



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 98 OF 2010

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, PROHIBITION, STAY AND MANDAMUS**

AND

**IN THE MATTER OF: CONSTITUTION OF KENYA, REGISTRATION OF TITLES ACT
CAP 281, AND LOCAL GOVERNMENT ACT**

CAP 265, LAW OF CONTRACT CAP 23

AND

**IN THE MATTER OF: ORDERS OF NAIROBI CITY COUNCIL, NAIROBI CITY
COUNCIL TOWN CLERK MR. MBUGUA THEN DATED 30.9.2002,**

**NAIROBI CITY COUNCIL TOWN CLERK JOSEPH KISIA DATED
17TH NOVEMBER 2010, MINISTER FOR LOCAL**

**GOVERNMENT AND PERMANENT SECRETARY, MINISTRY OF
LOCAL GOVERNMENT, MINISTER FOR LANDS**

**CANCELLING APPLICANT’S LEASES GRANTED BY NAIROBI CITY
COUNCIL AND ORDERS OF**

THE MINISTER FOR LANDS REVOKING THE APPLICANT’S TITLES VIDE

LEGAL GAZETTE NOTICE NUMBER 15580 OF 26TH NOVEMBER,

2010.

REPUBLIC.....APPLICANT

VERSUS

**THE CITY COUNCIL OF NAIROBI.....1ST
RESPONDENT**

**THE TOWN CLERK,CITY COUNCIL OF
NAIROBI.....2ND RESPONDENT**

EX PARTE

WAIRIMU WAIYAKI (Suing in her capacity as Administrator of the Estate of ZIPPORAH
NAISENYA (Deceased)....APPLICANT

JUDGEMENT

1. By a Notice of Motion filed on 31st January 2011, the *ex parte* applicant herein, **Wairimu Waiyaki** seeks the following orders:
1. **That the Applicant be granted Judicial review Orders of certiorari to remove into the High Court and quash the decision of the Nairobi City Council Town Clerk dated 17th November 2010 and the gazette Notice Number 155580 dated 26th November 2010 to cancel and or revoke the allocation of House Number 86(57/5) on L.R. Number 209/13539/18 on Joseph Kangethe Estate (Woodley) Nairobi to the Applicant.**
2. **That the Applicant be granted Judicial Review Orders of Prohibition, Prohibiting the Nairobi City Council and Nairobi City Council Town Clerk, their Servants and/or Agents from proceeding with the process of cancelling the allocation of House Number 86(57/5) on L.R. Number 209/13539/18 on Joseph Kangethe estate (Woodley) Nairobi and also proceeding with the process a stated in their letter dated 17th November, 2010 and the gazette Notice Number 15580 dated 26th November 2010 and also proceeding with the demanding of monthly rent from the Applicant.**
3. **That the Applicant be granted Judicial Review Orders of mandamus directed to the Nairobi City Council Town Clerk Mr. Joseph Kisisa, Ministry of Local government, and Ministry of Lands, their Servants and/or Agents, commanding them to cease forthwith cancelling the allocation of House Number 86(57/5) on L. R. Number 209/13539/18 on Joseph Kangethe Estate (Woodley) Nairobi and further commanding them to allow the Applicant quiet enjoyment of their long term leases until the leases are extended.**
4. **That the Applicant be granted Judicial Review Orders of Permanent Stay of all proceedings of cancelling the allocation of House Number 86(57/5) on L.R. Number 209/13539/18 on Joseph Kangethe estate (Woodley) Nairobi to the Applicant and the process of recovery of the said house from the Applicant.**
5. **That the PPO Nairobi Province and the Officer in Charge (OCS) Kilimani Police Station do ensure compliance of the ORDERS.**
6. **The costs of this application be provided for**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement of Facts dated 24th December 2010 and filed on 31st January 2011 and the affidavit sworn by the applicant herein on 24th December 2010 and filed with the Chamber Summons seeking leave on 31st January 2011.
3. According to the applicant, she is the administrator of the Estate of **Zipporah Naisinya Waiyaki** (hereinafter referred to as the Deceased). According to the deponent, the 1st respondent in September 1994 offered to sell to the applicant as sitting tenants LR No. 209/13539/18 House Number 86(57/5) respectively, **Joseph Kangethe Estate** (Woodley) Nairobi (hereinafter referred to as the suit property) each at a price of Kshs 1,110,000.00. The said offer having been accepted by the applicants the applicants duly paid the requisite deposits towards the purchase thereof and

- the 1st defendant resolved that no rents would be collected from the applicants thereafter. The deponent, on request from the 1st respondent's lawyers duly remitted payment for stamp duty, registration fees for the Title Deeds, disbursements and lawyers' fees totalling the sum of Kshs 98,905.
4. According to the deponent she has enjoyed quiet occupation of the premises till 17th February 2003 when the 1st respondent served them with 7 days' Notices to vacate the suit premises and upon enquiry learnt that the 1st respondent had purportedly cancelled the said sale on the strength of a Ministerial directive. According to the applicant the 1st respondent is now demanding from the applicant rent arrears despite holding the purchase price, deposits and stamp duties.
 5. According to the applicant the 1st respondent in the exercise of its constitutional and statutory rights under the **Local Government Act Cap 265** decided to sell its properties to make money for financing its services and pursuant thereto granted to its Chief Officers permission to sell properties such as the suit property.
 6. It is the applicant's position that in HCCC Misc. Application No. 899 of 1993 the 1st respondent's decision to sell its houses was challenged and it was held that the 1st respondent was constitutionally and legally entitled to sell its houses and the suit was dismissed.
 7. It is the applicant's case that the 1st respondent on 29th April 2003 attempted to evict them from the suit premises on the ground that the applicants were in arrears of rent. However, on advice from the applicant's legal advisers the applicant believes that the 1st respondent's action is illegal as the 1st respondent holds the suit property in trust for them since the 1st respondent is holding their purchase price. It is further disclosed by the applicant that in 2003 the applicants filed Miscellaneous Civil Suit No. 678 of 2003 seeking judicial review orders stopping the 1st respondent from demanding rents from the applicants and repossessing the houses and obtained stay orders. However on 17th November 2012 the respondents served them with notices demanding Kshs 360,000.00 under the threat of an eviction within 24 hours.
 8. It is also deposed that by a Gazette Notice dated 26th November 2010, the Minister for Lands and or Anti Corruption Commission revoked the Applicants' Title Deeds and purported to revert the suit premises to the 1st respondent. According to the applicant the said action is illegal, ultra vires and contrary to the rules of natural justice since the issue of ownership of the suit properties is *sub judice* and pending the determination in HCCC No. 78 of 2003 hence the application seeking the quashing of the decision of the Minister for Lands and Kenya Anti Corruption Commission.
 9. There were two other supplementary affidavits sworn by the applicant on 31st March 2011 in which the applicant denied the allegations contained in the replying affidavits sworn on behalf of the respondents and reiterated the contents of the verifying affidavit herein.

1ST AND 2ND RESPONDENTS' CASE

10. On behalf the 1st and 2nd Respondents the application was opposed by way of an affidavit sworn by **Aduma Joshua Owuor**, the Director of Legal Affairs at the 1st respondent on 25th February 2011.
11. According to him, the property known as LR No. 209/13539 (Grant No. IR 76717), an Estate comprising of 210 housing units known as Woodley/Joseph Kang'ethe Estate was a public property owned by the 1st respondent and was not available for allotment and since the same had not been subdivided/surveyed and there was no title in respect of the property at the time of the purported allotment was incapable of being allotted in the manner claimed by the applicants. According to him the said consideration claimed to have been paid by the applicant cannot be traced from the 1st respondent's accounts records. It is further deposed that the property claimed by the applicant was public property held by the 1st respondent in trust for the benefit of the public hence unavailable for disposal. According to him the houses mentioned above were constructed by the 1st respondent for rental purposes and were not intended to be disposed of hence the purported disposal is irregular, illegal and fraudulent since it was done prior to issuance of the titles. According to him the council suffered loss of various titles and other documents relating to its

- properties together with the title register prompting the 1st respondent to lodge a claim with the Director of Criminal Investigations Department advising that no transaction be permitted involving the Council's properties at the lands office.
12. According to the deponent due to the fraudulent actions leading to loss of the 1st respondent's properties recovery processes have been commenced on the instructions of the Minister for Local Government and one such property is Woodley Estate property. According to him, the actions of the 1st Respondent's Chief Officers of purporting to sell the 1st respondent's properties was without the requisite approvals, illegal, null and void, and in blatant breach of the laid down procedures and the Constitution of Kenya hence the letters of allotment and any document resulting from the purported alienation, did not confer title or any rights to the applicant. Following the revocation of the said titles the persons who acquired the same including the applicants remained rent paying tenants of the Council.
 13. It is further deposed that the applicants and other tenants have filed suits which they were not keen to prosecute after securing injunctive orders hence amounts to an abuse of the process of the court.
 14. Following the refusal of the applicant to pay the rent, it is deposed that the 1st respondent rightfully demanded from the applicant immediate payment of all outstanding rent from the time of the purported purchase of the suit properties, failing which the 1st respondent would rightfully evict them. According to the deponent, therefore, there was no element of trust created between the 1st respondent and the applicant as alleged since the property allegedly owned by the applicant was not available for acquisition
 15. The deponent avers that the revocation of the titles purportedly owned by the applicant was proper, and in accordance with the law, as the manner of allotment and acquisition was fraudulent and in breach of the law hence the application ought to be dismissed. In the alternative the 1st and 2nd respondents seek an order directing the applicants to surrender the titles in respect of the suit property in exchange of the purchase price.

4TH RESPONDENTS' CASE

16. In opposition to the application, the respondents filed a replying affidavit sworn by **Nzioki Wa Makau**, an investigator with Kenya Anti Corruption Commission (hereinafter referred to as the Commission). According to him, the purported statement of facts and affidavit in support of the statement of facts filed on 31st January 2011 are not the ones which were filed with the application for leave hence the Court should withdraw the leave granted to the applicant on 24th December 2010 and vacate the limited stay granted on 24th December 2010 and decline the stay whatsoever and proceed to dismiss the application.
17. According to him, the application is misdirected against the 4th respondent and the issues raised by the application are on ownership of the land hence cannot be determined in judicial review proceedings. According to the deponent, the entire Woodley Estate properties are subject of recovery suits by the 2nd Respondent on the basis that the properties are public properties which were acquired illegally and unlawfully which unlawful acquisition is null and void and does not confer any title to the applicant. Since the Constitution does not protect any property that is acquired unlawfully. To the deponent, the applicants do not have any proprietary right on the suit properties. According to him the foregoing demonstrate that such matters cannot be tried in a Judicial Review Application but in a substantive suit where evidence will be produced and witnesses called. It is further contended that issues of rent, termination of contract of sale of land, conferment of title to Council property by resolutions do not fall within the purview of judicial review. It is deposed that the applicant sought and was granted leave to apply for similar orders in Misc. Application No. 678 of 2003 and that there is pending HCCC No. 1653 of 2002 between the 1st Respondent and the applicant in which the applicant is seeking injunction, declaratory orders and specific performance on the same issues and property. Similarly there exists another matter being ELC No. 498 of 2008 on the same property in which the cause of action is that the title to the property was acquired illegally and unlawfully. Therefore, it is deposed that while the above suits are pending in court, it is most inappropriate for the *ex parte* applicant to file the present application and that doing so is an abuse of the process of the court. In the deponent's view, leave

- ought not to have been granted in the circumstances and that the orders sought are not merited since they are available in the said previous suits.
18. There was a further affidavit sworn by Francis **Njeru Mwaniki**, an investigator with the said Commission in which he disputed the issue of the alleged resolution passed by the 1st respondent and annexed what in his view are the true resolutions.

APPLICANT'S SUBMISSIONS

19. On behalf of the *ex parte* applicant it was submitted while reiterating the contents of the supporting affidavit that whereas the applicant has demonstrated ownership of the suit property through annexures, the Respondents have only made mere allegations and actually misled the Court by alleging that the suit property belongs and or is public property which the same actually belongs to the applicant and relies on **Godfrey Githinji Kairi vs. City Council of Nairobi, Nairobi HCCC No. 173 of 2003**. Citing **Mbothu and 8 Others vs. Waitimu and 11 Others Civil Appeal No. 22 of 1984**, it is submitted that under section 23(1) of the ***Registration of Titles Act*** a certificate of title issued to a purchaser of land upon a transfer or transmission by the proprietor is conclusive evidence of proprietorship and the title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party. Further reference is made to **Osotraco Limited vs. Attorney General Uganda HCCC No. 1380 of 1986** and **Salima Enterprises and Others Civil Appeal No. 185 of 1997**.

1ST AND 2ND RESPONDENTS' SUBMISSIONS

20. On behalf of the 1st and 2nd Respondents, it is submitted while reiterating the contents of the replying affidavit sworn on their behalf that based on **Professor Sam Ongeri vs. Greenbays Holdings and 2 Others HCCC No. 30 of 2006**, the applicant's title is null and void *ab initio*. It is submitted that the 1st and 2nd respondents did not cancel the purported allotment of the lease to the applicant but that at the request of the Registrar of Titles made under section 60 of the ***Registration of Titles Act***, Cap 281 Laws of Kenya, the applicant delivered the title as requested and in the exercise of his powers under section 60(1) of the said Act the Registrar went ahead to cancel the lease vide Gazette Notice No. 15580 dated 26th November 2010. It is therefore submitted that the Applicant misled the Court by alleging that only the High Court can order any correction to be done on the title document. It is submitted that the Court can only order the cancellation of instruments where persons summoned to deliver the instrument by the Registrar under section 60(1), refuses or neglects to comply with the summons as provided under section 60(2) of the Act. Under this provision, it is submitted that the Court issues summons to the person to appear before it, to show cause why the instrument should not be delivered to the Registrar of Titles for correction which is not the position in this case. It is submitted that if the applicant had any objections to the intended cancellation, the same should have been made under section 60(2) of the Act and not through the present application. By not invoking the appellate procedures provided in sections 62 to 64 of the Act, it is submitted that this application is an abuse of the Court process, incompetent, incurably defective, bad in law and should be struck out as it is based on an illegality.
21. It is further submitted that by alleging that the respondents' action is unconstitutional in judicial review, the application is misconceived and reliance is based on **Republic vs. Chief Justice of Kenya and 5 Others High Court Miscellaneous Application No. 764 of 2004**.
22. According to the respondents by concentrating on the issue of cancellation of title without disclosing how the title was obtained the applicant is guilty of material non-disclosure. Based on **Kenya Anti-Corruption Commission vs. Lands Limited & 8 Others HCCC No. 448 of 2008**, it is submitted that there cannot be any taking away, if the property was not validly acquired in the first place.
23. It is further submitted that since the property was held in trust by the 1st respondent for the public, based on **Kenya Anti-Corruption Commission vs. Lands Limited & 8 Others** (supra) it is the responsibility of the Courts to uphold public interest and where it is in doubt to always strike a reasonable balance between individual interest and those of the public. It is further submitted that

Article 40(6) as read with Article 62(4) clearly demonstrate that public land cannot be disposed of unless and until the same is authorised by an Act of Parliament and since in this case the property was unlawfully and fraudulently acquired the same is not protected under Article 40(6). However, it is submitted in the alternative that if the applicant surrenders the leases/titles in respect of the suit property in exchange they would be refunded the purchase price if found to have been paid but purely on sympathetic grounds.

24. The respondents' contention is that as the applicants are tenants who have without good reason failed to pay the rents. The 1st respondent is entitled to demand for the same and if not paid to evict them.

4TH RESPONDENTS' SUBMISSIONS

25. On behalf of the 4th respondent, while similarly reiterating its replying affidavit, it is submitted that the application is misdirected against the 4th respondent as no orders are sought against the 4th respondent who was neither the author of impugned Gazette Notice neither the entity which cancelled the title to the suit property. Relying on **R vs. The Electoral Commission of Kenya ex parte Welamondi Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** it is submitted that the application in so far as it relates to the 4th Respondent is misconceived, misdirected and otherwise an abuse of the process of the court and should be dismissed on this account.
26. It is further submitted that the Registrar of the Titles as the person who signed the impugned Gazette Notice must be joined as a party since the application is challenging the statutory power of that office.
27. It is further submitted that although the court granted leave to apply for judicial review orders on 24th December 2010, the substantive application was filed on 1st February 2011 which was outside the 21 days stipulated under Order 53(3)(1) of the Civil Procedure Rules hence the application ought to be rejected.
28. It is further submitted that as there are earlier suits which are pending the Court ought to decline granting the orders sought in this application and allow the pending matters to be determined.
29. According to the 4th respondent judicial review is not the right forum to determine issues of ownership of land, matters of rent and validity of contracts all of which fall within the private law. Relying on **R vs. Oldbury Justices ex parte Smoth [1995] 7 Admin LR 315, 327 C-D**, it is submitted that "in a case such as the present, which bristles with factual difficulties the only convenient and proper way to get it before the Divisional Court is by case stated and not by way of an application for judicial review". Again in **R vs. Epping and Halow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257 at 262**, it is submitted that it was held that "But it is a cardinal principle that, save in the most exceptional circumstances, that [in reference to judicial review] jurisdiction will not be exercised where other remedies were available and have not been used".
30. It is further contended that the statement of facts and the affidavit filed together with the Notice of Motion herein are not the ones that were filed in support of the application for leave contrary to Order 53 rule 4(1) of the Civil Procedure Rules. It is submitted that the reliefs sought by the applicants in the statement and those in the Notice of Motion are totally different and this renders the application incompetent.
31. It is submitted that the remedy of judicial review being discretionary it will be refused where the process has been improperly invoked or its process abused.
32. It is contended that to issue open-ended orders of prohibition as sought will permanently impede lawful prosecution of the recovery suits hence ought not to be granted. In any case the orders seeking prohibition from cancelling the titles in question have been overtaken by events as the same has already taken place. It is submitted that the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. According to the 4th respondent what is sought here will necessarily require a determination on merits which is not the object of judicial review. It is also submitted that under Article 40(6) unlawfully acquired property like the suit property cannot be the subject of the remedy sought and that indefeasibility of title is not a defence against unlawful acquisition. It is therefore submitted that the application ought to

fail.

DETERMINATION

33. Having considered the foregoing, this is the view I form of the matter.

34. Before dealing with the merits of the application, there are issues of law which have been alleged render the application incompetent. First it is alleged that the Notice of Motion was filed outside the 21 day period stipulated under Order 53 rule 3 of the Civil Procedure Rules which provides that when leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court. In the present case leave was granted on 24th December 2010 and the Court reiterated the aforesaid provision by expressly directing that the substantive motion be filed and served within 21 days. However, it is my view that since the period of 21 days is provided for under Order 53 of the Civil Procedure Rules and not under the **Law Reform Act Cap 26 Laws of Kenya**, the provisions of Order 50 rule 4 of the **Civil Procedure Rules** applies. The said provision provides:

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

35. It follows that the last day for filing the Notice of Motion ought to have been 3rd February 2011.

The Notice of Motion herein was however filed on 31st January 2011. Accordingly I find no merit in the objection that the Motion was filed out of time and the same is rejected.

36. The next objection is that the grounds relied on in the Statement are not the same as those relied upon in the Motion. Rule 4(1) of order 53 provides:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

37. Therefore unless leave is sought and granted under subrule (2) of Rule 4 to amend the statement the only grounds to be relied upon and the relief to be sought are those stated in the statement accompanying the application for leave. See **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex parte Nzioka [2006] 1 EA 321.**

38. Although the applicants filed statements and affidavit in support of the Notice of Motion which documents were in my view unnecessary and inconsequential, nothing turns on that issue since the said documents were substantially the same as those which were filed together with the Chamber Summons seeking leave.

39. However with respect to the reliefs sought in the Motion it is clear that they were not the same as those sought in the Statement. For example the issue of quashing the Gazette Notice does not appear anywhere in the reliefs sought in the Statement.

40. However, as the prayers for which leave was sought and granted in the Chamber Summons are substantially the same as those sought in the Motion I will treat the discrepancy as a procedural technicality which is curable under the provisions of Article 159(2)(d) of the Constitution.

41. The next issue is the effect of the failure to join the Registrar of Titles as Respondent or party to these proceedings. It is clear that the impugned Gazette Notice was signed by the Registrar of Titles. Order 53 rule 3(2) of the Civil Procedure Rules provides.

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer

thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

42. In my view it was necessary to join the said Registrar as Respondent to these proceedings and it was not enough to simply join the Minister for Lands. Whereas generally the non-joinder of parties is not fatal to a suit, where the orders sought are against a person who is not a party to the proceedings I do not see how the Court can treat that as mere non-joinder since in the absence of such a party the Court would not be justified to grant orders against such a party since that course would amount to a breach of the rules of natural justice. Therefore to the extent that the orders sought seek to quash the action taken by the Registrar of Titles the same are incapable of being granted.
43. It is not disputed that the legal regime under which the titles to the disputed parcels of land fell was the ***Registration of Titles Act***. Section 23 of the said Act is based on the Australian 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); 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 is *prima facie* valid notwithstanding a defect in title. Indeed, it has been held that were it otherwise the principle object of the ***Registration of Titles Act***, which is founded on the said 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**.
44. Dealing with the provisions of section 23 aforesaid **Kimaru, J** in **Punda Milia Co-Operative Society vs. Savings & Loan (K) Limited Nairobi HCCC No. 273 of 2008** expressed himself as follows:

“Section 23 of the Registration of Titles Act requires the court to consider a certificate of title issued under that Act as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements, restrictions and conditions contained therein. The said section prohibits the challenge to such certificate of title on any other ground than that of fraud or misrepresentation to which the registered owner is proved to be party.”

45. The respondents however contend that under section 60 and 61 of the ***Registration of Titles Act***, the Registrar of Titles had the powers to cancel titles. The Respondents further contend that the applicant acquired the titles the subject of this application unlawfully and illegally. No doubt under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. In recognising this I associate myself with the decision in **Kenya Allied Guards Allied Workers Union vs. Security Services & 38 Others High Court Miscellaneous Application No. 1159 of 2003** that:

“public interest must be engine of the millennium and it must where relevant occupy the centre stage in the courts...should the Land Acquisition Act give shelter to the land grabbers of public land or are courts going to invent equally strong public interest vehicles to counter this, should individual land rights supersede the communal land, catchments and forests? How far are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indefeasibility of title? Are courts going to stay away and refuse to rise to the greater public good call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the constitution? I venture to suggest that such titles ought to be nullified on this ground and thrown to the dustbins”.

46. In **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L)**, it was held

that:

“The Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefensibility of title deed. It is clear from section 75 of the Constitution that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law.... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”

47. Article 40(6) of the Constitution, however, employs the use of the words ***“found to have been unlawfully acquired”***. Therefore there must be a finding that the property in question was unlawfully acquired. However, in making a decision either way, the Courts must uphold the provisions of the Constitution and the laws of the land. Article 47(1) of the Constitution provides as follows:

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

48. Further under Article 10 of the Constitution, the Court must be guided by national values and principles of governance one of which is the rule of law. 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.

49. 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.

50. 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.

51. 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.

52. 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 enjoined 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, in my view, must expressly require that the Grant, certificate or instrument be delivered for the purpose of being corrected. 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.

53. 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.

54. What these provisions are intended for is 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 of Titles to revoke a registered proprietor's title before the due process is adhered to.

55. Accordingly, the Respondent has only power to rectify titles where there are wrongful or fraudulent entries under section 60. However, the Respondent may cancel title when directed by the court under section 64 of the Act which states:

In any proceedings respecting any land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.

56. It is therefore clear from the foregoing that the Respondent has no power to revoke or cancel the title under section 60 unless directed by the court under section 64 of the Act. It has also been held time without a number that the Registrar of Titles has no authority in law to revoke or cancel titles

to land, whether in public interest or otherwise. See **Kuria Greens Limited v Registrar of Titles and Commissioner of Lands Nairobi HC Petition No. 107 of 2010 (Unreported)** and **Satima Enterprises Ltd v Registrar of Titles & 2 Others [2012] eKLR**.

57. Section 64 envisages a situation where the court is in a position to address itself to the substantive issues of cancellation of title after considering all the facts and evidence presented by the parties. Judicial review court like in the current application has no such advantage as its jurisdiction is confined to the procedural impropriety.
58. 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. Both under the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. The Respondents' position that under section 60 the Registrar has power to revoke illegally acquired land *suo moto* even if he had such powers, and I don't agree he has any such powers, would fly in the face of the express constitutional provisions and even if the interpretation adopted by the Respondents of section 60 of the Act was correct I would have no hesitation in declaring the same to be ineffectual on the ground of its being *ultra vires* the express provisions of the Constitution.
59. The *ex parte* applicants submitted that the rules of natural justice were not adhered to when their title was revoked and relied on the provisions of the Constitution which grant every person right to a fair administrative action and fair hearing respectively. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

60. In the recent case of **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR**, **Majanja J.** on a matter similar to the current one expressed himself thus:

“.....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.”

61. I find the said decision persuasive and accordingly hold that the Registrar had not power to cancel titles under sections 60 and 61 of the ***Registration of Titles Act***.
62. Under Article 10 of the Constitution the national values and principles of governance in this bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. I am further cognisant of the fact that under the same Article the national values and principles of governance include good governance, integrity, transparency and accountability. However, it is also provided thereunder that the rule of law also forms an integral part of the said values and principles. The adherence to the Rules of natural justice is, in my view, an integral part of the rule of law. In my view the correct proposition is that the public interests if in conflict with private interests ought to be balanced one as against the other in order to see where the scale of justice lies. Therefore the as was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs.**

- Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. To always allow the public interest to override private or individual interest would on occasion cause miscarriage of justice taking into account that in this country we do not subscribe to communist system of property ownership.
63. It is now important, in my view to recapitulate the scope of judicial review jurisdiction of the High Court. 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.”**
64. 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.***
65. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**
66. 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 determination of 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.**
67. 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 resolving 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.

68. In the present case, it is not disputed that there are pending cases in which the suit parcel of land is the subject. Whether or not seeking the same orders sought herein, it is clear that ownership of the suit parcel is central to those proceedings. In this case it is alleged by the respondents that this dispute concerns Land which had not been surveyed and titles had not been issued and therefore were not available for allocation. That is an issue that can only be determined in an ordinary civil case where parties would be afforded an opportunity of being heard. To grant the orders sought herein would have the effect of leaving the main dispute of ownership of the disputed land unresolved hence in my view the remedies sought herein would not be efficacious in the circumstances. I am persuaded to take this view by the fact that there are pending cases which if properly pursued would effectually bring this dispute to an end. Accordingly the power to grant judicial review orders being discretionary I in the circumstances of this case decline to exercise my discretionary jurisdiction in favour of the applicant/s and disallow the orders sought in the Notice of Motion filed herein on 31st January 2011. The order that commends itself to me is that the parties do fix the pending cases revolving around the suit land for hearing and determination.
69. Since I have found that the Registrar of Titles had no power to cancel the titles there will be no order as to costs.

Dated at Nairobi this 6th day of May 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Nyakwara for Mr Obura for the applicant and Ms Shamala for the 4th Respondent Commission.