IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 49 OF 2015

BETWEEN

MOUNT HOLDING LIMITED…….....…… APPELLANT

AND

MWAI LIMITED…….....……..1ST RESPONDENT

JAMES MATHENGE MWAI,

GRACE GACHEKE MWAI &

CATHERINE WANGUI MUIGAI AS (Administrators

to the Estate of ISAIAH MWAI MATHENGE……..…..2ND RESPONDENT

SIMON MWANGI MATHENGE…….....…3RD RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA…….....4TH RESPONDENT

G.K. MEENYE & M.N. KIRIMA T/A

MEENYE KIRIMA ADVOCATES…….....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL….....6TH RESPONDENT

CHIEF MAGISTRATE'S COURT AT MOMBASA….....7TH RESPONDENT

REGISTRAR OF TITLE MOMBASA…..….…….....8TH RESPONDENT

*(Being an appeal from the Ruling of the High Court of Kenya at Mombasa (**Emukule, J**.) dated 29th May, 201 in H.C.JR. Misc. C. No. 11 of 2008)*

****

JUDGMENT OF THE COURT

The undisputed background facts leading to this appeal are that the 1st, 2nd and 3rd respondents had defaulted in the payment of rates to the 4th respondent which together with interest, had accumulated to the tune of Kshs.23,540,921/40 in respect of land parcels **Nos. Mombasa/VI/MN/2960** and **Mombasa/VI/MN/911**, hereinafter "*the suit properties*". As a result, **Mombasa CMCC No. 362 of 2007** was filed, pitting the 4th respondent against the 1st, 2nd and 3rd respondents. For ease of reference, these respondents shall hereinafter simply be referred to as *"the three respondents"*. Through the law firm of Meenye & Kirima Advocates, the 4th respondent secured an interlocutory judgment against the three respondents on the basis that though served, they had failed to enter appearance and or defend the suit.

However, upon learning of the suit, the three respondents filed an application on 26th April, 2007 to set aside the interlocutory judgment, because contrary to the 4th respondent's assertion, they had not been served with any court process and that in fact, the purported 2nd respondent- Isaiah Mwai Mathenge was already deceased at the time of the alleged service of the court process on him. On this premise, they alleged that the interlocutory judgment was irregular. Consequently, interim orders were issued against the 4th respondent, staying the enforcement of the said judgment and decree pending the hearing of the three respondents' application *interpartes*, which was set for 9th May, 2007. Come the said hearing date and following a consent by the parties, the application was taken out of the hearing list to allow for negotiations with a view to a possible out of court settlement.

The *status quo* notwithstanding, the 4th respondent in a bid to actualize the fruits of the judgment, placed an advertisement in the *'Daily Nation'* newspaper of 24th October, 2007, in effect putting the suit properties up for sale by public auction. Interestingly, alongside the sale advert, the 4th respondent had also published a notice offering amnesty on interest on rates to any defaulter who settled them in full. On the strength of this promise of amnesty, the three respondents settled all their accrued rates, pursuant to which they were issued with certificates of compliance from the 4th respondent on 2nd November, 2007.

Notwithstanding the settlement of the arrears, Messrs Meenye & Kirima Advocates, the 5th respondent purporting to act for the 4th respondent proceeded to fix the application for hearing over the December holidays despite protest by the three respondents' counsel that he would be away on holidays. Not surprising, on the scheduled hearing date, the application proceeded *ex parte*, resulting in its dismissal for want of attendance by the three respondents and or their counsel. On 17th January, 2008, an auctioneer was instructed by the 5th respondent to carry out the auction of the suit property. The appellant allegedly emerged the highest bidder at the auction and a vesting order was subsequently issued in its favour, *ex parte* by the Chief Magistrate's Court at Mombasa, the 7th respondent.

Teaming up with the 5th respondent again, the appellant filed an application before the 7th Respondent purporting that the subject files of the suit properties were missing and sought orders for the issuance of provisional certificates. Prior to this, the Registrar of Titles, Mombasa, the 8th respondent by a letter dated 7th March, 2008, purported to confirm to the appellant that the subject files were missing and that provisional certificates should issue knowing very well that in fact the original titles were in the possession of the three respondents. The application was subsequently allowed. Of interest is that the application was again heard *ex-parte* and without service upon the three respondents. Oblivious to the fact that it lacked jurisdiction to deal with matters of title under the Registration of Titles Act (RTA) (repealed), the 7th respondent nonetheless issued orders directing the 8th respondent to create provisional titles. Following hot on the heels of this maneuver was another application dated 28th March, 2008 by the appellant, through the 5th respondent, and without instructions from the 4th respondent, or service upon the three respondents, in which the appellant sought and obtained *ex parte* mandatory injunction against the three respondents from the 7th respondent. In effect the three respondents were evicted from the suit property.

As this was going on, on 4th February, 2008 the Municipal Council published yet another notice in the dailies, this time disavowing the 5th respondent as their lawyers. It re-affirmed that the 5th respondent

had no instructions to act for it leave alone to auction the suit property and or apply for the vesting orders.

It is against this background that the three respondents instituted judicial review proceedings, vide a notice of motion dated 6th June, 2008 supported by a statutory statement dated 15th May, 2008 and an affidavit sworn on even date. The three respondents sought *inter alia*, orders of *certiorari* to quash:-

- ***The decision of the Chief Magistrate's Court in CMCC No. 362 of 2007 vesting the suit properties in favour of the appellant.***
- ***The purported public auction of 17th January, 2008 wherein the appellant was declared the purchaser of the suit properties.***
- ***The decision of the 7th respondent directing the 8th respondent to open skeleton files in respect of the suit properties and issue the appellant with provisional certificates of title to the suit properties without having to advertise in the Kenya Gazette.***
- ***The decision of the 7th respondent ordering the court bailiff Mombasa to remove the squatters, in effect the three respondents or any other person in possession of the suit properties and do put the appellant into possession.***
- ***Cancellation of the provisional certificate of title No. C.R.7361 issued by 8th respondent on 20th March, 2008 and also cancellation of the provisional certificate of title No. C.R. 2703 issued by the 8th respondent on 20th March, 2008.***

According to the three respondents, the interlocutory judgment on which the 4th respondent relied was unlawfully obtained as they had not been served with court process, the auction was undertaken at the behest of an unauthorized agent to wit the 5th respondent and as such, nothing legal came of it and the resulting vesting orders were thus invalid and that the court had without jurisdiction and irregularly issued a provisional certificate of title to the appellant *ex parte* despite the provisions of the RTA. As a result, the vesting order and all its attendant consequences ought to be quashed. In the main, the three respondents were saying with regard to the 7th respondent that it had exceeded its jurisdiction by granting an order for the creation of provisional certificates of title, granting a vesting order and issuing a mandatory injunction all ex-parte against them which was against the rules of natural justice. For the 8th respondent, it was contended that it acted in excess of jurisdiction by issuing the provisional titles knowing very well that the originals were in possession of the three respondents and without subjecting such request to gazettment in the Kenya Gazette as required by law.

The 4th respondent supported the application by the three respondents on the grounds that having cleared the rates arrears, it had no claim against the three respondents, and that it had never instructed the 5th respondent to act for it, and further that the filing of the suit, the *ex parte* judgment, the vesting order, the application for provisional titles and the eviction of the respondents were done behind its back and without its instructions, and were therefore null and illegal. With regard to the purported public action, the 4th respondent took the view that there was no such auction as it had not authorised it and further that even it if had taken place, it had never received from both the 5th respondent and the appellant the proceeds of the purported sale. As far as the 4th respondent was concerned, this was a mere paper auction.

Opposing the application, the appellant filed a replying affidavit sworn on 26th November, 2014 by one, Ashok Doshi. In a nutshell, the appellant deponed that the judicial review orders sought were unavailable as against the appellant as it was a private company, with nothing to do with the impugned administrative decisions. That such orders are only available against public entities. Further, that the appellant was a stranger to the proceedings in Mombasa CMCC No.362 of 2007 which gave rise to the vesting orders complained of. On the issue of 4th respondent's instructions, he deponed that the matter had already been dealt with by Mukunya J., in Mombasa HC. ELC No.158 of 2008. Lastly, that in so far as the sale transaction went, the appellant was an innocent purchaser for value without notice, whose subsequent title cannot be impugned.

On the part of the 6th, 7th and 8th respondents, though appearance was entered, they filed no further pleadings in the matter.

Upon hearing the application *inter parties*, by way of pleadings on record as well as written submissions, **Emukule J.,** found for the three respondents on the grounds; firstly, that indeed, the 4th respondent never instructed the 5th respondent as its counsel because its Town Clerk never signed the mandatory notices under **section 17** of the **Rating Act**. Additionally, that the 4th respondent never received the proceeds from the alleged auction, and the transaction was fraudulent because the three respondents had already cleared their rate arrears. As such, he found, the sale was a paper auction, a sham, null and void. Further, that the 7th respondent lacked jurisdiction to issue the vesting order and indeed all subsequent orders issued exparte, the appellant was not entitled to vacant possession of the suit properties as he was neither an innocent purchaser nor a purchaser for value without notice. Similarly, the 8th respondent exceeded its jurisdiction in issuing provisional titles without gazettment and knowing very well that the original titles were in the possession of the three respondents.

Dissatisfied with the entire decision, the appellant lodged this appeal, against the three respondents. Basically, the appellant contends that the Judge erred in issuing orders of judicial review revoking a registered title yet there is an established procedure in law for revocation of title which was not followed, issuing a decision that was *ultra vires* as he had no jurisdiction to entertain the judicial review application against a private company; issuing orders of *certiorari* against a provisional title yet *certiorari* neither divests a proprietor of ownership nor revokes a registered document; misapplying the provisions of **section 7** of the **Penal Code** to judicial review; determined the competency of the application purely on the basis of an improper determination on the issue of *locus standi;* misdirecting himself on the role of bidders at a public auction; misdirecting himself on the law applicable with regard to purchase by an innocent purchaser for value without notice; misdirected himself on the onus of proof; failing to give due regard to the decision in Mombasa HC. ELC No. 158 of 2007 pertaining to the instruction of counsel; failing to address himself on the standard of proof on fraud and lastly, improperly exercising his discretion on costs.

With leave of Court, the parties filed written submissions and were allowed limited oral highlights at the hearing of the appeal. Learned senior counsel, **Mr. Pheroze Nowrojee,** for the appellant submitted that the judicial review proceedings and judgment were contrary to the principles enunciated in the case of **Speaker of the National Assembly v. James Njenga Karume, Nairobi C.A Civil Application No. 92 of 1992** in that the court failed to appreciate that there was a clear avenue for redress of the three respondents' grievances under **section 60** of the **RTA** which was never followed by the three respondents. This is especially given the fact that they had sought revocation of the appellant's title whilst turning a blind eye to the available statutory remedy under the **RTA.** On this same score, counsel relied on the decision in **Kones v. Republic and another *Ex parte* Kimani Wanyoike & 4 others (2008) 3 KLR 291.** On this basis he submitted, the judgment ought to be set aside. In his view, if at all litigation was necessary, the same should have been instituted before the Environment and Land Court (ELC) under **section 60** aforesaid as well as **part III section 13** of the **Environment and Land Court Act No. 19** and **Article 162** of the **Constitution**. Instead, the three respondents sought the same relief against the same parties, in two parallel proceedings i.e. Mombasa HC. ELC No. 158 of 2008 and Mombasa HC JR No. 11 of 2008, which conduct amounted to an abuse of the court process. Further, that the trial court lacked jurisdiction to sit to entertain judicial review proceedings and that even if it was vested with such jurisdiction, the Judge erred when he found the appellant to have committed fraud without any proof to that effect. That he fell into further error when he held that it was the appellant's duty to ascertain the propriety of the proceedings held before the magistrate's court and the history of the property, yet the appellant was never a party to those proceedings. Also, that the issue of the 4th respondent not having received payment of the purchase price was an extraneous issue not canvassed at trial and lastly, that the appellant ought not to have been condemned to pay costs as no illegality, irrationality or irregularity had been attributed to it.

For the three respondents, learned counsel **Mr. Simiyu,** opposed the appeal submitting firstly, that while the appeal is against the judicial review judgment, the appellant's submissions appeared to focus on the

decision in Mombasa HC ELC No. 158 of 2008 that was not before court. That no single issue pertaining to the decision in HC ELC No. 158 of 2008 was ever raised before the trial court. That the High Court had the benefit of looking at the history of the dispute and that the three respondents had been the registered proprietors of the property since 1962. As such, the Chief Magistrates' Court acted without jurisdiction, thus the need for judicial review. Further, that the judicial review sought was against public bodies, to wit the Chief Magistrates Court and the Registrar of Titles and therefore, the proceedings were properly before court. Further, that the appellant was not an innocent purchaser for value without notice as he is the one who moved the court for vesting orders alleging that the title was lost yet it was aware that the same was in the custody of the three respondents. This, coupled with the fact that there was no evidence that the appellant paid the purchase or auction price as alleged or at all, the court was right in finding that the appellant had participated in the fraud. With regard to the authorities cited by the appellant, he submitted that the same were distinguishable, for in all those cases, the court was dealing with revocation of titles, as opposed to this case where the respondents just sought to quash decisions that led to the issuance of the provisional titles to the appellant.

On the other hand, learned counsel for the 4th respondent **Mr. Kibara**, submitted that **section 64** of the **RTA** donates a special jurisdiction to the High Court to give directions. While conceding that the appellant should have been treated as an interested party as opposed to a respondent, Counsel was quick to add that the appellant was not an innocent purchaser. That thanks to the notice published in the dailies, it was public knowledge that the 5th respondent had no instructions to act for the 4th respondent and the appellant ought to have known that its title was couched in fraud and desisted from seeking the vesting order. That the 4th respondent's town clerk filed an affidavit before the High Court, deposing that the 4th respondent neither received the proceeds of sale nor authorized any such sale, a contention that went unrebutted by the appellant. That in view of the fraudulent and unauthorized sale, and given the appellant's failure to prove its payment of purchase price, the Judge correctly applied the principles of judicial review.

For the 6th, 7th and 8th respondents, learned Counsel **Mr. Ngari** submitted that since they had not participated in the proceedings in the High Court, they had filed no written submissions in this appeal but would nonetheless abide by the outcome of the decision of this Court.

To our mind, two broad issues arise for determination in this appeal; one, whether the trial court had jurisdiction to entertain the judicial review application and secondly, whether orders of *certiorari* could issue in the circumstances of this case.

On the first issue, the law is settled. Where there exists a specific procedure or remedy, statutory or otherwise, that procedure or remedy should be pursued and exhausted before parties can resort to court, if they must (see. **Speaker of the National Assembly v. James Njenga Karume, [1990 – 1994] EA 546).**

Was such an alternative remedy available to three respondents in this case as urged by the appellant? The appellant contends it did under **section 60** of the **RTA,** which states in part that:

> **60. (1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected."** (Emphasis added)

And further, that

> **(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered**

> **up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination."** (Emphasis added)

From the above, the three respondents' first recourse lay with the registrar of titles who had the power to recall the title for correction. However, it is common ground that no such application was made to move the registrar to act under **section 60** aforesaid. Instead, the respondents went for judicial review, seeking to undo the consequences in **Mombasa in CMCC 362 OF 2007**. Was the three respondents' failure to take this route fatal to their case? We do not think so. It is trite that the presence of an alternative remedy does not bar a party from pursuing judicial review. This Court, in **Speaker of National Assembly v. Njenga Karume [1990 – 1994] EA 546,** observed that:-

> ***"Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it." (****emphasis provided****)***

See also Republic v. National Environment Management Authority ex-parte Sound Equipment Limited [2011] eKLR.

It thus follows that a party who departs from the statutory remedy in favour of judicial review must have very cogent reasons for so doing; and even then, it must be demonstrated to the court's satisfaction, that there existed valid reasons for not pursuing the statutory remedy. The rule of thumb here, being that judicial review should be a remedy of last resort. Failure to satisfy this to the required threshold means the judicial review proceedings shall as a matter of course, not be available to a party (see **Vania Investments Pool Ltd v Capital Markets Authority & 8 Others [2014] eKLR).**

Were the judicial review proceedings the appropriate remedy in this case? Undoubtedly, the central theme in the judicial review was an alleged breach of a statutory right and a failure to follow due procedure in Msa CMCC No. 362 of 2007. In particular, that those proceedings and their subsequent orders violated the rules of natural justice. Further, the three respondents' case was not about the correction of the title so as to bring into play or focus the provisions of section 60 of R.T.A. aforesaid. Their case was simply that the process through which they lost the suit properties was illegal, fraudulent and laced with improprieties.

Of course Judicial review proceedings are meant to be an avenue to interrogate the procedure followed in the making of an impugned decision. Looking at the acts and conduct of the 7th and 8th respondents, we cannot think of a more efficacious process than judicial review in the circumstances of this case.

It was alleged that the 5th respondent had not only acted without instructions, but had also flouted rules of procedure by seeking substantive orders in a summary manner, and all *ex parte*, thus denying the three respondents an opportunity to be heard. Further, that the 7th Respondent had entertained this flouting of procedure by unlawfully and unprocedurally granting interlocutory judgment on an impugned affidavit of service in which the process server claimed to have served the suit papers on a party long dead. In further disregard of the law, that the said 5th respondent, acting in cahoots with the appellant, orchestrated an irregular or a 'paper' auction of the suit properties, which culminated in the issuance of the vesting orders followed by an order directing the 8th respondent to issue provisional certificates without gazettment in the Kenya Gazette when they knew very well that the original certificates were in the possession of the three respondents, and thereafter issuing mandatory injunction to get the three repsonents out of the suit properties, all *ex-parte*. All these decisions required judicial intervention to put them right, hence the need for judicial review proceedings as opposed to the procedure under section 60 of the RTA or other

civil proceedings in the ELC as urged by the appellant.

By definition, judicial review is meant to guard against excesses of power and failure to observe natural justice. In the case of **Bivac International S.A (Bureau veritas) [2005] E.A 43**; it was held that judicial review stems from the doctrine of *ultra vires* and the rules of natural justice; that it has grown to become a legal tree with branches of illegality, irrationality, impropriety of procedure (the 3 I's) and has become the most powerful enforcer of constitutionalism, promoter of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

In view of the above, and given the utterly flawed proceedings at the chief magistrates' court in this matter, it would have been an abdication of duty for the High Court to turn a blind eye to the *ultra vires* acts perpetrated in the proceedings. The essence of judicial review is to set right any decisions fraught with impropriety illegality, abuse of power, arbitrariness as exhibited in this case.

The events leading to the transfer of the suit properties to the appellant were orchestrated in the 7th respondent's backyard. Until and unless those proceedings were quashed, it would have been futile and foolhardy for the three respondents to invoke **Section 60** of the RTA. All that the 8th respondent would have said in its defence would have simply been *"I acted on the basis of a court order." That court order is still valid since it has not been reviewed, varied or set aside "and until that is done, my hands are tired".* **Further this was a case of blatant abuse of the court process by the appellant in collusion with the 5th respondent. They conveniently got the 7th respondent to issue orders without or in excess of jurisdiction such as the vesting order, provisional titles without gazettment and eviction of the three respondents all prosecuted *ex-parte* and without service of the applications on the three respondents as required. Again, given that the appellant was well aware that the 5th respondent was allegedly acting for the 4th respondent, he went ahead to instruct the 5th respondent to apply for a vesting order, obtain provisional certificates as well as the eviction of the three respondents the obvious likelihood of conflict of interest notwithstanding. The appellant's conduct and that of the 5th, 7th and 8th respondents is inexcusable. In the circumstances, the appellant cannot claim to be an innocent purchaser. The only effective remedy was judicial review proceedings to quash the proceedings and not the statutory remedy under Section 60 of the RTA, which is in any event limited to correction of title, that the three respondents were not seeking.**

In any event, the argument that an alternative remedy obtained under RTA is being raised for the first time in this appeal. That argument was never raised in the High Court. *It is trite law that pleadings, particularly in an adversarial system such as ours, are binding not only on the parties but on the court as well (see.* **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** as cited with approval by this Court *in* ***Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR****).* **Had the appellant raised that argument in the trial court, we would have had the benefit of that court's reasoning, input and determination on the issue. Nevertheless, we appreciate that it is a matter of law which can be raised at any stage in the proceedings. However, it is desirable that it be raised at the earliest opportunity. We stated thus in the case of George Owen Nandy v Ruth Waitiri Kibe C.A. No. 39 of 2015, regarding new issues being raised on appeal for the first time.**

> ***"In general a litigant is precluded from taking a completely new point of law for the 1st time on appeal. The jurisdiction of this court is not to decide a point, which had not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction…."***

And in North Staffordshire Rahway Company v. Edge (1920) A.C 254, Lord Birkenhead, L.C. explained the rationale why an appellate court should be reluctant to entertain new points on appeal. He reasoned:

> ***"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods…The efficiency and the authority of a court of appeal, are increased and strengthened by opinions of the learned Judges who have considered these matters below.***

To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake a decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below…"

This is yet another reason why we are not at all impressed by this argument.

Closely related to the above, was also the argument that the proper forum for the dispute was the ELC under the provisions of Article 162 of the Constitution. Indeed, the Constitution bestows exclusive jurisdiction in land cases upon the ELC. However, it should be noted that the judicial review proceedings herein were instituted way back in 2008, long before the promulgation of the present Constitution.

Under Section 22 of the sixth schedule of the Constitution, it is provided as follows:

" All judicial proceedings pending before any court shall continue to be heard and shall be determined "by the same court" or a "corresponding court" established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."

This meant that the parties had three options either; have the matter determined by the same court in which it was filed or, have it transferred to the ELC or go by any directions as may be issued by the Chief Justice in that regard.

It would appear that the parties chose to stay in the High Court for hearing and determination of the application. None of them protested the continued hearing of the suit by the High Court nor did the appellant file an application to have the suit transferred to ELC. The appellant again never raised this jurisdictional question with the High Court. It is raising it for the very first time in this appeal. But given the above transitional clause, the High Court cannot be faulted for entertaining the proceedings. That ground too fails. Closely related to this is the argument regarding the fate of Mombasa HC ELC No. 158 of 2008. On this, all we can do is adopt the submissions of counsel for the three respondents in reply that no single issue touching on that case was raised before the trial court. Our perusal of the record confirms this fact. We say no more.

On the question whether or not the purchase price following the auction was paid and if so passed on to the 4th respondent, we are unable to agree with the appellant's submissions that the same was an extraneous issue as it was never raised before the trial court. A perusal of the replying affidavit by the 4th respondent leaves one in no doubt that the issue was raised.

With regard to the complaint that orders should not have been directed at the appellant as it was a private entity, we would say that the judicial proceedings were directed in the main actors, the 7th and 8th respondents and not the appellant. The appellant was merely a nominal party. In addition, none of the orders sought were directed at the appellant. Further the orders sought were not for the revocation of the title. Rather they were directed at quashing the proceedings leading to the issuance of the provisional titles so that the argument by the appellant that the Judge erred in issuing *certiorari* in respect of a provisional title while *certiorari* should not in law revoke a registered document under statute does not hold. Finally, the appellant was privy to the newspaper notices wherein the 4th respondent had disavowed the 5th respondent as its counsel. Yet the appellant still went on to procure the services of the said law firm in a bid to obtain vesting orders over the very process that the 4th respondent had disowned. The appellant should not be seen to cry wolf over the consequences of its acts. Neither can it be allowed to benefit from the flawed process.

Finally, we agree entirely with the three respondents' submissions that to allow this appeal will be tantamount to upholding anarchy and abuse of the court process to deprive the three respondents of the suit properties by an illegal court process while they had as at the material time, settled all their rates arrears and had been issued with clearance certificate. Allowing this appeal will be upholding impunity perpetrated by the 7th and 8th respondents to deprive the three respondents

their properties through an illegal order of the Subordinate Court purporting to order issuance of new titles on allegations of the originals being lost and without such loss being advertised in the Kenya Gazette, in case of any objection. It would be a big blow to the fight against impunity in this country as it is the only compelling reason as to why the 7th Respondent went ahead to blatantly disregard the law and hear four successive applications *Ex parte* and issue orders it knew were out rightly illegal and ultra vires.

For the above reasons, the appeal is without merit and is dismissed with costs to the 3rd and 4th respondents.

Dated and delivered at Mombasa this 11th day of May, 2017

ASIKE-MAKHANDIA

…….....……

JUDGE OF APPEAL

W. OUKO

…….....……

JUDGE OF APPEAL

K. M'INOTI

.....……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR