



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPL. JR NO. 9 OF 2012**

**BETWEEN**

**REPUBLIC ..... PETITIONER**

**AND**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MASAI VILLAS LTD.....INTERESTED PARTY**

***EX PARTE***

**JIMMY MUTINDA**

**JUDGMENT**

1. This case concerns the ownership of LR No. 209/12168 (Grant No. IR 130520) located at Likoni Lane, Kileleshwa within Nairobi (“the suit property”). It was originally owned by the Government. This is evident from the prayers in the amended Notice of Motion dated 16<sup>th</sup> August 2013 which are as follows;
1. *An order of certiorari to remove into the High Court and quash the Respondent’s decision to cancel the Ex parte Applicant’s Grant over parcel No. 209/12168 (Grant No. IR 130520).*
2. *An order of Mandamus compelling the respondents to issue a Grant over the parcel known as Land Reference No. 209/12168 (Grant No. IR 130520) in favour of the Ex parte Applicant herein.*
3. *An order of prohibition prohibiting the Respondents from granting, issuing and/or transferring the parcel known as Land Reference No. 209/12168 (Grant No. IR 130520) to any other person, individual or third party.*
4. *An order for mandamus to compel the 2<sup>nd</sup> respondent to deregister and or cancel the registration of all that property known as Land Reference No. 209/12168 (Grant No. IR 63626) issued to the Interested Party herein Masai Villas.*
5. *That the respondent bears the costs of these proceedings.*

**The Applicant’s Case**

2. The facts upon which the application is grounded are set out in the verifying affidavit and the supplementary affidavit of the ex-parte applicant (“the applicant”) sworn on 15<sup>th</sup> August 2013 and 13<sup>th</sup> November 2012 respectively. The applicant also filed written submissions dated 7<sup>th</sup> October 2013. The material facts are set out below.
3. The genesis of the applicant’s case is a letter dated 3<sup>rd</sup> June 1988 in which the Ministry of Works, Housing and Physical Planning allocated the suit property then part of the government quarters to one Mr E K Kiswii (deceased), a relative of the applicant. On 21<sup>st</sup> May 1996, the application dated 2<sup>nd</sup> January 1996 by Mr Kiswii and the applicant for allocation of the suit property was approved. Unfortunately, Mr Kiswii received a letter dated 29<sup>th</sup> May 1996, the Ministry of Public Works and Housing requesting him to vacate the suit property to enable a new allottee take occupation but Mr Kiswii did not vacate the house as he has applied to be allocated the said property and the application had been approved.
4. On 1<sup>st</sup> August 1996 the suit property was valued and on 27<sup>th</sup> November 1996, the applicant paid the requisite fees including the subdivision fee. The suit property was subdivided into two equal portions of 0.2 hectares each and named Plot No 1 and Plot B. A Grant was issued for the latter plot which became parcel LR No. 209/13341 registered in the name of the applicant and one Margaret Kawembe Kimwolo, the widow of Mr Kiswii, as tenants in common in equal shares.
5. On 19<sup>th</sup> September 1996, the applicant avers that he was issued with a letter of allotment for the second plot, No. LR 209/2810, but as a result of financial constraints he was unable to process the grant. However, by a letter dated 14<sup>th</sup> March 2011, the applicant accepted the letter of allotment paid the Stand Premium and outstanding Land Rent for 16 years. The applicant avers that ultimately the plot allocated to him became LR No. 209/12168 (Grant No. IR 130520).
6. The applicant deposes that having completed payments, the 1<sup>st</sup> respondent’s officer proceeded to prepare a new grant in his favour for LR No. 209/12168. The applicant learnt that a grant allocated IR No. 130520 was signed on 22<sup>nd</sup> June 2011 by the 1<sup>st</sup> respondent in his favour but that he was never issued with the original Grant. He was only able to obtain copies of the Grant.
7. The applicant states that he only discovered that the Grant issued to him was cancelled through an internal memo dated 19<sup>th</sup> August 2011 which stated that another Grant was previously issued for the suit property in favour of the interested party (“the Company”) on 27<sup>th</sup> October 1994. The internal memo written by the Chief Land Registrar to the Commissioner of Lands stated as follows;

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*This is in reference to our discussion on the above subject and the new grant executed in favour of Jimmy Mutinda as Folio 11.*

*In the process of registration, it was discovered that another grant was issued to Masai Villas Limited and registered as I.R. 63626/1 of 27<sup>th</sup> October 1994. See Folios 13 and 15.*

*Unfortunately, though the relevant deed file for IR No. 63626 is available, the original file No. 158585 that can shed more light on the matter is missing. And whereas the Letter of Allotment in favour of Jimmy Mutinda is dated 19<sup>th</sup> September, 1996, the title in favour of Masai Villas Limited was registered on 27<sup>th</sup> October, 1994.*

*I would therefore suggest, subject to your further guidance on the matter, that Mr Mutinda be informed that the allocation of the land to him was a mistake and that he is at liberty to apply for refund of any payments he made in pursuance to the erroneous allotment.*

## CHIEF LAND REGISTRAR

8. As a result of this state of affairs the applicant pursued the matter by correspondence to the Permanent Secretary, Ministry of Lands and to the Chief Land Registrar. He also conducted an unofficial search at the Companies Registry on the directors and shareholders of Company which revealed that the Company was incorporated in 1991 with Registration No. C. 47595 with Mr Harbans Amrit and Mrs Prakash Amrit as directors and shareholders who subsequently transferred their shareholding and directorship on 17th October 2002 to Mr. Wilson Gacanja and Tracy Wanini Gacanja, the former being a former Commissioner of Lands who had signed the Grant in favour of the Company in 1994.
9. The applicant avers that the purported Grant of the suit property in favour of the interested party in 1994 did not exist as the subject property had not been surrendered by the Ministry of Works and Housing neither surveyed nor subdivided out of Plot LR No. 209/2810 and the same was still a government property. The applicant avers that there is reason to believe that said execution of the documents reveals bad faith, abuse of power and fraud.
10. The applicant avers that the decision to cancel or refuse to register the Grant LR No. 209/12168 (Grant IR 130520) in his favour having not been formally communicated to him was unfair, irrational, made in bad faith, un-procedural, bias, ultra-vires, an abuse of power and contrary to his legitimate expectations. That the grant issued to the interested party was so issued irregularly, illegally and is therefore null and void.
11. The applicant avers that since being allocated the suit property he has been in actual physical possession for 16 years and the refusal to register the grant for the suit property in his favour without communicating to him is also contrary to his legitimate expectation.
12. The applicant submits that the interested party cannot claim support of the provisions of **section 23** of the **Registration of Titles Act (Repealed)** which provides for indefeasibility of title as the Grant issued to it was as a result of irregularity, illegality and of fraud.
13. The applicant cited several cases where the court has quashed the Registrar's decision to revoke and cancel titles; **Republic v Commissioner of Lands ex-parte Mohammed Kuno Nairobi Misc. Civil Appl. No. 58 of 2010 [2013]eKLR**, **Republic v Commissioner of Lands and Registrar of Titles ex-parte Carolizanne Gathoni Nairobi HC Misc. Appl. No. 44 of 2011** and **Adan Hassan and Others v Registrar of Titles and Others Nairobi HC Petition No. 7 of 2012**. In these cases, the court emphasised that a registered proprietor's title to land cannot be arbitrarily cancelled without affording the party an opportunity to be heard as this would be contrary to **Article 47(1)** of the Constitution which protects the right to fair administrative action.

### Respondents' Case

14. The respondents oppose the application through grounds of opposition dated 8<sup>th</sup> October 2012. The respondents also filed written submissions dated 9<sup>th</sup> November 2012.
15. The respondents submit that judicial review is a discretionary remedy and in light of the fact that the case concerns a dispute over ownership over the suit property, the orders sought may not be the most efficacious and appropriate remedies in the circumstances. Counsel for the respondent, Ms Maina, cited several cases; **Sanghani Investment Limited v The Officer in Charge, Nairobi Remand and Allocation Prison Nairobi HC Misc. App. 99 of 2006 [2007]eKLR**, **Republic v Chief Land Registrar, Murang'a and Another ex-parte Geoffrey Wanyatura Mwangi Nairobi HC ELC No. 14 of 2007 [2010]eKLR** and **John Peter Mureithi and 2 Others v Attorney General and Others Nairobi HC Misc. Appl. No. 158 of 2005 [2006]eKLR** to support the proposition.
16. The respondents submit the order of certiorari sought cannot be granted on the ground that the

applicant never complied with the terms of the allocation and was not issued with the Grant. Further that the applicant has not annexed the decision sought to be quashed contrary to **Order 53 rule 7** of the **Civil Procedure Rules** which requires the decision to be attached to the verifying affidavit. The respondents submit that even assuming that internal memorandum dated 19<sup>th</sup> August 2011 was a decision capable of being quashed, the application for certiorari is time barred a year later.

17. The respondents oppose the prayer for mandamus on the ground that the court cannot compel the Registrar to issue a grant when another grant over the same property is in existence. Counsel cited the case of **Welamondi v Chairman of the Electoral Commission of Kenya Bungoma HC Misc. App. No. 81 of 2002** for the proposition that the order of mandamus cannot quash what has already been done.

### **Interested Party's Case**

18. The Company relies on the affidavit of Wilson Gacanja, its managing director, sworn on 18<sup>th</sup> September 2012. He admits that he served as the Commissioner of Lands from January 1989 up to November 1999. He depones that he purchased the Company from the then directors with the resultant effect of change of directors to himself and his daughter in October 2002 after he had left the civil service.

19. According to him, the available records from the interested party company shows that an entity known as Joma Investments applied for an unsurveyed plot A at Hill area Nairobi and was issued with a letter of allotment on 25<sup>th</sup> May 1994. The said entity paid the requisite stand premium on 10<sup>th</sup> September 1994 and requested the Commissioner of Lands to issue the title in the name of the Company, the interested party. After compliance with all the relevant conditions, the interested party was issued with a Grant I.R Number 63626 for the same parcel L.R No. 209/12168 was duly issued under the provisions of **section 23** of the **Registration of Titles Act** on 25<sup>th</sup> October 1994.

20. Mr Gacanja depones that at the time he issued and signed that grant to the Company, he was neither a director nor was he aware of any objection lodged against the issuance of the said grant by anybody including the applicant. In October 2002 he purchased the shares of the interested party company together with this parcel of land and by then he had ceased to be the Commissioner of Lands and at the time a search was conducted on the parcel of land in issue in the year 2002 and confirmed that indeed the registered owner was and still is the Company.

21. The Company argues that it is inconceivable that the applicant is laying claim on the same parcel of land 18 years later and purported to be paying for a letter of allotment issued sixteen years ago and long after the title to the said property was processed and issued strictly in accordance with the existing law. It contends that the purported letter of allotment issued to the applicant is a forgery as at the time it was purportedly issued, there was no land available for allotment as the parcel in issue had already been allocated and a title issued.

22. The Company submits that as the registered owner of the property, it is entitled to protection by virtue of **section 23** of the **Registration of Titles Act (repealed)** and that therefore the orders sought in the application cannot be granted.

### **Determination**

23. The facts I have outlined speak for themselves and at the heart of this matter is the lawful owner of the suit property.

24. The applicant has marshalled evidence to show that he was allocated the land and complied with the terms of the allocation resulting in a grant being signed and executed in his favour but was cancelled by the internal memorandum dated 19<sup>th</sup> August 2011. The applicant alleges fraud,

collusion and illegality in the manner in which the Company was issued a Grant in respect of the suit property on the part of its director who was the Commissioner of Lands at the time the allocation was made.

25. The Company on the other hand lays claim to the suit property. Its director contends that he purchased the Company after it had been allocated the property after complying with the terms of allocation. The interested party's position is that it is the legal and indefeasible owner of the property by virtue of **section 23** of the **Registration of Titles Act (Repealed)** and as such the remedies the applicant seeks cannot apply to the circumstances of the case.
26. Against this factual background, can the court issue orders of judicial review? I take the position that this is matter that is properly determined in another forum so that the court may test all the evidence presented on both sides in coming to the conclusion who is the lawful owner of the property. It is for this reason that I have eschewed commenting on the totality of the evidence so as not to prejudice arbitration of the matter in that forum.
27. In this respect I wish to re-state what was held in **Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison (Supra)**, "*Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. .... Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.....It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being a discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.*"
28. I would also add that in this case the applicant alleges fraud, illegality and collusion involving the Company's director who was a Commissioner of Lands. Such issues cannot be determined in an application for judicial review.
29. As regards the prayer of certiorari, even if I were to grant the orders of certiorari in favour of the applicant, quashing the internal memorandum dated 19<sup>th</sup> August 2011, the issue of validity of the applicant's title would remain unresolved and since the interested party has a title over the same property. The internal memorandum is not the Grant of the suit property or the decision conferring title to the Company. It is internal communication from one officer to another expressing an opinion and it cannot therefore be termed as a decision capable of being quashed.
30. Prayer 2 and 4 of the amended notice of motion seeks orders of mandamus. In **Welamondi v Chairman of the Electoral Commission (Supra)**, Ringera J., addressed the purpose of the order of

mandamus as follows, “Mandamus cannot issue to compel the exercise of a discretionary power let alone it exercise with a view of arriving at a particular result as prayed by the applicant here .... Certiorari would have been the appropriate remedy. That is because certiorari looks at the past and quashes a decision already made, whereas Mandamus looks to the present situation and aims at enforcing a duty that has not been performed. Unlike Certiorari, Mandamus does not quash that which has been done...”

31. The interested party already has a grant issued in his favour hence the court cannot issue an order of mandamus to the respondents to grant the applicant a title instead. The result would be double allocation of the same property. As pointed out by the applicant, the Registrar would have to make a decision as to who holds the proper title among the two parties therefore granting prayer 4 of the motion to quash the title issued to the Company would be directing the Registrar to act in particular way. Like Ringera J., I hold that an order of mandamus cannot be used to achieve the result intended by the applicant.

32. Notwithstanding the result I have reached, the court has in appropriate cases quashed orders of the Registrar revoking title. The cases cited by the applicant confirm that the court may directly quash the decision of the registrar to cancel a title particularly where there has been lack of due process but these cases may be distinguished on the ground that there was no dispute as regards ownership of the property and the cancellation of the title was initiated directly by the State without the involvement of the third parties. In other words, in those cases the remedy of judicial review was efficacious as there was no further requirement to determine third party rights to the same property.

### **Disposition**

33. I find and hold that the orders of judicial review sought in this matter would not be efficacious to resolve the issues surrounding title to the suit property. In the circumstances the Amended Notice of Motion dated 16<sup>th</sup> August 2013 is dismissed with costs to the interested party.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of February 2014**

**D. S. MAJANJA**

### **JUDGE**

Mr Bwire with him Mr Marete instructed by Mutembei, Gichuru and Company Advocates for the ex-parte applicant.

Ms Maina, Litigation Counsel, instructed by the State Law Officer for the respondents.

Mr Njuguna instructed by Kang’ethe and Company Advocates for the interested party.