



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

JUDICIAL REVIEW NO. 383 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, LAWS OF KENYA

AND

IN THE MATTER OF THE UNLAWFUL INTERFERENCE WITH A REGISTERED INTEREST OF A PRIVATE PROPERTY DULY REGISTERED IN THE NAME OF A PRIVATE COMPANY

AND

IN THE MATTER OF VIVO ENERGY KENYA LIMITED (FORMERLY BP KENYA LIMITED) BEING THE REGISTERED PROPRIETOR OF ALL THAT PROPERTY BEING DAGORETTI/RIRUTA/S.598

BETWEEN

REPUBLIC OF KENYAAPPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE REGISTRAR,

MINISTRY OF LANDS, NAIROBI.....2ND RESPONDENT

COUNTY GOVERNMENT OF NAIROBI.....3RD RESPONDENT

***Ex-parte*.....VIVO ENERGY KENYA LIMITED (Formerly B.P KENYA LIMITED)**

AND

RIRUTA SATELLITE WARD DEVELOPMENT COMMITTEE.....INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion filed 14th October, 2014, the *ex parte* applicant herein, **Vivo Energy Kenya Limited (Formerly B.P Kenya Limited)**, seeks the following orders:
 1. **AN ORDER OF PROHIBITION** restraining the National Lands Commission and the Registrar either by themselves and/or their agents, employees or such other persons whomsoever from taking any steps administrative or otherwise that would affect VIVO ENERGY KENYA LIMITED (formerly known as BP KENYA LIMITED) its leasehold interest in respect of ALL THAT PROPERTY KNOWN AS DAGORETTI/RIRUTA/S.958 including the execution of the Gazette Notice number 5022 being the Kenya Gazette Special Issue Vol. CXVI No.86 to the extent that it did revoke VIVO ENERGY KENYA LIMITED's (formerly known as BP KENYA LIMITED) registered interest in respect of DAGORETTI/RIRUTA/S.958.
 2. **AN ORDER OF MANDAMUS** compelling the National Lands Commission to issue to VIVO ENERGY KENYA LIMITED (formerly known as BP KENYA LIMITED) being the registered proprietor of ALL THAT PROPERTY KNOWN AS DAGORETTI/RIRUTA/S.958 with any complaint lodged, or any intended investigations to be carried out in respect of its acquisition of the Leasehold interest ALL THAT PROPERTY KNOWN AS DAGORETTI/RIRUTA/S.958 and serve and/or issue it with a Notice to appear before it for purposes of being inspecting any such complaint or such other documents that informs any intended inquiry and/or investigation of the one part and be issued with a proper Notice for purpose of being afforded a fair opportunity to be heard on such any inquiry and/or any investigation.
 3. **AN ORDER OF CERTIORARI** removing into the High Court for purposes of quashing the Gazette Notice number 5022 being the Kenya Gazette Special Issue Vol. CXVI No.86 to the extent that it did revoke VIVO ENERGY KENYA LIMITED's (formerly known as BP KENYA LIMITED) registered interest in respect of DAGORETTI/RIRUTA/S.958.
 4. **THAT** costs of this application be provided for.

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn on 10th October, 2014 by **Naomi Assumani**, the applicant's Company Secretary on 10th October, 2014.
3. The *ex parte* applicant's case was that the applicant was successor of B.P. Kenya Limited having acquired its whole interest and it is the registered proprietor of all that property known as Dagoretti/Riruta/S.958 (hereinafter known as the "**Riruta Shell Station**").
4. The said Riruta Shell Station, it was deposed, was purchased by the Applicant from **Stanley Manyara, Baptista Mugambi, Christian Jack Mutuma and Stephen Mutathia** vide an Agreement for Sale dated 14th December 1998 for Kshs.4,000,000.00. In effecting the Transfer in respect of the Riruta Shell Station, it was deposed the applicant also surrendered the Lease dated 22nd January 1979 that had been issued to the said vendors and registered on 14th March 1979 which Surrender of Lease and Transfer were duly registered by the 2nd Respondent on 22nd September 2000 and a new Certificate of Lease issued on an even date. Since the year 2000, the Applicant has been in occupation of Riruta Shell Station and does through a Dealer run fuel station thereat.
5. It was therefore contended that anybody who wishes to carry out an inquiry on the Riruta Shell Station would easily be guided as its ownership and thereby be led to the Applicant's disclosed registered offices at Laibon Centre on Lenana Road within Nairobi County. However out of the blues, the Applicant, through its Dealer, did on 6th October 2014 receive a very telling letter from the Interested Party which read as follows:

“REVOCATION OF DAGORETTI/S/958 AND RIRUTA SHELL PETROL STATION

Reference is hereby made by “**RIRUTA SATELLITE COMMUNITY**” that the above captioned subject matter has been duly revoked above subject plot REVERTED TO **RIRUTA SATELLITE COMMUNITY** as per “**THE NATIONAL LAND COMMISSION**”, under article 67 of the Constitution of Kenya, under section 14 of the National land Commission Act.

In the foregoing, the **RIRUTA SATELLITE COMMUNITY** hereby demands that:-

- i) *Riruta Shell Petrol Station float acceptable terms and conditionalities if at all they want continuity of that facilities on the said plot, and if the terms and Conditionalities for continuity occupation are acceptable to the **RIRUTA SATELLITE COMMUNITY** then a leasehold deal shall be formulated thereof.*
- ii) *If the terms and conditionalities are not acceptable to the **RIRUTA SATELLITE COMMUNITY**, the option will be to demolish the Petrol Station structures and construct **COMMUNITY SHOPPING MALL** thereof.*

Kindly float something acceptable herewith, or arrange to vacate the said premises on or before 30th October 2014 without further recourse thereof.

Thanking you in advance.

Yours Sincerely,

Francis N. Migwi

RIRUTA SATELLITE WARD DEVELOPMENT COMMITTEE

6. It was averred that thereafter, the Applicant made an inquiry with the Respondents as to the veracity of the decision the interested party was alluding to in its communication to the Applicant as an Official Search issued to its advocates on record on 8th October 2014 confirmed that the Applicant was still the registered owner of the suit property. However, upon inquiring from the 1st Respondent, it were referred to the Kenya Gazette, Special Issue being Vo. CXVI-No.86, Gazette Notice NO.5022 published on 18th July 2014 (hereinafter referred to us “the Gazette Notice”) from which it was noted that the 1st Respondent alluded to having exercised powers conferred by Article 68(c)(v) of the Constitution, 2010; made reference to information being made to the general public about it having received complaints and undertaken review of Grants and dispositions of public land to establish their legality or otherwise; made reference to a public notice in the local dailies dated 14th April 2014; and alluded to determination made in respect of several grants and proceeded to make several orders including one revoking the suit property.
7. It was averred that save for the small print in the property description column of the Gazette Notice, the name of Vivo Energy Kenya Limited or of B.P. Kenya Shell Limited was not disclosed therein and in fact there was no disclosure as to any party who would be Interested with the determination alluded to and upon whom personal service would have been effected.
8. The deponent deposed that the Applicant was neither served with any Notice of any complaint made by any person over Riruta Shell Station nor was it advised of any inquiry being carried out by the 1st Respondent and had the 1st Respondent been diligent and desirous of affording parties affected with a fair administrative process it would have easily have established from the records held at the Ministry of Lands, the nature of business being carried out on Riruta Shell Station and copies of Rates payment held at the County Government of Nairobi that indeed the Applicant is the registered proprietor of the Riruta Shell Station.
9. The Applicant therefore lamented that it was not heard on any sitting nor was it aware of any pendency of a complaint as to legality or otherwise of the acquisition of Riruta Shell Station and consequently, did not attend any inquiry that led to the decision revoking the title in respect of its property which was on the basis of very strong allegations of illegality as required under Article

- 47 of the Constitution, 2010 to an administrative process that is expeditious, efficient, lawful reasonable and procedurally fair.
10. It was the Applicant's case that the Applicant's right to property as reserved under the Constitution, 2010 is being violated as; the 1st Respondent has purported to deprive the Applicant of its right to property by classifying it as property that is illegally acquired so that it can be precluded from enjoying constitutional protection; that the Applicant is now unable to exercise its proprietary rights in the property since its interest has been declared to have been illegally/irregularly acquired; and that the Applicant is unable to sustain any claim against anyone in respect of the property as the legal claim would be defeated with a defense of *ex tunc causa non-oritur action*.
 11. It was contended that the conduct of the 1st Respondent was unlawful and unconstitutional to the extent that the Applicant was not served nor notified in terms of Section 14(7) of the *National Land Commission Act*, Chapter 5D Laws of Kenya, having lawfully purchased the property; no rules for the conduct of the affairs and/or determination by the 1st Respondent have been gazetted nor made; no information was supplied and/or furnished to Applicant as to existence of any inquiry and/or complaint; the Applicant to date is not aware on what basis or grounds the Title in respect of Riruta Shell Station was revoked by the 1st Respondent; and the Applicant's right to property has been unfairly violated without due process.
 12. In the Applicant's view, although the 2nd Respondent has not acted on the Gazette Notice, there is real and present danger that he shall so proceed and thereby permanently affecting the Applicant's rights over the property hence it is in the interest of justice that the *ultra vires* acts by the 1st Respondent be interfered with by an Order of this Court as the 1st Respondent's actions that culminated in the revocation as shown in Gazette Notice were not only *ultra-vires* but also against the rules of natural justice.

Respondent's Case

13. In response to the application, the 3rd Respondent filed the following grounds of opposition:
 1. **THAT the substratum of the proceedings herein revolves on the proprietary interests in the Property known as Dagoretti/Riruta/S.958 and property belongs to the Land & Environmental Division of the High Court and not the Constitutional & Judicial Review Division.**
 2. **THAT no allegations or claim has been made as against the 3rd Respondent nor any relief sought against the 3rd Respondent.**
 3. **THAT in any event at the time of the impugned decision/action by the 1st and 2nd Respondent, the 3rd Respondent was not in existence in the form it is sued.**
 4. **THAT the 3rd Respondent is unsuited.**
 5. **THAT reasons whereof the Judicial Review Application should be dismissed and or struck out as against the 3rd Respondent with costs to the 3rd Respondent.**

Determination

14. Having considered the foregoing it is clear that the factual basis of the ex parte applicant's case is not challenged in light of the fact that the Respondents have opted not to controvert the same by way of affidavit evidence. In fact apart from the 3rd Respondent who has filed grounds of opposition, no other party has opposed the application.
15. Section 24 of the *Land Registration Act* provides as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

16. The impugned Gazette Notice seems to suggest that there was an illegality involved in the registration of the suit land in the name of the applicant. No doubt under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The crucial words in Article 40(6) are ***"found to have been unlawfully acquired"***. Therefore there must be a finding that the property in question was unlawfully acquired. Who then is empowered to make this finding?
17. The power of review of titles is conferred by section 14 of the ***National Land Commission Act*** Cap 5D of the Laws of Kenya which provides:

(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 a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

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

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

18. It is implicit from the foregoing that the rules of natural justice apply when the 1st Respondent in exercising its powers under section 14 of the ***National Land Commission Act***, pursuant to which it purported to have been acting when it made the impugned decision. The Applicant however contends, which contention is not denied that the rules of natural justice were never adhered to.
19. Article 40(3) of the Constitution provides:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

20. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

21. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution.

22. It is therefore clear that under both the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be revoked without the proprietor being afforded an opportunity of being heard.

23. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

24. In the recent case of **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR, Majanja J.** on a matter similar to the current one expressed himself thus:

“.....first, the Registrar of Titles has no authority under the *Registration of Titles Act* to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40 of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation.”

25. I find no reason for diverging from the learned judge's finding.

26. In my view the decision of the 1st Respondent was clearly tainted with illegality and procedural

impropriety.

Order

27. Accordingly, an order of certiorari is hereby issued removing into this Court for the purposes of being quashed Gazette Notice number 5022 being the Kenya Gazette Special Issue Vol. CXVI No.86 to the extent that it did revoke Vivo Energy Kenya Limited's (formerly known as BP Kenya Limited) registered interest in respect of Dagoretti/Riruta/S.958 which notice is hereby quashed.
28. Further an order of prohibition is hereby issued restraining the National Land Commission and the Registrar either by themselves and/or their agents, employees or such other persons whomsoever from taking any steps administrative or otherwise that would affect Vivo Energy Kenya Limited (formerly known as BP Kenya Limited) its leasehold interest in respect of Dagoretti/Riruta/S.958 including the execution of the Gazette Notice number 5022 being the Kenya Gazette Special Issue Vol. CXVI No.86 to the extent that it did revoke Vivo Energy Kenya Limited's (formerly known as BP Kenya Limited) registered interest in respect of Dagoretti/Riruta/S.958.
29. The Applicant has also sought an order of mandamus compelling the National Lands Commission to supply the applicant with complaints lodged in respect of the suit land and its investigation thereon. However, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order of mandamus, though there are exceptions to the rule. See **The District Commissioner Kiambu, vs. R And Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**
30. Apart from that in my view once the impugned decision is quashed the next course of action is left to the authority concerned which course is of course expected to be lawful. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572,** the Court of Appeal expressed itself as follows:

“The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court’s consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law.....Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari*, prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable.”

31. The 3rd respondent has however contended that it ought not to have been made a party to these proceedings since there were no orders sought against it. I agree that there is no reason why the 3rd Respondent was made a party to these proceedings at all. It was neither the author of the impugned legal notice nor was it the implementing authority. Accordingly, the applicant will bear the costs of the 3rd Respondent. However, the costs of the applicant will be borne by the 1st Respondent.

Dated at Nairobi this 18th February, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ondati for Mr Luseno for the Applicant

Miss Malu for Mr Mogaka for the 3rd Respondent

Cc Patricia