



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
JUDICIAL REVIEW DIVISION CASE NO. 36 OF 2012

REPUBLICAPPLICANT

VERSUS

THE LAND REGISTRAR TAITA TAVETA DISTRICTRESPONDENT

THE BOARD OF GOVERNORS

KONGOLIO TECHNICAL HIGH SCHOOLINTERESTED PARTY

JUDGMENT

INTRODUCTION

1. By Notice of Motion dated 2nd May 2012, the applicant sought order as follows:
 1. *That pursuant to leave granted on 27th April 2012, an order of certiorari do hereby issue to bring into this court and quash the decision of the Land Registrar, Taita Taveta, revoking the Title for Plot No. Bura/Nyolo/ 2492 [the Chamber Summons for leave however refers to parcels nos. 2470 and 2494, as does the Gazette Notice] as published in the Keya Gazette No. 14714 dated 4th November 2011.*
 2. *That costs of this Motion be provided for.*
2. According to the Statement dated 26th April 2012 filed in support of application for leave under Order 53 rule 1 of the Civil Procedure Rules, the grounds upon which the relief was sought are as follows:
 1. *The applicant is the registered proprietor of the property known as BURA/NYOLO/2470 and BURA/NYOLO/2494 since 28th April 1999.*
 2. *That by Gazette Notice NO. 14714 dated 4th November 2011 and published on 25th November 2011 the Respondent revoked the applicant's tile to the said property on the allegation that the land was reserved for KONGOLIO TECHNICAL HIGH SCOOL.*
 3. *That the applicant was not given a hearing before the revocation of the Title Deed.*
 4. *That the Registrar of Titles acted ultra vires the powers granted under the registered Land Act cap 300.*
 5. *That the Respondent has todote failed to inform the Applicant officials of its decision.*

The application was supported by a verifying affidavit by the ex parte applicant sworn on 25th April 2012 setting the same facts relied on in the Statement.

3. The Respondent filed Grounds of Opposition dated 4th June 2012 to the Notice of Motion through V. J. Yator, Litigation Counsel, as follows:
 1. *That the application is frivolous, vexatious and an abuse of the process of the court.*
 2. *That the Respondents decision to revoke was proper and well within his powers.*
 3. *That no rules of Natural justice are demonstrated to have been breached.*
 4. *The Respondents acted in accordance with the Law ad the orders made were not ultra vires.*
4. In a short replying affidavit sworn 30th October 2012 by one Francis Kenyeru Orioki, Land Registrar Taita Taveta, the Respondent's case was set out briefly as follows:

“I, FRANCIS KENYERU ORIOKI of Post Office Box 1061, TAITA TVETA WUNDANYI hereby make oath and state as follows: -

1. *THAT I am the District Land Registrar Taita Taveta District well conversant with the matters herein, hence competent to swear this affidavit.*
2. *THAT I have read the application dated 2nd May, 2012 and wish to respond as follows.*
3. *THAT the titles to Plot NO. BURA/NYOLO/2492 were revoked vide a notice published in the Kenya Gazette Notice NO. 14714 dated 4th November, 2011.*
4. ***THAT apart from the execution of the notification vide the Kenya Gazette, the actual processing of the same was done by the Ministry headquarters (at Nairobi), specifically by the section dealing with public utilities and government institutions.***
5. ***THAT the section (stated in paragraph 4 above) has information, generally and/or specifically that the suit property belongs to Kombolio High School.***
6. *THAT the revocation only acted as notice to the proprietors to the extent that it did.*
7. *THAT the revocation vide the said Gazette Notice was therefore not absolute.*
8. *THAT the purported revocation was necessitated by the fact that the parcel of land is actually developed by Kombolio High School.*
9. *THAT I am informed that Kombolio High School is a public school.*
10. *THAT the said action was taken purely in the public interest to safe guard land belonging to the institution.*
11. *THAT what is deponed to herein is true to the best of my knowledge, information and belief except where otherwise stated.”*
12. *No affidavit in reply was filed by the Interested Party, Kombolio Technical High School.*

SUBMISSIONS

13. Counsel for the parties – M/S Khatib & Co advocates for the applicant and Ms. Ruth Lutta, Litigation Counsel, for the Attorney General for the Respondent and the Interested Party, filed written submissions dated 20th June 2012 and 3rd April 2014, respectively, and Judgment was reserved.
14. The ex parte applicant's case was, principally, two fold that the registrar had no statutory power to revoke a title and that in any event the applicant was not heard before the decision to revoke the title was made, as set out in the written submissions filed on his behalf as follows:

“Your Honour, the provisions of the Registered land Act and especially section 8 of he said act do not confer the respondent powers to revoke a title. The respondent overstepped its jurisdiction and acted ultra vires. It is our humble submission that any administrative act or order which is ultra vires is void in law. Therefore the decision of the respondent is a nullity and ought to be deprived of all legal effect.

Secondly, the Respondent proceeded to revoke the applicant's Titles without according the applicant an opportunity to be heard. The Applicant acquired the property in 1999 and a

Title was produced to prove the same. This clearly shows that the applicant has a legal right over the subject property and the respondent in the circumstances was supposed to consult the applicant prior to his decision to revoke the Titles.”

15. The applicant relied on **Matiba v. Attorney General** (1995-98) EA 192, **Ridge v. Baldwin** (1963) 2 All ER 66, **R v. Paddington Valuation Officer ex p. Peachery Property Corp. Ltd** (1965) 2 ALL ER 839 and **Commissioner of Lands v. Kunste Hotel Ltd.** (1995-98) EA 1 and urged that an order of certiorari was appropriate in circumstances of the case where the breach of the applicant's right under rules of natural justice to be heard had resulted in the decision to revoke the title being a nullity
16. For the respondent, it was submitted that the court had a duty to protect the public interest in a school in the region against the private interests of the applicant and that the court should not enforce a fraudulent or illegal dealing in the acquisition of the suit property which had been reserved for a public school, the interested party herein. Counsel submitted, principally, as follows:

“Your Lordship, it is the Respondent's and Interested Party's submissions that the attempt by the applicant to thereafter claim of exclusive ownership of the suit property is a detriment to the public as there being an educational institution established and running in the premises the whole Mombasa population and its environment shall be adversely affected in the event that application filed is allowed. Although the remedy of judicial review is open to every citizen with an arguable case regarding a decision of any authority and/or implementation of power or a decision making process by an administrative body it has been established that public interest is a prime factor which this Honourable Court has a role to protect.” (sic)

17. Counsel for the Respondent and Interested Party relied on several authorities in support her proposition on public interest and non enforcement of illegal transactions, namely: **The Commissioner for Lands ex p. Somken Petroleum Company Ltd.** Nairobi HC Misc. Appl. 807 of (2004), (2005) eKLR, (Nyamu, J.) applying **Scott v. Brown** (1892) 2 QB 724, **Mohamed Tariq v. Land Registrar Lamu**, Malindi HC Misc Application No. 27 of 2010 (Meoli, J.), **Peter Bogonko v. National Environment Management Authority** Nairobi HC Misc Appl. 1535 of 2006 (Wendo, J), **Kenya National Examinations Council v. Republic ex parte Regina Ouru** Nairobi HC No. 127 of 2009, **Kenya Power & Lighting Co. Ltd. v. NMG Co. Ltd & 2 Ors.**, Nairobi Court of Appeal Civil Application No. 74 of 2010 and **Fahim Twaha & Anor. District Land Registrar, Lamu** (Omondi, J.).
18. In urging the facts of the case, counsel improperly gave through the written submissions evidence which was never before the court, as shown in the brief replying affidavit sworn by the Respondent set out in full above. Counsel submitted that –

*“That it is indeed a fact on perusal of the necessary documents that the suit property herein to wit **BURA/NYOLO/2470** which was land was excised from a property which is and has always been occupied by **Kombolio Technical High School** thereby being set apart for public use. The aforesaid land was illegally and irregularly allocated to private owner who is the applicant herein for his personal benefit. This was in complete disregard of the public nature and use of the said land.*

Upon realization of [t]his massive anomaly the Ministry of Lands ordered for the revocation of the title issued. The revocation was effected vide gazette Notice No. 14714 on 4th November, 2011. The revocation was on the basis that the suit property was allocated and set apart for the construction and occupation for school. In fact the applicant had encroached into the said portion which is squarely based between the Administration block of the school and the lavatory facility used by the students. The respondent and the interested party submit therefore the alleged exclusive ownership of the said property by the applicant is irregular and against public policy and therefore fraudulent and/or illegal. It is upon this discovery that the title issued to the applicant was revoked giving

rise to this suit.”

19. In truth there was before the court no evidence, as alleged by the submissions, of fraudulent or illegal acquisition of the suit property by the registered proprietor under whom the applicant claimed as a personal representative.

ISSUES FOR DETERMINATION

20. The issue that arose for determination were therefore:

- a. ***Whether the Registrar has power to revoke titles under the Registered Land Act cap. 300; and***
- b. ***Whether the Judicial Review court could consider a respondent's allegations of fraudulent acquisition of the suit property in exercising discretion to grant or refuse an order of Certiorari.***

DETERMINATION

21. It is now accepted that the Registrar had no jurisdiction to revoke titles to land under the Registered Land Act or the Registration of Titles Act. In this regard, I reiterate my holding in ***Republic v. The Registrar of Titles, Mombasa & 2 Ors ex Parte Emfill Ltd.***, [2012] eKLR which, as shown below, the Court of Appeal approved-

“For these reasons, I find that the government cannot revoke title to land even “for public need or interest” or for alleged illegality. The Government is obliged to move the Court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the Court in an appropriate case in making an order for cancellation of title or in authorizing, subject to due compensation, the compulsory acquisition or take-over of the private property.”

See also ***Kuria Greens v. Registrar of Titles and Anor.*** [2011] eKLR (per Musinga, J. as the then was) and ***Republic v. The Senior Registrar of Titles ex parte Brookside Court Ltd.***, [2012] eKLR per Warsame, J. (as he then was).

22. It is also trite that in Judicial Review, the Court does not deal with the merits of the case but only process of administrative decision making. In ***Commissioner of Land v. Kunste Hotel Ltd.***, supra, the Court of Appeal 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 an individual is given fair treatment by an authority to which he has been subjected (***Republic v. Secretary of State for education and Science ex parte Avon County Council*** [1991] 1 ALL ER 282 and ***Chief Constable of the North Wales Police v. Evans*** [1982] 1 WLR 1155 adopted).”*

23. In ***Emfill Limited v. The Registrar of Titles and 2 Ors.***, Court of Appeal at Mombasa Civil Appeal No. 312 of 2012, in an appeal from a decision of this court, held that the once the High Court established that the Registrar had no jurisdiction to revoke titles to land, it would be unreasonable to refuse an Order of Certiorari in discretion and that considerations of public interest, in that case for the settlement of squatters, are subject to the rule of law which must prevail. The Court said:

*“22. Thus it was not disputed that the appellant had titles to the suit properties, which the 1st respondent purported to revoke. In ***Pastoli vs. Kabale District Local Government Council and Others*** [2008] 2 EA 300 it was held:*

“In order to succeed in an application for judicial review, the applicant has to show that the decision or 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 a law or its principles are instances of illegality.”

The learned judge made a finding that the 1st respondent had no authority or power to revoke titles. Indeed, the learned judge at paragraph 17 of his judgment stated that the appellant had demonstrated that the gazette notice no. 6652 of 2011 was made without authority and in breach of the right to fair administrative action under Article 47 of the Constitution....

27. On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively, if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the Constitution and the Land acquisition act to acquire the land. The Government chose to follow none of these processes but acted in clear violation of the law. It is in public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the Court with judicial power. The remedy of judicial review of administrative action is intended to check excesses of power to ensure that the rule of law prevails.

28. The appellant having established its titles to the suit properties, backed with the order from the civil suit, it was unreasonable for the trial judge to refuse to exercise his discretion in the appellant’s favour.” [underlining mine]

24. In the circumstances of this case, I find that the Government should have moved the court, which has jurisdiction to invalidate titles that are obtained by fraud, for orders for the revocation of the Applicant’s titles on the ground that they were fraudulent and illegal as alleged in the Gazette Notice No 17714 of 2010. Having chosen to revoke the titles without jurisdiction under the law, the decision of Registrar is subject to quashing by an order of Certiorari for being **ultra vires** the Registered Land Act cap. 300 under which the parcels of land were registered.
25. As regards the allegations of illegality of the Applicant’s title, the determination thereon calls for the court to investigate the merit of the case, which is outside the special jurisdiction of the Judicial Review Court. I would, respectfully, agree that in public law litigation, the court must give effect to the issue of public interest in accordance with the law, as public interest should find expression in the law. However, on good authority (see **Emfill**, supra, for instance), I am unable to agree that public interest could trump express provisions of the law as to defeat the constitutional and statutory rights of a registered proprietor of land whose title has not been shown to be fraudulent and therefore not constitutionally protected by virtue of Article 40 (6) of the Constitution. If public interest called for the establishment of a school, the Government could acquire the parcel of land in accordance with the law on compulsory acquisition of property.
26. I, respectfully, agree with the statement of Lindley LJ. in **Scott v. Brown**, supra, that –

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.”

These words are echoed in the former section 23 of the Registration of Titles Act and the current section 26 (1) of the Land Registration Act, 2012, where a title can be challenged on the basis of fraud or misrepresentation to which the registered proprietor is shown to have been implicated, as

shown below.

27. Accordingly, it is a matter of proof of the fraud or illegality: if the court is satisfied by evidence to the required standard that the applicant is guilty of fraud or other illegality in the acquisition of the title to the property, the court cannot enforce the title and is, as a matter of law, enjoined by the provisions Article 40 (6) to disregard the purported title. Article 40 (6) of the Constitution is in terms as follows:

“(6) The rights [to protection of right to property] under this Article do not extend to any property that has been found to have been unlawfully acquired.”

