act in revoking his title without asking him to show cause why the same should not be revoked hence the said actions were unreasonable and in breach of the principles of natural justice. According to the Applicant, the Respondents relied on irrelevant considerations and in breach of his constitutional right to own land anywhere in Kenya and hence it is in the interests of justice that the Court intervenes so as to prevent perversion of justice by the Respondents.

In opposition to the application the Respondents on 6<sup>th</sup> September 2012, filed the following grounds of opposition:

1. **That the application is inept, incompetent and a gross abuse of the Court process.**
2. **That the prerogative orders are misplaced and not efficacious as the dispute before the court is in respect of ownership and/or title to land which dispute cannot be addressed by way of judicial review.**
3. **That the applicant has no locus standi to bring these proceedings.**
4. **That the applicant has not made out a case for judicial review proceedings as the threshold for the orders sought has not been met.**
5. **That this application is brought malafides.**
6. **That the Application lacks merit, is frivolous and vexatious, and only amounts to an abuse of the court process.**

The application was prosecuted by way of written submissions which I have considered.

In my view the first issue for determination is the scope of judicial review application. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

**“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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the**

**decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

It follows therefore that where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determine the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with a view to determining the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

The respondents contend that since the dispute herein revolves around the issue of ownership of the suit land, the Court ought not to grant the orders sought. However, the respondents did not file any affidavit to dispute the factual allegations made by the ex parte applicant. It follows that the issues of fact raised in the verifying affidavit are largely uncontroverted and in the absence of any affidavit to the contrary the Court would have no basis for finding that the said factual averments are disputed. This, however, is not to say that the Court, based on the averments made by the ex parte applicant would be entitled to determine whether the proprietorship of the disputed parcel of land by the ex parte applicant cannot be challenged. The only issue that the Court would be entitled to determine is whether based on the uncontroverted facts before the Court the decision made by the Respondent should be allowed to stand.

The determination of the court will largely depend on the interpretation of the effect, tenure, intent and meaning of the letter dated 13<sup>th</sup> April 2010 from the Respondent to the Applicant. Section 23(1) of the Repealed Registration of Titles Act provide as follows:

***The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.***

Before dealing with the issue it is important to recap the historical underpinning of section 23 of the Registration of Titles Act. It is trite law that the Registration of Titles Act is based on the Torrens system of registration and its prime principle is the sanctity of the register. See **Popatlal vs. Visandjee [1960] EA 361, 365; [1959] EA 372, 376 (PC). Impeachment of Title Page 241; Souza Figueredo vs. Moorings Hotel [1960] EA 926; Cross vs. Great Insurance Company Limited of India [1966] EA 94.** The title of a person appearing on the register as proprietor is, as against third parties, conclusive of that fact and a charge created by such a proprietor is valid notwithstanding a defect in title. Indeed, were it otherwise the principle object of the Registration of Titles Act, which is founded on the Torrens system of

land registration, would be defeated. See Govindji Popatlal vs. Nathoo Visandji [1962] EA 372 at 376 and Dinshaw Byramjee & Sons Ltd vs. The Attorney General of Kenya [1966] EA 198.

Section 60 of the Registration of Titles Act states as follows:

***(1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.***

***(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.***

The foregoing provision sets out the steps the Registrar is to take if he deems that there is an error or mistake in the Grant or Title or where the Grant or Title for reasons disclosed therein ought not to have been issued. He is obligated to summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected. The summons ought to be very clear that the Registrar requires that the Grant, certificate or instrument be delivered for the purpose of being corrected. Therefore at that stage the issue of revocation of the title does not arise. In default of honouring the summons the Registrar then moves to the next stage which is to apply to the Court for the issuance of summons to issue to the person why the same cannot be delivered for correction. It is only in default of honouring the Court summons that the warrants are issued for the persons to be apprehended for examination.

Section 61 of the Act then provides as follows:

***Upon the appearance before the court of any person summoned or brought by virtue of a warrant the court may examine that person on oath or affirmation, and may order him to deliver up the grant, certificate of title or other instrument, and, upon refusal or neglect to deliver it up pursuant to the order, may commit him to prison for any period not exceeding six months, unless the grant, certificate of title, or instrument is sooner delivered up; and in that case, or where the person has absconded so that a summons cannot be served upon him as hereinbefore directed, the court may direct the registrar to cancel or correct any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute and issue such certificate of title or other instrument, or make such entry, as the circumstances of the case may require.***

These strict provisions clearly recognise that before a person is deprived of his title to property the due process which includes an opportunity to be heard must be followed. There is no power, however, conferred upon the Registrar or the Government before the due process is adhered to for the revocation of a person's title.

Article 40(3) of the Constitution provides:

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

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

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

***(i) requires prompt payment in full, of just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

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

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

From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution. To do so Article 24(1) provides:

***A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***

***(a) the nature of the right or fundamental freedom;***

***(b) the importance of the purpose of the limitation;***

***(c) the nature and extent of the limitation;***

***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

To argue that public interest must always override private interest would in my view render the said Constitutional provisions useless. The Court in determining disputes before it must balance the interests of the public vis-à-vis private interests. This does not mean that one interest must override the other but that consideration must be given to both. Where there is a procedure set out by the law to be followed before a person's rights are limited, to argue that the interests of the public override the need to adhere to the procedure would in my view be unreasonable and unjustifiable in any democratic society.

In fact Article 40(2) of the Constitution emphasises this fact when it provides:

***(2) Parliament shall not enact a law that permits the State or any person—***

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***

***(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***

In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **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 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.”**

In Dr. N K Arap Ngok vs. Justice Moiwo Ole Keiwua & 5 Others Nairobi Civil Application No. 60 of 1997 the Court of Appeal held:

**“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on the ground of fraud or misrepresentation to which the owner is proved to be a party. Such is sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.**

Accordingly, the title of a registered proprietor may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and this can only be done after the due process is adhered to. It must also be remembered that under the provisions of Article 40(6) of the Constitution, the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. In arriving at that finding the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard.

In this case, in the absence of an affidavit sworn by the respondents, there is no legal justification given and the Court is unable to find any that empowered the respondents to take the action they took. Their action was clearly *ultra vires* their powers and in my view the Respondents' actions were clearly tainted with irrationality, illegality and procedural impropriety. The said decision was clearly *ultra vires* the powers conferred by section 60 of the Registration of Titles Act. The failure to comply with the clear provisions of section 60 with respect to adherence to the rules of natural justice clearly established the procedural impropriety of the decision making body. As was held in Republic vs. Vice Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] eKLR:

**“The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles.”**

Similarly, in Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 it was held:

**“A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary...The order of *mandamus* is of a most extensive remedial nature, and is, in form, of**

justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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 and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”

Having considered all the foregoing I find merit in the Notice of Motion dated 31<sup>st</sup> March 2011. Accordingly the same is allowed with the result that:

1. An order of Certiorari is hereby issued to bring into the High Court the decision of the Registrar of Titles, Nairobi, contained in the Kenya Gazette No. 15580 dated 26.11.2010 revoking the Applicant’s title to L.R. No. 209/13539/20 and is hereby quashed.
2. An order of mandamus is hereby issued compelling the Registrar of Titles to issue a fresh Gazette Notice revoking Gazette Notice No. 15580 of 26.11.2010 with regard to L.R. No. 209/13539/20.
3. An order of prohibition is hereby issued restraining the Registrar of Titles, Nairobi, from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way of manager or at all, of any matter or material which may be construed as being inconsistent with the legality of the registered proprietorship of the Applicant over L.R. No. 209/13539/20 pursuant to the said Gazette Notice.

I also award the costs of the Motion to the applicant.

**Dated at Nairobi this 6<sup>th</sup> day of March 2013**

**G V ODUNGA**  
**JUDGE**

*Delivered in the presence of Mr Onyango for Mr Macharia for the ex parte applicant*