



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

(JR) MISC. CIVIL APPLICATION 12 OF 2011

IN THE MATTER OF: AN APPLICATION BY ALDOFO GUZZINI AND ANNA TACCALITINI GUZZINI FOR THE ORDERS OF MANDAMUS AND PROHIBITION DIRECTED AT THE CHIEF LAND REGISTRAR

AND

IN THE MATTER OF: THE REGISTERED LAND ACT, CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT, CAP 281 OF THE LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....RESPONDENT

EMMANUEL CHARO TINGA.....1ST INTERESTED PARTY

LOVE ISLAND BEACH LIMITED.....2ND INTERESTED PARTY

KIDZIZI PROPERTIES LIMITED.....3RD INTERESTED PARTY

J U D G M E N T

Introduction

1. What is before me is the *Ex-parte* applicants’ Notice of Motion dated 14th April 2011 filed pursuant to the provisions of Order 53 Rule 3 of the Civil Procedure Rules. In the Application, the *Ex-parte* Applicants are seeking for the following judicial review orders:
 - a. An order of *mandamus* do issue directed to the Chief Land Registrar to compel the said Chief Land Registrar to cancel the register and recall the title deed in respect of the parcel of land known as Kilifi/Jimba/1126 and issued under the Registered Land Act on 5th October 2000 and/or any other title deeds issued over Kilifi/Jimba/1126 after 5th October 2000.
 - b. An order of *prohibition* do issue to prohibit the Chief Land Registrar from endorsing in the

register the transfer in respect of land parcel known as Shoni and V.M. Jabron to Emmanuel Charo Tinga and/or to any other person to whom the title to Kilifi/Jimba/1126 has been issued.

- c) The costs of this application be awarded to the applicants.
2. Prior to the filing of the substantive Motion, the *Ex-parte* Applicants sought and were granted leave to apply for judicial review by way of an order of mandamus to compel the Chief Land Registrar to cancel the register and recall the title deed in respect of parcel of land known as Kilifi/Jimba/1126 issued on 5th October 2000.
3. The *Ex-parte* Applicants were also granted leave to apply for judicial review by way of an order of prohibition to prohibit the Chief Land Registrar from registering any transfer in respect of Kilifi/Jimba 1126. The leave was to operate as a stay of any further transactions in respect of Kilifi/Jimba 1126 pending the hearing and determination of the substantive Motion.
4. The Application for leave to commence judicial review was accompanied with the *Ex-parte* Applicants' statement and affidavit.
5. The Application has been opposed by the Interested Parties.

The *Ex-parte* applicants' case:

6. According to the *ex-parte* Applicants' statement and affidavit, they are the registered owners of L.R. No. 945 (original number 655/2) Watamu Township as lessees from the government of Kenya for a term of 99 years from 1st February, 1990.
7. 1st *ex-parte* Applicant deponed that L.R No. 655 was owned by the late Simeon Hongo Ominde and was subsequently subdivided with resultant numbers being L.R. No. 944, 945 and 946 and that they purchased the suit property from one Elizabeth Ogoja and Kenya Commercial Bank as executors of the will of Simeon Hongo Ominde.
8. The *Ex-parte* Applicants stated that they came to learn that the 1st Interested Party had been issued with a title deed by the Chief Land Registrar for a portion of L.R. No. 945 and registered as Kilifi/Jimba 1126 when he started putting up a perimeter wall which encapsulated almost half the suit property.
9. Consequently, the *Ex-parte* Applicants filed Malindi HCCC No. 107 of 2005 to stop the 1st Interested Party from putting up the wall but their Application for injunction was dismissed on 13th July, 2006; that the case is yet to be determined.
10. It was the averment of the *Ex-parte* Applicants that the 1st Interested Party is in occupation of the disputed portion of land and that the lands office at Kilifi was aware that the title to Kilifi/Jimba/1126 was irregularly and erroneously issued as a result of double allocation.
11. It is the *Ex-parte* Applicants' case that the actions of the Chief Land Registrar were illegal because their title has never been cancelled, or their land converted to land governed by the Registered Land Act (repealed); that it is not legally possible to have two valid titles in respect of the same parcel of land registered under two different land registration regimes and that the title known as Kilifi/Jimba/1126 could not have been legally issued whereas there was and there is still in existence a valid title in their names.
12. According to the *Ex-parte* Applicants, it was unreasonable for the Chief Land Registrar to issue the title document under the Registered Land Act in view of the existence of the *Ex-parte* Applicants' title. Consequently, it was averred, the Respondent should be compelled by this court to cancel the register and recall the title deed in respect of parcel of land known as Kilifi/Jimba/1126 which was issued on 5th October 2000.

The 1st Interested Party's case:

13. Emmanuel Charo Tinga, the 1st Interested Party, filed a Replying Affidavit and deponed that the issues raised in the Motion are the same issues that had been raised in Malindi HCCC NO. 107 of 2005 and HCCC No. 111 of 2005.
14. The 1st Interested Party deponed that the original owners of Kilifi/Jimba/1126 transferred the land

- to love Island Beach Resort, the 2nd Interested Party and that parcel of land number Kilifi/Jimba/1126 is in Jimba adjudication area and not Watamu township and that he has never been registered as the owner of parcel of land number Kilifi/Jimba/1126.
15. It is the position of the 1st Interested Party that judicial review is not a suitable method of challenging the ownership of Kilifi/Jimba/1126 because it is a summary procedure geared towards a decision making process and not in contested matters and that in any event he is non-suited.

The 3rd Interested Party's case:

16. In its Replying Affidavit, the 3rd Interested Party's director deponed that the Ex-parte Applicants have not exhibited a certificate of search from the Registrar of Titles to prove ownership of the parcel of land that they are claiming; that there exists Malindi HCCC No.111 of 2005 instituted by Watamu Sail fish Limited and an Application for injunction against the 1st Interested Party was dismissed and the Ex-parte Applicants' Application for injunction in Malindi HCCC. No. 107 of 2005 was also dismissed by the court.
17. It is the 3rd Interested Party's deposition that in the year 1990, when the alleged title was issued to the Ex-parte Applicants, there was an embargo relating to transactions and dealings in land in Kilifi/Jimba area; that it is the *bona fide* lawful registered owner of the suit property having purchased it through its sister company from the 2nd Interested Party for a sum of Kshs. 125,000,000 and that its title is indefeasible.
18. Before the transfer of the said property to the Interested Party's sister company, it was deponed, the Commissioner of Lands, the Malindi Land Control Boards and the President gave their respective consents and that it conducted an official search to show the status of the land before purchasing it.
19. The 3rd Interested Party's director deponed that L.R. No. 945 Watamu Township was previously part of L.R. No. 655 Watamu which was sub divided into three plots, to wit, L.R. No. 944, 945 and 946 and that by the time the original number L.R. 655 Watamu was allegedly allotted to Simeon Hongo, the Government had placed an embargo on all the transaction in the area.
20. According to the 3rd Interested Party, the creation and issuance of Parcel of land number Kilifi/Jimba/1126 was done procedurally and lawfully and that it is an innocent purchaser for value without notice; that the 3rd Interested Party's application for change of user was granted on 26th June 2013 and that the 3rd Interested Party has invested hundreds of millions of shillings in the property and will suffer prejudice if the Application is allowed.
21. The 3rd Interested Party's director finally deponed that even if L.R. No. 655 was property allotted, the allottees breached the special conditions because they never developed the plot for more than twenty (24) months.

The Ex parte Applicants' submissions:

22. Mr. Muchoki, counsel for the Ex-parte Applicants submitted that it his clients' title which was issued under the repealed Registration of Titles Act (RTA) that was issued first before. Consequently, it was submitted, the RLA title that was issued to the Interested Parties was issued either in error or by mistake by the Respondent.
23. Counsel submitted that section 142 of the Registered Land Act gives power to the Respondent to rectify such errors; that the Respondent has abdicated that duty and an order of mandamus should issue to compel him to rectify the error in the register in order to protect the rights of the Ex-parte Applicants.
24. Counsel submitted that in issuing the RLA title which overlaps the RTA title, the Respondent acted in manifest error of the law as there can be no two titles over the same property; that the Respondent acted unreasonably by issuing the two titles over the same property; that the Respondent acted in excess of jurisdiction and that the Respondent failed to consider material facts including the legitimate expectation of the Ex-parte Applicants by issuing two titles over the same piece of land.
25. Having failed to cancel the RLA title pursuant to the provisions of section 142 of the Act, it was

- submitted, the Respondent had abdicated his duty thus this suit.
26. The *Ex-parte* Applicants' advocate submitted that under section 23 of the RTA, a title is sacrosanct and not liable to challenge, except on the ground of fraud or misrepresentation to which the registered is shown to have been a party. Counsel relied on the cases of **Power Technics –Vs Attorney General** quoted in **John Mukwa Wachihhi-vs Minister of Lands (2013) eKLR** and **Dr. N.K. Ngok –vs- Justice Ole Keiwua & two others – C.A NO. 60 OF 1997** to buttress his arguments.
 27. Counsel submitted that while Malindi HCCC. No. 107 of 2005 is in respect to the tort of trespass, the current suit is seeking for cancellation of the RLA title; that the Applicants' property falls within Watamu which was not affected by the Government embargo and that the authenticity of Kilifi/Jimba 1126 is in doubt.
 28. To show that the Respondent acted unreasonably and irrationally in issuing the RLA title to the Interested Parties, counsel relied on the case of **Associated Provincial Picture Houses –Vs Wednesbury Corporation (1948) 1 KB 223**. Counsel submitted that the Respondent was aware that his clients' title was in existence but went ahead to issue another title, a decision which was unreasonable and irrational.
 29. Notwithstanding the error, it was submitted, the Respondent was under a duty to rectify the said error under section 142 of the RLA but he chose not to exercise that legal duty.
 30. Counsel finally submitted that the Respondent's actions of issuing to the Interested Party a title in respect to his land denied the Applicants legitimate expectation in the suit property and that his actions were illegal and abuse of power; that the Respondent did not exercise due diligence before issuing the second title and that the Respondent's actions are an affront to the right to fair administrative action.

1st Interested Party's submission:

31. Mr. Kilonzo, counsel for the 1st Interested Party, submitted that there are two pending matters being HCCC No. 107 of 2005 and 111 of 2005 in which the court has ruled that the *Ex-parte* Applicants do not have a *prima facie* with a probability of success in respect to Kilifi/Jimba/1126; that those matters raise substantially the same issues which have been raised in the current Motion and that the *Ex-parte* applicants are abusing the process of this court.
32. According to counsel, parcel of land known as Kilifi/Jimba/1126 is not in Watamu Township but in Jimba adjudication area, which issue was determined by Ouko J (as he then was) in HCCC No. 107 of 2005 and also in a Ruling delivered in HCCC No. 111 of 2005.
33. The 1st Interested Party's counsel submitted that the nexus between the *Ex-parte* Applicants' alleged land known as L.R. No. 945, Watamu and Kilifi/Jimba/1126 cannot be ascertained in judicial review proceedings.
34. Counsel submitted that the repealed Registered Land Act does not confer to the Respondent the power to cancel titles and an order of mandamus can therefore not issue as prayed.
35. The 1st Interested Party's counsel submitted that the issues in these proceedings involve disputed facts of land ownership which should be ventilated by an ordinary action and which had been undertaken by the *Ex parte* Applicants in Malindi HCCC No. 107 of 2005.
36. Counsel submitted that the Applicants, other than seeking for cancellation of the Interested Parties title deed should seek for indemnity from the Government by way of an ordinary suit. In the circumstances, it was submitted the orders of mandamus or prohibition cannot issue.
37. The 1st Interested Party's advocate relied on the case of **Mureithi & 2 others –Vs Ag & 4 others KLR E & L page 707, African Auto suppliers Ltd. –Vs- AG and three others (2006) e KLRR** amongst other decisions in which the courts held that where the underlying dispute is ownership of land, judicial review would not be a forum where such a dispute can be adjudicated and determined.
38. Counsel finally submitted that the 2nd and 3rd Interested Parties purchased for value Kilifi/Jimba/1126 which had been purchased from Johnson Katana Kalume, Kepita B. Shani and VM Johron, the first registered proprietors. Consequently, it was submitted, the non-joinder of

those individuals in these proceedings renders the proceedings a nullity.

The 3rd Interested Party's submissions:

39. The 3rd Interested Party's advocate submitted that in October, 2011, a company known as Acta Holdings purchased Kilifi/1126 from the 2nd Interested Party for KShs. 125,000,000. The suit property was subsequently transferred to the said company after all the necessary consents had been obtained. Acta Holdings then transferred the said property to the 3rd Interested Party.
40. Counsel submitted that the alleged overlap of title in respect of Kilifi/Jimba 1126 over L.R. No. 945 Watamu does not exist because there is no report from an expert or a surveyor to prove that L.R. No. 945 Watamu and Kilifi/Jimba/1126 are one and the same thing on the ground; that prior to the purchase of Kilifi/Jimba/1126, Acta Holdings and the 3rd Interested Party were never informed of the alleged overlap and that it was only on 25th May 2012 that the Applicants advertised a caveat emptor in the Daily newspaper.
41. Counsel submitted that the crux of the *Ex-parte* Applicants' Application is that they have been deprived of their private property. Consequently, it was submitted, the appropriate prayer that this court should consider is whether or not an order of mandamus can issue to compel the Land Registrar to investigate the title and not whether or not an order of mandamus can issue to cancel the register in respect of Kilifi/Jimba/1126.
42. Counsel submitted that there is evidence that the Land Registrar investigated the circumstances surrounding the issuance of the disputed title and found that there was no overlap between Kilifi/Jimba/1126 and L.R. No. 945 Watamu and that whether the Registrar's decision was right or not is not within the province of this court. Counsel relied on the case of the **Truth Justice and Reconciliation Commission -Vs- Chief Justice of Kenya & another (2012) e KLR** and submitted that the Applicants have not exhibited any evidence to show that they have a legal right over the suit property and that the title document exhibited by the Applicants is not a certified copy as required under section 23(2) of the RTA.
43. Counsel finally submitted that the Applicants filed Malindi HCCC No. 107 of 2005 in respect to the suit property; that the prayers in the Application shows that the Applicants are seeking to have the title in respect of Kilifi/Jimba/1126 quashed and yet they have not sought for an order of *certiorari*.

Analysis & findings:

44. The *Ex-parte* Applicants (the Applicants) are seeking for an order of mandamus directed to the Chief Land Registrar compelling him to cancel the register and recall the title deed in respect of land known as Kilifi/Jimba/1126. The Applicants are also seeking for an order of prohibition prohibiting the Chief Land Registrar from effecting any transfers in respect to Kilifi/Jimba/1126.
45. The crux of the Applicants' case is that they are the registered owners of L.R Number 945 (original number 655/2) Watamu Township as lessees from the Government of Kenya for 99 years. However, before cancelling the said title, the Government issued another title being Kilifi/Jimba/1126 in respect to the same land to third parties.
46. The Applicants annexed on their affidavit a copy of the grant that was issued to the initial allottee for plot number 655 and registered on 9th January, 1992 in the land titles registry in Mombasa as CR 22084. Was subdivided and created plot No. 945, amongst others.
47. The Applicants have annexed on their affidavit a copy of the Certificate of Title for plot number 945, Watamu Township in the name of Elizabeth Ominde and Kenya Commercial Bank which was registered on 23rd May, 2005. According to the 2nd entry, plot number 945, Watamu Township was transferred to the Applicants on 8th August, 2005. The sale agreement shows that the Applicants purchased the property for Euro 110,000.
48. The Applicants also annexed on their Affidavit a report by Mr. Walter Ombogo, a surveyor. According to the surveyor's report dated 12th September, 2006, he did not come across survey documents showing the existence of Kilifi/Jimba/1126. However, the surveyor goes ahead to show the extent of encroachment of Kilifi/Jimba/1126 on plot numbers 944 and 945 by way of a sketch

plan.

49. The documents annexed on the 1st Interested Party's Replying Affidavit shows that the title deed for Kilifi/Jimba/1126 was issued to Johnson Katana Kalume, Kapita B. Sheni and V.M. Jabron on 5th October 2000. The three individuals are not parties in these proceedings.
50. The 1st Interested Party, who says he initially had an interest in the suit property, has annexed the transfer document showing that Kilifi/Jimba/1126 was transferred to the 2nd Interested Party on 10th May, 2007. The said transfer was registered on 2nd August 2007. The Malindi Land Control Board gave its consent for the transfer of the property to the 2nd Interested Party on 20th July 2006. The official search annexed on the Replying Affidavit shows that a title deed was issued to the 2nd Interested Party on the day the transfer was registered, that is, on 2nd August, 2007.
51. It would appear that before the Kilifi District Land Registrar could register the Transfer of Kilifi/Jimba/1126 in favour of the 2nd Interested Party, he sought for authorization from the Chief Land Registrar. I say so because a copy of a letter dated 1st August, 2007 annexed on the Replying Affidavit by the Chief Land Registrar and addressed to the District Land Registrar states as follows:

“Reference is made to my letter to you regarding authorization of transfer and your subsequent reply thereto.

My records however reveal that title for plot No. 655 was issued when there was an embargo on the land. The issuance of the said title therefore contravened the intended intention of nullification since the people who were supposed to get the titles were usually the earlier beneficiaries.

In view of the above fact, unless there is any impediment to obstruct you allowing the transfer, you may proceed after taking the usual precautions.

Please proceed.”

52. From the said letter, it would appear that both the Chief Land Registrar and the District Registrar were aware of the dispute in respect of L.R. No. 655 which is being claimed by the Applicants and Kilifi/Jimba/1126. Indeed, by August 2007, the Applicants had sued the 1st Interested Party in Malindi HCCC No. 107 of 2005 raising the issue of double allocation and seeking for declaratory orders in respect of plot number 945 vis a vis Kilifi/Jimba/1126. I shall allude to this suit in a short while.
53. Before the transfer of Kilifi/Jimba/1126 to the 2nd Interested Party, the Chief Land Registrar vide his letter dated 25th June, 2007 had directed the District Land Registrar to remove the restriction which had been placed on Kilifi/Jimba/1126 vide the letter dated 20th November, 2003. The letter dated 20th November, 2003 has not been exhibited and it is not clear why a restriction had been placed on the property in the year 2003.
54. However, entry number 4 in the copy of the extract of the register annexed on the 3rd Interested Party's Affidavit gives an indication as to the contents of the letter dated 20th November, 2003. The said entry was made on 24th November, 2003 and it states as follows:

“RESTRICTION-TITLE ERRONEOUSLY REGISTERED UNDER THIS ACT. SEE LETTER DATED 20/11/2003 KFI/A/14/VI/64 FROM THE CHIEF LAND REGISTRAR (see CR-22804/4 RTA MSA.”

55. It would appear that in 2003, the Chief Land Registrar was of the view that the title in respect of Kilifi/Jimba/1126 had been erroneously issued thus the restriction. However, he changed his mind in the year 2007 and had the restriction lifted. He gave the reasons as to why the said restriction should be lifted *vide* his letter dated 1st August, 2007.
56. The 1st Interested Party exhibited a copy of a letter dated 15th August, 2003 by the District

Surveyor, Malindi, directed to the Director of Surveyors in respect of Kilifi/Jimba/1125 and 1126. In the letter, the District Surveyor was responding to the Director of Survey's letter dated 23rd June 2003 which was not exhibited. The District Surveyor, in the said letter, informed the Director of Surveys that the titles in respect of Kilifi/Jimba 1125 and 1126 are the valid ones as per his record.

57. After parcel of land known as Kilifi/Jimba/1126 was transferred to the 2nd Interested Party by the three individuals who are not parties to this case in the year 2007, the property was sold by the 2nd Interested Party to a company known as Acta Holdings Limited for Kshs. 125,000,000 as per the agreement of sale dated 3rd November 2011. The consent by the Commissioner of Lands and Malindi Land Control Board in respect to that sale has been attached to the 3rd Interested Party's Affidavit. The land was then transferred by way of a Transfer dated 5th January, 2012 from the 2nd Interested Party to the 3rd Interested Party.
58. The efficacy and scope of an order of mandamus and prohibition was set out by the Court of Appeal in the case **Kenya National Examination Council –Vs- Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996**. The court quoted with approval **Halsbury's Laws of England, 4th edition, volume 1** at page 111 from paragraph 89 as follows:

“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 office and is in the nature of a public duty..... The order must command no more than the party against whom the application is made 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.

.....If the complaint is that the duty has been wrongly performed, i.e that the duty has not been performed according to law, then mandamus is a wrong remedy to apply because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”(emphasis mine).

59. Having regard to the law relating to the writ of mandamus as stated above, is the Chief Land Registrar legally bound to cancel the register and recall the title deed in respect of land known as Kilifi/Jimba/1126?
60. The Applicants' advocate submitted that the Chief Land Registrar acted in error, unreasonably and in excess of jurisdiction when he issued a title deed for Kilifi/Jimba/1126 before cancelling the Certificate of Title that had been issued to the Applicants earlier on.
61. According to counsel, it is not possible to have two titles under different registration systems over the same parcel of land or to have titles that overlap each other.
62. I entirely agree with the latter argument. Where there are two title documents over the same piece of land, and both titles are shown to have been validly issued by the Government, then the first title should take precedence over the latter.
63. However, the validity or otherwise of the titles must be established first, on the basis of the evidence before the court cannot conclusively decide the title document that should be nullified. In the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal held as follows;-

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

64. In fact, where the court finds that due process was followed before the titles were issued, the Government may be compelled to indemnify the affected party for any loss that he may incur due to an order of cancellation of the title occasioned by double allocation. Indeed, the Land Registration Act, 2012 at section 82 has stipulated how the indemnity to be awarded in respect of loss of any interest in land should be calculated.
65. The Applicants' counsel relied on the provisions of sections 142 and 143 of the Registered Land Act (repealed) in support of the argument that an order compelling the Chief Land Registrar to recall the title deed in respect of Kilifi/Jimba/1126 should issue.
66. Section 142(1) (a) of the Registered Land Act (repealed) provides as follows:

“The Registrar may rectify the register or any instrument presented for registration in the following cases:-

(a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor.”

67. That is the only provisions in the whole Act that gives the Respondent the mandate to rectify the register or any instrument presented for registration under the Act. The rectification of the register or any instrument by the Registrar is only limited to errors or omissions which do not materially affect the interests of the proprietor.
68. A proprietor has been defined by the Act to mean “the person named in the register of the parcel of land or a registered lease.”
69. The cancellation of the register and recalling of the Title Deed in respect of Kilifi/Jimba/1126 will obviously affect the 3rd Interested Party, who is a purchaser for value of the said land.
70. In view of the limited powers of the Respondent, as provided under section 142(1) (a) of the Act, I find and hold that an order of mandamus cannot issue to the Respondent to recall and cancel the register and the title deed for Jimba/Kilifi/1126 even if it is shown that the title deed was irregularly issued. The Respondent is not clothed with such a duty.
71. The writ of mandamus will not issue in cases where to do or not to do an act is left to the discretion of the authority. The duty of the Chief Registrar to rectify errors and omissions in the register or any instrument presented for registration is not imperative because he has to consider the interests of the proprietor. The Registrar has the discretion not to rectify what might be considered as an error or omission because, firstly, the Section 142 (1) (a) uses the word “may” and secondly, because he has to consider the interests of the proprietor, who in this case, is the person issued with the title deed or a certificate of lease under the Act.
72. It is only the court, pursuant to the provisions of Section 143 (1) of the Registered Land Act (repealed) that can order for rectification of the register by cancellation or amendment where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.
73. There are several disputed facts in this matter. These facts can only be established by the court after a full hearing. Evidence has to be adduced as to show that L.R. No. 655 and the resultant subdivisions fall within the Jimba/Kilifi adjudication area and if so how and why that happened.
74. Each party has to establish how it acquired its title and why its title should take precedence over the other one. Evidence has to be led to show how the first registered proprietors of Jimba/Kilifi/1126, who are not parties to this suit, were issued with a Title Deed which they transferred to the 2nd Interested Party in view of the Applicants' claim that they already had a title over the same land.
75. The Applicants also have to lead evidence to show how they were issued with the certificate of title in their possession and the Government has to show why it cannot be condemned to indemnify the party whose title is nullified by the court.
76. Because of those disputed facts, the remedy of judicial review, and especially an order of mandamus, cannot be the appropriate remedy.
77. In the case of **Mureithi & 2 others Vs AG and 4 others, KLR E & L**, pg 707, Nyamu J, as he was then, held as follows:

“A party cannot seek judicial review orders where the institution of an action or a constitutional application is the prescribed procedure. The 5th and 6th Respondents were

juristic persons capable of being sued. They were not public authorities as far as ownership land was concerned since their ownership of land was derived from either adjudication or registration under the Land Adjudication Act or setting apart. Thus the application was an abuse of the court process.”

78. In the case of **Funzi Island Development Ltd. & Others –Vs- County Council of Kwale & 2 Others, Civil Appeal No. 252 of 2005 (Mombasa)** Karanja J.A, while dealing with whether or not to grant to a party the orders of *certiorari* stated (obiter dictum) as follows:

“Unlike in England, Canada and India, our judicial review process is not broad enough to accommodate a party who is not just aggrieved by the process but who may also want to ventilate other issues arising from the matter or lay a claim for compensation or damages against some of the parties in the suit.

In my view, a matter such as this ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the RTA and other disputed facts would have been fully canvassed and conclusive determination made on the same.”

79. I am aware the Applicants filed Malindi HCCC No. 107 of 2005 against the 1st Interested Party by way of a Plaint. In the Plaint, the Applicants have sought for a declaration that they are the registered proprietors of plot number 945 (original number 655/2) Watamu and that no other titles could issue in respect of that land.

80. Indeed, an amended Plaint was filed enjoining the 2nd and 3rd Interested Parties in that suit and the Attorney General. The Applicants’ have further sought, in the alternative, for compensation as against the Government.

81. That, in my view, is the appropriate remedy that the Applicants should pursue and not an order of *mandamus* and *prohibition* because what they are seeking is to quash an act that has already happened. The disputed facts can only be ventilated fully, and parties can seek damages or compensation, amongst other prayers in H.C.C.C No. 107 of 2005.

82. If the Applicants are aggrieved with the legality of the issuance of a title in respect of Kilifi/Jimba/1126, which they are, the other appropriate remedy would have been, if the facts were not seriously disputed, an order of *certiorari*.

83. I say so because the writ of *certiorari* deals with the legality of decisions of bodies and persons. As was held by the Court of Appeal in the case of **Mexner & Another –vs- AG (2005) 2 KLR 189**, a decision of a body or person can be upset through *certiorari* on a matter of law if in the face of it, it was made without jurisdiction or in consequence of an error in law. That is what the Applicants are claiming in this matter.

84. I am aware of suits in their tens in this court in which the same issues of double allocation of land within the Kilifi/ Jimba region have arisen. Those matters are at different stages of hearing. Indeed, a suit involving Kilifi/Jimba/1125 and plot number 103 Watamu is coming up for defence hearing in the new term. An order of *mandamus* in this matter would therefore be prejudicial to the parties in those pending matters.

85. For the reasons I have given above, I dismiss the *Ex parte* Applicants’ Motion dated 14th April, 2011 with costs to the 1st Interested Party.

86. I shall not award costs to the 2nd and 3rd Interested Parties because the *Ex Parte* Applicants did not institute this suit against them at the first instance.

87. Indeed, the *Ex Parte* Applicants were not aware that Kilifi/Jimba/1126 had been transferred to the 2nd Interested Party in August, 2007. On the hand, the 3rd Interested Party purchased Kilifi/Jimba/1126 during the pendency of these proceedings.

Dated and delivered in Malindi this 31st day of **July**, 2014.

O. A. Angote

Judge