



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 17 of 2011

IN THE MATTER OF: AN APPLICATION BY YELLOW HORSE INNS LIMITED FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP.26 LAWS OF KENYA) AND ORDER LIII CIVIL PROCEDURE RULES, AND ARTICLES 40, 47, 48, 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTE R OF: GAZETTE NOTICE NO.15580 DATED 26TH NOVEMBER 2011 BY THE SENIOR REGISTRAR OF TITLES, NAIROBI REVOKING THE APPLICANT'S TITLE TO L.R. NO.209/11856

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE GOVERNMENT LANDS ACT (CAP. 280 LAWS OF KENYA), THE TRUSTLAND ACT(CAP.288 LAWS OF KENYA) AND THE REGISTRATION OF TITLES ACT (CAP.281 LAWS OF KENYA) LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF LANDS.....1ST RESPONDENT

REGISTRAR OF TITLES2ND RESPONDENT

EX PARTE

YELLOW HORSE INNS LIMITED

JUDGMENT

This is yet another case challenging the power of the Commissioner of Lands and the Registrar of Titles

of revoking title to land through a gazette notice.

Through a Notice of Motion filed on 23rd February 2011, the Exparte Applicant herein Yellow Horse Inns Limited (*hereinafter referred to as the Applicant*) commenced judicial review proceedings against the Commissioner of Lands (1st Respondent) and the Registrar of Titles (2nd Respondent) seeking the following orders:

- 1) An Order of Certiorari to quash the decision of the Registrar of Titles, Nairobi contained in the Kenya Gazette Notice No.15580 dated 26th November 2010 revoking the applicant's title to L.R. No.209/11856.
- 2) An Order of Mandamus compelling the Registrar of titles to issue a fresh Gazette Notice revoking Gazette Notice No.15580 of 26th November, 2010 with regard to L.R. No.209/11856.
- 3) An Order of Prohibition prohibiting the Registrar of Titles, Nairobi, from disseminating, publishing, placing advertisements, notification to the public in any form of media, expressing, making representations and or verbal utterances to anyone in any way or manner or at all, of any matter or material which may be construed as being inconsistent with the legality of the registered proprietorship of the Applicant over L.R. No.209/11856.
- 4) Costs of this application be provided for.
- 5) Any other order or relief as the Honourable Court may deem fit and expedient to grant.

The Application is supported by the statutory statement dated 15th February 2011 and a verifying affidavit sworn by Joseph Gathuku, a director of the Applicant on the same date.

The application is premised on grounds stated in the statutory statement and on the face of the Notice of Motion. It is opposed by the Respondents through grounds of opposition filed on 4th October 2011 in which the Respondents stated as follows;

- a. That the application is inept, incompetent and a gross abuse of the court process.
- b. The application lacks merit.
- c. By Section 60 of the Registration of Titles Act, the Registrar is repositied with sufficient powers to cancel an irregularly issued title:-
- d. The title the subject of this application was issued irregularly.
- e. The application is brought mala fides

It is important to note that the Respondents did not file a replying affidavit in this case which means that the facts deponed to by Mr Gathuku in the verifying affidavit in support of the Applicant's case are uncontroverted.

The undisputed facts of this case are that the Applicant is the registered owner of all that piece of land known as L.R.209/11856 (*hereinafter referred to as the suit property*). The suit property was sold by the City Council of Nairobi for a consideration of Kshs.60,000/- and was transferred to the Applicant on 8th March 1993 – *see annexure marked JG2*. The interest transferred to the Applicant was a lease hold from the Government of the Republic of Kenya issued for a period of 99 years with effect from 1st January 1993.

On 26th November 2010, the 2nd Respondent without prior notice or consultation published his decision to revoke several titles which included the Applicant's title to the suit property in Gazette Notice

No.15580 which in so far as is relevant to this case read as follows:

GAZETTE NOTICE NO.15580

NOTIFICATION OF REVOCATION OF LAND TITLES

WHEREAS the parcels of land whose details are described under the Schedule herein below were allocated and title issued to private developers, it has come to the notice of the Government that the said parcels of land were reserved for public purpose under the relevant provisions of the Constitution, the Government Lands Act (Cap.280) and the Trust Land Act (Cap.288). The allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of the public need and interest, the Government revokes the said titles.

SCHEDULE

NAIROBI CITY

WOODLEY ESTATE

L.R. No.209/13539/154

.....
.....

The above land was part of Woodley Estate

.....

L.R. No.11856

.....
.....
.....
.....

The above land was reserved for open space (Woodley Estate)

G.G. GACHIHI

Senior Registrar of Titles, Nairobi”

It is the Applicant's case that the decision of the 2nd Respondent to revoke its title through a gazette notice was unlawful as the 2nd Respondent had no power under the law to revoke title through a gazette notice. The Applicant contended that having been registered as owner of the suit property under the Registration of Titles Act, it had acquired an absolute and indefeasible title which could not be challenged except on grounds of fraud or misrepresentation which could be attributed to it. The Applicant claimed that only the High Court had authority to inquire into validity of titles issued under the Act and revocation could only be lawfully done on orders of the High Court.

The Applicant further asserted that the action of the 2nd Respondent of unilaterally revoking its title violated its constitutional right to acquire and own property and that as the decision had been made without giving the Applicant an opportunity to state how it had acquired the said title, the 2nd Respondent's action contravened the rules of natural justice.

In opposition to the Applicant's application, the Respondents through state counsel Mr. Moses Kipkogei filed grounds of opposition on 4th October 2011. The gist of the Respondents opposition to the application is that the application lacks merit as under Section 60 of the Registration of Titles Act (the Act), the Registrar (2nd Respondent) is repositied with the power to cancel irregularly issued titles and that the Applicant's title had been irregularly acquired .

It is important to note that as stated earlier, the Respondents did not file a replying affidavit in this case and therefore no evidence was availed to the court to substantiate the Respondent's claim that the Applicant's title had been irregularly acquired or that the suit property had been set aside for public purposes (open space for Woodley Estate) prior to its acquisition by the Applicant.

In compliance with orders issued by this court, the parties herein filed written submissions which they highlighted orally in court on 27th December 2012.

Having considered the pleadings and rival submissions made by the parties as well as all the authorities cited, I find that four main issues emerge for determination by this court. They are the following:

- 1) Whether the 2nd Respondent had jurisdiction or authority to revoke title to land through a gazette notice.
- 2) Whether the 2nd Respondent's decision violated the Applicant's constitutional right to acquire and own property in Kenya.
- 3) Whether the impugned decision was made in violation of the rules of natural justice.
- 4) Whether the Applicant is entitled to the reliefs sought.

I wish to state from the outset that the decision challenged in these proceedings was made when the old regime of land laws was in force. Those laws have now been repealed by the Land Registration Act of 2011. However, any reference to the law in this judgment will be a reference to the Registration of Titles Act (RTA) since it was the law applicable when the impugned decision was made.

Starting with the first issue, the gist of the Applicant's submissions was that the 2nd Respondent has no power or authority under the law to revoke title to land once issued and that the Registrar's decision was *ultra vires* the Constitution of Kenya specifically Article 40(3) which protects the right of every person to acquire and own property in Kenya. The Applicant also submitted that the Registrar's decision violated the principle of sanctity of title enshrined in Section 23(1) of the Act.

The Respondents on their part submitted that the 2nd Respondent had power and authority under Section 60 (1) of the Act to cancel or revoke title to illegally acquired land or where he was satisfied that the title had been acquired through fraud. The Respondent also submitted that the constitutional protection of the right to acquire and own property did not extend to land which was unlawfully or illegally acquired and that since the Applicant had unlawfully acquired the suit property, the 2nd Respondent was legally mandated to revoke its title.

This court has severally expressed its view on the issue of revocation of titles most recently in the case of **Republic -Vs- Commissioner of Lands and the Registrar of Titles Exparte Emrose Academy, JR. Misc. App. No.87 of 2011**. In that case the court having considered several other authorities on the same issue for example the case of **Kuria Greens Limited -Vs- Registrar of Titles & Another [2011] eKLR, Kongowea Market Estate Ltd. -Vs- Registrar of Titles [2011] eKLR, Sound Equipment -Vs- Registrar of Titles & Another [2011] eKLR** among others adopted the decision of Musinga J in the Kuria Greens Ltd case (supra) where he held as follows:

“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”.

As I stated in the case of **Republic -Vs- Commissioner of Lands and Registrar of Titles, Exparte Emrose Academy Ltd (Supra)**, the Registrar of Titles does not have any legal mandate or power to revoke title to registered land except through the involvement of the title holder or in compliance with a court order issued under Section 61 of the Act.

I have scrutinized the provisions of Section 60(1) and Section 60(2) of the Act and I take the position that neither of these sections of the law gives the Registrar of Titles legal authority to revoke title to land through a gazette notice even when he has reason to believe that the title in question had been fraudulently or unlawfully obtained.

Section 60(1) states as follows:

“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”.

Section 60(2) continues to state :

“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”.

Section 60(1) and 60(2) read together shows clearly that the only power the Registrar can lawfully exercise is that of summoning a title holder to deliver the title, grant or any instrument for purposes of correction if he is satisfied that the title, grant or other instrument had been issued in error or was fraudulently and wrongfully obtained or retained.

If the person summoned does not comply with the summons, the Registrar is given an option to apply to the court for the court to issue summons for the title holder to appear before it and show cause why the title, grant or instrument should not be surrendered for correction.

Clearly Section 60 (1) does not give the Registrar any power to unilaterally revoke title through a gazette notice.

It is therefore my finding that in this case, the 2nd Respondent acted *ultra vires* Section 60(1) and 61 of the Act when he revoked the Applicant's title through a gazette notice. The 2nd Respondent's decision was therefore unlawful and bad in law having been taken without jurisdiction.

Secondly, the impugned decision was also illegal as it violated the Applicant's right to property which is guaranteed under Article 40 of the Constitution of Kenya 2010. The 2nd Respondent's decision amounted to arbitrary deprivation of the Applicant's proprietary interests in the suit property or compulsory acquisition of land without adequate compensation by the State.

I have considered the Respondent's submissions with regard to the application of Article 40(6) of the Constitution which removes constitutional protection of the right to property which had been unlawfully acquired. In this case, the State has not offered any evidence to prove that the suit property was either unlawfully or illegally acquired by the Applicant. Even if such evidence had been availed, I find that it would not have made any difference to the Applicant's case given that power to revoke title to land is only vested in the High Court of Kenya or any other competent court and not in the Registrar of Titles.

In any event, for Section 40 (6) of the Constitution to apply, there must be a finding that the property in question had been unlawfully acquired and in my view, this finding can only be made through an established legal process which can only be provided by a court of law. The making of such a finding

cannot be left to the whims or subjective opinion of either the 1st or 2nd Respondent.

It is therefore my finding and decision that the 2nd Respondent's decision to revoke the Applicant's title through a gazette notice was not only *ultra vires* his powers under the Registration of Titles Act but was also unconstitutional. It was also a decision made in violation of the cardinal principles of the rules of natural justice given that it is not disputed that the Applicant was not given any notice or an opportunity to state its case regarding how it had acquired the suit property before the gazette notice revoking its title was published. This contravened the rule of natural justice that no man should be condemned unheard.

It is also my view that the 2nd Respondent's decision violated the Applicant's right to fair administrative action which is enshrined in Article 47(1) of the Constitution of Kenya.

In view of the foregoing, I have no doubt in my mind that the 2nd Respondent's decision was illegal and unconstitutional and is a good candidate for quashing by orders of Certiorari as sought in Prayer 1. I consequently issue an order of **Certiorari** in terms of Prayer 1.

In Prayer 2, the Applicant had sought an order of mandamus compelling the 2nd Respondent to issue a fresh gazette notice revoking Gazette Notice No.15580 of 26th November 2010 in respect of the suit property. Judicial Review orders are discretionary in nature and even when they are deserved, the court may nevertheless refuse to grant them if in its opinion they are not efficacious having regard to the circumstances of the case.

In this case, I find that no purpose will be served by an order of mandamus compelling the 2nd Respondent to issue a fresh gazette notice revoking the impugned notice. The order of Certiorari issued in terms of Prayer 1 will have the effect of revoking the impugned notice and restoring the Applicant's proprietary rights in the suit property. An order of Mandamus as sought if issued would in my humble view be superfluous.

I therefore decline to exercise my discretion in granting the order of Mandamus as sought in Prayer 2.

With regard to the Prayer for an order of Prohibition in terms set out in Prayer 3, I find that the prayer is drafted in very general terms and considering the Respondent's allegations that the suit property had been set apart for public purposes but was unlawfully or irregularly acquired by the Applicant, it is my view that granting such an order will not be in the wider interest of justice since it may inhibit any legal process the Respondents may want to institute in future in a bid to reclaim property which is suspected to have been unlawfully acquired.

I consequently decline to exercise my discretion in granting an order of prohibition as sought in Prayer 3.

In the end, the application dated 23rd February 2011 partially succeeds and it is hereby allowed in terms of Prayer I only.

The Applicant is awarded costs of the application which will be borne by the Respondents.

Dated, Signed and Delivered by me at Nairobi this 25th day of January 2013.

C. W. GITHUA
JUDGE

In the presence of:

Kazungu Court Clerk

Mr. Nderitu for Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent