IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE, & KIAGE, JJ.A)

CIVIL APPEAL NO. 205 OF 2010

BETWEEN

REPUBLIC.....APPELLANT

AND

OLOLULUNG'A LAND DISPUTES TRIBUNAL...1ST RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE.....2ND RESPONDENT

EX-PARTE

NGURUMAN LIMITED.....APPLICANT

(*Appeal against part of the Ruling and Order of the High Court of Kenya at Nakuru (Ouko, J.) dated 19th May, 2010*

in

Judicial Review Application No. 121 of 2009

Consolidated with

Judicial Review Nos. 7 of 2010 & 122 of 2009)

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JUDGMENT OF THE COURT

This appeal is limited to only that part of the ruling of the High Court at Nakuru (Ouko J, as he then was) delivered on 19th May 2010 which disallowed the application for orders of certiorari in Misc. Civil Application No. 7 of 2010 by Nguruman Limited, the effective appellant herein. That application had been consolidated with two other applications seeking orders of judicial review namely Misc. Civil Application Nos. 121 and 122 of 2009 also filed at the High Court in Nakuru 122 of 2009 had sought orders of prohibition but was effectively abandoned, the event targeted having occurred and relief instead was pursued through *certiorari* in No. 7 of 2010.

In the learned Judge's ruling, the appellant's prayers in No. 121 of 2009 granted *certiorari* calling up and quashing the decision by the Ololunga Land Disputes Tribunal as adopted and effected by the Senior Principal Magistrate's Court, Narok, purporting to cancel the appellant's title to Narok/Nguruman/Kamorora/1 and transferring it to Kamorora Group Ranch. The appellant does not challenge that part of the ruling, being favourable to itself.

In No. 7 of 2010, which is the subject of this appeal, the appellant as the ex-parte applicant after obtaining the requisite leave filed the substantive motion in which it sought this order;

> ***"That an order of certiorari do issue to bring into the High Court the decision of the respondent herein, contained and reflected in a Certificate of Incorporation No. 0041 dated 3rd November 2009 to incorporate Kamorora Group Ranch under the provisions of section 7 of the Land (Group Representatives) Act Cap 287 Laws of Kenya for the purpose of being quashed and the said decision be quashed."***

The first seven grounds on which the application was premised and which capture the essence of the appellant's case appeared on its face as follows;

> ***1. On 19th January 2010 the applicant became aware that the respondent issued a Certificate of Incorporation No. 0041 dated 3rd November 2009 to the 1st Interested Party incorporating the said Group Ranch under section 7 of the Land (Group Representatives) Act Cap. 287 Laws of Kenya in utter violation of the legislative policy and intendment of the provisions of section 13(1) (b), (2) (3) and (4) of the Land (Group Representatives) Act.***
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> ***2. The respondent acted in bad faith by issuing a certificate of incorporation to the 1st Interested Party so as to validate ex-posto fact the illegal and fraudulent transfer of title No. Narok/Nguruman/Kamorora /1 on 9th September 2009 from the applicant to the 1st Interested Party when the said group ranch did not exist in law and or further the incorporation of the 1st Interested Party is founded on patent violations of the provisions of the Land Disputes Tribunal Act No. 18 of 1990 and the Registered Lands Act Cap. 300 Laws of Kenya.***
>
> ***3. The respondent acted in bad faith by issuing a certificate of incorporation to the 1st interested party so as to validate ex-post facto its registration on 9th September 2009 as the proprietor of Title No. Narok/Kamorora/1 which registration was procured and obtained fraudulently by the 2nd, 3rd and 4th Interested Parties and others.***
>
> ***4. The respondent incorporated the 1st Interested Party contrary to legislative policy and intendment of the provisions of section 13 of the Land (Group Representatives) Act Cap. 287 Laws of Kenya.***
>
> ***5. The respondent acted ultra vires and or without jurisdiction under the provisions of Part III of the Land (Group Representatives) Act Cap. 287 by incorporating the 1st Interested Party.***
>
> ***6. The respondent acted unreasonably and in violation of the Wednesbury principles (<u>Associated Provincial Picture Houses v Wednesbury Corporation</u> (1984) 1 KB 273) by issuing a certificate of incorporation to the alleged group representatives the 1st Interested Party under section 7(2) of the Land (Group Representatives) Act.***
>
> ***7. The respondent violated the principle of legitimate expectation in relation to the applicant by issuing a certificate of incorporation to the alleged group representatives the 1st Interested Party under section 7(2) of the Land (Group Representatives) Act.***

The appellant also depended on further or other grounds as appeared in the statutory statement and the verifying affidavit relied on at the leave stage as well as like documents filed in No. 121 of 2009 and the

plaint in a separate suit, Nakuru HCCC No. 359 of 2009. Cumulatively those various documents run into hundreds of pages and are quite repetitive and incorporating those other proceedings. The story they tell can however be summarized from the verifying affidavit sworn on 21st January 2001 by Moses Loontasati Ololowuaya, a director and chairman of the appellant: The appellant was since 13th June 1986 the registered absolute proprietor of the subject land but Kamorora Group Ranch through the Land Adjudication Tribunal's decision as adopted, decreed and effected by the Senior Principal Magistrate, managed to have itself registered as the owner thereof. Those decisions were quashed by Ouko, J as we have already stated. The deponent was able to gather information respecting Kamorora Group Ranch and found out that it held an alleged Annual General Meeting on 29th October 2009 which was attended by the Registrar of Group Representatives. The minutes of that meeting under Item 'AOB' record the Registrar as having said as follows;

> ***"(t)he Registrar of Group Representatives thanked all for attending the meeting and discussing freely/actively to make the meeting a success. She asked them to liaise with her office and other government offices at all times in order to realize the aspirations of all members. She further asked the newly elected officials to forward duly signed forms and minutes of this meeting, for issuance of certificate of incorporation."***

The appellants' chairman found it surprising that the Registrar was encouraging the members of Kamorora Group Ranch to apply for its incorporation yet he had been a member thereof until 19th August 1985 when it was dissolved under **Section 139** of the Land Group representatives Act, Cap 285. He came to learn that the Registrar in fact went ahead and re-incorporated Kamorora under **Section 7** of that Act which he considered to be in violation of the legislative policy and intendment of the statute under which it had been lawfully dissolved. Consent for such dissolution was granted on 19th August 1985 and all its members became shareholders in the appellant, which was previously known as Rift Valley Seed Limited until 28th June 1984 when the Registrar of Companies approved its change of name.

The issuance of a Certificate of Incorporation for Kamorora Group Ranch on 3rd November 2009 bearing the same No. 0041 that the certificate to the dissolved Nguruman Kamorora Group Ranch bore was impugned as being illegal and a nullity for non compliance with the mandatory requirements of **Sections 5** and **7** of the said Act as well as **Section 23(5)** of the Land Adjudication Act, Cap 284. It was deposed to that the Registrar's decision to issue a certificate of incorporation to Kamorora Group Ranch was unreasonable, violated the applicant's legitimate expectations, proceeded from and was actuated by bad faith the particulars of which were stated.

The deponent swore further that the purport, import and effect of the issuance of that certificate was *"to validate ex-post facto the illegal and fraudulent transfer of Title No. Narok/Nguruman/Kamorora 1 on 9th September 2009 from the [appellant] to the said group ranch."* The particulars of the illegality of that transfer was gone into at length and with reference to Misc. Civil Application No. 121 of 2009 but, the matters complained of therein having been quashed by the learned Judge, we need not restate the same save that on the basis of the Tribunal case and the Principal Magistrate's decree, some persons purporting to be acting for and on behalf of Kamorora Group Ranch namely; Noontinai Ole Senteu, Raphael Loolpapit, Paul Maina Mugo and others made false and fraudulent representations which were fully particularized, as a result of which they procured the transfer of the aforesaid property to Kamorora Group Ranch.

The deponent proceeded to give a detailed account of the adjudication process which led to the incorporation of Kamorora Group Ranch on 13th November 1974 and its registration as the proprietor of the suit property on 19th June 1975 in particular the declaration of Nguruman/Kamorora of Loita Location of Osopoko Division of Narok District as an adjudication section on 1st March 1974 and how Nguruman Kamorora Group Ranch was adjudged to be the owner of Nguruman/Kamorora Parcel No. 1, which comprised the entire Nguruman/Kamorora Adjudication section. On 9th November 1974 the Director of Land Adjudication certified the Nguruman Kamorora Adjudication Register as final whereafter the Registrar of Group Representatives issued a certificate of incorporation to the representatives of

Kamorora Group Ranch pursuant to **Section 7** of the relevant Act and on 19th June 1975 Nguruman Kamorora Group Ranch was registered as the absolute proprietor of the subject land.

That rendition was followed by a reiteration of the process that led to the transfer of the suit land from Kamorora Group Ranch to the appellant on 11th November 1986 one of the highlights of which was the resolution of the Annual General meeting of Nguruman Kamorora to dissolve the group ranch and transfer the subject land to the appellant. There followed an application to the Registrar for the dissolution of the Group Ranch and the winding up of its affairs pursuant to **Section 13** of the Act and consent was granted on 19th August 1985 with advise that the transfer of the land required land Control Board consent which was granted on 14th December 1984 culminating in a certificate of title in the appellant's name given on 11th November 1986.

Copious amounts of documents numbering no fewer than thirty-seven and running into 224 pages were annexed to that affidavit evidencing the various averments in the verifying affidavit.

That application was served upon the Attorney-General on behalf of the Registrar of Group representatives, but, as noted by the learned Judge, it entered appearance but made no reply. The learned Judge gave directions for parties to file skeleton arguments and these were highlighted before him by counsel before the ruling giving rise to this appeal in which the appellant challenges the learned Judge's decision that *certiorari* was not available to the appellant in the circumstance of the case. In so deciding, the appellant complains that, the learned Judge erred by;

- **Finding that the challenged certificate of incorporation issues to Kamorora Group Ranch was** *prima facie* **evidence that the procedure and legal requirements for incorporation had been followed.**
- **Failing to find and determine that the Registrar had no jurisdiction to issue the certificate of incorporation dated 3rd November 2009 as no evidence of compliance with various requirements under the relevant Act had been met.**
- **Finding that there was no bar under the relevant Act for reincorporation of a group ranch with the same name as a dissolved one.**
- **Failing to find that the certificate of incorporation given to the Interested Party on 3rd November 2009 was the same one bearing the same serial number as the one previously issued prior to the dissolution of the interested party.**
- **Finding that the dissolved group ranch was Nguruman Kamorora Group Ranch and not the interested party despite evidence it was the latter.**
- **Failing to find that the Registrar had acted in bad faith by issuing a certificate of incorporation to the interested party thereby validating** *ex post facto* **the transfer to it of the subject land which transfer the judge had held to be a dissolved body and quashed.**
- **Failing to find that the Registrar's incorporation of the Interested Party on 3rd November 2010 was contrary to public policy and was** *ultra vires* **or without jurisdiction.**
- **Failing to find that the Registrar acted unreasonably in violation of the Wednesbury principles in issuing the certificate to the alleged representatives of the Interested Party.**
- **Failing to find and to determine that the Registrar violated the principle of legitimate expectation in issuing the certificate of incorporation.**

The appellant therefore prayed that the learned Judge be reversed on the question of *certiorari* and an order do issue granting the same as prayed.

