



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.89 OF 2014

BETWEEN

NGAMAU LIMITED.....PETITIONER

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT

REGISTRAR OF TITLES2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petition herein was filed on 27th February 2014 and the factual background to it is uncontested because the Respondents, all represented by the 3rd Respondent, filed no Affidavit to contradict the Supporting Affidavit sworn on 21st February 2014 by Ngamau Mungai Muigai, the Managing Director of the Petitioner Company.

2. According to the Petitioner therefore, it is the lawfully registered proprietor of L.R. No.11927 within the City of Nairobi having acquired it by transfer of lease registered on 5th May 2009. That it was surprising to it, with its title having been lawfully acquired when the 1st Respondent by Gazette Notice No.15580 dated 26th November 2010 purported to revoke the said title without any colour of right.

3. It therefore seek the following orders:-

“(a) A declaration that Gazette Notice No.15580 in Volume CXII-No.124 of the Kenya Gazette of 26th November 2010 and its effect violate the principles of the Constitution and is thus unconstitutional.

(b) A determination that Gazette Notice No.15580 in Volume CXII-No.124 of the Kenya Gazette of 26th November 2010 violates the fundamental rights and freedoms of the Petitioner to own land and to equal benefit and protection of the law.

(c) A declaration that Gazette Notice No.15580 in Volume CXII-No.124 of the Kenya Gazette of 26th November 2010 violates the principle of expeditious,

efficient, lawful, reasonable and procedurally fair administrative action enshrined in Articles 27, 47, 48 and 50 of the Constitution.

(d) An order for judicial review to move into the High Court and quash the decision of the Registrar of Titles revoking the Petitioner's lease to Land Reference No.11927/38.

(e) Costs of this Petition.

(f) Any other or further relief that this Honourable Court considers appropriate and just to grant."

4. On their part, the Respondents field Grounds of Opposition only and they are as follows;

"(1) That the Petitioner has not established a prima facie case with any chances of success.

(2) That while indeed the Constitution at Article 40 guarantees the right to own land, the same does not extend to any property that has been found to have been unlawfully acquired.

(3) That the actions of the 2nd Respondent were guided by law, a fact that is within the full knowledge of the Petitioner.

(4) That the Petition is manifestly an attempt to circumnavigate the clear provisions of the law."

5. Since the Respondents failed to make any submissions, oral or written on the above grounds, I will take them as they are.

6. In the above context, I have read the Submissions by Counsel for the Petitioner and the only issue to address is whether Gazette Notice No.15580 was lawful and whether it was issued in violation of the Petitioner's right to property under **Article 40** of the **Constitution**.

7. On my part, there is really no answer to the Petitioner's claim because from the Grounds of Opposition reproduced above, the bare statements made therein do not amount to any credible answer to the Petition. In any event, Gazette Notice No.15580 has been the subject of past proceedings in this Court. I say so because in **H.C. Misc. Civil Application No.30 of 2011**, Odunga J. in a case involving L.R. No.209/13539/20 which had also been cited in the offending Gazette Notice stated as follows;

"In Dr. N.K. Arap Ngok vs Justice Moiwo Ole Keiwua & 5 Others Nairobi Civil Application No.60 of 1997 the Court of Appeal held;

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on the ground of fraud or misrepresentation to which the owner is proved to be a party. Such is sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

He then further stated as follows;

"Accordingly, the title of a registered proprietor may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and this can

only be done after the due process is adhere to. It must also be remembered that under the provisions of Article 40(6) of the Constitution, the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. In arriving at that finding the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard.”

The learned Judge then concluded thus;

“In this case, in the absence of an Affidavit sworn by the Respondents, there is no legal justification given and the Court is unable to find any that empowered the Respondents to take the action they took. Their action was clearly ultra vires their powers and in my view the Respondents’ actions were clearly tainted with irrationality, illegality and procedural impropriety. The said decision was clearly ultra vires the powers conferred by Section 60 of the Registration of Titles Act. The failure to comply with the clear provisions of Section 60 with respect to adherence to the rules of natural justice clearly established the procedural impropriety of the decision making body”.”

8. The learned Judge then proceeded to revoke the Gazette Notice in as far as L.R. 209/13539/20 was concerned.

9. In another case, challenging the same Gazette Notice, i.e. **H.C Misc. Appl. No.2 of 2011, Charles Malenya & Others vs Registrar of Titles & Anor**, the Court stated as follows;

“The first issue for determination is whether the 1st Respondent acted ultra vires in issuing the Gazettee Notice in question. This question has been the subject of a number of decision of this Court – See the cases of Kuria Greens Limited v Registrar of Titles & Anor (2011) eKLR (Petition No.107 of 2010), Kongowea Market Estate Ltd v Registrar of titles (2011) eKLR (miscellaneous Application 92 of 2010).

The Principles all running through these cases is that the Registrar of Titles, on his own motion, has no power to cancel or revoke a title to land by way of a Gazette Notice. Musinga J in the Kuria Greens Case supra properly set out the procedures through which the Registrar of Titles should act where he is of the view that a title to land has been fraudulently or illegally acquired. The learned judge stated as follows;

“If the Respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state..., appropriate notice ought to have exercised any of the following options;

(a) Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the Petitioner or

(b) File a suit in the High court challenging the Petitioner’s title and await its determination one way or the other.

Short of that, the Respondents’ purported action of revoking the Petitioner’s title is an affront to private proprietary rights which are guaranteed by our Constitution and such an action must be frowned upon by the law”.”

10. In the end, the three learned Judges had no hesitation in revoking Gazette Notice No.15580.

11. Further, in **Petition No.178 of 2011, Power Technicians Ltd vs The A.G & Others**, where land titles had been revoked in a similar manner, s the title in issue, Majanja, J made the following orders;

“(a) A declaration be and is hereby issued declaring that the revocation of titles issued under the Registration of Titles Act (Chapter 281 of the laws of Kenya) by the Registrar of Titles, the Commissioner of Lands or any other officer authorized by them by way of publication of a Gazette Notice under the provisions of the Government Lands Act (Chapter 280 of the Laws of Kenya) and the Trust Land Act (Chapter 288) or any other law is contrary to Article 40 and 47(1) of the Constitution and is therefore null and void.

(b) A declaration be and is hereby issued declaring that the Petitioners’ rights under Article 40 and 47(1) of the Constitution were violated by the publication of Gazette Notices Numbers 9230, 7751, 3640 and 13104.

(c) A declaration be and is hereby issued declaring that Gazette Notices Numbers 9230, 7751, 3640 and 13104 are null and void and of no effect.

(d) The Registrar of Titles be and is hereby directed to cancel, delete and or remove all entries giving effect or made pursuant to Gazette Notices Numbers 9230, 7751, 3640 and 12104 in the titles to all the properties listed in the Gazette Notices.

(e) The Registrar of Titles, the Commissioner of Land or any other person authorized on their behalf, be and are hereby restrained from giving effect or implementing in any manner whatsoever the contents of Gazette Notice Numbers 9230, 7751, 3640 and 13104.

(f) The Petitioners be and are hereby awarded costs of the respective Petitions.

(g) The Registrar of Titles is directed to publish these orders in the Kenya Gazette within 21 days from the date hereof.”

12. I have stated above that there is no credible defence to the Petition and I have shown that from previous decisions of the High Court, the Gazette Notice has no legs to stand on. If that be the case, I see no reason to say more than I have.

13. The Petition is merited and I shall grant the following final orders;

(a) A declaration is hereby issued that Gazette Notice No.15580 in Volume CXII-No.124 of the Kenya Gazette of 26th November 2010 and its effect violate the principles of the Constitution and is thus unconstitutional.

(b) A determination is hereby issued that Gazette Notice No.15580 in Volume CXII-No.124 of the Kenya Gazette of 26th November 2010 violates the fundamental rights and freedoms of the Petitioner to own land and to equal benefit and protection of the law.

(c) A declaration is hereby issued that Gazette Notice No.15580 in Volume CXII-No.124 of the Kenya Gazette of 26th November 2010 violates the principle of expeditious, efficient, lawful, reasonable and procedurally fair administrative action enshrined in Articles 27, 47, 48 and 50 of the Constitution.

(d) An order for judicial review is hereby issued to move into the High Court and quash the decision of the Registrar of Titles revoking the Petitioner’s lease to Land Reference No.11927/38.

(e) Costs of this Petition are granted to the Petitioner.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY, 2015.

ISAAC LENAOLA

JUDGE

In the presence:

Miron – Court clerk

Mr. Njenga for Petitioner

No appearance for Respondent

Order

Judgment duly delivered.

Copies to be supplied.

ISAAC LENAOLA

JUDGE

29/5/2015