



Khan & another (as Executors of the Estate of Antonio Ferro - Deceased) v Land Registrar, Lamu (Civil Appeal 55 of 2016) [2023] KECA 1392 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1392 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 55 OF 2016
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
NOVEMBER 24, 2023**

BETWEEN

MOHAMED TARIQ KHAN 1ST APPELLANT

MS. FEDRICA FERRO 2ND APPELLANT

AS EXECUTORS OF THE ESTATE OF ANTONIO FERRO - DECEASED

AND

LAND REGISTRAR, LAMU RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Malindi (C. W. Meoli J.) delivered on 5th March 2012 in Malindi Judicial Review Misc. Appl. No. 27 of 2010 (Formerly MSA JR Misc. Appl. No. 126 of 2010))

A Land Registrar did not have the legal authority under the Registered Land Act (repealed) to revoke a title to land in the absence of judicial proceedings

The appellants filed a judicial review application challenging the Land Registrar's decision to revoke the title to their property. The appellants claimed the property was lawfully acquired in 2001 under the Registered Land Act (repealed) and had been in their use and occupation since then. The title was revoked through Gazette Notice No. 5564 dated May 21, 2010, citing irregular allocation and the land being within a designated water catchment area. The trial court dismissed the judicial review application, prioritizing public interest. The appellants appealed to the Court of Appeal. The Court of Appeal found the revocation illegal and procedurally improper, quashed the decision, and reinstated the title while denying a prohibition order.

Reported by John Ribia

Land Law – Land Registrar – powers – powers under the Registered Land Act (repealed) – revocation of title – conditions precedent – public interest – water catchment area - whether a Land Registrar had the legal authority under the Registered Land Act (repealed) to revoke a title to land in the absence of judicial proceedings or a court order - whether the revocation of the appellants' title was procedurally proper and complied with the rules of natural justice, given that the appellants were not notified or afforded an opportunity to be heard prior to the



revocation - whether public interest considerations, such as the protection of a water catchment area, could justify a Land Registrar's revocation of a land title without adhering to statutory and procedural requirements - Land Registration Act (cap 300) sections 14, 28, 142, and 143; Registered Land Act (repealed) (cap 300) sections 142, and 143; Antiquities and Monuments Act (repealed) (cap 215) sections 4, 16, 17, 18, and 20; Government's Land Act (repealed) (cap 280) sections 120, 121.

Land Law – *acquisition of land – fraudulent acquisition – evidence of fraud - whether a court could be deemed to be in error for addressing allegations of fraud by relying on assumptions and generalizations without concrete evidence to support claims of fraudulent acquisition.*

Brief facts

The appellants filed a judicial review application challenging the Land Registrar's decision to revoke the title to their property. The appellants claimed the property was lawfully acquired in 2001 under the Registered Land Act (repealed) and had been in their use and occupation since then. The title was revoked through Gazette Notice No. 5564 dated May 21, 2010, citing irregular allocation and the land being within a designated water catchment area.

The appellants argued that the revocation was *ultra vires*, unconstitutional, and in breach of natural justice, as they were not notified or given an opportunity to be heard. They sought orders of *certiorari*, *mandamus*, and prohibition to quash the revocation and reinstate their title.

The Land Registrar defended the decision, citing public interest in protecting the water catchment area and alleging fraudulent acquisition of the title. The trial court dismissed the application, finding the dispute unsuitable for judicial review and prioritizing public interest considerations. Dissatisfied, the appellants appealed to the Court of Appeal.

Issues

- i. Whether a Land Registrar had the legal authority under the Registered Land Act (repealed) to revoke a title to land in the absence of judicial proceedings or a court order.
- ii. Whether the revocation of the appellants' title was procedurally proper and complied with the rules of natural justice, given that the appellants were not notified or afforded an opportunity to be heard prior to the revocation.
- iii. Whether public interest considerations, such as the protection of a water catchment area, could justify a Land Registrar's revocation of a land title without adhering to statutory and procedural requirements.
- iv. Whether a court could be deemed to be in error for addressing allegations of fraud by relying on assumptions and generalizations without concrete evidence to support claims of fraudulent acquisition.

Held

1. The first appellate court had a duty to reconsider the evidence, evaluate it and draw its own conclusion of facts and law. The first appellate court would only depart from the findings by the trial court if they were not based on evidence on record; where the trial court was shown to have acted on wrong principles of law.
2. There were two schools of thought on merit review in judicial review. The first being that with promulgation of the Constitution of Kenya, 2010 judicial review had shifted from the process only approach to merit review in appropriate cases; while the second had maintained the traditional approach that believed that judicial review proceedings involved a process only approach limited to the interrogation of the process and not the merits of the decision being challenged. The intention of the Constitution never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court.
3. The trial court appeared to have conflated the issue of the procedural propriety and legality of the respondent's decision with the issue of the legality of the appellant's title, when it stated that in order to find that the respondent acted *ultra vires* there must be some certainty that the applicant was the



- owner of the suit land under the Registered Land Act regime. The question of the appellants' title to the suit property was in this respect only relevant in so far as it was the main reason advanced by the respondent to justify its decision. The trial court commenced its analysis and determination on the wrong premise, namely that the validity of the appellants' title was the subject matter of review before it, and hence reached a wrong conclusion that the said application was not amenable to judicial review.
4. Sections 142 and 143 of the Registered Land Act (repealed) provided procedures. The first was where there was a resurvey and an area was found to be incorrect, prior notice was required to be given to all parties appearing on a register of the intention to rectify. The trial court found that the Gazette Notice No. 1933 dated March 1, 2002 was sufficient notice in that regard. The said Gazette Notice was issued pursuant to the provisions of section 4 of the Antiquities and Monuments Act (repealed) and not section 142 and 143 of the Registered Land Act (repealed), nor did it give any notice of intended rectification, but of a declaration of a monument. The trial court found that the declaration that Lamu Crescent as a monument ought to have spurred the Appellant to action. However, the court did not specify which action was necessitated by the said declaration, and no analysis was made by the court on the legal consequences of the declaration, and particularly whether or not it was tantamount to revocation of title, so as to lay a basis for its finding.
 5. The Antiquities and Monuments Act (repealed) provided for three legal consequences of such a declaration. Under section 16, the Government or, with the sanction of the Minister, the National Museums Board, could purchase or take a lease or accept a gift or bequest of a monument; under sections 17 and 18, the National Museums Board or any authority appointed by the Minister could, with the sanction of the Minister, enter into a written agreement with the owner of a monument and any other person for the guardianship, protection or preservation of the monument; and under section 20, if the Minister was apprehensive that a monument was in danger of being destroyed, injured or allowed to fall into decay, he may acquire the monument by way of compulsory purchase under the provisions of the Land Acquisition Act (repealed).
 6. The effects of the failure by the respondent to give notice of the intention to rectify the appellants' title was to deny the appellants an opportunity to be heard on the said revocation. On the application of the principles of natural justice, whereby those making decisions which would affect others were required to act fairly and give those affected an opportunity to be heard.
 7. The second procedure that was required by section 143 of the Registered Land Act (repealed) was that any revocation of a title issued under the repealed Act was to be undertaken by the court, and particularly where the ground for such revocation was that the registration (other than a first registration) was obtained by fraud or mistake as alleged by the respondent. There was also a condition precedent for the exercise of the powers under section 143, namely that it had to be established that proprietor had knowledge of the fraud or mistake in consequence of which the rectification was sought, or caused such fraud or mistake or substantially contributed to it. The respondent had no powers to revoke title issued under the Registered Land Act (repealed), and since no evidence was brought by the respondent of proceedings and orders by a court of law ordering him revoke the title, the purported revocation in Gazette Notice No. 5564 dated May 21, 2010 was *ultra vires* and illegal. The respondent did not produce any evidence that the suit property was vested in the Government.
 8. There was procedural impropriety on the part of the respondent, that the respondent acted *ultra vires* and illegally in revoking the appellant's title. The trial court failed to take into account the relevant provisions of the law and as a result reached a wrong conclusion in law. It was also notable that the trial court observed that the appellant had relied on the decision of *Fashim Yasin Twaha & another vs the District Registrar Lamu*, Judicial Review Miscellaneous Application. No. 17 of 2010, in which the same gazette notice was successfully challenged and quashed by the court, and distinguished the said case on account of the fact that the respondent did not make submissions therein, did not produce Gazette Notice No of 1933 of 1st March 2002 declaring Lamu Crescent as a water catchment area



- under the Antiquities and Monuments Act (repealed), and the evidence produced demonstrated that the subject parcels of land were not part of the Lamu Crescent.
9. Fraud must not only be specifically pleaded, but also strictly proved, and could not be inferred from facts. The trial court applied the wrong principles of law in reaching its findings on the possibility of fraud on the part of the appellant.
 10. While the respondent alluded to the Ndungu Commission report having found the allocation to be illegal, he did not produce any evidence of the specific findings in that report with respect to the suit property. In addition, the respondent did not produce any other evidence of processes converting the suit property into public land as indicated in the Gazette Notice. If indeed the appellant's land was situated in the Lamu Crescent, certain legal acts were required to be taken under the Antiquities and Monuments Act (repealed) for the said land to be converted to public land, and lastly, there were also specific procedures required to be undertaken in that regard under the Registered Land Act (repealed). The finding by the trial court that there was a public interest element in the matter was not supported by the evidence on record or the applicable legal provisions.
 11. There may be interventions that may be required in the future to protect, guard or acquire the suit property or parts thereof, in the event that it was found to be located within the Lamu Crescent, subject to observance of the applicable legal procedures. The order of prohibition as sought by the appellants would in this respect unduly inhibit and prevent such interventions if found to be necessary, and was therefore not available in the circumstances of this appeal.

Appeal allowed.

Orders

- i. *An order of certiorari was issued to remove into the court for the purpose of quashing the decision made by the respondent in Gazette Notice No. 5564 dated May 21, 2010 purporting to revoke the suit land.*
- ii. *An order of mandamus was issued compelling the respondent or equivalent officer to reinstate and/ or rectify the Land Records contained in the Land Registrar relating to the suit land to the position that existed immediately prior to the purported revocation of the said title by Gazette Notice No. 5564 dated May 21, 2010.*
- iii. *Each party was to bear their respective costs of the suit and of the instant appeal.*

Citations

Cases

Kenya

1. *Commissioner of Lands v Kunste Hotel Limited* Civil Appeal 234 of 1995; [1997] KECA 413 (KLR) - (Followed)
2. *Emfil Limited v Registrar of Titles Mombasa & 2 others* Civil Appeal 312 of 2012; [2014] KECA 348 (KLR) - (Followed)
3. *Jabane v Olenja* Civil Appeal 2 of 1985; [1986] KECA 21 (KLR); (1986) KLR 661 - (Followed)
4. *Oloo Onyango v Attorney-General* Civil Appeal 152 of 1986; [1987] KECA 56 (KLR); (1986-1989) EA 456 - (Explained)
5. *Republic v Principal Secretary Ministry of Industrialization & Enterprises Development & another exparte Rishit Metals Limited* Judicial Review 268 of 2013; [2013] KEHC 6668 (KLR) - (Followed)
6. *Saisi & 7 others v Director of Public Prosecutions & 2 others* Petition 39 & 40 of 2019 (Consolidated); [2023] KESC 6 (KLR) - (Explained)
7. *Twaha, Fashim Yasin & another v District Registrar* Miscellaneous Application 17 of 2010; [2011] KEHC 3355 (KLR) - (Followed)
8. *United India Insurance Co Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* ? 36 of 1983; [1985] KECA 130 (KLR) - (Explained)



9. *Vijay Morjaria v Nansingh Madhusingh Darbar & another* Civil Appeal 106 of 2000; [2000] KECA 14 (KLR) - (Explained)

Tanzania

Catholic Diocese of Moshi v Attorney General [2000] 1 EA 25 - (Explained)

United Kingdom

1. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] EWCA Civ 1 - (Applied)
2. *Council for Civil Service Union v Minister for Civil Service* [1984] UKHL 9 - (Explained)

Regional Court

1. *Mbogo & another v Shah* [1968] EA 93 - (Followed)
2. *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 - (Explained)
3. *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 - (Followed)

Statutes

Kenya

1. Antiquities and Monuments Act (Repealed) (cap 215) sections 4, 16, 17, 18, 20 - (Interpreted)
2. Constitution of Kenya In general - (Cited)
3. Government's Land Act (Repealed) (cap 280) sections 120, 121- (Interpreted)
4. Land Acquisition Act (Repealed) (cap 295) In general - (Cited)
5. Land Registration Act (cap 300) sections 14, 28, 142, 143- (Interpreted)
6. National Museums and Heritage Act (cap 216) In general - (Cited)
7. Registered Land Act (Repealed) (cap 300) sections 142, 143 - (Interpreted)
8. Trust Lands Act (Repealed) (cap 288) In general - (Cited)

Advocates

Mr Munga h/b for *Ms Lutta* for the respondent.

JUDGMENT

1. On March 5, 2012, the High Court of Kenya at Malindi (CW Meoli J) delivered a ruling dismissing the appellants' notice of motion dated December 7, 2010 filed in Malindi Judicial Review Misc Appl No 27 of 2010 (formerly MSA Judicial Review Misc Appl No 126 of 2010), after finding that the appellants had not demonstrated that they were entitled to the orders sought therein. The appellants had in the said application moved the High Court seeking the following orders:
 - 1) An order of certiorari to remove into the court for the purpose of quashing the decision made by the respondents and gazetted on May 21, 2010 purporting to revoke the Title compromised in Title No Lamu/ Block [particulars withheld].
 - 2) An Order of *mandamus* to reinstate and/ or rectify the Land Record contained in the Land Registrar relating to the said property that existed immediately prior to the purported revocation of the said title showing Antonio Ferro as the registered proprietor.
 - 3) An order of Prohibition to prohibit the respondent from unlawfully and/ or illegally exercising any powers in purporting to revoke the aforesaid title known as Lamu/ Block [particulars withheld] and/ or from interfering with the occupation, use proprietorship, ownership, dealing, disposition or quiet enjoyment of the property comprised in the said title by the applicants and/or applicants and /or the beneficiaries of the Estate of Antonio Ferro or any other person authorized by them so to do.



- 4) The costs of and occasioned by the motion be taxed and paid by the respondent to the applicant and be provided for.
2. The grounds upon which the application was based were that the deceased Antonio Ferro was registered proprietor of Title No Lamu/ Block [particulars withheld] (hereinafter “the suit property”) in August 2001 under the Registered Land Act (since repealed), after surrendering the lease to the land for purposes of change of user and conversion of the title. That on May 31, 2010, the District Land Registrar Lamu, the Respondent herein, vide Gazette Notice No 5564 published on even date, illegally, wrongfully, and without following due process or legal basis, power or authority, purported to revoke the said title of the deceased. The appellants urged that this was in breach of the rules of natural justice, unconstitutional and *ultra vires* since they were neither notified of the intention to cancel the title, nor given an opportunity to show cause why the title should be cancelled, nor were they given a reason for the revocation and cancellation. Further, that having constructed their residence on the suit property, and had uninterrupted use and enjoyment of the developed the land, the respondent’s actions amounted to deprivation of their rights to life and property and was likely to cause them irreparable economic loss and damage.
3. In addition, that the actions of the respondent were based on irrelevant and extraneous to legal considerations as it was evident that the Deceased’s title deed was acquired well before the gazettment of the Lamu Water Catchment Area on March 28, 2002, and was outside the designated Lamu Water Catchment Area and not included in an earlier Gazette Notice No 1033 seeking to revoke titles in the water catchment area. That to this extent the Land Registrar was acting with mala fides and lack of candour and the public’s interest was therefore not adversely affected. The appellants also denied that the suit land was fraudulently obtained since the deceased had title to the property prior to 2001, and that in any event, the validity of the title to the suit property was not in dispute in the application, but rather the conduct of the Respondent in purporting to revoke the said title in excess of his powers and in breach of the rules of natural justice, as well as the appellants’ constitutional rights to protection of proprietary rights.
4. The respondent in opposition to the application filed grounds of opposition dated March 21, 2011 and a replying affidavit sworn on March 30, 2011 by Shume Chinyaka, the Land Registrar, Lamu. The respondent asserted that the Gazette Notice no 5564 dated May 21, 2010, cancelled and revoked the registration of the suit property because the land was acquired irregularly, and therefore the allocations were illegal and unconstitutional. The respondent contended that it was in the public limelight that from the 1980’s and before 2003, there was rampant, illegal and irregular allocation of land reserved for public use, denying public institutions, bodies and organizations use of land reserved for public purposes, and that in 2003, the Government appointed the Ndungu Commission to investigate all irregular and illegally acquired public land. That the Ndungu Commission’s Report listed several plots including the appellants plot’s which were found to have been irregularly allocated. The Respondent further stated that the process of land allocation begins with the preparation of Part Development Plans however, that there was no record of the any Part Development Plans in their offices nor had the Appellants provided any evidence of the Part Development Plans in relation to the suit property, and in the absence of the said plans, the title issued was irregular and illegal.
5. The respondent also averred that the land allocated to the appellants was reserved as a water catchment area, and that the sand dunes therein had been the source of clean fresh water for the Lamu island and was protected as such until the appellants acquired it. Therefore, that the public should not be denied use of the only source of water for Lamu residents, and that the appellants have always been aware of intended cancellation and/or declaration of all the land known as the Lamu Crescent where this suit property falls which is within the high water mark, when it was declared a monument vide



an earlier Gazette Notice of March 28, 2002 to which the appellants did not object. In conclusion, the respondent stated that it was necessary for the interest of justice and in the public interest for the decision to revoke the title to the suit property to be upheld, since the appellants always had knowledge that the land parcel was not available for allocation and that since validity of the title was in dispute, judicial review was not an adequate remedy.

6. The trial in the High Court was canvassed by way of written submissions which were considered by the learned trial judge (CW Meoli J), who found that judicial Review proceedings are best suited for matters in which material facts are not seriously disputed and the suit was therefore not amenable to judicial review since the validity of the appellant's title to the suit property was contested. However, that the court could not "shut its eyes to the possibility that indeed some of the titles in Lamu/ Block [particulars withheld] were acquired through fraud,". Regarding the appellant's complaint that he was denied the right to be heard, the trial court held that Gazette Notice No 1933 of March 1, 2002 spurred the appellant to action, and that even if this court were to quash the revocation of title, the gazettelements of March 1, 2002 would still stand. Lastly, that even if the appellant had brought himself within the requisite grounds for judicial review, the Court was reluctant to exercise its discretion in their favour because of the public interest element in the matter.
7. The appellants were aggrieved by the decision of the trial court and proffered this appeal by way of a memorandum of appeal dated July 27, 2016 which raises ten (10) grounds of appeal revolving around the exercise of the learned trial judge's discretion. It is alleged the said exercise of discretion was improper, injudicious, wrongful, took into account irrelevant matters or applied the wrong principles, by failing to consider whether the actions of the respondents in revoking the applicants title to Lamu/ Block [particulars withheld] via Gazette Notice No 5564 was *ultra vires* and in contravention of section 14, 28, 142 and 143 of the *Registration Land Act*; in finding that the appellants' title to the suit property could have been fraudulently acquired despite there being no evidence to support this finding; by misapplying the principles of judicial review and inquiring into the validity of the appellants' title while failing to consider whether the respondent had complied with the principles of administrative justice in revoking the appellants' titled to the suit property; in finding that the appellant were given an opportunity to be heard before the revocation of title to the suit property by virtue of a Gazette Notice dated March 3, 2022 when the said Gazette Notice was incidental to the proceedings and did not form the subject matter of the prerogative orders sought by the appellants; in failing to consider whether the appellants were given an opportunity to be heard before the revocation of the title to the suit property via the respondent's Gazette Notice No 5564 dated May 21, 2010; and in finding that the suit property fell within a water catchment area and was therefore subject to public policy consideration when there was no cogent evidence to support this finding.
8. We heard the appeal on this court's virtual platform on May 8, 2023, when learned counsel Mr Munga holding brief for Ms. Lutta, appeared for the respondent and relied on written submissions dated March 27, 2017 filed by Ms Lutta. There was no appearance for the appellants though their advocates were duly served with the hearing notice, and we reserved the appeal for judgment after noting that written submissions dated February 27, 2017 filed by the appellants' advocates were on record.
9. This being a first appeal, we are mindful that the duty of this Court as set out in the decision of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* [1968] KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & another v Shah* [1968] EA 93.



10. The main issue in this appeal is whether the learned trial Judge exercised her discretion judiciously in dismissing the Appellants' application. The circumstances when this Court can interfere with the exercise of this discretion were laid out in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

11. The appellants in their submissions urged that the learned trial judge failed to exercise her discretion properly in dismissing the appellants' notice of motion dated December 7, 2010 by failing to appreciate that the Land Registrar's action of unilaterally revoking title to the suit property without affording the appellants' fair hearing was *ultra vires* the provisions contained in section 142 and 143 of the *Registered Land Act* (since repealed), the statute applicable to the suit land at the time. Further, the learned judge failed to appreciate that the appellants' core contention was that the revocation of title to the suit property could only be validly effectuated by a court, in strict compliance with the said section and the learned judge derogated from the core evidentiary elements of the motion and embarked on a fact finding journey to arrive at the conclusion that the respondent was exercising power under section 120 and section 121 of the *Government's Land Act*.
12. While placing reliance on the decisions in *Republic v Principal Secretary Ministry of Industrialization & Enterprises Development & another exparte Risbit Metals Limited* [2013] eKLR and *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR that discretion ought to be exercised judiciously by the courts, the appellants submitted that the trial judge exercised her discretion wrongly and fell into an error by taking into account allegations of fraud in the acquisition of the suit property while the same was unsubstantiated and not proved, and when he had tendered sufficient evidence to satisfy the court that by having title to the suit property he was entitled to a hearing and the due process before the revocation of the same as held in the case of *Commissioner of Lands v Kunste Hotel Limited* [1997] eKLR. Further, that while the learned trial judge took into account the fact that a proper determination of fraudulent manipulation could only be made through evidence, she went ahead to lay controvertible possibility of fraud “at the feet of the appellants”.
13. In addition, that the learned trial judge took into account irrelevant matters in finding that the appellants were given an opportunity to be heard before revocation of the title to the suit property by virtue of an entirely separate Gazette Notice dated March 1, 2002 that neither made specific reference to the suit property nor the action of revocation of title, and that by construing the Gazette Notice dated March 1, 2002 as sufficient notice to the appellants, the learned trial Judge erred. Lastly, that the learned trial judge misapplied the law in finding that the suit property fell within a water catchment area and was therefore subject to public policy considerations, and by distinguishing the case of *Fashim Yasin Twaha & another v the District Registrar* Lamu, JR No 17 of 2010 which was an identical application for prerogative orders in respect of a parcel of land that was contiguous to the suit property by placing reliance on the lack of specific inclusion of the suit property in correspondence from



- the Ministry of Lands which excluded certain properties from the water catchment area. Further, if the respondent was of the view that the protection of water catchment area was a genuine interest that needed to be protected, nothing would have been easier than for the respondent to conduct a compulsory acquisition of the suit property. The appellants relied on the jurisprudence in the *Emfil Case (supra)* on the issue of public interest *vis-a-vis* the protection of private rights of an individual.
14. The respondent's counsel in response submitted that the trial court judge exercised her discretion judiciously and place reliance on the case of *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR for the position that the trial judge tried to balance the rights of the appellant and public interest; that the trial court's decision that the appellant was given an opportunity to be heard was proper as the Gazette Notice of 2002 was issued after the issuance of the alleged title to the appellants in 2001 and notified all affected parties who wished to raise an objection to the declaration of the water catchment area as a monument to do so within a month. Reliance was placed on the case of *Catholic Diocese of Moshi v Attorney General* [2000] 1 EA 25 (CAT) where this court held that the whole objective behind such publications is to bring the purport of the orders concerned to the notice of the public or person likely to be affected by it.
 15. Lastly, that the appellants had failed to substantiate the grounds of irrationality and illegality, and the respondent's counsel cited the case of *Council for Civil Service Union v Minister for Civil Service* [1985] in this regard. Further, that the gazette notice clearly stated that it was issued under the *Government Land Act* and *Trust Lands Act* and that the decision taken by the respondent in the circumstances was not outrageous and the decision of the Trial court was proper.
 16. It is notable that the main finding by the learned trial judge was that the dispute before the trial court was not amenable to judicial review for the following reasons:
 - “ 37. The annexures tendered by the applicant raise several questions. Is Plot 162 part of the gazette Lamu Crescent? There is conflicting evidence from either side because clearly this matter is dogged with controversy since 1993. Is the applicant's title superior to the gazettement in 1993 and 2002 regarding the Lamu Crescent? Is the Applicant's title genuine or is it a product of fraudulent manipulations in cahoots with unethical lands officials?
 38. These questions are important, because, in order to find that the respondent acted *ultra vires* there must be some certainty that the applicant is the owner of the suit land under the Registered Land Act Regime. Yet the applicants title deed held under the Registered Land Act had been put to serious questions by their own annexures (the report by AO Eshitera) in addition to the Replying Affidavit.
 39. I have taken time to set out the relevant contents of Eshitera's report as a way of highlighting the intensity of the controversy and dispute over issues germane to this matter. In considered view, a proper determination of these matters would require evidence. This in my opinion renders the present suit not amenable to judicial review.”
 17. The Supreme Court of Kenya has on several occasions ruled on the issue of merit review in judicial review applications, and noted in *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) that there are two schools of thought on merit review in judicial review from decided cases, the first being that with promulgation of the *Constitution* of 2010, judicial review has shifted from the “process only approach” to merit review in



appropriate case; while the second has maintained the traditional approach that believes that judicial review proceedings involve a “process only approach” limited to the interrogation of the process and not the merits of the decision being challenged. The Supreme Court then pronounced the law on this issue to be as follows:

- “75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly “in the circumstances of the case”, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora*, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of the *Constitution* which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.
76. Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah*, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”



18. The issue before the trial court was the legality of the respondent's decision to revoke the appellants' title, and in particular if the proper procedure was followed, and if so, whether the decision to revoke the title was constitutional, fair and reasonable. This was an issue which was within the judicial review jurisdiction of the trial court, as confirmed by the Supreme Court of Kenya in the above cited decision. This was also the position that obtained under common law before the enactment of the Constitution of 2010 and at the time of delivery of the impugned judgment by the High Court, as aptly described in *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 as follows:

"... like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century..."

19. This position had been confirmed years back in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. In addition, the test as to whether an action or decision was reasonable had also been laid down by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 as follows:

"In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account."

20. The trial court appears to have conflated the issue of the procedural propriety and legality of the respondent's decision with the issue of the legality of the appellant's title, when it stated that

"in order to find that the respondent acted ultra vires there must be some certainty that the applicant is the owner of the suit land under the Registered Land Act Regime".

The question of the appellants' title to the suit property was in this respect only relevant in so far as it was the main reason advanced by the respondent to justify its decision. Therefore, the applicable standard of assessment with respect to the arguments made by the respondent as regards the appellants' title was whether they were fair and reasonable, to justify its decision to revoke the said title. It is thus evident that the trial court commenced its analysis and determination on the wrong premise, namely that the validity of the appellants' title was the subject matter of review before it, and hence reached a wrong conclusion that the said application was not amenable to judicial review.

21. The appellants had in this respect challenged the legality of the respondent's action along three fronts. Firstly, that the title could only be set aside in accordance with the provisions of the Registered Land Act particularly section 142 and 143 thereof; secondly, that section 40 of the previous Constitution protected the appellants' right to property and prevented arbitrary deprivation thereof; and lastly that the respondent's conduct was in breach of the rules of natural justice. It was not disputed that the



appellants' title was issued under the Registered Land Act, and the trial court observed as follows in this regard:

- “28. Having carefully considered the material placed before me, I take the following view. Judicial review proceedings are best suited for matters in which material facts are not seriously disputed (see *Seastar Malindi Ltd v Kenya Wildlife Services*(2002) eKLR).
29. In the suit before us, some key questions have loomed large over the proceedings:- what is the true tenure applicable to the suit property and who is the rightful owner thereof? Is it the Applicant under the Registered Land Act or the Government under the Government Lands Act or Trustlands Act. The applicants have argued that the Respondents had no power under the Registered Land Act (the purported law applicable to the suit land as per the applicant) to revoke the title. Is the suit part of a gazetted monument pursuant to Antiquities and Monuments Act?
30. Notably, the impugned gazette notice did not cite the Registered Land Act at all. The revocation was purportedly done under the Government Lands Act CAP 280, and the Trust Lands Act. Hence Miss Lutta's submission that the Respondent was exercising powers under section 120 and 121 of the Government Lands Act.”
22. The trial court then proceeded to undertake a procedural and merit review of the respondent's decision in Gazette Notice No 5564 dated May 21, 2010, and made several findings in this regard. First, that the Gazette Notice 1933 of March 1, 2002 was sufficient notice to the appellants that the suit land was considered of cultural and historical interest to be a monument within the Act; second, that the court could not shut its eyes to the possibility that some of the titles in Lamu/ Block [particulars withheld] were acquired through fraud, which is “a notorious fact of life in most urban Kenya Centres”; and lastly that the public interest elements must take priority. It is notable in this regard that the trial court did not consider the applicable provisions as regards the procedure of revocation for a title under the repealed Registered Land Act, which, being the registration statute of the suit property, was a relevant factor to take into account.
23. In this respect, section 142 and 143 of the repealed Registered Land Act which was then in force, provided as follows:

“142.

- (1) 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;
 - (b) in any case and at any time with the consent of all persons interested;
 - (c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons



appearing by the register to be interested or affected of his intention so to rectify.

- (2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

143.

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

24. Two procedures are relevant from the said provisions in the circumstances of this appeal. The first is where there was a resurvey and an area is found to be incorrect, prior notice was required to be given to all parties appearing on a register of the intention to rectify (emphasis ours). The trial Court found that the Gazette Notice No 1933 dated March 1, 2002 was sufficient notice in this regard. The said Gazette Notice provided as follows:

“The Antiquities and Monuments Act (cap 215) Declaration of Monuments

In exercise of the powers conferred by section 4(1)(a) of the Antiquities and Monuments Act, the Minister for Heritage and Sports declares the area of land specified in the schedule, which he considers to be of and cultural and historical interest to be monuments within the Act. Any objection to the declaration of the area as monuments shall be lodge with the Minister within one (1) month from the date of this notice”

“Schedule

Lamu Water Catchment Area

All that area of land measuring approximately 958.21 hectares also known as Lamu Crescent, a strip of land about 1200 metres wide from the high-water mark to the land running from Kizingoni along the beach to Singue in Lamu Island, Lamu District of Coast Province”....

Dated the March 1, 2002

FM Nyenze

Minister for Heritage and Sports.”

25. The said Gazette Notice was issued pursuant to the provisions of section 4 of the Antiquities and Monuments Act which has since been repealed, and not section 142 and 143 of the Registered Land Act also since repealed, nor did it give any notice of intended rectification, but of a declaration of a



monument. The trial Court found that the declaration that Lamu Crescent as a monument ought to have

“spurred the appellant to action”.

However, the court did not specify which action was necessitated by the said declaration, and no analysis was made by the court on the legal consequences of the declaration, and particularly whether or not it was tantamount to revocation of title, so as to lay a basis for its finding.

26. The repealed *Antiquities and Monuments Act* provided for three legal consequences of such a declaration. Under section 16 of the *Act*, the Government or, with the sanction of the Minister, the National Museums Board, could purchase or take a lease or accept a gift or bequest of a monument; under sections 17 and 18, the National Museums Board or any authority appointed by the Minister could, with the sanction of the Minister, enter into a written agreement with the owner of a monument and any other person for the guardianship, protection or preservation of the monument; and under section 20, if the Minister was apprehensive that a monument is in danger of being destroyed, injured or allowed to fall into decay, he may acquire the monument by way of compulsory purchase under the provisions of the *Land Acquisition Act* (cap 295). We will come back to the legal implications of Gazette Notice No 1933 of March 1, 2002 later on in this judgment.
27. The effects of the failure by the respondent to give notice of the intention to rectify the appellants’ title was to deny the appellants an opportunity to be heard on the said revocation, and the Court of Appeal in its decision in the case of *Onyango Oloo v Attorney General* (1986-1989) EA 456 in this regard had emphasised that on the application of the principles of natural justice, whereby those making decisions which will affect others are required to act fairly and give those affected an opportunity to be heard.
28. The second procedure that was required by section 143 of the *Registered Land Act* was that any revocation of a title issued under the Act was to be undertaken by the court, and particularly where the ground for such revocation was that the registration (other than a first registration) was obtained by fraud or mistake as alleged by the respondent. There was also a condition precedent for the exercise of the powers under section 143, namely that it had to be established that proprietor had knowledge of the fraud or mistake in consequence of which the rectification is sought, or caused such fraud or mistake or substantially contributed to it. It is thus evident that the respondent had no powers to revoke title issued under the *Registered Land Act*, and since no evidence was brought by the respondent of proceedings and orders by a Court of Law ordering him revoke the title, the purported revocation in Gazette Notice No 5564 dated May 21, 2010 was *ultra vires* and illegal. The respondent in this respect relied on section 120 and 121 of the repealed *Government Lands Act*, which provided for correction of errors and cancellation of entries in the registers of Government Land. However, the respondent did not produce any evidence that the suit property was vested in the Government.
29. It is thus our finding that there was procedural impropriety on the part of the respondent, that the respondent acted *ultra vires* and illegally in revoking the appellant’s title. The trial court in this regard failed to take into account the relevant provisions of the law set out in the foregoing and as a result reached a wrong conclusion in law. It is also notable that the learned trial judge, observed that the Appellant had relied on the decision of Omondi J (as she then was) in *Fashim Yasin Twaha & another v the District Registrar Lamu*, Judicial Review Miscellaneous Application No 17 of 2010, in which the same gazette notice was successfully challenged and quashed by the court, and distinguished the said case on account of the fact that the respondent did not make submissions therein, did not produce Gazette Notice No of 1933 of March 1, 2002 declaring Lamu Crescent as a water catchment area under the Antiquities & Monuments Act, and the evidence produced demonstrated that the subject parcels of land were not part of the Lamu Crescent.



30. The learned trial judge then observed that:

“ 20. The court was evidently persuaded that the respondent had no power under the Registered Land Act, the regime under which the land was registered, to cancel the titles in the manner he did and secondly. That the respondent acted arbitrarily ...

24. Therefore while the general principles applied in the Twaha case are unassailable the facts before this court are eminently distinguishable therefrom. It is also true that consistency in judicial decisions enhances certainty, but it should be an aid to justice and not end in itself.”

31. It is in this regard notable that the Gazette Notice that was impugned in *Fashim Yasin Twaha & another v the District Registrar Lamu* (*supra*) was the same Gazette Notice No 5564 dated May 21, 2010 that was the subject of the application in the trial court, and that the said Gazette Notice was quashed in that case for the same reasons advanced by the appellants herein as regards the illegality of the respondent’s actions. As we have already noted, the reliance on Gazette Notice No of 1933 of March 1, 2002 did not absolve the respondent in this regard.

32. We will briefly comment on the other findings by the trial court for purposes of record, since by now it should be evident that its discretion was wrongly exercised. The trial court took judicial notice that

“ fraud and corruption were “a notorious fact of life in most urban Kenya Centres”

in finding that there was a possibility that indeed some of the titles in Lamu/ Block [particulars withheld] were acquired through fraud. The law in this respect as buttressed in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, is that fraud must not only be specifically pleaded, but also strictly proved, and cannot be inferred from facts. To this extent the trial court applied the wrong principles of law in reaching its findings on the “possibility” of fraud on the part of the appellant.

33. Lastly on the issue of the public interest, Gazette Notice No 5564 dated May 21, 2010 indicated as follows with regards to the reasons for the revocation of the appellant’s title among others:

“Whereas the parcels of land whose details are described under the schedule herein below were allocated and titles issued to private developers, it has come to the notice of the government that they said parcels of land were reserved for public purposes under the relevant provisions of the *Constitution* of Kenya, the *Government Lands Act* (cap 280) and The Trust *Land Act* (cap 288). The allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of the public need and interest, the Government revokes all the said titles.”

34. Among the titles listed in the schedule was the suit property. The trial court on its part held as follows:

“ 50. Adopting the same logic, I have to ask what the priority in this matter ought to be: the preservation of the Lamu Crescent which is a lifeline to Lamu, a World Heritage Site, or the right of the applicants to their alleged investment is compelling. The public interest element in this matter is both vivid and significant and must take priority. So that even if the applicants had brought



themselves within the requisite grounds this court would have been extremely reluctant to exercise its discretion in their favour. (See *Bogonko's* case).”

35. While the respondent alluded to the Ndungu Commission report having found the allocation to be illegal, he did not produce any evidence of the specific findings in that report with respect to the suit property. In addition, the respondent did not produce any other evidence of processes converting the suit property into public land as indicated in the Gazette Notice. If indeed the appellant’s land was situated in the Lamu Crescent, we have already found that certain legal acts were required to be taken under the repealed *Antiquities and Monuments Act* for the said land to be converted to public land, and lastly, there were also specific procedures required to be undertaken in this regard under the *Registered Land Act*. We therefore find that the finding by the trial court that there was a public interest element in the matter was not supported by the evidence on record or the applicable legal provisions.
36. We therefore find the appeal to be merited. On the remedies sought by the appellant, we find that the orders sought of certiorari and mandamus are necessary to correct the illegalities committed by the respondent. As regards the order sought of prohibition, we note that it was not disputed that Gazette Notice No of 1933 of March 1, 2002 has not been revoked, and the legal consequences we have identified of the declaration made therein as regards Lamu Crescent being a monument were retained in the *National Museums and Heritage Act*, that repealed and replaced the *Antiquities and Monuments Act*.
37. We are alive to the fact that there may be interventions that may be required in the future to protect, guard or acquire the suit property or parts thereof, in the event that it is found to be located within the Lamu Crescent, subject to observance of the applicable legal procedures. The order of prohibition as sought by the appellants would in this respect unduly inhibit and prevent such interventions if found to be necessary, and is therefore not available in the circumstances of this appeal.
38. We accordingly set aside the ruling and orders granted by the High Court of Kenya at Malindi (CW Meoli J) delivered on March 5, 2012 in Malindi Judicial Review Misc Appl No 27 of 2010 (Formerly MSA JR Misc Appl No 126 of 2010) in their entirety, and in their place grant the following orders:
- 1) An order of certiorari be and is hereby issued to remove into the Court for the purpose of quashing the decision made by the respondent in Gazette Notice No 5564 dated May 21, 2010 purporting to revoke the Title compromised in Title No Lamu/ Block [particulars withheld].
 - 2) An order of *mandamus* be and is hereby issued compelling the Respondent or equivalent officer to reinstate and/ or rectify the Land Records contained in the Land Registrar relating to the Title No. Lamu/ Block [particulars withheld] to the position that existed immediately prior to the purported revocation of the said title by Gazette Notice No 5564 dated 21st May 2010.
 - 3) Given the circumstances giving rise to the suit in the High Court at Malindi in Malindi Judicial Review Misc Appl No 27 of 2010 (Formerly MSA JR Misc Appl No 126 of 2010) and this appeal, each party shall bear their respective costs of the said suit and of this appeal.
39. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

S. GATEMBU KAIRU FCIArb

JUDGE OF APPEAL

.....

P. NYAMWEYA



JUDGE OF APPEAL

.....

G. V. ODUNGA

JUDGE OF APPEAL

.....

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

