



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MISC. CIVIL APPLICATION NO.1305 OF 2004**  
**IN THE MATTER OF AN APPLICATION**  
**FOR AN ORDER OF CERTIORARI**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**PERMANENT SECRETARY, MINISTRY OF**  
**LANDS AND HOUSING, NAIROBI.....RESPONDENT**  
**EX-PARTE: JOSIAH OBUOGI OKUMU**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 15<sup>th</sup> October, 2004 filed on 21<sup>st</sup> October, 2004, the *ex parte* applicant herein, **Josiah Obuogi Okumu**, prays that an order of Certiorari do issue to remove into the high court and quash the decision of the Permanent Secretary, Ministry of Lands and Housing communicated to the Applicant by a letter dated 9<sup>th</sup> of September 2004 to the effect that the Government of Kenya is offering to sell all that property known as Land Reference Number 209/12917 to the Applicant notwithstanding the fact that the Government has no power to offer for sale to the Applicant at this point in time.

**Ex Parte Applicant's Case**

2. The application was supported by a verifying affidavit sworn by the applicant on 29<sup>th</sup> September, 2004.
3. According to the Applicant, he is the registered owner of the property known as Land Reference Number 209/12917 (hereinafter referred to as the suit property) of which he has been in uninterrupted occupation since 1989 and subsequently as owner from July, 1996.
4. However, on or about the 9<sup>th</sup> day of September, 2004, the Ministry of Lands and Housing through its Permanent Secretary served him with a letter purporting to give him a deadline of 31<sup>st</sup> October, 2004 within which he was required to accept to purchase the said property.
5. According to him, the Government has no power at this point in time to offer the said property for sale

to him for the reason that the Government has no interest whatsoever in the said property, save as lessor. Furthermore the person referred to in the said letter of 9<sup>th</sup> September, 2004 as '**Joseph Okumu**' is neither the owner nor the occupier of the said property and is otherwise unknown to him.

6. He further deposed that it is his constitutional fundamental freedom and right to own property hence the threat by the Ministry of Lands and Housing to dispossess him of his rights of ownership of the said property would otherwise be unlawful and unconstitutional in the extreme.

7. It was the applicant's case that by a letter of allotment dated 16<sup>th</sup> October, 1995, the Government of Kenya allotted Land Reference Number 209/12917 (referred to as unsurveyed residential plot – Nairobi in letter of allotment) to him and duly paid all the requisite charges as per the terms and conditions contained in the letter of allotment and the property was subsequently duly registered in his favour on or about the 29<sup>th</sup> day of July, 1996 and since then he has been duly paying the land rent and rates to the Department of Lands and the Nairobi City Council respectively.

### **Respondent's Case**

8. In opposition to the application, the Respondent filed the following grounds of opposition:

- 1. THAT the court lacks jurisdiction to entertain the application.**
- 2. THAT the Respondent will be greatly prejudicial if this suit proceeds in its current form.**
- 3. THAT the application has been brought in bad faith as the Respondent will show.**
- 4. THAT the annexure clearly shows that there is dispute as to ownership of property.**
- 5. THAT the annexure lacks verification as true copies of the originals and their authenticity and origin is therefore in doubt.**
- 6. THAT the Respondents have been denied a chance to question the procedure used by the interested party in 'acquiring' a Government house.**
- 7. THAT the application is defective, incompetence and an abuse of the process of this court and ought to be struck out.**

9. The Respondents also filed a replying affidavit sworn by **Tirop Koskey**, the permanent secretary in the Ministry of Housing on 2<sup>nd</sup> June, 2008.

10. According to him, the house in dispute is No. MG 731 situated in Kileleshwa and it belongs to the Government of Kenya and is recorded as a Government House in the register of Government Building and Houses to date and it is among the pool of houses constructed by the Government of Kenya in 1970's to house senior officers in Nairobi and has belonged to the Government to date.

11. He deposed that he was a stranger to the alleged letter of allotment dated 16<sup>th</sup> October 1995 transferring the said house to the Applicant and purported title L.R. No. 209/12917 was therefore fraudulently and irregularly obtained. Similarly, the documents the Applicant sought to rely on to prove ownership of the house herein were not genuine. According to him, Government Policy is to sell its houses at prevailing market rates and not by the way of allocation through alienation by the Commissioner of Lands.

12. To him, the purported grant and allotment of Government House without following the laid down procedure is illegal, null and void and contrary to the provisions of **Government Lands Act** Chapter 280, Laws of Kenya. It is further contrary to the procedures and guidelines for disposal of Government houses as assets and property as the same were not followed in this case since the said Government Procedures

are aimed at protecting Public Property and ensuring transparency and Accountability in the disposal of public assets. Towards that end the said guidelines are set out in Chapter 19 of the Government Financial Regulations and Circular No. 2/58 dated 1<sup>st</sup> March 1958 which continues to be in force to date and they required a board of survey initiated by the officer in charge of buildings to be constituted before the disposal of any Government house or building. After determining the condition of the building, the Board prepares an inspection report for the authorized officer who is the accounting officer of the Ministry and the proceedings and recommendations of the Board of survey are recorded in form FO58 and sent to the Accounting Officer together with the inspection report. The said form FO58 is forwarded to the Permanent Secretary Treasury for approval and it is only after approval that the Building or house is deleted from the Register and the Controller and auditor General informed accordingly.

13. He deposed that the house in dispute has never been bonded nor has the Board of survey been constituted and or recommended its disposal hence the purported transfer of the house in dispute to the Applicant is void and not valid and the same does not bestow on the Applicant absolute right over the Government house nor has the house been legally transferred to the Applicant. He therefore contended that the offer to sell the property in dispute herein is lawful and proper since the same still belongs to the Government. To him this application is brought in bad faith since it locks out the Government from testing the veracity and authenticity of documents the Applicant seeks to rely on to prove ownership of the house in issue and questioning the procedure used to obtain them. It was therefore his view that *vivavoce* evidence is the proper way of resolving the dispute herein as issues raised in this application fall in the realm of private law.

### **Applicant's Submissions**

14. On behalf of the applicant **Mr Chacha Odera**, learned counsel submitted that it is not in dispute that the applicant is the registered owner of the suit property. Accordingly the applicant would only be liable to pay the rents specified on the face of the grant. As long as the title remains, the same is indefeasible.

15. Since the Respondent is the one who allocated the land to the Applicant, he cannot blow hot and cold after receiving premiums and asking for validation fees as well as insisting on claiming rents to demand that the applicant purchases the same.

16. To the applicant, once a title is issued the Government ought to follow the process which they have not done. According to learned counsel at the time of the alienation of the suit property the Regulations for Disposal of the suit property were not in place. As long as the title stands and has not been cancelled the application merits favourable orders.

### **Respondent's Submissions**

17. On behalf of the Respondent, it was submitted that the suit property is a government house belonging to the Ministry of Housing and there is a clear procedure for disposal of government properties. In this case the applicant's application clearly indicated that the suit property was government quarters and that he was a civil servant hence the applicant was not just an ordinary person.

18. It was submitted that what the Respondent did was not to cancel the title but to just request him to validate the same. According to the Respondent the issue in dispute is ownership of the suit property and whether the suit property was available for alienation and section 3 of the Government Proceedings Act was cited. In the Respondent's view this is a dispute which can only be sorted out in a civil suit.

### **Determination**

19. I have considered the foregoing. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

20. The ex parte applicant has exhibited a copy of the grant issued to him pursuant to the provisions of the ***Registration of Titles Act***. Section 60 of the repealed ***Registration of Titles Act*** sets out the steps the Registrar was to take if he deemed that there was an error or mistake in the Grant or Title or where the Grant or Title for reasons disclosed therein ought not to have been issued. He was enjoined to summon the person to whom the grant, certificate or instrument had been so issued, or by whom it had been obtained or was retained, to deliver it up for the purpose of being corrected. In the summons, in my view, it was necessary to expressly require that the Grant, certificate or instrument be delivered for the purpose of being corrected. At that stage the issue of revocation of the title did not arise. In default of honouring the summons the Registrar would then move to the next stage which was to apply to the Court for the issuance of summons to issue to the person why the title could not be delivered for correction. It was only in default of honouring the Court summons that the warrants were issued for the persons to be apprehended for examination.

21. In my view what the provisions of sections 60 and 61 of the said Act were intended for was to ensure that before a person was deprived of his title to property the due process which includes an opportunity to be heard was followed. There was no power however, conferred upon the Registrar of Titles to revoke a registered proprietor's title before the due process was adhered to. The power to direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register was conferred on the Court under section 64 of the said Act.

22. 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.***

23. The said Article accordingly protects the right of any person to own property vests. 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.**

24. 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. Both under the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. A decision by the Registrar to unilaterally cancel or revoke a title even if he had such powers would fly in the face of the express constitutional provisions. 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. The *ex parte* applicant contends that being the proprietor of the suit parcel of land, its title is indefeasible. However, under the current Constitutional dispensation a title can be challenged and even revoked if found to have been unlawfully acquired. Before that is done, however there must be a finding to the effect that the title was unlawfully acquired and in my view such a finding can only be made by a Court of competent jurisdiction.

26. In the letter dated 9<sup>th</sup> September, 2004, the view taken by the Respondent was that the alienation of the suit property to the Applicant was irregular and illegal. In my view it was not within the jurisdiction of the Respondent to make that determination. Whether or not the applicant's title to the suit property is legal is a matter which can only be determined in a civil suit in which the title issued in favour of the applicant is being challenged. We are not told that there is any pending suit in which the applicant's title is sought to be annulled. Whereas the decision whether or not to grant judicial review orders is an exercise of discretion, to decline to grant deserved orders when the party who ought to have initiated the process of legally annulling the title has not done so would occasion a miscarriage of justice to the applicant.

27. In my view, by prescribing terms to be fulfilled by the Applicant in order to validate the Applicant's interest in the suit land the Respondent was restricting the applicant's interest in the suit parcel of land. The registration of a leasehold title no doubt confers an interest in the subject parcel of land in the proprietor thereof. Article 40 of the Constitution of Kenya protects the right to property and Article 47(2) thereof provides that 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.

28. I must however emphasise that it is not the jurisdiction of this court to make a determination with respect to whether or not the Applicant acquired the interest in the suit land lawfully and procedurally. The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

29. In **Republic vs. Permanent Secretary, Ministry of Lands & Housing High Court Misc. Application No. 334 of 2005**, an application with striking similarities to the instant application, this

Court held that the respondent ought to have given the ex parte applicant an opportunity to explain his position and also ought to have proffered valid reasons for seeking what was being sought from the applicant. Without offering valid reasons for such a step the action taken by the Respondent had the effect of unlawfully impinging upon the proprietorship interest of the applicant in the suit land.

30. An issue that has, however, given me concern is whether the letter dated 9<sup>th</sup> September 2004 was a decision since under Order 53 rule 7 the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. However, in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. Accordingly, in light of the fact that there is no allegation from the Respondent that there was a decision separate from what was contained in the letter, I will pursue the issue no further.

### **Order**

31. In the foregoing premises it is clear that the Respondent did not follow the procedure laid down in the law before taking the action contained in the letter dated 9<sup>th</sup> September 2004. I accordingly find merit in the Motion dated 15<sup>th</sup> October, 2004. Accordingly, an order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the decision of the Permanent Secretary, Ministry of Lands and Housing communicated to the Applicant by a letter dated 9<sup>th</sup> of September 2004 to the effect that the Government of Kenya is offering to sell all that property known as Land Reference Number 209/12917 to the Applicant which decision is hereby quashed.

32. The costs of this application are awarded to the applicant.

**Dated at Nairobi this 26<sup>th</sup> day of June 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Odundo for Mr Chacha Odera for the Applicant***

***Mr Kamau for the Respondent***

***Cc Kevin***