The case as was presented in the pleadings and the grievance in the memorandum of appeal were the thrust of the submissions made by Mr. Pheroze Nowrojee the learned Senior Counsel who appeared with Mr. Mong'eri for the appellant in the absence of counsel for the other parties who were however served with notice of the hearing. We need not respect his incisive submissions *in extenso*. He contended that *many if not all* of the pre-requisites for the issuance of a certificate of incorporation of a group ranch under the relevant Act were not met as averred in detail in the pleadings but which the Registrar never controverted or otherwise answered. The provisions of the Land Adjudication Act and specifically

Section 23(5) were also not satisfied yet the Registrar must be so satisfied before issuing the certificate of incorporation. Senior Counsel criticized the learned Judge for wrongly holding that the mere issuance of the certificate was *prima facie* evidence of compliance yet there was actual non-compliance that called for an order *of certiorari*.

Learned senior counsel next asserted as erroneous the learned Judge's failure to appreciate that what the Registrar did was re-incorporate the Kamorora Group Ranch yet there is no provision and no power in the statute for the re-incorporation of a group ranch that has been dissolved with the consent of the appropriate authority. He pointed to a letter to the Registrar dated 10th September 2009 which in fact requested specifically for reincorporation of the Kamorora Group Ranch. He added that the basis for the Registrar's action was wholly erroneous and improper as it was based largely on the decision of the Land Disputes Tribunal purporting to cancel the appellant's title to the subject property which was made without jurisdiction and therefore was a nullity. Mr. Nowrojee submitted that on the facts the learned Judge fell into error for peremptorily dismissing the appellant's plea as going into the facts and merits of the Registrar's decision yet he was duty bound to enquire whether the statute was complied with and whether precedent facts existed to enable the Registrar, as the concerned decision-maker to act as he did. And he cited in aid a passage from Jonathan Auburn et al; *JUDICIAL REVIEW: Principles and Procedure*,Oxford University Press; (2013) at paragraph 20.23 p 459 where the learned authors state as follows;

> ***"Introduction***
>
> ***Where Parliament has provided that a public body's power or duty to act in a particular way depends upon the existence of a particular factual situation and the public body's assessment of that factual situation is challenged, in certain cases the court will itself determine whether the relevant factual situation actually exists. In such cases, the court will not permit the public body to confer on itself power to act (or to deny itself power to act) by an erroneous conclusion as to the relevant fact. Such a fact is known as a 'precedent', 'collateral', or 'jurisdictional' fact."***

He concluded by stating that the Land Disputes Tribunal Decision of 2nd April 2009 and the Principal Magistrate's decision of 16th June 2009 conveyed the subject land to an entity that was not in existence and this could not be cured by the purported re-incorporation on 3rd November 2009 and therefore remained a nullity. That, together with numerous wrongs and jurisdictional errors committed in the issuance of the certificate meant, in Senior Counsel's view that the same could not stand and the learned Judge ought to have quashed it by *certiorari*.

We have gone to some great lengths in setting out the matters in controversy in this appeal not only for the pragmatic purpose of drawing the discernible contours of an old, highly convoluted and voluminous document-ridden legal dispute, but also in obedience to our mandate as a first appellate court to subject the whole evidence to a fresh and exhaustive scrutiny and re-evaluation before drawing our own independent inferences and conclusions on the same. That has been the approach of appellate courts in the common law tradition for the longest time so that as long ago as the century before the last, it had been stated in ***COGHLAN vs. CUMBERLAND*** [1898] 1 CH. 704 that;

> ***"….the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the material before the Judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from over-ruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of a witness from written depositions and when the question arises which witness is to be believed rather than another, and that question turns on the manner and demeanor of a witness, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witness. But there may obviously be other circumstances quite apart from manner and demeanor***

which may show that a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

This has been pronounced on in many cases here at home all restating that a first appeal is a re-hearing in which the appellate court goes into an in-depth analysis of the facts and the law but always aware that it may not have had the advantage of hearing and observing the witnesses with the result that it would not be quick to depart from the finding of the trial court. In ***NZOIA SUGAR COMPANY LTD vs. CAPITAL INSURANCE BROKERS LIMITED*** **[2014]eKLR** for instance the Court expressed itself thus;

"We are enjoined to be slow to disturb the findings and conclusions of the trial court. Those findings are not sacrosanct however and we will not hesitate to disagree and reverse such findings in appropriate cases or, as was stated in MAKUBE Vs. NYAMIRO [1983] KLR 403;

' … a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

It goes without saying that this Court where convinced that the evidence and the justice of the case demands, it will not be coy about overriding and reversing the decision of the High Court. It is even less tramelled when the case in the court below proceeded on the basis of the affidavits and submissions as opposed to oral testimony for then that court is not possessed of any advantage and its findings can be more freely departed from.

With these principles in mind, we have thoroughly and meticulously gone through the entire record and considered the documentary evidence tendered, the authorities cited and the submissions by learned counsel.

The first thing that strikes as an oddity is that the copious amounts of documentation and the many cases cited seem not to have earned the learned Judge's attention to sufficiently address them in his rather brief ruling. It may well be that he did consider all the relevant matters but, with great respect, that is not apparent from the ruling. It is not lost to us that it would have taken a great deal of time to piece the entire controversy together but it is a duty placed on us as judges and we must discharge it- back breaking though it be.

We commend the learned Judge for very properly finding that the purported assumption of jurisdiction by the Land Disputes Tribunal to order cancellation for the appellant's title to the subject land was a nullity which he proceeded to quash together with the consequential adoption and expression of that decision as a decree of the Principal Magistrate's Court which proceeded to order its executive officer to execute transfer documents conveying the land from the appellant to Kamorora Group Ranch.

That decision stands in stark contrast with his finding, impugned herein, that *certiorari* was not available to quash the Registrar's re-incorporation of Kamorora Group ranch. We use the term re-incorporation deliberately because it is the term employed by the alleged representatives of Kamorora Group Ranch in their letter of 10th September 2009. In so far as the Registrar proceeded to incorporate it with the same name and the same certificate number 0041 as had been issued way back on 13th November 1974, she purported to literally roll back the time and with one stroke of the pen of reincorporation erase all that had transpired in the interviewing period, including the decision in 1985 to dissolve the Group Ranch which was consented to and actioned by the Registrar under **section 13** of the Act on 19th August 1985.

That letter seeking re-incorporation was in the following terms;

KAMORORA GROUP RANCH

P.O. BOX 128-20500

NAROK

10TH SEPTEMBER 2009

THE REGISTRAR OF GROUP REPRESTATIVES

DEPARTMENT OF LAND ADJUDICATION AND SETTLEMENT

P.O. BOX 30287

NAIROBI

Dear Sir/Madam,

RE: KAMORORA GROUP RANCH

We refer to the above subject matter and Minute 2/07 and 3/07 of a meeting held on 9th July 2007 at Entasekera Divisional office.

We held the said meeting and resolved to elect new officials since most of our officials had died, and also resolved to revert our land back to group ranch as the company that it had been transferred to had outlived its usefulness.

Further, we moved to court vide Miscellenous land case no. 13 of 2009, where we obtained an order to cancel title held by Nguruman Ltd back to Kamorora group Ranch. The said order was effected by the District land registrar Narok and issued a title in the name of the group ranch on the 9th of September 2009.

We are now writing to request that our group be re-incorporated and our new officials registered as per our minutes herein attached. Also find a certified copy of the decree, and a copy of official search for ease of reference.

We shall appreciate your quick response.

Yours faithfully,

NOONTINIAI OLE SENTEU – CHAIRMAN .....

LEKINANA OLOLKIPAI – TREASURER .....

TULUYIA OLE SIMEL – SECRETARY .....

CC.

DISTRICT ADJUDICATION AND SETTLEMENT OFFICER-NAROK SOUTH

(Emphasis added)

The Registrar in re-issuing certificate number 0041 was acting on that letter and before we address any other aspects of it, we must say up front that the *"re-incorporation"* that was sought and was granted by the Registrar is wholly unknown under the Act. That statute was passed for a specific purpose and operates within the context of Land Adjudication hence its commencement on 28th June 1968 at the very height of land adjudication in the country. Its long title speaks to that thus;

"An Act of Parliament to provide for the incorporation of representatives of groups who have

been recorded as owners of land under the Land Adjudication Act, and for purposes commented therewith and purposes incidental thereto."

The very incidents attached to the incorporation of representatives of groups under the Act suffice to show that re-incorporation was not in the contemplation of the law maker. The Registrar never initiates the process and never advises the representatives to get incorporated as is alleged, without contest or controvert, to have happened herein as a prelude to the re-incorporation in 2009. Rather, it starts by way of notification of advice by a land adjudication officer provided for under **Section 5(1)** of the Act as follows;

"5.(1) Upon being notified under section 23(5) (c) of the Land Adjudication Act that a group has been advised to apply for group representatives to be incorporated under this Act, the registrar shall convene a meeting of the members of the group, at a specified time and place to-

(a) Adopt a Constitution

(b) Elect not more than ten and not less than three persons to be group representatives of the group; and

(c) Elect persons to be the officers of the group in accordance with the Constitution.

(2) the registrar or a public officer appointed by him in writing for the purpose shall preside at the meeting to be held under section 5 of this Act."

The advice from the land adjudication officer which triggers the foregoing process arises out of the process of preparation of the adjudication register and a group happens to be recorded as the owner of land in question. The relevant provision of the Land Adjudication Act is as follows;

"S.23(5) Where a group is recorded as the owner of land or as entitled to an interest not amounting to ownership of land, the adjudication officer shall-

(a) Cause the group to be advised to apply for group representatives to be incorporated under the Land (Group Representatives) Act (Cap. 287);

(b) Cause the recording officer to record that the group has been so advised; and

(c) Notify the Registrar of Group Representatives that the group has been so advised.

The Act knows only of initiation of incorporation of group representatives in the context we have referred to and no other. Indeed, **Section 7(1)** lays down the process that must be followed subsequent to the meeting held under **Section 5** in the following terms;

"7. (1) Where at a meeting held under section 5 of this Act the members of a group resolve that group representatives shall be incorporated, and elect not more than ten and not less than three persons to be group representatives, the persons so elected shall make application to the registrar in the prescribed manner for their incorporation under this Act."

It is noteworthy and mandatory that an application for incorporation of group representatives has to be in the prescribed form. That form appears in the First Schedule to the Act as Form A and a perusal of it dispels any doubt that incorporation has to be in the context of adjudication. Among the particulars of the group that must be supplied is;

"(b) Description of the area determined in accordance with the Land Adjudication Act, 1968 …."

It stands to reason that the incorporation cannot apply in a situation where, as here, the process of

adjudication was long completed and there had been registration and even transfer of title to the land in question. Moreover, once the process of dissolution of the incorporated group representatives has been set in motion and fully actioned under **Section 13** of the Act, it would, with much respect, be both idle and clearly outside the purview, competence or jurisdiction of the Registrar to purport to be acting under **Section 7** of the Act to engage in the strange and unknown procedure of *reincorporation* as if she were dealing with a fresh and independent application for incorporation.

