



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**MISC. APP. NO. 69 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF  
CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF LAW REFORM ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF LAND PARCEL NO. KISII MUNICIPALITY/BLOCK II/225**

**AND**

**IN THE MATTER OF KENYA GAZETTE NOTICE NO. 3451 OF 1<sup>ST</sup> APRIL 2010**

**AND**

**IN THE MATTER OF THE DISTRICT LAND REGISTRAR – KISII**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300 LAWS OF KENYA)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**LAND REGISTRAR KISII DISTRICT ..... RESPONDENT**

**EX PARTE APPLICANT**

**SAMWEL KINYINYI MAINA T/A VISA PRINTERS AND STATIONERS**

**J U D G M E N T**

1. The ex parte applicant was on 30<sup>th</sup> July 2010 granted leave to institute judicial review proceedings and on 12<sup>th</sup> August 2010 filed the Notice of Motion dated 6<sup>th</sup> August 2010 seeking inter alia the following orders:-

**1. That this honourable court be pleased to issue an order of certiorari to remove unto the High Court and quash the decision made by the land registrar Kisii District vide the Kenya Gazette Notice No. 3451 of 1<sup>st</sup> April, 2010 revoking and/or cancelling title No. Kisii Municipality/Block II/225 registered in the names of the ex parte applicant herein.**

**2. That an order of prohibition to bar the land registrar Kisii District from implementing his decision given vide Kenya Gazette Notice No. 3451 of 1<sup>st</sup> April 2010.**

The Notice of Motion was grounded on the facts stated in the statement of facts and the affidavit verifying the facts sworn by Samuel Kinyinyi Maina, the ex parte applicant herein.

2. The ex parte applicant's case is that visa printers and stationeries is his business firm and that he was allocated an unsurveyed Plot 'B' within Kisii Municipality by the Commissioner of Lands which was subsequently surveyed to become **LR No. Kisii Municipality/Block II/225** and he was issued with a certificate of lease in respect of the same on 7<sup>th</sup> January, 2003 upon being registered as the owner. The ex parte applicant avers that he prepared building plans in respect of the said property which were duly approved by the Kisii Municipal Council and further that he had been paying rates to the Municipal Council. The applicant states that he had requested for a validation of the plot from the Minister of Lands and Housing as the servant quarter intended for the property extended beyond the surveyed plot but before receiving a response to his request from the Ministry of Lands and Housing he learnt sometimes during the month of May 2010 that the respondent had issued a Gazette Notice No. 3451 dated 1<sup>st</sup> April 2010 seeking to nullify and revoke the applicant's title. The applicant contends that the decision by the respondent to revoke his title was in excess of the respondent's jurisdiction and was made without giving the applicant an opportunity to be heard.

3. The respondent filed a replying affidavit sworn by one **Steve Mokaya**, Land Registrar Kisii on 30<sup>th</sup> January 2017 filed in court on 12<sup>th</sup> April 2017 in opposition to the Notice of Motion. In response, the respondent averred that the Permanent Secretary was the registered owner of the suit property for a term of 99 years from 1<sup>st</sup> June 2010 as per the green card and lease instrument. The respondent stated that he was unaware that the applicant had been registered owner of the suit land and besides the respondent had acknowledged under paragraph 8 of the affidavit verifying facts that the land had belonged to the government with the consequence that the same was not available for allocation as private land. The respondent prayed for the dismissal of the applicant's suit.

4. Directions were given for the parties to argue the application by way of written submissions but only the ex parte applicant filed his submissions on 11<sup>th</sup> November 2014. The respondent despite belatedly filing their replying affidavit on 29<sup>th</sup> May 2017 indicated they would not file any submissions and will rely on the filed replying affidavit.

5. Having reviewed the brief facts of the case as set out in the pleadings, the issues that stand out for determination are:

**i. Whether the decision by the respondent to revoke the applicant's title was made without jurisdiction.**

**ii. Whether the respondent complied with the rules of natural justice to give the applicant an opportunity to be heard before making the decision.**

**iii. Whether an order of certiorari and prohibition are merited in the circumstances.**

6. In considering an application for judicial review the court needs to be alive as to what the scope of judicial review is. It has repeatedly been stated by courts that judicial review is not concerned with the merits of the decision made but rather with whether the process through which the decision was made was fair. The Court of Appeal in the case of **Cortec Mining Kenya Ltd –vs- Cabinet Secretary Ministry of Mining and 9 Others** [2017] eKLR expressed itself thus on the issue:-

**“27. There is no divergence of view on the law relating to the nature and scope of JR orders. It is trite that judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made. In the case of Commissioner of Lands –vs- Kunste Hotel Ltd [1977] eKLR, the court stated:-**

**“But 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 Republic –vs- Secretary of State for Education and Science ex parte Aron County Council [1991] ALLER 282 at P. 285). The point was more succinctly made in the English case of Chief Constable Evans [1982] IWLK 1155, by Lord Hailsham of St. Marylebone, thus:**

**“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”**

**See also Republic –vs- Judicial Service Commission ex parte Pareno Nairobi HC Misc. Civil Application No. 1025 of 2003.**

**28. As for the scope of the remedy, it is also trite that:-**

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...illegality is when the decision making authority commits an error of law in the process of taking 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...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.” See Pastoli –vs- Kabale District Local Government Council and Others [2008] EA 300.**

**We are, nevertheless, aware that the limits of judicial review continue to expand so as to meet the changing conditions and demands affecting administrative decisions. See the case of Kuria & 3 Others –vs- Attorney General [2002] 2 KLR 69.”**

7. In the cases of **Kuria Green Ltd –vs- Registrar of Titles & Another** [2011] eKLR and **Isaac Gathungu Wanjohi & Another –vs- Attorney General & 6 Others** [2012] eKLR the court held in both cases that a registrar has no power to cancel a title without following due process and held the cancellation of the titles by the registrar was null and void and of no effect. In the case of **Shimoni Resort –vs- Registrar of Titles & 5 Others** [2016] eKLR this court sitting at Nairobi (Milimani) Environment and Land Court held that the Minister of Lands action of cancelling the petitioner’s title

without affording the petitioner a chance to be heard denied the petitioner a fair chance to be heard and that contravened the petitioner's right under Article 50 (1) of the Constitution to a fair hearing. In the matter before me the applicant has stated that he was not afforded an opportunity to be heard before the decision to revoke his title was made. The rule of natural justice require that a party who is likely to be affected prejudicially by an administrative decision such as the one the land registrar made to Gazette the revocation of the applicant's title deed should be given a chance to be heard. There is nothing on record to suggest the applicant was heard and/or was given a notification before the revocation of his title was gazetted.

8. Under Section 143 of the repealed Registered Land Act, Cap 300 Laws of Kenya, any rectification of the register affecting title could only be made pursuant to an order of the court. Under Section 159 of the said Act, only the court had the jurisdiction to make an order for revocation and/or cancellation of title. Thus it is my holding and finding that the land registrar acted in excess of his jurisdiction when he gazetted the revocation of the applicant's title. He had no power to do so and his act was ultra vires and of no legal effect. The only option available to the respondent and/or for that matter, the government, if they were of the view that the applicant was unlawfully allocated and issued with title to the said land was to move the court for the revocation and/or cancellation of the title if indeed it was illegally and unlawfully issued to the applicant. **Article 40 (6)** of the Constitution and **Section 26 (1) (a) and (b)** of the Land Registration Act No. 3 of 2012 provides for instances where a title may be challenged. Due process of the law must be adhered to before a person's right can be taken away.

9. In the instant case, I am satisfied that the respondent did not follow due process before revoking the title of the applicant and his actions are amenable to judicial review. I accordingly grant an order quashing the land registrar's decision in terms of prayer (1) of the Notice of Motion dated 6<sup>th</sup> August 2010. In case the illegal and unlawful Gazette Notice No. 3451 of 1<sup>st</sup> April 2010 was acted upon and the applicant's title revoked, I order that his name be reinstated in the register as the registered owner of **LR No. Kisii Municipality/Block II/225** forthwith. I make no order for costs and each party will bear their own costs of the suit.

10. Orders accordingly.

**Judgment dated, signed and delivered at Kisii this 21<sup>st</sup> day of July, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Godia for Bosire for the applicant

N/A for the respondent

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**