28. If, on the other hand, that evidence is weak and scanty as found by Omondi, J. in the ***Fahim Twaha*** decision with respect to the reservation for public purposes of the suit property therein, the court has no basis for exercise of discretion in favour of public interest. The gazettement of the revocation herein came after the registration of the title in the deceased for whom the applicant is representative. It cannot be used to demonstrate a reservation or setting apart of the suit property for public purposes; to attain such status, the setting apart by gazettement should have been demonstrated as occurring first in time before the allocation and registration of the suit property in the deceased's name. Apart from the allegations of fraud and illegality made in replying affidavit and documents attached therein and in the submissions by counsel no evidence is adduced to prove the alleged fraudulent acquisition of the suit property. Ultimately, it is a question of availability of cogent evidence of fraud or illegality that defeats the purported registered proprietor's interest. Such evidence is, with respect, not availed before this court.

29. While this Court is sympathetic of the submission that a court must not condone or enforce an illegality especially as in this case property allegedly reserved for a public school is taken by a private individual, it is not able to act on the contention which is not supported on the facts by evidence of fraud or any wrong-doing on the part of the applicant in acquisition of his titles save by hearsay deposition in the replying affidavit of Francis Kenyeru Orioki in terms that –

4. ***THAT apart from the execution of the notification vide the Kenya Gazette, the actual processing of the same was done by the Ministry headquarters (at Nairobi), specifically by the section dealing with public utilities and government institutions.***
5. ***THAT the section (stated in paragraph 4 above) has information, generally and/or specifically that the suit property belongs to Kombolio High School.***

The alleged information showing that the suit property belongs to the school was not availed to the Court.

30. Indeed, even the allegations of grabbing of the parcel of land were not established to the Respondent before the revocation of the titles was done. In an Internal Memo authorizing the revocation dated 20th September 2011 attached to the replying affidavit it clear that grabbing of the suit parcel, among others was only alleged. The Internal Memo said –

“It was resolved that the following parcels which were allegedly grabbed be revoked immediately (to be in Kenya Gazette Friday this week) and be registered in the name of the Ministry of Education.”

31. Moreover, the deponent of the replying affidavit puts a doubt to the merits of the decision to revoke titles when he asserts that the revocation was only calculated to put the proprietors on notice. It was deponed by the Land Registrar, Taita Taveta at paragraphs 6-9 of the Replying affidavit that:-

6. ***THAT the revocation only acted as notice to the proprietors to the extent that it did.***
7. ***THAT the revocation vide the said Gazette Notice was therefore not absolute.***
8. ***THAT the purported revocation was necessitated by the fact that the parcel of land is actually developed by Kombolio High School.***

9. ***THAT I am informed that Kombolio High School is a public school.***

32. The information on the alleged fraud in the acquisition of the suit property is, as demonstrated above, contained in hearsay statements by the 1st respondent in his replying affidavit and by counsel for the respondent and the interested Party in the written submissions filed herein, un supported by any direct evidence in that regard. No court would on such evidence, or on submissions by counsel unsupported by evidence before the court find fraud on an applicant's acquisition of title so as to justify the withholding of the otherwise deserved order of certiorari to protect the title holder.
33. The Judicial Review Court is particularly ill-equipped to deal with disputed matters of fact where, as in this case, it would involve fact finding on an issue of fraud which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. To prove fraud there is need for direct evidence to be adduced and tested through cross-examination of the witnesses before the court can conclude that fraud has been committed and that the applicant had participated in it to warrant revocation of title by the Court under sections 143 of the Registered Land Act cap. 300, section 23 of the Registration of Titles Act cap. 281 and now section of the Land Registration Act 2012 which repealed the former two Acts. As I have recently held in Mombasa HC Misc. App. No. 46 Of 2002 ***Republic v. The Registrar of Titles & Ors. Ex Parte Kalidas Kanji (Africa) Ltd.***, "*Judicial review which proceeds on the basis of affidavits is not the appropriate procedure for determining disputed matters of fact.*"
34. The Court must therefore uphold the Rule of Law with regard to the applicant's rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:

"26. Certificate of title to be held as conclusive evidence of proprietorship

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and **the title of that proprietor shall not be subject to challenge, except—***

(a) on the ground of fraud or misrepresentation to which the person is

proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

35. Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised, acquire the suit property for the purposes of use by the public school, the Interested Party herein.

ORDERS

36. Accordingly, for reasons set out above, I grant an order of Certiorari to quash the Respondent's decision contained in Gazette No. 14714 of 4th November 2011 revoking title to plots nos.

BURA/NYOLO/2470 AND BURA/NYOLO/2494. As the Respondent believed it was acting in the public interest, there shall be no order as to costs.

DATED SIGNED AND DELIVERED THIS 13TH DAY OF MARCH 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mohamed for the Applicant

Miss Namahya for the Respondent and Interested Party

Ms. Linda - Court Assistant.