This is the more so when the Registrar is enjoined statutorily by **Section 7(2)** of the Act, to act not mechanically, but deliberately and cerebrally as follows;

> ***"(2) On receiving an application under subsection (1) of this section, the registrar, if he is satisfied that –***
>
> > ***(a) The requirements of this Act and of any regulations made under it have been complied with; and***
> >
> > ***(b) The Constitution of the group is acceptable on substance and in form, may issue a certificate of incorporation of the group representatives, subject to any conditions, limitations or exempts which he considers appropriate."***
> >
> > (Our emphasis)

We are firmly persuaded that given those express provisions of the Act, the learned Judge was clearly wrong to suppose and find that the issuance of a certificate was curative of any and all preceding defects. The Registrar is under a positive duty under the Act to exercise his mind and to interrogate whether there has been compliance with the Act's requirements before issuing a certificate of incorporation. This was, we think, a clear case where the learned Judge was called upon to inquire into a *precedent fact* of statutory compliance and, as stated by ***Jonathan Auburn*** and his learned co-authors, the fact he was to enquire into was equally 'collateral or 'jurisdictional' and he erred in glossing over the challenge and thereby sanitizing an illegality that was patent on the record in that the Registrar both failed to satisfy herself that the Act had been complied with, and acted without jurisdiction in purporting to exercise a non-existent power of re-incorporation. Such power was not founded on any law and the act of reincorporation was null, void and of no force or effect.

The situation called for the clear sentiments expressed by Lord Pearce in ***ANISMINIC LTD vs. THE FOREIGN COMPENSATION COMMISSION & ANOR*** **[1969] 1ALL ER. 208 at 233-34**, with which we respectfully agree;

> ***"(…)***
>
> ***Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper enquiry, the tribunal may depart from rules of natural justice; or it may ask itself wrong questions; or it may take to account matters it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed unless special provisions provide otherwise that the tribunal will make its decisions according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error."***
>
> (Emphasis supplied)

It is also not difficult to see how the Registrar's decision was tainted with, unreasonableness and breach of the appellant's legitimate expectations. The letter seeking re-incorporation made mention of the tribunal case that divested the appellant of the subject land and purported to annul or cancel its registration and title thereto. That ought to have put the Registrar on notice and called her to proceed with deliberate circumspection first because it was facially highly questionable whether the tribunal had powers to so decide, and, second, because what she was being requested to do would definitely affect, in all probability quite adversely, the appellant's interests and for that reason there was at least a duty to call for representations or at the very least inform the appellant of the intended action. This the Registrar did not do and such unreasonableness and lack of due process or natural justice would entitle the court to enquire into the propriety of the decision taken. In so far as the learned Judge failed to address his mind to this aspect of the case he fell into error calling for reversal.

Also intricately linked and writ large in the entire saga leading to the re-incorporation of Kamorora Group Ranch in 2009 are the patent falsehood and fraudulent misrepresentations as sworn to and demonstrated at length by the appellant before the High Court. It can scarcely be said to have been a proper exercise of the learned Judge's judicial review jurisdiction for him to have paid scant attention to the many allegations of fraudulent misrepresentations made and particularized on behalf of the appellant. Such representations, even as can be seen by the letter we set out above, largely affected the decision of the Registrar. It was the duty of the High Court to step in and right the wrong. In ***R vs. RECORDER OF LEICESTER EX PARTE WOOD*** **[1947] 1 ALL ER 928** it was stated, and we think it is the proper approach that;

> ***"The leading case for the present purpose appears to be R. v Gillyard decided in 1848, where it is interesting to observe, the Attorney General himself obtained a rule to quash a conviction of a man on the ground that the proceedings were fraudulent in that a charge had been made by the prosecutor which he knew to be untrue and had been made to exculpate himself. The court held that where a decision of an inferior court resulting in a conviction had been obtained by fraud certiorari was a remedy which was open to the subject who had been convicted and the rule was made absolute and the conviction quashed. That seems to have been followed in other cases: see R v. Alleyne and in Colonial Bank of Australia v. Willan, the Judicial Committee obviously admitted the principle that, if the court was satisfied that there had been fraud in the proceedings, the remedy of certiorari would lie.***
>
> ***(…)***
>
> ***I agree. In the words of ERLE, J in R. v Gillyard (12 Q.B 530):***
>
> ***This court has authority to correct all irregularities in the proceedings of inferior tribunals, which in this case have been resorted to for the purpose of fraud. In quashing this conviction, we are exercising the most salutary jurisdiction which this court can exercise.***
>
> ***So, in the present case the order of the inferior court was obtained by fraud and perjury. So far as I know, this procedure is the only one which can be adopted to put right the wrong which has been done."***

Having already found that she failed on the point of precedent fact, are deliberately eschewing a detailed and minute classification of the various other defects in the Registrar's decision-making process. This is out of our being alive to the fact that sometimes the defaults of the decision-maker are cross-cutting and can be challengeable on various aspects which may yet fall under the general rubric of *unreasonableness*. These are not separate and distinct heads lacking in nexus and interpenetration. We adopt the dicta of Lord Greene MR in the leading 70 year old case of ***ASSOCIATED PROVINCIAL PICTURE HOUSES LTD vs. WEDNESBURY CORPORATION*** **[1947] 2 ALL ER 680** at 682-83;

> ***"In the present case we have heard a great deal about the meaning of the word 'unreasonable.' It is true that discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use***

the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said and often is said to be acting "unreasonably." Similarly you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON LJ., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact all these things largely fall under one head."

(Emphasis supplied)

The futility of seeking cut and dry distinctions has been recognized by leading scholars and we do no better than cite De Smith's Judicial Review 6th Edn, London, Sweet & Maxwell 2007 at P 536;

"Categories of unreasonableness

The great many cases held unlawful on the ground of unreasonableness may be divided into the following broad categories (recognizing of course that there will always be decisions which do not easily fall into any of them, or that overlap between them).

Unreasonable process

First, is the case where there has been a material defect in the decision making process. The assessment here focuses upon the quality of the reasoning underlying or supporting the decision; upon the weight placed upon the factors taken into account on the way to reaching the decision; upon the way the decision is justified. We shall examine here(a) decisions based on considerations which have been accorded manifestly inappropriate weight and (b) strictly "irrational" decisions, namely decisions which are apparently illogical or arbitrary (c)uncertain decisions (d) decisions supported by inadequate or incomprehensible reasons or (e) by inadequate evidence or which are made on the basis of mistake of fact."

(Emphasis supplied)

We are quite clear in our minds that for the reasons we have set out, the decision of the Registrar was most certainly for quashing because it was a patent nullity. Nullities are a species of actions or decisions that are an embodiment of nothingness and they are deserving only of quashing without ado whenever and wherever challenged. The purported reincorporation of Kamorora Group Ranch and the issuance of a certificate to its purported representatives with the intention of *post-facto* acquisition of the subject land through a series of illegal, unreasonable and *ultra vires* manouvres of the Registrar at the behest of the alleged leaders or representatives of the Group Ranch was an attempt to turn back the clock and subvert the due process of law. It was in every sense a nullity and the learned Judge, having quashed the very decision of the Land Disputes Tribunal as adopted by the Principal Magistrate's Court, that the Registrar purported to act upon in effecting the reincorporation, should have had no hesitation in declaring the Registrars decision null and void. He should have quashed the same and the certificate of reincorporation issued on 3rd November 2009. See ***MACFOY vs. UNITED AFRICA CO. LTD*** **[1961] 3 ALL ER 1169**.

The upshot of our consideration of this appeal is that it succeeds. The part of the ruling and order of Ouko J, delivered on 19th May 2010 that decided that an order of *certiorari* was not available in the circumstance of J.R. Application No. 7 of 2010 be and is hereby set aside. It is substituted with an order granting the Notice of Motion before the High Court dated 25th January 2010 with costs.

There was delay in delivery of this Judgment occasioned by a heavy workload and the same is regretted. We are grateful for the parties' patience.

The appellant shall also have the costs of this appeal.

Dated and delivered at Nakuru this 21st day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……..……....

JUDGE OF APPEAL

P. O. KIAGE

……...…....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR