



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 424 OF 2016

IN THE MATTER OF AN APPLICATION BY MAGNATE VENTURES LIMITED OR THE ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA, THE ENVIRONMENT AND LAND COURT ACT, NO. 19 OF 2011, THE LAND REGISTRATION ACT, NO. 3 OF 2012, THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012, THE LAND ACT, NO. 6 OF 2012 AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF MAGNATE VENTURES LIMITED

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

REGISTRAR OF TITLES, NAIROBI.....2ND RESPONDENT

AND

MAJESTIC SECURITY

SYSTEMS LIMITED.....INTERESTED PARTY

MAGNATE VENTURES LIMITED.....EX-PARTE

JUDGMENT

1. By a notice of motion dated 16th September, 2016 the ex parte applicant Magnate Ventures Ltd in this case seeks for Judicial Review orders of:

i. Certiorari to quash the decision made by the 1st respondent National Land Commission on 4th August, 2016 cancelling the transfer of property land reference No. 21069 Grant No. I.R. 78032 to the ex parte applicant and directing that the property reverts to the interested party Majestic Security Systems Limited.

ii. Mandamus to compel the 2nd respondent to remove the caveat registered against the title of the property on 28th February 2015 at the behest of the 1st respondent.

2. The application is predicated on 23 grounds set out on the face of the application and supported by a statutory statement and verifying

affidavit sworn by Stanley Kinyanjui on 9th September 2016.

3. The exparte applicant's case is that it is a registered owner of the property pursuant to a purchase and transfer for valuable consideration from the interested party. The property was transferred in the applicant's favour on 21st December 2009 following all the procedures for transfer of the property as evidenced by the annexed documents exhibited.

4. That on 25th February 2015, the 2nd respondent registered a caveat over the subject title of the suit property at the instance of the 1st respondent, prompted by a complaint from Eric Naibei, who alleged that he was fraudulently dispossessed of the property by Mrs Rahab Karei Mukiyama. The 1st respondent after hearing the complaint by the Mr Naibei, it made a decision on 4th August, 2016, after allegedly conducting an inquiry to establish the propriety or legality of the grant in respect of the suit property.

5. The exparte applicant claims that during the hearing of the complaint, it was never given an opportunity to tender its evidence.

6. In addition, it was alleged that during the course of the hearing, the Vice Chair of the National Land Commission [the Commission] Mrs Abigael Mbagaya Mukolwe indicated that there was a preliminary finding that the suit property was reserved for Veterinary Services under the Ministry of Livestock, without disclosing any particulars to the applicant beforehand.

7. In the end, it is alleged that the National Land Commission found that there was fraud in the manner in which Mrs Rahab Mukiyama and her husband became directors of the interested party company and that the National Land Commission revoked the transfer of the property to the exparte applicant, and that the decision to revoke the title was made notwithstanding the 1st respondent's finding that it had no jurisdiction or mandate to determine the issue of directorship of the interested party company.

8. The applicant therefore asserts that the 1st respondent lacked jurisdiction to review grants and dispositions in the land in issue because the land is private land, not public land contemplated in Article 68(c) (v) of the Constitution.

9. Further, that the 1st respondent had no jurisdiction to revoke transfer of property to the exparte applicant by the interested party as the relationship between the two was purely contractual for a consideration of kshs 48,000,000.

10. According to the applicant, the decision made on 4th August 2016 was in excess of jurisdiction and that therefore this court is empowered by Section 7(2) (a) (1) and (11) of the Fair Administrative Action Act, 2015 to review the 1st respondent's decision, the 1st respondent having acted in excess of the mandate conferred on it by section 14(1) of the National Land Commission Act.

11. The applicant also asserts that on 25th January 2016 when it appeared before the 1st respondent Commission to present its case in respect of the property, it was not accorded a hearing.

12. The 1st respondent filed a replying affidavit sworn by Brian Ikol, its Deputy Director Legal Affairs and Enforcement on 9th December 2016 contending that the 1st respondent is mandated by Section 14(1) of the National Land Commission Act to review all grants and dispositions of public land either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety and that in its exercise of its mandate, it operates as a quasi judicial body within the full meaning of Article 169(1) of the Constitution and further, that the procedures adopted in carrying out its mandate are stipulated in the Constitution and Section 14 of the National Land Commission Act.

13. That the review of grants and dispositions of public land simply entails the respondent analyzing the process under which public land was converted to private land and making findings of the legality of the grants in question.

14. Further, it was contended that the 1st respondent continues to receive complaints from members of the public and public institutions on various grants allegedly to have been acquired unlawfully or irregularly and requesting the 1st respondent to review the same.

15. The 1st respondent claimed that once a complaint is determined the 1st respondent publishes notices in the dailies notifying all interested parties the dates and venues of the scheduled review hearings and the period within which the interested parties are required to submit their documents as per annexure B1 1 attached and that after expiry of notice, review of a particular grant commences at the scheduled dates and venues prescribed.

16. It was therefore contended that in this case the 1st respondent received a complaint from Eric Naibei now deceased to the effect that there had been fraudulent dealings regarding LR No. 21069 Grant No. 1.R. 780832 which title had been transferred to Rahab Karei Mukiyama and her husband Titus Mukiyama as directors of the interested party and that the latter transferred the land to the exparte applicant herein.

17. The 1st respondent therefore maintains that it correctly invoked its jurisdiction and mandate under Section 14(1) of the National Land Commission Act and proceeded to consider the complaint and gazetted and published the subject title parcel number and conducted various hearings for review but that the applicant despite actual knowledge of the 1st respondent's proceedings relating to the subject review of the legality of the grant, the applicant utterly disregarded the Commission and failed to participate in the hearing. However, that the applicant participated in the initial review process through its advocate Havi & Company Advocates who attended the hearing and even filed submissions hence the 1st respondent complied with Article 50 of the Constitution, the Fair Administrative Action Act, 2015 and Section 14(3) of the National Land Commission Act.

18. It was contended that the Commission did advise the complainant's counsel Mr Isaiah Kandie who served on all the interested parties copy of the complaint lodged with the Commission and that the applicant confirmed receipt of the same.

19. The 1st respondent further contended that it observed that there had been fraud in the manner in which Rahab Karei Mukiyama and her husband Titus Mukiyama purported to be directors of the interested party company and that an investigation through a CR 12 from the Registrar of Companies indicated that the couple were not directors of the interested party company at the time of the hearing but that the directors were Eric Naibei & Jack Kimkung, and that the power of Attorney used to transact in the land was not registered hence it could not have been legally used to transfer the interests in land as registration of the power of Attorney is mandatory.
20. The 1st respondent further contended that however, the 1st respondent restricted itself to the transfer of the valuable land not on the directorship of the company. It was contended that the applicant's action smacked of bad faith and that the current proceedings are therefore an abuse of court process hence this court should not be used as a conduit to cure fraud by a recalcitrant applicant.
21. The interested party Majestic Security Systems Ltd filed a replying affidavit on 9th December 2016 sworn by Esther Jeanet Ngenyi its alleged director claiming that there was apparent collusion between the ex parte applicant and other persons who are not parties to this matter to wrest the suit property from the interested party company.
22. That the interested party company did not instruct Njeru Nyaga advocate to represent the company (interested party) to purport to compromise this matter as he did not represent the interested party before National Land Commission during the hearing of the complaint.
23. Those fraudulent activities were discovered at the Registrar of Companies as confirmed by the Registrar by her letter dated 3rd May 2012.
24. Further, that the interested party is represented by Isaiah Kandie advocate. It was deposed that the motion by the applicant is misconceived, mischievous and abuse of the court process as the allegations therein have not been substantiated to enable the respondents or the court make appropriate response or findings or the orders sought.
25. That it had not been demonstrated that the 1st respondent in arriving at its decision also directed that the matters of fraudulent transfer of the company be pursued through the relevant jurisdictions hence the applicant intends to obtain orders of the court by misleading the court and concealment of the facts with assistance of fraudulent persons and advocates who are not parties to these proceedings.
26. It was contended that on 30th November 2015 the ex parte applicant filed an elaborate statement and attached documents in support of its claim; that the interested party filed its documents on 26th November 2015. That Rahab Karei Mukiyama received original title document for the suit land from the interested party and signed for it on 17th October 2005 in her handwriting for subdivision purposes but unlawfully disappeared with the original title only for it to be discovered by the interested party after a fraudulent transfer to the ex parte applicant herein.
27. It was deposed in contention that after the fraudulent transfer of the title in Rahab Mukiyama's name and the name of Titus Kurauka Mukiyama her husband, the two then fraudulently transferred the title to the ex parte applicant herein with the help of Njeru Nyaga advocate. It was contended that the allegation that the applicant was not heard by the 1st respondent is therefore false as proceedings show its participation through Havi Advocate after receiving letters of 16th January 2015 and 17th February 2015.
28. It was conceded that it was the interested party who lodged the complaint with the National Land Commission and that the hearing was fairly conducted thereby reaching a decision based on the material and evidence adduced hence no extraneous material influenced the decision.
29. That the ex parte applicant had no good title as they got the land fraudulently hence the 1st respondent's decision to cancel the transfer should not be faulted as the 1st respondent did not act ultra vires or illegally but was exercising its constitutional and statutory mandate under Article 67 and Section 14(1) of National Land Commission Act respectively.
30. That a caveat had to be lodged on the title to preserve the suit property owing to suspicious fraudulent transactions hence the application should be dismissed with costs since the applicant had failed to demonstrate that it had lawfully acquired the title to the suit property.
31. On 25th November 2016, Mrs Rahab Karei Mukiyama filed a replying affidavit deposing that she was the Director of Majestic Security System Ltd [the interested party herein] together with her husband Professor Titus Kurauka Mukiyama.
32. It was contended that she was unable to access the Companies Registry file due to a dispute she had with the deceased Eric Naibei over the suit property and that it was interesting to note that the deceased's advocate now claims to act for the interested party meaning he acted for both complainant and the respondent at the National Land Commission.
33. It was further deposed in contention that the National Land Commission upheld her submissions through her advocates on record that the commission did not have jurisdiction to deal with company law matters but strangely went ahead to make orders under challenge.
34. That the interested party supports the application by the ex parte applicant which is well grounded in law and fact.
35. Mrs Esther Jeanet Ngenyi filed another supplementary affidavit on 16th January 2017 contending further that the interested party had instructed Isaiah Kandie to come on record for them. She also annexed annual returns for 2015 filed with Registrar of Companies and denying that Njeru Nyaga acted for the interested party and that he is a stranger to them. She also denied that Rahab and Titus had ever been directors of the interested party company as alleged by Njeru Nyaga advocate, and as evidenced by CR 12.

36. The parties' advocates on record, despite disputes on legal representation of the interested party filed written submissions which they all relied on as canvassing the notice of motion and which the court has adopted and considered in this decision making process.

37. The ex parte applicant, through Havi Advocates filed their written submissions on 9th December 2016 together with a list and bundle of authorities setting out the background to this matter and outlining two main issues for determination namely;

1. Whether the 1st respondent had jurisdiction to hear and determine the complaint by the interested party.

2. Whether the applicant was given an opportunity to be heard at the review of the title/grant/disposition of the subject title.

38. According to the ex parte applicant, the 1st respondent National Land Commission had no jurisdiction to hear and determine the complaint and to review title to the private land. That as such, the Commission violated or exceeded its mandate under Article 68(c) (v) of the Constitution and Section 14(1) of the National Land Commission Act.

39. It was submitted that the applicant lawfully bought the suit property from the interested party [represented by Mr and MRS Kiama] at shs 48 million and the title was transferred to the applicant lawfully hence the National Land Commission could not purport to review such title to private property. Reliance was placed on **Republic vs Chairman Members of National Land Commission Ex parte Turf Developers Ltd [2016] e KLR** on the Scope of jurisdiction of the 1st respondent as espoused in Section 14(7) of National Land Commission Act, 2012 and the Constitution where the court held that the National Land Commission had no power to revoke title to private land.

40. Further reliance was placed on **Krystaline Salt Ltd vs National Land Commission[2016] e KLR** where the court further made it clear that the National Land Commission had no jurisdiction to review grants/dispositions in private land and a submission made that power is vested in the Environment and Land Court as stipulated in Section 13 of the Environment and Land Court Act.

41. It was further submitted that Section 7(2) of the Fair Administrative Action Act stipulates circumstances under which the court may review an administrative action or decision and that is, if the person who made the decision was not authorized to do so by the empowering provision; and acted in excess of jurisdiction or power conferred under any written law.

42. It was submitted that based on the principle of "**greater intensity review**" a court may review the process of decision making and the merits thereof as was held in **Sucham Investments Ltd vs Ministry of National Heritage & Culture & 3 Others [2016] e KLR**.

43. It was also submitted that moreover, the ex parte applicant was not accorded a fair hearing on 25th January 2016 when it appeared before the 1st respondent to present its case in respect of the property in issue. Reliance was placed on **Republic vs National Land Commission & 2 Others Ex parte Airways Holdings Ltd Miscellaneous 275/2014** where the court issued certiorari on grounds that the rules of natural justice had not been adhered to with the court also holding that the Commission's decision was tainted with procedural impropriety and that the right to a hearing expressed in the Constitution must not be given casual observance or breached with impunity by the Government or its servants.

44. The ex parte applicant maintained that the decision to cancel the title and directing the 2nd respondent to lodge a caveat on the title was made without jurisdiction and that there was no observance of natural justice and hence the same are null and void *ab initio*, and ought to be remedied by an order of certiorari and mandamus.

45. The respondents did not file any submissions but the court does adopt their replying affidavits sworn by Mr Brian Ikol on behalf of the 1st respondent commission.

46. The interested party through Ms Isaiah Kandie advocate despite being accorded an opportunity to file written submissions on 22nd May 2017 and 26th July 2017, no submissions were filed as at the date of this judgment. I shall therefore wholly adopt the 1st respondent's and interested parties' replying and supplementary affidavits as constituting their entire case.

47. Therefore, having considered all the parties pleadings, affidavits, submissions and authorities relied on and the documentary evidence attached to their respective affidavits, in my humble view, the main issues for determination in this matter are:

1) Whether the National Land Commission had jurisdiction to hear and determine the complaint raised by the interested party company against the ex parte applicant.

2) Whether the National Land Commission had jurisdiction to cancel the title in question and therefore in reverting it to the interested party from the ex parte applicant.

3) Whether the ex parte applicant was accorded an opportunity to be heard on the complaint before the decision to cancel its title was made.

4) Whether the ex parte applicant is entitled to the Judicial Review orders of certiorari and mandamus sought.

5) What orders should the court make.

6) Who should bear costs of these proceedings?

48. On the first issue of whether the National Land Commission had jurisdiction to hear and determine the complaint raised by the interested party company against the ex parte applicant, Section 14(1) of the National Land Commission Act provides that:

“subject to Article 68(1)(v) of the Constitution, the Commission shall, within 5 years of the commencement of this Act, on its own motion or upon a complaint by the National or County Government, a community or an individual, review all grants of dispositions of public land to establish their propriety or legality.”

49. From the above provisions of the law, it is clear that National Land Commission has jurisdiction to receive complaints from any individual or on its own motion inquire into and review all grants or dispositions of public land to establish the legality or propriety of the title thereof.

50. The power vested in the National Land Commission is derived from Article 68 of the Constitution. The Commission is established under Article 67 of the Constitution as an independent commission with powers and functions vested in it under various statutes including the Land Act, the National Land Commission Act among others.

51. However, those powers are not absolute. They must be exercised within the constitutional and statutory confines. The applicant claims that the land subject of the complaint before the Commission and which the Commission adjudicated upon is private land registered in its name hence the Commission had no jurisdiction to entertain such a complaint and review the grant. The applicant cited several court decisions and maintained that Section 14(1) of the National Land Commission Act does not empower the Commission to review dispositions in private land but in public land only.

52. The position held by this court is that one cannot claim that the National Land Commission has no jurisdiction or power to inquire into how land which was public land was converted into private land for, without that power, the National Land Commission would be powerless since the land subject of review of grants is public land that was alienated and allocated to private individuals to develop, thereby becoming private land. (see **Robert Mutiso Lelli and Cabin Crew Investments Ltd vs National Land Commission & 3 Others [2017] e KLR.**

53. However, that is not the situation in this case where the National Land Commission was, from the decision of the Commission annexed to the affidavit of Brian Ikol marked B1-4 received a complaint from Eric Naibei to the effect that their land IR No. 21069 was transferred to Rahab Karei and another and later to the ex parte applicant without his knowledge and that the Commission, based on its own wisdom decided to review the grants and disposition of both the properties in line with Section 14 of National Land Commission Act and invited both parties to appear.

54. From the above facts, it is clear that the Commission was not reviewing the grant or disposition in public land but investigating into a dispute between two private parties to establish whether one party the applicant had deprived the interested party of the latter's title to the land in issue. That being the clear position, I have no doubt in finding that the ex parte applicant has a genuine grievance that the 1st respondent waded into a private dispute over ownership of private land and which dispute neither the Commission nor this court would have jurisdiction to hear and determine.

55. The jurisdiction to hear and determine such disputes is exclusively vested in the court contemplated in Article 162(2) (b) of the Constitution, the Environment and Land Court and Subordinate Courts as maybe designated pursuant to the Environment and Land Court Act, 2011.

56. In other words, if the interested party properly so called as represented by Mr Kandie had issues as to how its title changed hands into the ownership of the ex parte applicant, it had the right to institute court proceedings before the Environment and Land Court or even report to the Directorate of Criminal Investigation for investigations into alleged fraudulent dealings. It was not for the National Land Commission to purport to determine a dispute over title or ownership between the ex parte applicant and the interested party as that was a purely private dispute, and moreso, there was no claim or complaint to the effect that the subject parcel was public land which had been illegally or irregularly acquired by the ex parte applicant herein.

57. The jurisdiction of the National Land Commission as far as reviewing of grants and dispositions in land is concerned is limited to public land as defined in the Constitution and to establish whether the said public land same was acquired legally or regularly. That was not the case in this matter where the 1st respondent National Land Commission exceeded its mandate by purporting to determine how the applicant acquired the land from the interested party and not from the Government.

58. Accordingly, I find and hold that the National Land Commission had no jurisdiction to hear and determine the complaint raised by the interested party, having regard to the nature of that complaint and therefore it acted ultravires section 14 of the NLC Act and Article 68 of the Constitution. That kind of decision amenable to being reviewed by this court in exercise of its supervisory jurisdiction under Article 165(6) and (7) of the Constitution.

59. The second issue is whether the National Land Commission had jurisdiction to cancel or revoke the title in question and therefore in reverting the title from the applicant to the interested party on account that the applicant fraudulently acquired the title from the interested party.

60. The National Land Commission in its report and therefore determination made on 4th August 2016 directed that:

a) The transfer of the land to Magnate Ventures Ltd is hereby cancelled.

b) Title reverts to Majestic Security Systems Ltd.

c) Matters of fraudulent transfer of the company be pursued through the relevant jurisdictions.”

61. In other words, the commission did, upon finding that the title to the suit land was fraudulently transferred from the interested party to the exparte applicant, direct that the alleged fraudulent transfer be canceled and that the said title do revert to the interested party properly so called as represented by Mr Kandie advocate.

62. Section 14 of the National Land Commission Act also provides for the procedure for the review of grants and dispositions of public land to establish their propriety and legality and where the Commission finds that the title to the subject public land was unlawfully, and irregularly acquired, the Commission shall direct the Registrar to revoke the title (Section 14(5) of National Land Commission Act).

63. Examining the decision rendered by the Commission on 4th August 2016, and signed by the Commission Vice Chairperson Mrs Abigael Mbagaya, the decision reproduced herein above is clear that:

“ the transfer of the land to Magnate Ventures Ltd is hereby cancelled” and the :title reverts to Majestic Security Systems.”

64. There is no legal or constitutional mandate for the 1st respondent Commission to revoke or cancel titles, even assuming that the Commission had jurisdiction to review the title subject of these proceedings, which is a private land and not public land .in other words, the dispute is not between the Government grantor and the grantee, but between two private entities each claiming ownership and title to the suit land.

65. The power to revoke or cancel titles to land which titles are found to have been acquired or irregularly vests in the Registrar and not on the Commission. The Commission is only given the power to **“recommend”** to the Registrar for cancellation or revocation.

66. The Commission’s determination through its vice chair person Abigael Mbagaya, cancelled the title to the subject parcel which decision, I have no doubt, amounts to usurping powers of the Registrar in revoking titles and therefore I find and hold that the National Land Commission exercised jurisdiction of revoking title to land which jurisdiction it lacked. It therefore follows that the Commission acted outside and in excess of its jurisdiction and it is in such instances that this court would have jurisdiction to interfere with decisions which are made in excess of jurisdiction. Such decisions are illegal and therefore null and void ab initio. They must be so declared and quashed.

67. The third issue is whether the exparte applicant was accorded an opportunity to be heard. The exparte applicant claims that it was never accorded an opportunity to be heard. However, in the decision annexed made on 4th August 2016, page 2 of 4 clearly shows that Mrs Rahab Karei Mukiyama made a presentation before the Commission in her capacity as the Director of the interested party claiming that her company acquired the land from Eric Naibei through purchase but that before he transferred title to her, he sold it to another person and so she reported him to the police and he was charged with the offence of obtaining money by false pretence but he offered another title 21069 and signed a power of attorney and surrendered the title together with the seal for the interested party to her in 2004. That Mr Naibei later started harassing her and that is when she sold the land to the exparte applicant herein. The exparte applicant also gave evidence before the Commission through Mr Stanley Kinyanjui its director and stated that he acquired the subject LR 21069 through purchase from Rahab Karei Mukiyama for shs 48 million, by a sale agreement dated 19th August 2009 and that on 24th December 2009 the exparte applicant got registered as the owner and had been in occupation since then.

68. From the above record of the 1st respondent’s determination, and which has not been controverted, it is clear that the exparte applicant did actively participate in the proceedings before a determination was reached.

69. In addition, the information by the applicant in its claim herein that it was never accorded an opportunity to be heard is so skeletal and unsupported that it is not possible to decipher how the Commission declined to accord it an opportunity to be heard.

70. In the end, I find and hold that the applicant was accorded an opportunity to be heard and did fully participate in the hearing of the complaint lodged against it by the interested party herein.

71. The next issue is whether the exparte applicant is entitled to the Judicial Review orders of certiorari and mandamus sought. This court has found and held that the Commission lacked the requisite jurisdiction to review the title to the subject land and further that it lacked jurisdiction to revoke or cancel the title and directing the title to revert from the exparte applicant to the interested party on account of fraud.

72. In my humble view, the exparte applicant satisfied this court that the Commission in its determination reached on 4th August 2016 exceeded its jurisdiction and acted without jurisdiction. Accordingly, the decision by the 1st respondent was tainted with illegality and hence, meets the threshold set out in the **Pastoli v Kabale District Local Government council and Others[2008] 2 EA 300** where it was held that acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. This principle is reiterated in section 7(2) of the Fair Administrative Action Act, 2015.

73. An administrative or quasi judicial or judicial decision which is made without jurisdiction and in excess of jurisdiction and which is therefore illegal is amenable to be brought before this court for quashing, in the court’s exercise of supervisory jurisdiction stipulated in Article 16 (6) of the Constitution.

74. Therefore, having so found that the decision of the 1st respondent made on 4th August 2016 was made in excess of jurisdiction and without jurisdiction, I find that the order that commends itself to wipe the slate clean is certiorari bringing into this court and I hereby bring into this court for purposes of quashing and hereby quash the decision of the 1st respondent made on 4th August 2016.

75. On whether mandamus to compel the 2nd respondent to remove the caveat registered on the title property LR 21069 Grant IR 78032 on 25th February 2015 at the behest of the 1st respondent is available, Mandamus compels performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but where the allegation is that the duty has not been performed in accordance with the law, then mandamus cannot quash what has already been done (see **Kenya National Examinations Council vs Republic Exparte Geoffrey Gathenji Njoroge & Others [1997] e KLR**. Only certiorari will issue if the decision is already made.

76. In this case, the registrar had already registered the caveat when these proceedings were initiated. The applicant did not seek for certiorari to quash the registration of the caveat from the impugned title.

77. That being the case, in the absence of any evidence that the 2nd respondent was under any legal duty to remove the caveat, I find the prayer for mandamus misplaced. The applicant had the option of seeking orders of declaration and or filing an appropriate suit before the Environment and Land Court for removal of the caveat and not to seek for mandamus. This is so because mandamus is a discretionary remedy and is for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant, provided there is no more appropriate remedy and the duty must be of an imperative nature. Mandamus is thus not a consequential remedy. It exists as an independent Judicial Review remedy. (see **Shah vs Attorney General (No. 3) Kampala HC Miscellaneous No. 31 of 1969 [1970] EA 543**.

78. In the end, I decline to grant mandamus for purposes of quashing a decision which has already been taken that of registering or lodging a caveat on the subject title.

79. The next issue is what orders should this court make? This issue has been determined in the above holding where I have held that the exparte applicant has demonstrated that it is entitled to the Judicial Review orders of certiorari as prayed in the notice of motion dated 16th September 2016 which I hereby grant as prayed. I however decline prayer No. 2 of the notice of motion for the reasons given above.

80. On who should bear the costs of these proceedings, costs follow the event and to the successful litigant. In this case, the 1st respondent knew and ought to have known that it was acting in excess of its jurisdiction when it waded into a dispute that never concerned the legality of title to public land and it also knew or ought to have known that it had no jurisdiction to cancel title to land but it went ahead and cancelled the title and defended its illegal action.

81. The exparte applicant has substantially succeeded in this matter. It is however the tax payers who suffer most when public bodies like the 1st respondent make such serious mistakes out of ignorance of overt provisions of the law. The exparte applicant had to spend money challenging the illegal decision of the Commission. The Commission must bear some costs. Accordingly, I exercise my discretion and award to the exparte applicant half (½) costs of these Judicial Review proceedings. I so order.

Dated, signed and delivered in open court at Nairobi this 25th day of January 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Njuguna for the 1st respondent

Mr Kandie for the Interested Party

Aisha h/b for Mr Akhaabi for the exparte applicant and h/b for Mr Njeru for the other interested party

CA: Kombo