IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 186 OF 2004

BETWEEN

BIREN AMRITLAL SHAH……..1ST APPELLANT

BHARATKUMAR NATHALAL SHAH……..……..2ND APPELLANT

AND

REPUBLIC……..1ST RESPONDENT

THE LAND REGISTRAR KILIFI DISTRICT……2ND RESPONDENT

THE COMMISSIONER OF LANDS……..…..3RD RESPONDENT

ANTONY KIBIRIBIRI……....……4TH RESPONDENT

(An application on appeal from the ruling of the High Court of Kenya at Nairobi (Githinji, j) dated 31st July 2002

in

H.C.Misc. C.Appl No. 316 0f 2001)

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RULING OF THE COURT

The Appeal before us arises from an Order issued by the High Court **(Githiji, J.)** (as he then was) on 31st July, 2002 in H.C. Misc. Appl. No. 316 of 2001 dismissing with costs the appellants application seeking, among other things, a review of that Court's earlier orders given on 7th December 2001 granting the 4th respondent an order of mandamus directing the 2nd and 3rd respondents to return the original Green Card and or Register in respect of **Title No. Chembe/Kibabamshe/273** ("the suit property") and directing the 2nd and 3rd respondents to reconstruct the land register in respect of the suit property so as to reflect the 4th respondent as the current owner.

In that application, the 4th respondent had sought an order of certiorari to quash the decision of the 2nd

and 3rd respondents for destroying the original register in respect of the suit property and creating a new register which showed the appellants as the registered proprietors of the suit property. The 4th respondent also sought orders of mandamus to compel the 2nd and 3rd respondents to reconstruct the register of the suit property, and an order of prohibition to restrain them from interfering with the same.

The matter concerns a land dispute between the 4th respondent and the appellants, wherein the 4th respondent claimed to have purchased the suit property from Raphael Diwani trading as Musoloni Villas after which he was on 14th November 2000 registered as its proprietor and issued with a title deed. Thereafter, 4th respondent obtained a loan of Kshs.2 million from Barclays Bank of Kenya and a charge to secure it was registered against the title. It was after that that the 2nd and 3rd respondents cancelled the registration and title deed issued to the 4th respondent, and went ahead to register and issue another title deed in the joint names of the appellants on 3rd March 2001.

In the circumstances, having bought the suit property from Mr. Ali Didi Aboud to whom it had been adjudicated during the adjudication process, the 4th respondent claimed to hold a title superior to that of the appellants as the absolute joint owners of the suit property.

The 2nd and 3rd Respondents did not file any replying affidavit in response to the 4th respondents application in the High Court. Instead, Mr.Runo, State Counsel in the Attorney General's Chambers appeared and submitted on behalf of the 2nd and 3rd Respondents.

Having considered the documents, authorities and the submissions of counsel, the learned Judge was satisfied that the 2nd and 3rd Respondents acted without jurisdiction when they made a decision on 19th March 2001 to cancel the registration of the 4th respondent as registered proprietor, and to issue a second title deed to the appellants.

The learned Judge declined to issue the orders for certiorari and prohibition as prayed, but issued an order of mandamus directing the 2nd and 3rd Respondents to cancel the registration of the appellants as the owners of the suit land and restore the 4th respondent as its owner.

Being dissatisfied with that decision, in their Notice of Motion dated 11thMarch 2002 the appellants sought its review on the grounds that since the issuance of the decision of the Court, they had discovered the existence of two Green Cards/registers which were not available to them at the time of hearing their application, despite their diligent efforts to obtain the records. The appellants contended that, it was extremely important that the new matters be taken into consideration.

In his ruling dated 31st July, 2002, the learned judge dismissed the application for review holding that he had no jurisdiction to review his earlier decision of 7th December, 2002. In the Judge's own words:

> ***"By section 8(3) of the Law Reform Act , the order of mandamus, certiorari, prohibition made by the High Court when exercising that supervisory jurisdiction is final subject to a right of appeal to the Court of Appeal and section 8(5) gives an aggrieved party the right to appeal to the Court of Appeal.***
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> ***The right of appeal against an order for mandamus, certiorari and prohibition is not given or disallowed by the Civil Procedure Act. Clearly, an order made by the High court in Judicial Review proceedings is outside the purview of section 80 Civil Procedure Act and order XLIV Civil Procedure Rules."***
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> ***"Mr. Kariuki Runo is correct to say that the High Court has no jurisdiction to review, under Section 80 Civil Procedure Act and Order XLIV Civil Procedure Rules, the order of mandamus made in the Judicial Review proceedings. The application is therefore grossly incompetent."***

In their Memorandum of Appeal dated 20th August 2004, the appellants outlined eleven grounds of appeal but based their submissions onthreemain issues as follows:

a. whether in judicial review the High Court, having rendered a decision, had jurisdiction to review, and

b. whether the High Court erred in failing to consider the new evidence that had been placed before the Court;

c. Whether the matter should have been dealt with by the High Court under judicial review, or by way of a substantive case.

When the appeal came up for hearing,Mr.Mwangi, learned Counsel for the appellants appeared before us. There was no appearance on behalf of the Respondents, though they had been duly served with hearing notices.

