



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL, JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 37 OF 2014

IN THE MATTER OF: AN APPLICATION BY TURF DEVELOPERS LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: PARCEL OF LAND KNOWN AS PLOT NO. L.R. MOMBASA/MNVI/3458

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2012, THE CONSTITUTION OF KENYA 2010 AND THE REGISTRATION OF TITLES ACT (CAP 281), LAWS OF KENYA (REPEALED)

BETWEEN

REPUBLIC.....APPLICANT

AND

THE CHAIRMAN & MEMBERS OF NATIONAL LAND COMMISSION.....RESPONDENTS

EX PARTE APPLICANT: TURF DEVELOPERS LTD

RULING

1. In a Notice of Motion (the Application) dated 12th August, 2014 and filed on 13th August, 2014, the ex parte Applicant, Turf Developers Limited, sought –

(1) an order of certiorari to issue to remove into the court for the purpose of being quashed the decision of the Chairman and members of the National Land Commission herein contained in the Gazette Notice No. 5022 published in the Kenya Gazette dated 1st July, 2014 revoking the Applicant’s Title to parcel of land known as Plot No. Mombasa/MN/VI/3458;

- (2) an order of prohibition prohibiting the Respondents herein, their servants and/or agents from alienating, handing over possession of or vesting the Title of the parcels of land known as Plot No. Mombasa/MN/3458 or any of them to any other person and from having any other dealing whatsoever with the said property or taking any further proceeding or action in relation thereto;
- (3) an order of mandamus do issue directed at the Respondents herein commanding them to reinstate the Applicant's Title over the parcel of land known as Plot No. Mombasa/MN/3458 by inter alia, reinstating the Applicant's name in the register of the said property as the proprietor of the leasehold interest therein, and to revoke and/or cancel any dealing with the said title and any entry in the register of the said property made pursuant to the purported revocation of the Applicant's Title.
- (4) the costs of and incidental to this application be provided for.

2. The Application was supported by the Affidavit Verifying the Facts sworn on 12th August, 2014, by one Ashok Labshanker Doshi, sworn on 24th July, 2014 in support of the Chamber Summons dated 24th July, 2014 for leave to commence Judicial Review proceedings and filed on 24th July, 2014, and the grounds on the face of the application.

3. The Applicant's case as set out in the Application, the Supporting Affidavit aforesaid, and the Applicant's counsel's submissions dated 19th May, 2015 and filed on 20th May, 2015 and the Reply to the submissions of the Interested Party dated 2nd June, 2015 and filed on 3rd June, 2015 is that the Applicant was the registered owner of the parcel of land known as Mombasa/MN/VI/3458 (the suit property) before the Respondents unlawfully purported to revoke its title and grant the same to the Interested Party, the Board of Governors, Changamwe Secondary School (the School) (which opposed the Application).

4. The Applicant submits that a dispute over the ownership of the suit property between the Applicant and the Interested Party in Mombasa ELC No. 162 of 2007 was resolved in favour of the Applicant in a Ruling delivered on 30th October, 2015 and which Ruling set aside the purported consent decree entered into between the Interested Party and the Commissioner of Lands and the Attorney-General dated 8th December, 2009, and issued on 17th December, 2009.

5. The Applicant's main ground for seeking the orders herein is based on the ground that the Respondents had no jurisdiction to revoke the Applicant's title, and more importantly also, the revocation of title was done without reference to the Applicant and thus in breach of the rules of natural justice, contrary to both Section 14(1) and 14(7) of the National Land Commission Act, 2012

6. For those reasons, the Applicant urged the court to allow the Application.

THE RESPONDENT'S CASE

7. The Respondent never filed any reply to the Application.

THE INTERESTED PARTY'S CASE

8. The Application was opposed by the Interested Party, through **firstly** the Replying Affidavit of Josephine Nduku Ndivo, the Principal of the Interested Party, sworn on 28th February, 2015 and filed on 6th February, 2015. **Secondly**, the application was opposed through the written submissions of counsel for the Interested Party dated and filed on 26th May, 2015.

9. The Interested Party's case is that the suit land was allocated to the school, a public facility, that the ownership was subject of proceedings in ELC No. 162 of 2007 where a consent order was entered into between the Interested Party (as Plaintiff), and the Commissioner of Lands and the Attorney-General as Defendants. It was counsel's submission that the said order had never been set aside and was still valid.

10. Counsel also argued a technical point that neither the proceedings nor the Gazette Notice was attached to any of the Affidavits in support of the Application, and that even if the court were to quash the Gazette Notice the proceedings would be intact. The court would therefore be acting in vain. Counsel therefore urged the court to dismiss the Application with costs.

ANALYSIS OF THE APPLICATION AND SUBMISSIONS

11. I have considered the submissions by the counsel for the respective parties. The question is whether the Respondent had any jurisdiction to revoke the Applicant's title to the suit property. To answer that question the court will examine the Respondent's powers under the Constitution, and its constituting statutes, the National Land Commission Act 2012 (the Act). The Respondent is established under Article 67(1) of the Constitution. Its functions as set out in Article 67(2)(e) include to –

“initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress.”

12. And Article 68(2) empowers Parliament to enact legislation to *inter alia*, enable the review of all grants or dispositions of public land to establish their propriety or legality.

13. The National Land Commission Act 2012 (the Act), was enacted pursuant to the said Article 68(2) (1) provides in Section 14(1) and (7) as follows –

“14(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or county government, community or an individual review all grants or dispositions of public land to establish their propriety or legality.

(2) – (6)

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

14. The dispute over the suit land goes back to Civil Case No. 162 of 2007 between the Board of Governors Changamwe Secondary School vs. the Commissioner of Lands and the Attorney-General in which a consent was recorded on 8th December, 2009, that the Grant No. CR 28149 for Plot No. LR MN/VI/3458 be revoked.

15. That consent was however set aside by a Ruling delivered on 30th October, 2015, which in effect meant that the suit land reverted to the Applicant. Ownership is however not the issue in this application. The issue here is whether the Respondent has jurisdiction to revoke the Applicant's title to land at all or let alone without reference to the Applicant.

16. In light of the clear provisions of both the Constitution and the National Land Commission, the Commission has no power to revoke titles in respect of private land. The suit land had been alienated and a grant made to the predecessor in title of the Applicants and from whom the Applicants bought it. The Respondents had no jurisdiction to revoke such title under Section 14(7) of the National Land Commission Act, 2012 without reference to the Applicants. The purported revocation is therefore null and void.

17. There shall therefore issue an order of certiorari to bring to this court, and quash by order of certiorari, Gazette Notice Number 5022 published in the Kenya Gazette dated First July 2014 containing the Respondent's decision to revoke and revoking the Applicant's Title to parcel of land known as Mombasa/MN/VI/3458.

18. Likewise there shall be an order of prohibition prohibiting the Respondents herein, their servants and/or agents from alienating, allocating, handing over possession or vesting the Title of the suit property

to any other person or having any other dealing whatsoever with suit property or taking any further proceedings or action in relation thereto.

19. There shall also issue an order of mandamus directed at the Respondents directing them or their agents to reinstate the title to the suit property to the Applicant's name in the Register of Titles as proprietor of the leasehold interest and revoke and/or cancel any dealing with the said title and any entry in the Register of the suit property made pursuant to the purported revocation of the Applicant's title.

19. I direct that the costs herein be borne by each party.

20. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 8th day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Khanna for Petitioner

No Appearance for Respondent

No Appearance for Interested Party

Mr. S. Kaunda Court Assistant