REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR ELC NO 26 OF 2011

ANHALT HOLDINGS LIMITED.....APPLICANT

VERSUS

REGISTRAR OF TITLES .....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

MINISTER FOR LANDS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

By way of the amended Notice of Motion dated 8th April 2014, the ex parte applicant, Anhalt Holdings Ltd prays for orders that:-

> **"1. This Honourable Court be pleased to grant an order of certiorari to remove and bring to the High Court for purposes of quashing the decision by the Registrar of Titles contained in Gazette Notice No. 16531 published on 24th December 2010 revoking the Title to the Applicant's property i.e. all that piece of land situate in the city of Nairobi in Nairobi area containing by measurement six decimals six nought eight (6.608) hectares or there about that is to say L.R. No. 21730.**
>
> **2. This Honourable Court be pleased to grant an order of prohibition directed against the Respondents, prohibiting them through their servants and/or agents from interfering in any way with the Applicant's property i.e. that piece of land situate in the city of Nairobi in Nairobi area containing by measurement six decimal six nought eight (6.608) hectares or thereabouts that is to say L.R. No. 21730.**
>
> **3. Costs of this application be provided."**

The application is supported by the statutory statement and the verifying affidavit of the Applicant's director Mr Lee Nyachae filed together with the chamber summons application for leave on the 8th March 2011. It is also supported by the supplementary affidavit sworn by the said Lee Nyachae on 23rd March, 2011.

According to the papers filed in Court, the Applicant is the registered owner of L.R. No. 21730 measuring approximately 6.608 hectares. Through Gazette Notice No. 16531 of the 24th December, 2010, the 1st Respondent, the Registrar of Titles revoked the said title.

It is the Applicant's case that the 1st Respondent did not substantiate the basis for the revocation as no reasons were given for the decision. Further that the impugned Gazette Notice did not state under what provisions of the law the 1st Respondent's action was based. It is the Applicant's case that the 1st Respondent's decision was procedurally improper and *ultra vires* the express provisions of Section 60 of the repealed Registration of Titles Act, Cap 281 Laws of Kenya.

The Applicant asserts that the 1st Respondent failed the constitutional test as it was not subjected to fair administrative action. The Applicant contends that the 1st Respondent's decision is arbitrary and made without any legal basis or justification whatsoever.

The Applicant asserts that it had legitimate expectation that its title would be respected by the respondents by virtue of its registration and it could rely on the sanctity to commit itself to third parties as it has already done.

The Applicant supported its case with the decision of Musinga, J (as he then was) in **KURIA GREENS LTD v REGISTRAR OF TITLES AND COMMISSIONER OF LANDS (2011) eKLR**.

In a replying affidavit sworn on the 28th October, 2011, Gordon Odeka Ochieng, the Chief Land Administrative Officer averred that L.R. No. 21730 is a portion of L.R. No. 189/R which was government land set aside for public utility. The original parcel of land known as L.R. No. 189 was reserved by the government for Kabete Disease Control Centre for Quarantine of animals used for research of animal diseases. L.R. No. 189/R was excised from L.R. No. 189 and reserved for Kabete Veterinary Laboratories and no title had been issued as it was the practice then that land reserved for the government was not issued with titles.

He avers that in 1990 and 2002 portions of L.R. No. 189/R, including L.R No. 21730 were irregularly allocated to private developers.

That even with the allocation, the original title was not surrendered to the Commissioner of Lands, by the Ministry of Livestock and the records in the Department of Lands show that the land is public land. That the impugned Gazette Notice states that the parcel of Lands was reserved for public utility and that the allocation was illegal and unconstitutional and the Applicant has not disputed the contents of the Gazette Notice. It is the respondents' case that land set aside for public utility is not available for allocation to individuals or private entities and any allocation is void *ab initio* and not protected by the Constitution.

Further, that a title originating from an unlawful allocation cannot confer any interest. The respondents contend that the provision of Section 143(1) of the Registered Land Act which legalizes fraud in the case of a first registration is in conflict and contravenes the provisions of Article 40 (6) of the Constitution. That in any case, the registration to Mab-Lok Investments is not a first registration since the land was already allocated to the Ministry of Livestock. The respondents conclude that the doctrine of sanctity of title and the legality of title are inseparable in the present case.

The key question in these proceedings is whether the 1st Respondent's decision to revoke the Applicant's title complied with the laws of this country. I think it is now well established that the only way the 1st Respondent could revoke a title was through Section 60 of the repealed Registration of Titles Act, Cap 281. The said Section gave the 1st Respondent power as follows:

> **"60(1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has**

been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.

(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination."

According to me, the said Section only allowed the Registrar to cancel a title with the cooperation of the person in whose name the title was registered. Where cooperation was not forthcoming, the Registrar had no option but to seek the assistance of the Court.

This position was well illuminated by Musinga J (as he then was) when he stated in **KURIA GREENS LTD v REGISTRAR OF TITLES AND ANOTHER (2011) eKLR** that:

"In Gazette Notice No. 15584 vide which the 1st respondent purported to revoke the petitioner's title to the suit land he did not indicate the provisions of law that he invoked as the basis for his decision. Was that an omission? I do not think so. This is simply because there is no provision under the Registration of Titles Act or any other Act that bestows on the 1st respondent or the Commissioner of Lands or the Government power to revoke a registered title in the absence of a court order to that effect. I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the Registered Land Act and the Land Control Act and I did not come across any provision that grants power to a Registrar of Titles or Commissioner of Lands to arbitrarily revoke a valid land title."

I agree with Musinga, J (as he then was) on his exposition of the law. There is no evidence that in the case before me the Applicant's directors were summoned to explain how the title to the property was obtained. In not summoning the Applicant's directors, the 1st Respondent not only acted *ultra vires* the Registration of Titles Act but also breached the rules of natural justice as the Applicant was condemned unheard.

The question that follows is whether the orders sought should issue. Judicial review remedies are discretionary in nature, one of the issues to be considered by the court before the orders are issued is whether judicial review is the most efficacious remedy in the circumstances of the case. The discretion must be exercised judiciously.

In the case before me, it has clearly emerged that Mr Lee Nyachae was among the people who were first allocated the land in question before they transferred it to the Applicant. He is also a director of the Applicant. It is clear that the Applicant was aware or ought to have been aware that the land was initially public land and there are procedures to be followed in allocation of such land to private persons. The respondents have stated that the land was not available for allocation and that the allocation was irregular.

There is therefore need for a hearing where the parties would have had the opportunity to table the evidence. In **Nairobi H.C. Misc. Application No. 99 of 2006 SANGHANI INVESTMENT LIMITED v THE OFFICER IN CHARGE NAIROBI REMAND AND ALLOCATION PRISON**, Wendoh, J correctly observed that:

"Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be 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 the case of REP V EX-PARTE KARIA MISC APPLICATION 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that 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 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."

The observation of the learned Judge tallies with the judicial review principle that where there is an alternative remedy, an applicant should go for the most efficacious remedy – see the decision of the **Court of Appeal in Civil Appeal No. 84 of 2010, REPUBLIC v NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.** On the same issue, the Court in **LIVINGSTONE KUNINI NTUTU V MINISTER FOR LANDS & 4 OTHERS [2014] eKLR** opined that:

"43. The Respondents referred us to decisions where the courts have held that where the validity of title was in dispute judicial review is not the most efficacious remedy. One such decision was that of Odunga, J, a member of this panel, in Republic v Registrar of Titles & Another ex-parte David Gachina Muriithi [2014] eKLR where he stated that:-

"…..even if I were to grant the orders sought herein, the issue of validity of the applicant's title would remain unresolved and since there is already in existence civil proceedings revolving around the suit property substantially between the parties herein, it is my view that the issue ought to be determined before that forum in which *viva voce* evidence will be taken so that appropriate declaratory orders can be made and the matter brought to a finality. To grant the orders sought without determining the ownership of the suit land would in my view be an exercise in futility."

44. At paragraph 45 of the same judgement the learned Judge explained the reason why judicial review was not appropriate in that case as follows:-

"Whether the allocation was illegal or not is, in my view, a matter beyond the scope of this determination. However, it is not an issue which can be wished away as inconsequential. There are in my view issues which ought to be properly investigated and evidence adduced. They are not matters which can simply be determined based on the grant possessed by the applicant which grant according to the Constitution is simply *prima facie* evidence of title which title can be challenged if found to have been unlawfully acquired."

45. The species of jurisprudence propagated by Odunga, J in the above cited case is not alien to us. We would align ourselves with this school of thought which holds that judicial review is not the most efficacious remedy where the process under which a title was obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy."

In my view, judicial review is not the most efficacious remedy where the process under which the title was obtained is in dispute. In such a case, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy. The Applicant's title can only be validated after the hearing of witnesses and production of documents.

In the circumstances of this case, I therefore decline to exercise my discretion in favour of the Applicant. The Applicant's application fails and the same is dismissed. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 30th day of October, 2014

W. KORIR,

JUDGE OF THE HIGH COURT