The first issue as to whether in judicial review the High Court had jurisdiction to review its own decision, Mr. Mwangi argued that it had, and faulted the learned Judge for holding otherwise. He submitted that, in the interpretation of **Section 80 Civil Procedure Act (CPA)**, the Court is required to adopt a versatile and robust mode of interpretation instead of a constrained approach particularly in the light of the new facts and evidence that had been placed before it. Further that the Court is obliged to rely on the rules of the CPA, and to have due regard for the requirements of the new Constitution for a more liberal approach by Court in judicial review.

In urging the us to apply a liberal approach in the interpretation of Section 8 and 9 of the Law Reform Act, learned Counsel for the appellants relied on the decision of this Court in **Commissioner of Lands vs Coastal Aquaculture Ltd- Civil Appeal No 252 0f 1996** in which it held that,

> ***"If an issue arises in judicial review proceedings that is not expressly provided for in Order LIII, relevant provisions of the Civil Procedure Act or Rules can be called into aid."***

In determining whether, the High Court had jurisdiction to hear the review, the question that arises, is whether the CPA and the Rules can be applied in judicial review proceedings?

Section 80 of the CPA is clear. It stipulates, that a review is allowed from an order or a decree from which an appeal is allowed or not allowed by the Act. It therefore follows that, the High Court can review its own orders or decrees in suits where the Court is exercising its ordinary jurisdiction.

With respect to judicial review the Court is exercising powers under **Order 53 of the Rules** wherein the procedure of judicial review are set out. It is noteworthy that, there is no provision for review by the Superior Court of its own decisions in judicial review, once rendered.

Section 8(5) of the Law Reform Act does however specify that:

> "***Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal."***

It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the Law Reform Act, the High Court had no jurisdiction to review its previous order.

We now turn to the second issue, raised by Mr. Mwangi that the learned Judge had misdirected himself by failing to take into consideration the new evidence that was placed before him on grounds that the said evidence was placed before him on grounds that the said evidence was neither new nor important.

From the Ruling, it is clear that, the learned Judge did in fact reevaluate the so called new evidence, and concluded that it did not in any event change his view that the 2nd and 3rd Respondents had acted without authority, and committed an illegality.

The learned Judge found that,

> ***"In fact the green Card now produced by the Applicants proves the illegality that the District Land Registrar opened a Register in which he registered Anthony Kibiribiri as proprietor of the land on 14 November 2011, and issued him with a Title deed but on 19 March 2001- four months later he opened another Register and registered the applicants as proprietors and issued them with second title deed. Indeed if the copy of the second register now produced was before the court when determining the Judicial Review application, the court would have granted an order of certiorari which it declined to give for lack of proof that a second register had been opened"***

We agree with the learned judge and are not persuaded that he misdirected himself.

We turn next to the issue of whether the matter should have been dealt with by the Superior Court by way of judicial review.

In judicial review, the High Court has special jurisdiction to issue orders of mandamus, prohibition and certiorarias the remedies against acts or omissions by public entities.

In the case ***of R vs Secretary of State for Education and Science exparte Avon County Council (1991)*** which was referred to in the case of ***the Commissioner of Lands vsKunste Hotel Limited CA No 234/95*****,** the Court held that,

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

Judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question. ***(See R vs Judicial Service Commission Misc. Civil Application No 1025 of 2003).***

In the present appeal, it is noted that the High Court, was dealing with a complaint against a decision made by the 2nd and 3rdRespondents. The2nd and 3rd Respondents had cancelled the registration of 4th respondent, without adhering to the rules of natural justice, by failing to provide him an opportunity to be heard. It was this decision that was the subject of the judicial review. It must be emphasized that, the question that was before the High Court was not which of the two parties held a superior title to the other, but whether the 2nd and 3rdRespondents had the powers and authority under the Registered Land Act, to cancel the registration.

Mr.Mwangi cited the case of***Akebavs Kenya Ports Authority CA No. 255 of 2003*****,** which also concerned a dispute over the ownership of land, where the Applicants, had been registered as the proprietors. The Respondent, filed a judicial review to have the certificates of title quashed, even though the land had not at any point been registered in the Respondent's name. The High Court had issued an order of certiorari quashing the titles.

In this respect, we agree with decision of the Court of Appeal in **the Akeba case**, where it was stated that,

> ***"…. If the Respondent had been of the view that it had been wrongly deprived of its property, it ought to have sued in the ordinary way so that all the issues could be ventilated before the***

Court. We repeat that judicial review is confined to the process of decision making and the mere fact that a public body has made a decision does not necessarily or by itself entitle a party affected by the decision to the remedy of certiorari."

The appellants, were in a similar situation to the Respondents in the **Akeba case**, whereupon the discovery that the Suit Property had already been registered in the name of the 4th respondent, much as they believed that their "title" was superior, they should have filed suit to determine ownership. Indeed the appellants appear to have done so by filing HCCC 918 of 2001referred to in a replying affidavit sworn by the 1st appellant on 16th August 2001.

For these reasons, we dismiss this appeal with the costs to the 4th respondent.

Dated and delivered at Nairobi this 20th day of September, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

AGNES K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc