



**Republic v Senior Land Registrar of Titles Mombasa; Langat (Exparte Applicant) (Judicial Review Miscellaneous Application 1A of 2022) [2024] KEELC 4257 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4257 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 1A OF 2022**

**LL NAIKUNI, J**

**MAY 15, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SENIOR LAND REGISTRAR OF TITLES MOMBASA ..... RESPONDENT**

**AND**

**KIPTERER PAUL ARAP LANGAT ..... EXPARTE APPLICANT**

**JUDGMENT**

**I. Preliminaries.**

1. This is a Judgment pertaining to a Judicial Review suit instituted by the Ex - Parte applicant – Mr. Kipketer Paul Langat against the Respondent herein. To begin with, the Ex - Parte Applicant filed a Chamber Summons application dated 29<sup>th</sup> July, 2010 under the provision of Order LII rule 1 (2), 2 and 4 of the Civil Procedure Rules and the Law Reform Act, Cap 26.
2. On 30<sup>th</sup> July, 2010, the Ex Parte Applicant applied and obtained leave to file the substantive motion herein and provided with specific direction on how to proceed by this Court on 30<sup>th</sup> July, 2010. The said substantive application was dated 18<sup>th</sup> August, 2010 and which moved this court under the provision of Sections 8 and 9 of the Law Reform Act, Cap. 26 and Order 53 Rule 3 and 4 of the Civil Procedure Rules, 2010.
3. Upon service the Respondent – the Senior Registrar of Titles, Mombasa on 21<sup>st</sup> October, 2021 only filed grounds of opposition dated 18<sup>th</sup> October, 2021 opposing the Notice of Motion application dated 13<sup>th</sup> October, 2020 by the Ex – parte Applicant seeking to set aside the order by this Court made on 25<sup>th</sup> September, 2017 dismissing the suit for want of prosecution. As a matter of fact, vide a Ruling



delivered on 28<sup>th</sup> march, 2023 the said application was allowed reinstating the suit. Unfortunately, despite all efforts made, the Respondent never participated any further in this matter thereafter.

4. From the records, the last court session held in the proceedings was on 18<sup>th</sup> January, 2024. The Honourable Court observed that the Respondent had been given several opportunities to file responses nor submissions to the substantive motion but was all in vain as they failed and/or ignored to do so within the stipulated time directed. Ideally, therefore, the suit stands unopposed but the Honourable Court will proceed to deal with the matter on its own merit.

## II. The Ex – Parte Applicant’s Case

5. Through the substantive motion, the Ex - Parte Applicant sought for the following prayers:
  - a. An order of certiorari to remove into the High Court and quash the Order made by the Senior Registrar of Titles, Mombasa under *the Constitution* of Kenya, the Government Lands Act (Cap 280) and the Trust *Land Act* (Cap 288) of the Laws of Kenya, on the 21<sup>st</sup> May 2010 in gazette Notice Number 5562, declaring the Title issued to the Applicant for Malindi L.R No. Portion 10595 revoked.
  - b. An order of prohibition prohibiting the Senior Registrar of Titles, Mombasa from revoking, recalling, cancelling and/or impeaching the Applicant’s Title to Malindi L.R NO. portion 10595 and/or acting in any other way prejudicial to and/or inconsistent with the applicant’s registered ownership of Malindi L.R No. portion 10595.
  - c. An order of prohibition prohibiting the Senior Registrar of Titles, Mombasa from disseminating, publishing, placing advertisements, notifications to the public in any form of media expressing, making representations and/or verbal utterances to any one in any way or in any manner at all, of any of the material which may be construed as being inconsistent or which is inconsistent with the legality of the registered proprietorship of Kipterer Paul Arap Langat over Malindi L.R No. portion 10595.
  - d. Costs of the application be provided for.
6. The application is premised on the grounds, testimonial facts and averments made out under the 18 Paragraphed Verifying Affidavit of Mr. Kipterer Paul Arap Langat, the Ex - Parte Applicant herein together with several documents marked as “Bundle – A ” annexed thereon. He averred that:
  - a. He was the Ex – Parte Applicant herein as an adult of sound mind and understanding who was very conversant with the facts of this case and hence duly authorized to swear this Affidavit on his own behalf.
  - b. The Ex – Parte was the duly legal and absolute registered owner to all that parcel of Land Known as Malindi and Reference No. Portion 10595 (Hereinafter referred to as “The Suit Land”)
  - c. On or about 6<sup>th</sup> February, 1992, he applied for a Letter of Allotment for the suit land. Subsequently, on 18<sup>th</sup> January, 1992, the then District Commissioner wrote to the then Commissioner of Lands stating that there was no objection to the said allotment.
  - d. On 25 January, 1992, the then District Commissioner wrote to the then Permanent Secretary, Ministry of lands stating that there was no objection to the said allocation.
  - e. On 27<sup>th</sup> February, 1992, the said Letter of allotment was approved by the then President of the Republic of Kenya.



- f. After compliance with the terms and conditions of the said Letter of Allotment and payment of the Stand Premium and other requisite charges, a Grant in respect of the suit property was registered and issued to him.
- g. By a letter dated 15<sup>th</sup> February, 2008, the then Commissioner of Lands wrote confirming that he was the absolute owner of the suit property.
- h. In the meantime, on or about the year 2009, the said Commissioner of Lands asked him to consider surrendering the suit property for purposes of the Government building staff quarters for senior civil servants.
- i. On 13<sup>th</sup> May, 2009, he agreed to relinquish the suit property on the following conditions that:
  - i. The suit property would not be used for any purpose apart from building the staff quarters; and
  - ii. The Government provided him with the possession and Title of a suitable beach property of the same value to the suit property.
- j. Subsequent to the above, the said Commissioner of Lands wrote a letter dated 13<sup>th</sup> May, 2009 to the then District Commissioner of Lands, Malindi District, directing that the above exchange was acceptable and that a suitable parcel of land be identified for the surrender to continue.
- k. After nine months passed without any feedback from the Commissioner of Lands or any other Government representative, he rescinded his decision to surrender the suit property vide a letter to the then Commissioner of Lands dated 9<sup>th</sup> February, 2010.
- l. In response, the then Commissioner of Lands vide a letter dated 23<sup>rd</sup> February, 2010 admitted that there was no suitable land for exchange had been found and directed the then District Commissioner, Malindi District, to study the ground situation to enable him develop the suit property.
- m. The foregoing notwithstanding, the Senior Registrar of Titles, Mombasa purported to revoke the Grant he held by him vide gazette notice No. 5562 published in the Kenya Gazette dated 21<sup>st</sup> May, 2010.
- n. His advocates informed him that the cited statutes of Constitution of Kenya, The Government Lands Act (Cap. 280) and the Trust Lands Act (Cap. 288) never vested the Senior Registrar of Titles, Mombasa the power to revoke Title. Further, that there was no law in the Republic of Kenya, that vested the Senior Registrar of Titles, Mombasa the power to revoke Titles to land.
- o. Therefore, the purported revocation of title to the suit property was irregular, ultra vires and unlawful and hence the decision should be quashed forthwith.

### III. Analysis & Determination

7. I have carefully assessment the Judicial review application brought to this Honourable Court by the Ex – Parte Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. Despite of all the directions made by Court, the Respondent declined to file any responses leaving the Court to make a determination of the matter on its own merit.
8. For the Honourable Court to reach an informed, reasonable, fair and Equitable decision, it has crystalized the subject matter into three (3) salient issues for analysis. These are as follows:-



- a. Whether the Judicial review suit instituted by the Ex – Parte Applicant meets the threshold of such a suit and has merit whatsoever?
- b. Whether the parties are entitled to the prerogative reliefs sought.
- c. Who will bear the costs of the suit.

**Issue No. a). Whether the Judicial review suit instituted by the Ex – Parte Applicant meets the threshold of such a suit and has merit whatsoever?**

9. Under this Sub – heading, the Honourable Court will deliberate on the merits of the Judicial review case instituted by the Ex – Parte Applicant under the already set out provisions of the Law. But before that, the Court will extrapolate on the brief facts of the case for ease of reference.

**Brief facts**

10. Form the filed pleadings, the brief facts of the case are summarized in the verifying affidavit by the Ex - Parte applicant dated 29<sup>th</sup> July, 2010. It holds that upon making an application, the Ex - Parte applicant was allocated Malindi L.R No. 10595. This was by the defunct Commissioner of Lands through being issued with a Letter of Allotment dated 10<sup>th</sup> March, 1995. Upon payment of the prerequisite and statutory dues for the stand Premium and stamp duty being a sum of Kenya Shillings Three Fourty Three Thousand Four Twenty Hundred (Kshs. 343,420/=) as evidenced by an official receipt dated 22<sup>nd</sup> November, 1995 the suit property was registered as leaseholder in grant no. CR 36035 for a term of 99 years starting from 1<sup>st</sup> April, 1995.
11. However, in the course of time, the Ex - Parte Applicant averred that although he took possession of the land but was stopped from fencing and consequently developing the suit property by the police. The police danced the reasons that the suit property was hindering the neighboring portions of land from access to the beach. It also came out later as evidenced by the Ex - Parte's letter dated 13<sup>th</sup> May, 2009 that the national Government intended to build staff quarters for senior civil servants upon the suit property. Upon request by the then Commissioner of lands through correspondence that he agreed to surrender the title to the suit property on the condition that he be issued with an alternative beach property of similar value. Indeed, the Commissioner of Lands expressly communicated with the Respondent herein to that effect.
12. With the passage of time, unfortunately, this proposal and pre – conditions never crystalized. As a result, the Ex - Parte applicant rescinded his earlier surrender and demanded access to his property to start developing it. He made this statement through his letter dated 9<sup>th</sup> February, 2010 whereby the Commissioner of Lands replied through a letter dated 23<sup>rd</sup> February, 2010. In the said letter, the defunct commissioner of lands recognizes the fact that his office was unable to locate an alternative parcel of land and he therefore instructed the defunct District Commissioner to allow the Ex - Parte have access to the suit property. On the contrary, instead of fulfilling the aforestated proposal, the Senior Land Registrar; Mr Geoffrey Birundu proceeded to revoke the title for the suit property through publication of a notice in a Kenya Gazette notice dated 21<sup>st</sup> May, 2010. The said gazette notice read as follows:

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



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

13. It was from this point that the Ex Parte Applicant was compelled to institute this suit and sought for the reliefs already set out herein above. As indicated the Respondent never controverted the claims made out by the Ex – Parte Applicant from the filed pleadings and hence the suit. That is adequate on the brief facts of the case.
14. Now turning to the issues of analysis under this Sub – titles.  
First and foremost, it is important to appreciate the meaning of Judicial Review. The concept is based on the fact that administrative excesses must be checked through Judicial intervention. Administrative law relates to decision of offices or organs of Central Government or Public Authorities which may affect the rights or liberties of the citizens and which are enforceable in or organized by the courts of law. Therefore judicial review is an integral component of administration law.
15. In our legal parlance and jurisprudence, Judicial Review is founded under the provisions of Order 53 Rules 1 to 7 of the Civil Procedure Rules 2010 where the Prerogative orders of “Mandamus”, “Prohibition” and “Certiorari” are issued.
16. Primarily, the provisions of Sections 8 and 9 of the *Law Reform Act* Cap 26 of the Laws of Kenya where the Provisions of Order 53 of the Civil Procedure Rules 2010 was borrowed from the case of *Farmers Bus Services – Versus - Transport Licensing Appeals Tribunal (1975) E.A. 523*. And upon the promulgation of *the Constitution* of Kenya in 2010 Article 47 of *the Constitution* of Kenya introduced the Provisions of Fair Administration of justice and later on the legislation of “the Fair Administration of Action Act of 2012” which is the statutory framework governing judicial review and the Administrative law in Kenya currently.
17. The legal efficacy and scope of the statutory order of Mandamus, Prohibition and Certiorari are remedies granted by High Court to persons inferred by the exercise of administrative of judicial powers. These prerogative orders are only available against public bodies. Their origins lie in the expansion of common law in England and the jurisdiction of the Court of King Bench to acquire Superintendence over the observance of law by officials. These orders are predicated upon the fact that without law, society cannot function with fundamental values such as social order, social justice and personal freedom. Today public authorities determine an overwhelming extent how much of these values are enjoyed. Their decision affect vast numbers of people collectively and individually “Ipso Facto” unlawfully decision, must be available to Judicial Scrutiny hence judicial Review. The social need for how and the protection of legality is violated when a public official exceeds his/her authority or does not use his/her power in the prescribed manner.
18. The prerogative writs of “Certiorari” derives from the Latin word “Certiorari” which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made. The Order of “Prohibition” issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction. The order of “Mandamus” is derived from the Latin word “Mandare” meaning to command. It is issued in cases



where there is a duty of a public or a quasi-public nature or a duty imposed by statute, it compels the fulfillment of a duty where there is a lethargy on the part of a body or officer concerned.

19. In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.
20. In an application for Judicial review the Applicant must be person with a sufficient interest – (Locus Standi) and who commences proceedings promptly. To support this legal concept on judicial review, I have made indepth references to several literature review and court decisions – “Pharmaceutical manufacturers Association of South Africa in re- exparte president of Republic of South Africa - 2000 S.A. 674 CC at 33 Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic –Versus- Stanley Mambo Amuti (2018) eKLR.”; the Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996.
21. In the instant case, the Ex-Parte Applicant has sought all the above two out of the three known the writ prerogative Orders – Certiorari and Prohibition. As stated above, this court has powers under Sections 8 and 9 of the Law Reform Act, Cap. 26 of the Laws of Kenya to issue prerogative writ of Certiorari, which brings into this court to quash a decision which is ultra vires. A writ of prohibition intended to forbid or prevent an action by a public officer from taking place is granted alongside Certiorari, since it’s a similar remedy but more prospective than retrospective. While certiorari looks at the past, prohibition looks at the future. The provision of Section 8 of the Law Reform Act, also provides for a writ of prohibition which primarily prohibits a tribunals, judicial bodies or subordinate courts from doing or taking an action in excess of its jurisdiction.
22. In the book of “Administrative Law”, Sir. W. Wade and C. Forsyth, Page 605 noted that:-

“I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.

Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”

23. The provision of Section 9 (3) of the Law Reform Act states as follows:

“In the case of an application for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction



or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

24. The provision of Order 53 Rules 3 & 4 of the Civil Procedure Rules, 2010 lay the procedure when seeking the prerogative orders of judicial review being Mandamus, Prohibition and Certiorari.

25. To support my preposition, I am guided by the Civil Appeal No.266 of 1996 Kenya National Examination Council – Versus - Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997], the Court of Appeal addressed its mind to efficacy and purport of the order of certiorari and prohibition. On certiorari the court had this to say;

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

26. Additionally, in the case of “Pastoli – Versus - Kabale District And Others (2008) 2 E.A. 300 the court set out the duty of a court in Judicial Review applications as follows: -

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or the 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 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 would have made 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.”

27. In the case of “Municipal Council of Mombasa – Versus - Republic Umoja Consultants Limited Civil Appeal No. 185 2007 (2002) eKLR the court of appeal set out the parameters in applications for JR and held that:-

“The court would only be concerned with the process leading to the making of the decision. how was the decision arrived at. Did those who made the decision have power i.e. jurisdiction to make it. Were the provisions affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did the take into account irrelevant matters. These are the kind of questions a court hearing a matte by way of Judicial review is concerned with and such court is not entitled to act as a court of appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

#### **Issue No. b). Whether the parties are entitled to the prerogative reliefs sought.**

28. Under this Sub – heading, having clearly set out the principles on Judicial review above, the Honourable Court now wishes to apply them onto the instant case. In so doing, the Court has



considered the Applicant's notice of motion, the Statutory Statement, the Verifying Affidavit, the exhibits annexed to the verifying affidavit on record and is of the opinion that the issues arising for determination is whether or not the Senior Registrar of Titles acted in ultra vires of his powers hence making the decision unlawful and irregular. As earlier stated, the grievance of the Ex - Parte Applicant arose when a Senior Registrar of Titles, Mombasa revoked his title to the suit property by publishing it a notice in the Kenya Gazette and which revocation he claims was ultra vires, irregular and unlawful. He argued that there was no provision of the law in the Republic of Kenya that granted the Respondent this powers. The Court has a task to adjudicate on this aspect of facts and Law.

29. To determine the above question, I am guided by Justice Ogola in the case:- "Republic – Versus - Registrar of Titles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited [2018] eKLR where he stated:

"In this instant case the Respondents Revoked the Ex - Parte Applicant's title known as L.R NO. MN/VI/3832 vide Gazette Notice No. 9058 for the reason that it was a public utility as stated by the 3<sup>rd</sup> Interested Party.....As held in Kunste, supra, the judicial review court is not a fact finding court for determination of disputed facts or merits of the case. When considering a similar question in the Franns, supra, this Court said:

15. There was no dispute that there were pending before the Environment and Land Court nine suits filed by the 1<sup>st</sup> Interested Party as Plaintiff against the Petitioner and others as defendants alleging fraud and illegality, breach of statute and misfeasance of public office and seeking orders inter alia for rectification of the relevant land registers "by cancellation of the Certificate of Title" of the lands subject of the suits. Therefore, the matter of the merits of the contention by the Interested Parties that the titles in the Petition were unlawfully acquired by the Petitioner are not before this Court. They are properly for determination before the Environment and Land Court where the 1<sup>st</sup> Interested Party has already filed suits in that behalf. The worthy rival arguments as to whether the Court will eventually uphold the Petitioner's title to the suit property is for determination outside these proceedings.

Indeed, the question of title to land or ownership of the suit property being one which oral evidence must be taken is best dealt with in a civil suit where procedure by viva voce evidence is the regular method of fact finding. Although, oral evidence may be taken in constitutional litigation pursuant to Rule 20 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the fact that the civil suits in the Environment and Land Court are first in time and the question of title and ownership of land is proper province of the Environment and Land Court under Article 162 of *the Constitution*. That is the farthest the court may go in looking beyond the issue of revocation of petitioner's title to the suit parcels of land."

37. The merits of the case, including the alleged illegality of title on the principle of ex turpi causa and fraud must be proved and determined in suitable proceedings in that behalf.
38. The Court has determined that the land Registrar has no jurisdiction to revoke title to land. The purported revocation by the Gazette Notice herein must



be quashed and any further action thereon be prohibited by judicial review orders, as appropriate.”

30. Legally speaking, it is instructive to note that the suit property and its Certificate of Title in the subject matter was under the Registration of Titles Act, Cap 281 (now repealed). However, based on the saving Clause under the provision of Section 107 of the *Land Registration Act*, No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the LRA , No. 3 of 2012 and the *Land Act*, No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 ( 3 ) ( c ) of the *Interpretation and General Provisions Act*, Cap. 2 which provides, “inter alia”:-

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

The said legal position was upheld in the cases of “Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR” . The Court takes cognizance that in this case there were no pending suits appertaining to ownership of the suit property. The main substrata of the matter is on the administrative action taken by the Respondent in handling the Certificate of Titles bestowed on the Ex – Parte Applicant who was the absolute and legal proprietor to it with all indefeasible right, interest and title vested in him by law. Currently the power of revocation of titles is preserved for this court under the provision Section 80 of the *Land Registration Act*, No. 3 of 2012. The provision Section 80 was the equivalent of Section 61 of the Registration of Titles Act (Cap 281) (repealed). The Government Lands Act, Cap. 280 (Repealed) and the Trust *Land Act*, Cap. 288 (Repealed) did not give the registrar of titles any power to revoke titles. It follows therefore that, if the Court is satisfied that any registration was obtained, made or omitted by fraud or mistake, has the legal mandate under the provision of Section 80 (1) of the *Land Registration Act* to cause the title deed be cancelled or amended or annulled or revoked. Section 80 provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

Sub section (2) states that:

“The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake.”

31. In light of the above, therefore, I emphatically find that the Respondent acted in ultra vires of his powers and did not follow the procedure as laid out in the provision of Section 60 of the Registration of Titles Act (Cap 281).
32. As regards, the 2<sup>nd</sup> prayer of prohibition was discussed in Kenya National Examination Council case supra, where the Court of Appeal defined what an order of prohibition is and when it will issue:-

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in



contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – see HALSBURY’S LAW OF ENGLAND, 4th Edition Vol.1 at pg. 37 Paragraph 128. When those principles are applied to the present case, the council obviously has the power or jurisdiction to cancel the results of an examination.

The question is how, not whether, that power is to be exercised. If the Council were to declare in advance that it was going to cancel particular results because the candidates involved were not supporters of the government of the day or some such like irrelevant reason, there cannot be any doubt but that the High Court, on application by the candidates so threatened, would issue an order prohibiting the Council from acting either in excess of its jurisdiction or contrary to the laws of the land. In such an event, it would be idle for the Council to contend that it has its own statute and the High Court ought not to intervene; the High Court would be entitled, indeed duty-bound, to intervene. That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision as made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.”

33. On keen assessment of the 2<sup>nd</sup> prayer in the substantive application, the Court deciphered that it does not look into the future. On the contrary, it is a repetition of the prayers of Certiorari. Hence the said prayer is untenable and therefore dismissed.
34. On the other hand, the 3<sup>rd</sup> prayer is tenable as it looks into the future of the suit property. Once the National Land Commission is ready, it will begin the process of developing the suit property for public purposes and it is bound by law to make the public aware of such developments. At this point, the court is not aware if the process has begun or not as this suit was filed in the year 2010 and no recent Certificate of official search has been attached to ascertain the actual status of the suit property. For these reasons, therefore, the Honourable Court is reluctant in granting an order of prohibition at the moment and in the given circumstances to avoid embarrassing itself by giving vain orders. Thus, all said and done and in abundance of caution, I hereby decline to issue an order of prohibition.

#### **Issue No. Who will bear the costs of the suit**

35. It is now well established that the issue of costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of a legal action or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the Civil Procedure Act, Cap 21 provides as follows: -

“ Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary



directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

36. On this legal point, I seek refuge from the cases of:- “Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co - operative Society Ltd this court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

37. Further, I am guided by the following passage from the Halsbury’s Laws of England; 4<sup>th</sup> Edition (Re-issue), {2010}, Vol.10. para 16

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

38. Still on the same subject Mr. Justice (Retired) Kuloba in ‘Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011’, page 94 stated: -

“Costs are (awarded at) the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.....”

39. With respect to the instant application, the Honourable Court has found that the application by the Ex – Parte Applicant is meritorious. Thus the Ex – Parte Applicant is entitled to costs of the suit. The costs will borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> Defendants/Respondents accordingly.

#### **IV. Conclusion & findings**

40. Ultimately, having caused the analysis of the framed issues, on Preponderance of Probabilities and the balance of convenience, the Honourable Court grants the following specific orders:-

- a. That Judgement be and is hereby partly entered in favour of the Ex – Parte Applicant under the following terms and conditions:-
  - i. An order of Certiorari to remove into the High Court and quash the Order made by the Senior Registrar of Titles, Mombasa under *the Constitution* of Kenya, the Government Lands Act (Cap 280) and the Trust *Land Act* (Cap 288) of the Laws of Kenya, on the 21<sup>st</sup> May 2010 in gazette Notice Number 5562, declaring the Title issued to the Applicant for Malindi L.R No. Portion 10595 revoked.



- ii. An order of Prohibition prohibiting the Senior Registrar of Titles, Mombasa from revoking, recalling, cancelling and/or impeaching the Applicant's Title to Malindi L.R NO. portion 10595 and/or acting in any other way prejudicial to and/or inconsistent with the applicant's registered ownership of Malindi L.R No. portion 10595 be and is hereby declined.
- b. That an order of Prohibition prohibiting the Senior Registrar of Titles , Mombasa from disseminating , publishing, placing advertisements, notifications to the public in any form of media expressing, making representations and/or verbal utterances to any one in any way or in any manner at all, of any of the material which may be construed as being inconsistent or which is inconsistent with the legality of the registered proprietorship of Kipterer Paul Arap Langat over Malindi L.R No. portion 10595 be and is hereby declined.
- c. That the costs of the suit to be awarded to the Ex – Parte Applicant.

**JUDGEMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

.....

**HON. JUSTICE L.L. NAIKUNI**  
**ENVIRONMENT & LAND COURT AT**  
**MOMBASA**

**Judgement delivered un the presence of:-**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Ex – Parte Applicant.
- c. Mr. Mwandeje Advocate for the Respondent.

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