Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) (Civil Appeal 98 of 2016) [2018] KECA 17 (KLR) (19 April 2018) (Judgment)

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Neutral citation: [2018] KECA 17 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 98 OF 2016

ARM VISRAM, W KARANJA & MK KOOME, JJA

APRIL 19, 2018

BETWEEN

SUPER NOVA PROPERTIES LIMITED ..... 1ST APPELLANT

NOVA HOLDINGS LIMITED ..... 2ND APPELLANT

AND

THE DISTRICT LAND REGISTRAR MOMBASA ..... 1ST RESPONDENT

THE COMMISIONER OF LANDS ..... 2ND RESPONDENT

MINISTER FOR LANDS ..... 3RD RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

THE JUDICIARY ..... INTERESTED PARTY

THE JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

(Appeal from part of the judgement of the High Court of Kenya at Mombasa (Emukule J.), delivered on 22nd June 2016 in Judicial Review Application No. 105 of 2010)

JUDGMENT

1. Many cases have been determined regarding allocation of public land for private use, yet the issue has remained unresolved as courts, being a bastion of justice, have been called upon on a case by case basis to determine the competing public versus private rights over public land that is allocated for private

use. The decisions are on case by case basis, therefore, the ratio decidendi that seems germane in most of the decisions is that a merit evaluation of all the surrounding circumstances can best be litigated in the Environment and Land Court. One would have expected that with the public outcry associated with public land grabbing, that resulted in various commissions such as the "Ndungu Land Commission" and "Truth and Justice Commission" and other such initiatives a lasting solution in regard to public land acquired for private use would be realized at once. Nay, as in the dispute, the subject matter of this appeal, the court was called upon to adjudicate on a parcel of land that is occupied by the Mombasa Law Courts, now re-named "Justice Towers" which was allocated to private entities.

2. A brief background of the matter is; before Emukule J., a judicial review application was filed by Super Nova Properties Ltd and Nova Holdings Ltd, the 1st and 2nd appellants respectively. Each had filed a motion seeking orders of judicial review in the nature of certiorari for purposes of quashing the decision by the District Land Registrar Mombasa (1st respondent), the Commissioner of lands (2nd respondent) which was contained in Gazette Notice No. 3458 of the 1st April, 2010 revoking the appellants' title being, Mombasa/Block XXVI/917 (wrongly indicated in the gazette notice as Mombasa/Block XXVI/117), and Mombasa/ Block XXVI/916 (hereinafter referred to as the suit premises). They also sought an order of mandamus directing the 1st and 2nd respondents to restore or reinstate their names in the respective proprietorship of the suit premises.

3. According to the applicants (now appellants), on the 17th December, 1996, the Government of Kenya through the Commissioner of Lands allotted Kimeo stores, and Angeline Cherono Cheboi, jointly with Leah Sawe, the suit premises respectively. The allotees subsequently transferred their interest in the allotted suit premises to the appellants and the appellants were registered as leases for a term of 99 years with an annual ground rent of Ksh 90,000. The leases were registered at the Mombasa District Land Registry on the 19th December, 1996 with the result that the appellants became the registered proprietors and were issued with the requisite certificate of leases. It would seem that the appellants did not have peaceful enjoyment of the suit premises as soon thereafter, two civil suits were filed for the recovery of the suit premises, in particular, the plot forming part of the Mombasa Law Courts. These were, Mombasa HCCC No. 164 of 1997, instituted by *Mohamed F. Khatib & 3 Others v Nova Holdings Ltd and Commissioner of lands* and Mombasa HCCC No. 208 of 1997, *Mohamed F. Khatib & 2 Others v Super Nova Properties Ltd & Commissioner of Lands.* In the said suits, the plaintiffs were seeking to recover parcel Nos Mombasa Island/Block XXVI/ 916 and Mombasa Island/Block XXVI/ 917 on the grounds that the land formed part of the Mombasa Law Courts.

4. These two suits were consolidated and a consent order was recorded on 12th November, 1997 in Mombasa HCCC No 164 and 208 of 1997 to the effect that Nova Holdings Ltd would retain Plot No 916 while Plot No 917 was to be transferred to the Judiciary by the 1st appellant in exchange of 3 other plots within Kizingo area. The Judiciary was nonetheless not involved in the said suit or the consent order. Pursuant to the aforementioned consent, the 1st appellant was allocated Mombasa/ Block XXVI/983 measuring approximately 0.0055 HA, however it did not transfer plot No 917 which it was to relinquish to the judiciary. However, the respondents faulted the consent order which alienated land for the Judiciary without its involvement. The Ethics and Anti-Corruption Commission also filed Mombasa HCCC No. 186 of 2010- *KACC V Supa Nova Properties Ltd & Wilson Gacanja* seeking to recover the parcel of land known as Mombasa/ Block XXVI/983 on the ground that it was intended for public use.

5. The appellants argued very strongly in the High Court that the Commissioner of Lands in revoking their titles acted without authority, assumed and acted on powers that he did not have and thereby deprived the appellants their property rights that are protected under Article 40 of the *Constitution*; the provisions of sections 142 and 143 of the Registered Land Act, the Registrar of Lands is only given

power to rectify the title; it is only the court that can cancel and/revoke the registration of any person as a proprietor of a land or lease under the repealed Cap 300 .Since the appellants were not given a hearing, they were condemned unheard. The Judge was called upon to consider the process used to cancel the title went afoul to the laid down procedures of a fair hearing and the rules of natural justice; thus the decision to cancel the title was arbitrary, illegal highhanded and amounted to abuse of power. Since the process of revocation of title was illegal, the court was called upon not to consider the merit of the title especially the illegalities claimed by the respondents.

6. The application was opposed by the respondents who gave a very detailed history of the suit premises. It seems to us factual and common ground even before the lower court that the suit premises was public land that was reserved for the Judiciary (the 2nd interested party). That the suit premises was originally known as Mombasa/Block XXVI/244 measuring 1.46 Hectares or thereabouts (original parcel) was reserved for the Judiciary where the Mombasa Law Court is built. However, no title deed was issued to the Judiciary and the High Court building on the same parcel of land was officially opened by the 2nd President of the Republic of Kenya, Daniel T. Arap Moi on the 30th august 1984. According to the affidavits on record, it is stated that sometimes in 1996, the Kenya Anti- Corruption Commission, in furtherance of its mandate commenced investigations into allegations that the land on which the Law Courts Mombasa is built had been illegally alienated to private companies. The investigations revealed that the original parcel was irregularly subdivided to create parcel numbers Mombasa Island/ Block XXVI/916, 917 and 918. That the suit premises being Mombasa Island/Block XXVI/ 917 measuring 0.1039 HA was alienated to the 1st appellant while Mombasa Island/Block XXVI/ 916 measuring 0.4489 HA was alienated to the 2nd appellant. The investigations also revealed that the Judiciary was never involved or consulted when the decision was taken to subdivide the land on which the Mombasa Law Courts is situated.

7. Following a national public outcry regarding widespread illegal and irregular allocation and alienation of public land some of which inter alia, housed key government institutions, such as schools, hospitals and even public cemeteries, to mention just a few, the government of the day appointed a Commission of Inquiry on illegal and irregular allocation of public land known as the "Ndung'u Commission". The report by the said Commission listed thousands of irregularly acquired public land such as the suit premises, which was set aside for the Judiciary. The Government thus embarked on revocation of the illegally allocated parcels of land as indicated in the said report leading to the publication of many gazette notices such as the Gazette Notice no. 3458 which became the subject matter of the suit by way of judicial review before the High Court and the instant appeal. The respondents argued that the suit premises is part of the Court House set aside for the Judiciary and since the revocation, the title thereto was registered in the name of the Permanent Secretary to the Treasury as per the *Act* (Cap 101) to be held in trust for the Judiciary.

8. It was against the aforesaid background that the learned Judge rendered a Ruling the subject of this appeal in which he appreciated that, although the Land Registrar and the Commissioner of Lands had no powers to revoke the title to the suit premises, which could not have been done without following due process, he nonetheless held that in the interest of the larger public, and public policy, courts of law should not aid in the perpetuation of illegalities. In this regard, the Judge held that the scope of judicial review remedies in Kenya had expanded exponentially by dint of the provisions of Article 24(1) (b) and (e) of the *Constitution* which provides for the limitation of certain rights that is necessary in an open and democratic society so as to meet pressing societal needs; the doctrine of public trust provided for under Articles 10 and 73(1) that vests state officers with authority to be exercised in public trust and binds them to exercise power and authority so as to promote and protect the purposes and objects of the *Constitution*; in so doing, they are supposed to exercise honesty, objectivity, impartiality and accountability; Article 40 (6) which provides that land or property rights therein do not extend to any

property which has been found to have been unlawfully acquired; Article 159 (2) which enjoins courts and Tribunals to be guided by the constitutional values which should be promoted and protected while exercising judicial authority and section 7 of the Fair Administrative Action Act which introduced the principal of proportionality test. The learned Judge applied all these principles to the instant case to arrive at the conclusion that the appellants were not entitled to the orders sought.

9. The appellants were aggrieved by the said outcome, which provoked the instant appeal that is predicated on some 17 grounds of appeal which are not only repetitive but also argumentative contrary to Rule 86(1) of the *Court of Appeal Rules*. The Rule stipulates in mandatory terms thus;

> " A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make." Emphasis added."

We will summarize them in the three thematic issues which were adopted by Mr Olunga, learned counsel for the appellant during the hearing. That the learned Judge acted without jurisdiction by making an inquiry of how the suit premises was acquired in judicial review proceedings; acted in error by failing to exercise judicial discretion and by dismissing the appellants' application despite a finding that the Land Registrar had no power to revoke a title and finally, that the Judge denied the appellants their constitutional right to a fair hearing and a right to property.

10. During the hearing, Mr. Olunga, learned counsel for the appellant, relied on his written submissions and made some oral highlights. On jurisdiction, counsel submitted that by arriving at the conclusion that the allocation of the suit premises in favour of the appellants was illegal ab initio, that in effect invalidated the appellants' titles to the respective suit premises which was not within the province of the Judge in judicial review proceedings but fell under the Environment and Land Court (ELC). It is the ELC that has jurisdiction to deal with disputes relating to land use and title to land. The Judge was also faulted for making an inquiry into alienation process of the suit land which matter cannot appropriately be adjudicated within the judicial review proceedings. This much was admitted by the 1st respondent in its replying affidavit sworn by Renson Ingonga on 18th March, 2011 where he stated at paragraph 20 thereof;

> " ...judicial review is not a convenient way of bringing the dispute herein to court in view of the fact that the validity of the applicant's title to the land is disputed and elaborate proceedings may be necessary to unravel the issue"

11. Counsel for the appellants went on to submit that judicial review proceedings cannot be used to determine disputed issues of fact such as the validity of title involving private citizens. To buttress this argument counsel made reference to the case of Commissioner of Lands v Kuntse Hotel Limited [1997] eKLR where this Court stated;-

> " But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected"

See also the case of *Livinstone Kunini Ntutu v Minister For Lands & 4 Others* [2014] eKLR where a Bench of three judges also stated that judicial review is not the most efficacious remedy where the process under which title was obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate forum of adjudication.

According to counsel for the appellant, the Judge clearly outlined all the authorities and the guiding principles in judicial review but he proceeded to make a finding based on merit that the appellants' titles were obtained illegally which was erroneous.

12. Mr. Olunga further submitted that the contesting parties produced documents, on the part of the appellants, they produced letters of allotment to prove that the suit premises were allotted to them legally; the respondents produced the registry index map and the part development plan to prove that the land was allocated to the Judiciary; however, there was no indication in the said map that the land was reserved for the Judiciary. In view of the contested evidence, there was no way the Judge could have resolved the issue of ownership without calling oral evidence to resolve disputed facts. Counsel made reference to the case of;

Adan Abdirahman Hassan & 2 Others v The Registrar & 2 Others [2013] eKLR where it was stated as follows;

> " Even if the respondents held the view that the petitioners had no right to own the suit property because the property was reserved for public purpose..., the petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect to the suit property... The failure by the respondents to inform and hear the petitioners before the revocation of the title... was an affront to the petitioner's right to a fair hearing"

13. Counsel for the appellants went on to further submit that there was no justification for the Judge to decline to exercise his discretion on the basis of evidence and sound legal principles. Thus, in his view, there was no evidence tendered to prove that the suit properties were alienated land; the Judge had no jurisdiction to make a determination on the legality of the title and judicial review proceedings cannot resolve contested matters. On the issue that the appellants were divested of their constitutional rights without being afforded a hearing, counsel cited the provisions of Article 50 of the Constitution that affords every person a right to have any dispute resolved in a court of law through a fair and public hearing. Counsel entreated us to find as it was held in the case of *Livingstone Ntutu* (*Supra*) that;

> " The mighty and the powerless in this country seek refuge in the courts. The Constitution has given the courts the mandate to settle disputes. It is an abuse of the power for a party to bypass the courts and use its might to determine its case against a powerless opposite party. The state is powerful. Everybody shakes in its wake. The courts will however not lack one last arrow in its quiver for slaying the state's impunity."

Counsel implored us to allow the appeal and to affirm the rule of law and constitutionalism by granting the orders sought in the memorandum of appeal.

14. This appeal was opposed; Mr Nguyo Wachira, Principal State Counsel, for the Attorney General on behalf of the 1st and 2nd respondents relied on his written submissions. In his oral highlights, counsel pointed out that, in view of the glaring irregularities regarding the allocation of the suit premises that forms part of the Mombasa Law Courts, the Judge could not exercise his discretion in favour of the orders sought; according to counsel that would have amounted to sanitization of an illegal act. The appellants were relying on letters of allotment issued on 1st October, 1997 but failed to point out that the said letters clearly contained a caveat in the following words;-

> " The government shall not accept any liability whatsoever in the event of prior commitment or otherwise."

Also there was evidence that the suit premises was reserved for the Judiciary as it formed part of the Court House as contained in the part development plan no 187 which was prepared on 25th July, 1983 and approved by the Commissioner of Lands on 9th September 1983 and that was part of the material before the Judge. Further, there was also evidence to show the suit premises was registered in the name of Permanent Secretary, the Treasury in trust of the Judiciary, therefore, it was not available even if the orders were issued; moreover the appellants were seeking discretionary remedies to advance their own private interests over property which the Judge found were superseded by public interest which ought to be facilitated.

15. Counsel also took time to distinguish a decision of this Court in the case of *Bhangra Ltd v Land Registrar, Mombasa & 2 Others* Civil Appeal No. 58 of 2016 in which the present Bench of the Court of Appeal allowed an appeal in more or less similar facts involving allocation of public land. The distinction being that there was a suit pending in the High Court with active litigation where an injunction had been issued stopping Bhangra LTD from dealing in any way with the suit premises. Also the learned Judge had allowed one prayer of certiorari but declined to grant the order of mandamus. Counsel urged us to dismiss the appeal.

16. The Kenya Anti- Corruption Commission who were the 1st Interested Party were represented by Mr Waudo who relied on his written submissions and made some oral highlights. On the issue of jurisdiction, counsel stated that the scope of judicial review has expanded beyond the common law boundaries in view of the Constitution of Kenya 2010 and the Fair Administrative Action Act. He referred us to the case of *Suchan Investment Ltd v The Ministry of National Heritage And Culture & 3 Others*, [2016] eKLR, where this Court posited in a pertinent portion of the said judgment as follows;-

> "...the common law principles of administrative review have now been subsumed under Article 47 of the Constitution and Section 7 of the Fair Administrative Action Act. In this regard, there are no two systems of law regulating administrative action – the common law and the Constitution
>
> – but only one system grounded in the Constitution. The court's power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution".

Also judicial review remedies may be denied where it is found it would not be the most efficacious remedy in certain circumstances such as in this case where the suit premises is occupied by a court; the court is a temple of justice thereby taking it means denying the public access to judicial services that would impede access to justice which is also a right guaranteed by the Constitution. The Judge considered problems such as public inconvenience and administrative chaos that would ensue as there is presently a building re- named "Justice Towers" that is under construction on part of the suit premises. Counsel associated himself with submissions by Mr. Wachira for the Attorney General and urged us to dismiss the appeal.

17. On the part of the Judiciary and the Judicial Service Commission who were the 2nd and 3rd interested parties, they were represented by learned counsel Mr Issa, he too opposed the appeal. Counsel relied on the written submissions and while associating himself with the submissions by the Attorney General and the Anti-Corruption Commission underscored the fact that the scope of judicial review was now expanded as per the plethora of cases cited by the Judge. Emphasizing on public interest which was brought out in the affidavit of Mr Oscar Angote and the Chief Registrar of the Judiciary the information contained therein was not at all challenged. The Judge gave reasons why he declined to

grant the orders which in essence would perpetuate illegalities and compound problems other than solving them.

18. Mr Issa submitted that the Mombasa Law Society members had filed a suit challenging the consent orders that were recorded between the appellants without the participation of the Judiciary despite the fact that it was the Judiciary that was affected by the so called consent orders. The appellants knew from 1997, the suit premises was reserved for the expansion of the Mombasa Law Courts that was too small to accommodate the ever increasing quest for services; that was why they have never been able to take possession. Furthermore, it was common ground the suit premises was public land, the alleged allocation to the appellants had a caveat which they ignored, thus, the Judge had every justification to exercise his discretion in the manner that he did. The appellants were not without remedy because they are still at liberty to file a civil suit before the Environment and Land Court or with the Land Commission for compensation for any loss they may have suffered (if any). Counsel urged us to dismiss the appeal with costs.

19. We have considered this matter as per the above summary where we have attempted to capture the salient matters, the elaborate and well written submissions by counsel, the record of appeal and authorities cited. We shall deal with the three issues raised by counsel, that is, jurisdiction, failure to exercise discretion judiciously, and denying the appellants their property rights without affording them a fair hearing in seriatim. We shall begin with the issue of jurisdiction. It is trite everything flows from jurisdiction and without it every act or decision by a court or tribunal becomes null and void. Jurisdiction must be acquired before a court can issue a valid judgment or order. See the case of; The *Owners of Motor Vessel 'Lillian "S" " v Caltex Oil (Kenya) Ltd* [1989] KLR 1. It was emphasized that establishing jurisdiction is a condition precedent to the whole case as set out and mandated by statute or the Constitution. Nyarangi J (as he then was) had this to say;-

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

20. The fact that the appellants are challenging the Judges jurisdiction in this appeal is somewhat confusing as incidentally they are the ones who filed the judicial review application in the High Court instead of filling a suit before the Environment and Land Court. That notwithstanding, they did not raise the issue before the High Court, they proceeded to hearing and this issue is being raised for the first time in this appeal. In the case of *Galaxy Paints Co. Ltd V. Falcon Guards Ltd*. EALR (2000) 2 EA 385; it was stated that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. In the instant case, jurisdiction as urged by counsel for the appellants was neither raised in the pleadings nor canvassed before the trial court. However, since the appellants counsel argued the issue before us, with the foregoing caveat, we shall consider it.

21. The suit property in contention in this appeal raises the issue of allocation of public land for private development thus land becomes a resource in ordinary parlance. In the case of *R V. Lancashire County Council Ex p Gayer*, (1980) 1 WLR 1024, it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. The learned Judge was called upon to determine whether or not to issue the three orders being certiorari, prohibition and mandamus. Where the Judge was faulted is

when he went outside the usual trodden and traditional common law straitjacketed approach as stated by the Court of Appeal in the case of;- *Commissioner of Lands v Kunste Hotel Ltd* [1997] eKLR, thus:-

> " But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected (see Republic v Secretary of State for Education and Science exparte Aron County Council (1991) ALLER 282 at P. 285). The point was more succinctly made in the English case of Chief Constable Evans (1982) IWLR 1155, by Lord Hailsham of St. Marylebone, thus:
>
> > "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court".

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

As for the scope of the remedy, it is also trite that:

> " In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...
>
> Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision." See Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300."

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

22. Was the Judge wrong in considering the above matter outside the four corners of the common law principles? The Judge appreciated that judicial review is not concerned with merit but the decision making process when he cited the principles in the Kunste Hotel Ltd (supra) where it was emphasized that judicial review is not concerned with private rights or the merits of the decision being challenged

but with the decision making process. To demonstrate that the Judge was fully aware of the said common law principles, he stated as follows in a pertinent paragraph of the impugned Ruling;

> " Indeed the second and third interested parties appreciated the principle that judicial review is not concerned with the merit of the impugned decision but with the decision making process when they submitted in their written submissions as follows;-
>
> The 2nd and 3rd interested parties submit that the matter before this honourable court involves the cancellation of an illegal title by way of rectification and the issuance or restoration of an title that rightly belongs to the Judiciary. The bonafides (sic) and merits of the cancellation cannot be determined in judicial review proceedings.
>
> According to this doctrine therefore, this court's mandate is therefore clearly defined and that the same does not include making a finding as to whether the ex-parte applicants' title was illegally and irregularly procured or not. Doing so would be tantamount to delving into the merits of the impugned decision rather than looking into the process through which the decision was made."

23. In considering the issues that were before him, the Judge was acutely aware that judicial review remedy is no longer restricted and predicated on the common law principles of ultra vires, illegality, irrationality and procedural impropriety what he termed as "the three I's". He went on to state that the cancellation of the titles to the suit premises by the Mombasa District Land Registrar without giving the appellants a notice or a hearing was irregular. In this regard, the Judge cited the case of *John Mukora Wachihi v. Minister For Lands & 6 Others* [2013] eKLR in which Mumbi Ngugi J., observed as follows;-

> " ...I am not in a position to pronounce [myself] on whether the petitioners who hold titles to the properties they claim do so in accordance with the Constitution. Whether the properties were lawfully acquired is a matter... must be determined through a process and in a forum that allows all the parties to present their respective cases on their merits...
>
> The question whether the Registrar or indeed any of the respondents has a right to revoke the title of a registered owner of property by way of a Gazette Notice has been the subject of several decisions of this court and, in my view, is now settled in the negative."

24. Time may not allow us to highlight all the decisions of both the High Court and Court of Appeal that the learned Judge reviewed in regard to the powers of the Registrar of Lands to cancel title vide a gazette notice. In that regard, the Judge came to the conclusion that;-

> " The Registrar had no power, authority or jurisdiction to cancel the Ex-Parte Applicant's title to the suit property is therefore not in doubt. The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a court of law...The Registrar could not have derived the power to revoke the Ex-parte applicants title from the repealed Constitution either because the same did not have any provisions empowering the Registrar to revoke a person's title through a Gazette Notice...In my view, therefore, by purporting to revoke the Ex- parte applicants' title, the first respondent exercised powers which he did not have and therefore he acted unlawfully. His action was ultra vires his powers".

However, despite the above conclusions that the appellants were not given a hearing and therefore the Registrar of Land's action in revoking their titles was illegal, the Judge declined to exercise his discretion to grant the orders of mandamus and prohibition as sought by the appellants. The Judge was fastidious in his analysis of the law and decided cases. He commented on the provisions of Section 143 (1) of

the Registered Land Act (now repealed) which states that a court can order rectification of title by directing a cancellation or amendment (except for first registration) if registration was obtained by fraud or mistake. The facts in this case were however different; the Judge further noted that granting a party whose interest will be affected by cancellation of the title or amendment thereto a hearing to determine allegations of fraud was critical. The Judge was emphatic that the appellants were entitled to be given a hearing by the government before their titles were ordered revoked. Nonetheless, he was not satisfied that he should exercise his discretion on account of public interest considerations, that far, outweighed the private interests on a scale of proportionality.

25. The Judge recited and posed questions in regard to public interest aspect as it was done in a memorable passage in the case of *Kenya Guards & Allied Workers Union v Security Guards Services & 30 Others* (H.C Misc. Appli No 1156 of 2003) Nyamu J. (as he then was) way before the promulgation of the *Constitution* of Kenya 2010 and the *Fair Administration Action Act* came into effect. In the said decision, the Judge posed the following legal and moral questions ;

> " It is becoming increasingly clear that the challenges which now stare in the face of the courts and to a certain extent, the legislature is whether the public interest were relevant and in some ways whether individual rights can be advanced further by the two institutions so as to realize the millennium dreams of this nation. Should the two institutions just fold their hands and wait for the slow evolution of the right laws to deal with the challenges now knocking on our door? How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indefeasibility of title? Are courts going to shy away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab public utility plot such as a hospital by an individual violates the public and national interest and therefore a violation of the Constitution? I venture to suggest that such titles ought to be nullified on this ground and thrown to the dustbins."

26. In further interrogation of the public interest phenomena obtaining in regard to the issue at hand, the Judge further reviewed other authorities especially the case of Livingstone Ntutu (*Supra*) and *Emfil Limited v Registrar of Titles Mombasa & 2 Others* [2014] eKLR in which the Court of Appeal held that public interest must be pursued within the law. Since the aspect of public interest alone did not appear to sit well in view of the interpretation that was given in the above decisions and others that the Judge fastidiously reviewed in the impugned ruling, he invoked the provisions of Fair Administrative Action, in particular, the two principles of proportionality referred to in Section 7(2) (1) and justice and equity referred to in Section 11(1) which are founded on the twin principles of public interest and public policy that enjoin courts as vanguards of justice not to aid in perpetuating of illegalities. It was at this point where the appellants, as we understood their arguments, stated that the Judge had no jurisdiction to make a decision based on the aforesaid principles; according to the appellants' submissions, consideration of the expanded principles was outside the realm of judicial review as they touched on the merits.

27. On our part, we find no fault that the Judge expanded the grounds for judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity. The test of proportionality would automatically lead to a greater intensity of review of the merits as it invites a court to evaluate the merits of the decisions, by assessing the balance to make; that is whether the decision to be made is within the range of rationality or reasonableness. Secondly, the proportionality test may go deeper into examination of the interests of those to be affected by the said decision. See the case of; *Martin Nyaga Wambora v Speaker of The Senate* [2014] eKLR. As aforementioned, even before the Constitution of Kenya 2010, the list of the

traditional grounds was considered inconclusive in the case of *Republic v Kenya Revenue Authority Exparte Yaya Towers Ltd* [2008] eKLR where the court observed that the grounds of judicial review were not limited to; abuse of discretion, irrationality, excess of jurisdiction, improper motives, failure to exercise discretion, abuse of the rules of natural justice and error of law. Nyamu J., (as he then was) stated that a court cannot consider the grounds for judicial review as a conclusive list but must address each case on its own merits and in particular address the novel grounds that are emerging with the new jurisprudence.

Also in the case of Kuria & 3 Others v Attorney General [2002] 2 KLR 69 the court expressed thus:

> " So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit... This is in tandem with the holding in Re Bivac International SA (Bureau Veritus) [2005] 2EA 43 where it was stated that;
>
> > ...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 " Is") 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 v Stephenson in the last century..."

28. The cases where courts have interpreted judicial review remedies outside the four corners of the common law principles are now growing as such interpretations are now anchored in several Articles of the *Constitution*, key among them, Article 259 which places a constitutional obligation on courts of law to develop and give effect to its objects, principles, values and purposes. The Judge premised his decision also on the provisions of Articles 10 and 73 (1) of the *Constitution* which provides the National values and principles of governance which include, sustainable development. He further reminded himself of the overarching principles in exercising judicial authority that the purposes and principles of the *Constitution* shall be promoted and protected. In this regard, the provisions of Article 40(6) provided the ultimate answer as it was common ground that the suit premises was public land set aside for the Judiciary. We shall address the issue of whether the Judge was right in his conclusion that the title was illegal more substantively later. Suffice it to state that within the context of expansion of principles to bring to bear in a judicial review matters, we agree each case must be reviewed bearing in mind the

Constitution, the law and its own peculiar facts. There is no longer one size for all as was held by the Court of Appeal in the case of Suchan Investment Ltd case (Supra) that;

> " Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable... In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

We think we have said enough to demonstrate the learned Judge was within the law to consider this case outside the common law principles of judicial review and to call in aid the *Constitution* and *Fair Administrative Action Act*.

29. This now takes us to the second issue of whether the Judge erred by conducting an enquiry and by finding that the alienation of the suit premises was contrary to the provisions of the Government Land Act. According to the evidence adduced by the Judiciary and the Kenya Anti- Corruption Commission by way of depositions, which were largely not controverted, by 9th October, 1996 when the suit premises was allocated to the appellants, the consent of the Judiciary, who were most affected was not sought; consequently, the land was subdivided from the original parcel known as Mombasa Block XXVI/244 to the suit premises; it was contended that the subdivision was done without the approval by the Director of Survey; moreover under Sections 3, 7 and 9 of the repealed *Government Lands Act*, it provided inter alia that:

> " The Commissioner may cause any portion of a township, which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner."

Counsel made reference to the case of *Henry Muthee Kathurima v Commissioner of Lands & Another* [2014] eKLR in which the Court of Appeal considered the aforesaid sections and stated as follows;

> " We note that it is not in dispute that the 2nd respondent has always been in actual and physical occupation of the suit property from 1989 to-date. The appellant must have known of this fact when he applied for the suit property to be allotted to him...The inference to be drawn is that the appellant identified and knew the specific plot he desired and knew the 2nd respondent was in physical possession; it was the appellant's clear intention not only to disposes the 2nd respondent of the suit property but to acquire a public utility land that was in possession of a public entity. The bona fides of the appellant in applying for the specific

suit property knowing that it was in possession and occupation of a public entity was put in issue. In Mwangi & Another –v- Mwangi (1986) KLR 328. It was held that the rights of a person in possession or occupation of land are equitable rights that are binding on the land. It is our view that the 2nd respondent having been in possession of the suit land from 1989 to-date its rights are binding on the suit property and even if the appellant had any claim to the suit property, the 2nd respondent's possessory rights are overriding."

30. We are acutely aware that the appellants bought the interests in the letter of allotment from the original allottees and were issued with the certificate of title thereto. It is also clear from the records that the appellants were aware that the suit premises was occupied by the Judiciary, a public entity, although that did not seem to bother them. They approached the court by way of a notice of motion seeking to quash the decision of the Registrar of titles. Both the Registrar and the Commissioner of Lands who purportedly issued the appellants with title vehemently denied the validity of the said instruments of title vide the affidavit of Renson Ingonga sworn on 18th March, 2011 and Joel Samoei sworn on 22nd May, 2015. We recognize that judicial review proceedings cannot settle contested matters of ownership and allegations and counter allegations. To succeed in judicial review proceedings and obtain remedies thereto, the facts on which a matter is predicated must not be contested.

31. In a similar matter by this Bench in the case of Redcliff Holdings Limited v Registrar of Titles & 2 Others [2017] eKLR the High Court Odunga J., was faulted for declining to exercise his discretion in favour of the appellants who were allocated land belonging to the Ministry of Agriculture. In a pertinent portion of the judgment, it was pointed out as thus;-

> " To us, we see many contested issues in the above averments; the respondents are alleging irregular and illegal allocation of public land reserved for a Government Ministry and failure to follow the proper procedure in allocation of public land. On the other hand, the appellant claims there was no other body or party who had been allocated the same land. Bearing in mind the issue was not double allocation but whether the land was available for allocation for private development, we find ourselves agreeing with the learned trial Judge that the contested issues could not have been determined through judicial review proceedings but before the Environment and Land Court."

32. It was common ground that the appellants never occupied the suit premises. Issues of ownership and occupation of land are weighty matters requiring exhaustive examination of evidence that are best litigated in Environment and Land Court. See the case of *Funzi Island Development Ltd & 2 Others v County Council of Kwale & 2 Others* [2014] eKLR succinctly stated that-

> " It is true that generally speaking, judicial review procedure is not well suited for resolving disputes on material fact."

Karanja JA in the aforementioned case also expressed that-

> " It is common ground that the subject matter herein is property worth a substantial amount of money. There were also serious and weighty arguments, for instance, whether the property in question was Trust Land or not; whether it was forest land or not; whether it formed part of Funzi Island or it formed part of the foreshore which could not be set aside for allocation..
>
> 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 Registration of Titles Act (RTA), and

other disputed facts would have been fully canvassed and conclusive determinations made on the same."

33. In this case, unlike the aforementioned Funzi Island matter, most of the issues were not contested such as the suit premises having been public land that was and is occupied by the Judiciary and that certain procedures in subdividing and in allocating public land were not followed. We agree that it is in a civil suit that parties can be availed court room process such as discovery, examination and cross-examination of witnesses so as to resolve contested issues. It is however paradoxical that it was the appellants who proffered the judicial review way; once the 1st and 2nd respondents disowned the appellants' ownership of the suit land and termed it illegal, the burden shifted to the appellants to prove how they acquired public land; of course nothing stopped them from testing the evidence of the 1st and 2nd respondents by way of cross- examination; or seeking to transfer the matter to Environment and Land Courts for hearing and determination. They chose judicial review forum and in the circumstances, it is too late now in an appeal for the appellants to turn around and claim the Judge had no jurisdiction or to lay blame on him for declining to exercise his discretion in their favour. By declaring the titles illegal, the Judge cannot be faulted as he was merely persuaded by the averments of the respondents which were not challenged and many other uncontested issues such as occupation of the suit premises by the Judiciary.

34. In regard to the issue of whether the Judge failed to exercise discretion in favour of the appellants; the germane issue in this appeal is that the Judge, having found the Registrar of Title had no powers to revoke the appellant's title to the suit premises without recourse to the court process, he could not, by the same pen, decline to grant the orders of mandamus and prohibition. We hasten to add that the remedies are not automatic or conjoined; each involves an exercise of discretion of the court seized of the matter and such discretion may only be disturbed if the appellate court is satisfied that the decision is clearly wrong because of misdirection or basing it on wrong conclusion or failing to consider matters which were relevant. Sir Charles Newbold P. in *Mbogo & Anor v Shah* [1968] EA 93 stated the guiding principle as follows:

> " For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

35. Counsel for the appellants made very strong submissions that his clients were denied a fair hearing that is guaranteed under Article 50 of the *Constitution*; that the rule of law protects the weak against the mighty, especially the Government that can flex its muscle and revoke a citizen's title without due process; he made a passionate plea that the Judiciary is a temple of justice and the vanguard against the culture of impunity and lawlessness. We agree with the above sentiments, save to add that the Government through its state and public officers who are entrusted with public trust to be exercised for the good of the public also need to be checked and stopped from allocating public land where institutions that render services to the public such as the Judiciary, which was referred to as the "temple of justice" have built the "temples". Judicial review remedies invoke a Judges' exercise of judicial discretion and therefore cannot be guaranteed and orders can only be granted where issues are not contested and are obvious. Waving a certificate of title over a parcel of land occupied by the Mombasa Law Court which title was disowned by the issuing authority, is not a straight forward uncontested matter. Under the same expanded principles, if the grounds of the matter so require as it did in the instant matter, a court is supposed to weigh one thing against another and see the remedy

that is efficacious in the circumstances. In this case, it is obvious for many other reasons enumerated in the impugned ruling, the Judge found the "temple" itself should be preserved in pursuit of public good as it is obvious, the appellants are not the only ones who needed the "temple" to adjudicate their matter, it is needed by others now and future generations.

36. It has been restated time without number and even in the opening paragraph of this judgment that every case is determined according to its own unique circumstances. A recent decision of this Court and Bench, being the case of Bhangra Limited (supra) was cited to persuade us that the Judge was wrong in failing to issue orders of mandamus and prohibition. In the said, case the High Court Judge, as in the present case, issued an order of certiorari quashing the decision of the Land Registrar who had purported to revoke title to land for an alleged parcel of land that was a public land, in more or less the same fashion as in this matter. This Court allowed the appeal and issued the orders of mandamus.

The facts and circumstances in the said Bhangra Ltd case are distinguishable from the instant appeal and Mr. Wachira, learned counsel for the respondents distinguished it but it is necessary for us to revisit the matter. We reproduce paragraph 18 of the said judgment which clearly shows the two matters are distinguishable as there was active litigation of civil nature, where, with an order of injunction to preserve the subject matter until the matter was heard and concluded. This is what was stated;-

> " However, we part company with the learned Judge with regard to the following sentiments;-
>
> > "The Ethics and Anti- Corruption Commission (The Interested Party) on the other hand has placed before Court considerable evidence to prove that suit properties are still part of Tom Mboya Road, a public road. Nzioki wa Makau (then an Advocate with the Interested Party) swore an affidavit on 14th May 2012 explaining why the suit properties remain part of a public road..." (Emphasis added).
>
> We do so because the issues of whether or not the suit properties are still part of a road reserve and by extension the legality of the appellant's title over the suit properties is subject of the civil suits which are still pending. Hence no determination has been made on the issue."

We hasten to add that the suit premises in the Bhangra case was not left in the appellant's control as there was an injunction that had been issued in favour of the Interested Party that stopped the appellants from dealing with the suit land until the alleged issues of fraud were determined.

37. The learned Judge held and correctly so, that the Registrar of Titles had no power to revoke a title but the remedy did not lie in re- revoking the same title.

However, he declined to exercise his discretion in favour of the appellants, in our view, not because of any misapprehension of the law or precedent as every case is unique in its own way. In our view, the Judge appreciated the guiding principles that guide courts on when to dis-entitle a party of a relief. These are, inter alia, unreasonableness or unmeritorious conduct, acquiescence in the irregularity or illegality complained about or waiver of the right to object may result in the court declining to grant the relief. Other considerations, of course, include; whether granting the remedy is a futile exercise as in this case, the suit premises is now registered under the Trusteeship of the Permanent Secretary Treasury for the Judiciary. Also therein is constructed a court building called the "Justice Tower." The Judge considered all the issues including practical problems that would ensue in regard to delivery of justice to the public if the land that is occupied by the Judiciary for decades is given for private use, not to mention the administrative chaos and public inconvenience and the effect to third parties who seek judicial services would result from the orders sought. To us, these considerations were weighty and well founded in the *Constitution*, the law and even precedent.

38. Although we sympathize with the appellants who perhaps fell prey to unscrupulous public officers and in the process lost their money and time chasing the suit land that is occupied by the Judiciary, that appears like chasing the wind; we are of the view that equity suffers no wrong without a right; the appellants' claim (if any) lies before the Environment and Land Court where they can ventilate all their grievances and that court will have an opportunity to interrogate all the merits and demerits and issue appropriate compensation to the deserving party. For now, the "Justice Tower" should be allowed to tower as the "temple of justice" and to fulfil the Constitutional mandate of accessing and affording justice to all.

39. Accordingly, we find no merit in this appeal which we order dismissed with each party bearing its own costs in view of the public interest nature of the subject matter.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF APRIL, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR