



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 7 OF 2012

IN THE MATTER OF PETITION UNDER ARTICLES 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF THE PETITIONERS UNDER ARTICLES 19, 20, 23, 24, 27, 49, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF PROVISIONS OF SECTIONS 20, 23, 60, 62 AND 64 REGISTRATION OF TITLES ACT, CAP. 281 LAWS OF KENYA

AND

IN THE MATTER OF THE ACTIONS OF THE REGISTRAR OF TITLES IN ARBITRARILY REVOKING TITLE OF ADAN ABDIRAHMAN HASSAN AND MOHAMED MAALIM NOOR TO PROPERTY TITLE NO. CR.28017 LR NO. PORTION NO. 10400 MALINDI MUNICIPALITY WITHOUT DUE PROCESS

BETWEEN

1. ADAN ABDIRAHANI HASSAN

2. ABDISALAN MOHAMED MAALIM AND

3. IBRAHIM KHALIL MOHAMED &

ADMINISTRATOR OF THE ESTATE OF MOHAMED

MAALIM NOOR (DECEASED) T/A

MOHAMED NOOR ENTERPRISES

AND

1. THE REGISTRAR OF TITLES,

MINISTRY OF LANDS

2. COMMISSIONER OF LANDS

3. HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGEMENT

Introduction

1. This is one of those cases in which the Registrar of Titles, Mombasa, cancelled the title to the Petitioners' parcel of land Portion number 10400 Malindi. The cancellation was done *vide* Gazette Notice No. 15571 dated 26th November 2010. The Petitioners' contention is that the decision and actions of the Respondents to revoke their title to property CR. No. 28017 LR Portion 10400 was discriminatory and contravened the Petitioners' fundamental constitutional freedoms and rights to property and the said actions by the Respondents denied the Petitioners fair administrative practices as guaranteed by the Constitution of Kenya.

2. The Petitioners were represented by the firm of F.N. Wamalwa & Co. Advocates. Mr. Oscar M. Eredi, Principal Litigation Counsel filed a Notice of Appointment on behalf of the three Respondents but did not file any response to the Petition.

Petitioners' case:

3. The facts relating to the dispute and the Petitioners' case are set out in the Petition dated 14th February 2012 and filed in this court on 16th February 2012. The said Petition is supported by the Verifying Affidavit sworn by Adan Abdirahman Hassan on 14th February 2012 and the Supplementary Affidavit sworn on 15th March 2012.

4. The main depositions of the Petitioners are that by a letter of allotment dated 6th September 1995, the 1st Petitioner and the late Mohamed Maalim Noor were allocated a parcel of land situated in Malindi after duly applying for the same. Consequently, a letter of allotment was issued which required that the Petitioners make a payment of kshs. 370,000/= being the Stand Premium, amongst other charges. The Petitioners paid to the Commissioner of Lands the said Kshs. 370,000/= and were issued with an official receipt.

5. After the payment of Kshs. 370,000, the Petitioners were issued with a Grant of Title Number CR.. 28017 also known as Land Reference Number Portion No. 10400 situate in Malindi Municipality for a term of 99 years with effect from 1.09.1995.

6. The Petitioners aver that the said parcel of land was allocated to them with vacant possession for the development of a hotel and was subject to the special conditions which required the Petitioners to pay rates, taxes and outgoings that would be imposed upon the land by the Government or Local authority. The Petitioners have deponed that they faithfully and promptly paid to the Government and the Local Authority the requisite charges or levies as evidenced from the receipts that are annexed on the Verifying Affidavit.

7. The Petitioners further aver that they have been up to date with the special conditions contained in the Grant of the Title and they are not aware of any breach of the special conditions entitling the Respondents to forfeit their title; that they have not been served with any notice by the Respondents claiming forfeiture of the Petitioners' title to the land. The Petitioners further averred that they are not aware of any proceedings in the High Court by the Respondents for forfeiture, revocation or cancellation of the title of land reference number 10400.

8. The Petitioners have deponed that their attention was drawn to Gazette Notice No. 15571 published in the Kenya Gazette issue of 26th November 2010 whereby the 1st Respondent revoked the title of the suit property on the grounds that, firstly, the property was required for public need, secondly that the suit property was reserved for public purpose under the provisions of the Constitution of Kenya, the Government Land Act and the Trust Land Act and lastly, that the allocation of the suit property to the Petitioners was illegal and unconstitutional. The Petitioners have annexed the Gazette Notice No. 15571 dated 26th November 2010.

9. According to the Petitioners, the said property is one of the several parcels of land which were sub-divided and alienated by the Government to the members of public and the Petitioners do not understand why their plot was singled out for the unspecified public purpose; that regardless of whether there is or there is no public need for the suit property, the Respondents do not have a license for expropriation of the Petitioners' land without compensation and in flagrant violation of the Petitioners' fundamental rights to own property; that the Petitioners were not given any notice of the intended action by the Respondents in relation to the Petitioners' ownership of the title to the suit property neither were they given any opportunity to make representations in defence of their title to the said parcel of land prior to the Respondents' decision to revoke their title; and lastly that the 1st and 2nd Respondents have no power or authority to revoke titles in flagrant violation of the Petitioners' constitutional rights to own property. Consequently, in the Petition dated 14th February 2012, the Petitioners prayed for the following orders to issue:

(a) A declaration that the decision of the Respondents revoking the Petitioners' title to property CR No. 28017 LR Portion No. 10400 were discriminatory and contravened the Petitioners freedoms and rights to title to property and denied the Petitioners' right to fair administrative practices.

(b) A writ of certiorari directed to the 1st and 2nd Respondents to remove into court the Register of Title and to quash or cancel any entry therein of the decision of the 1st and 2nd Respondents revoking or cancelling the Petitioners' names as owners of title CR NO. 28017 LR NO. 10400 Malindi Municipality.

(c) An order restraining the Respondents by themselves or by any servant or agent of them from howsoever preventing the Petitioners from accessing or entering upon or exiting from their property title No. CR No. 28017 Portion No. 10400 Malindi.

(d) An order for payment of damages for violation of the Petitioners fundamental constitutional rights.

(e). The Petitioners to be awarded the costs of the Petition.

10. The Attorney General, on behalf of the Respondents did not file any response to the Petition despite having been given an opportunity by the court to do so on 30th May, 2012, 23rd October 2012 and on 27th November 2012.

11. Mr. F. N. Wamalwa made oral submissions and also relied on the filed written submissions. In his submissions, counsel reproduced the contents of the Gazette Notice Number 15571 which was headed as a “**Notice of Revocation of Land Titles.**” According to counsel, the Petitioners’ Grant of title to L.R. No. Portion 10400 was issued after due process was followed and bears the signature of the 2nd Respondent and attested by the 1st Respondent. The Grant, according to counsel was issued under the Provisions of Registration of Titles Act and was accordingly subject to the provisions of section 20 of the said Act. According to the said section, all land registered under the Act is subject to the Act and cannot be dealt with in any manner except in accordance with the provisions of the Act. Any dealings in the land in any other manner shall be null and void and of no effect. Counsel also relied on the provisions of section 23 of the Registration of Titles Act which, in a nut shell, protects the rights of a proprietor by introducing the doctrine of indefeasibility of title.

12. According to counsel, the Gazette Notice which purported to revoke the Petitioners’ title makes vague reference of the allotment of the suit property to be offensive or in breach to the provisions of the Constitution. However, the section of the Constitution that was breached is not cited by the Respondents. The Respondents, according to counsel, have also not cited the provisions of the Government Land Act and the Trust Land Act that enabled the Respondents to revoke the title to the suit property.

13. Mr. Wamalwa further submitted that it is only one portion, amongst so many others that was revoked without stating in the Gazette Notice the reasons for the said revocation. Counsel stated that the Respondents having failed to state the reasons for the revocation of the title in the Gazette Notice should have filed a Replying Affidavit in response to the present Petition as required under the “**Gicheru**” Rules. Having failed to file any response, counsel submitted, the court should take as admitted all the facts in the Petition.

14. On the issue of the failure on the part of the Respondents to hear the Petitioners before they revoked the Petitioners’ title, counsel submitted that section 65 of the Registration of Titles Act, cap 281 creates a special jurisdiction which mandates the Registrar of Titles to summon witnesses, to hear them and make a determination. The Registrar is supposed to administer oath and take evidence and then communicate to the parties his decision. Had this provision been followed by the Respondents, counsel urged, it would have allowed the Petitioners to be heard before the revocation was done and thereafter, the Petitioners would still have an opportunity to challenge the decision of the Registrar in the High Court pursuant to the provisions of sections 62, 63 and 64 of the Registration of Titles Act (RTA), cap 281.

15. Counsel concluded his submissions by stating that section 75 of the former Constitution and section 23 of the RTA guarantees individuals’ rights to own land and where there is public need for the same, Section 75 of the repealed Constitution provided the mechanism of how that should be implemented. Having failed to follow the laid down procedures in acquiring the suit property, counsel submitted that the Respondents’ actions were arbitrary and in excess of their jurisdiction.

Analysis

16. The facts of the Petitioners’ case, in the absence of any response from the Respondents, are uncontroverted. The only issue, in my view, for consideration and determination by the court is whether the Petitioners’ right to property under Article 40 (and under Article 75 of the repealed Constitution) have been violated by the Respondents.

17. Article 40(3) of the Constitution and Article 75 of the repealed Constitution protects a person from deprivation of property by the state unless the deprivation is for a public purpose or in the public interest and is carried out in accordance with the Constitution and the relevant pieces of legislation.

18. However, the right to own property, and as is with most rights, is limited both under the old Constitutional dispensation and the new dispensation. Section 75(1) of the repealed Constitution provided for situations in which land may be compulsorily acquired and section 6 of the Land Acquisition Act, cap 295 provides for the procedure to be followed in land acquisition. Where land is compulsorily acquired under the provisions of section 75(1) of the repealed Constitution and section 6 of the Acquisition of Land Act, Cap 295, the notice of acquisition should specify the public purpose for which the land is being acquired for.

19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the Registration of Titles Act cap 281, a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the Government Land Act or any other Act of parliament would be *null* and *void ab initio*.

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected.

21. The Petitioners are challenging the process by which the suit property was revoked by the Respondents allegedly because the land had been reserved for public purpose. The Petitioners have annexed on the Verifying Affidavit the documents that they acquired from the Respondents from the time they applied for the allocation of the suit property to when the Grant was issued.

22. The documents annexed on the Verifying Affidavit include the letter of allotment dated 6th September 1995, the Part Development Plan duly approved, the official receipt evidencing the payment of the stand premium, the indent from the Director of Surveys and the Grant. The Respondents did not file any Affidavit or documents to show that the documents in support of the Petitioners’ case were obtained in an unlawful manner or by mistake or misrepresentation.

23. Indeed, it was the Respondents’ duty to place before the court evidence showing the public purpose that the suit property was reserved for

to warrant the revocation of the Petitioners title by the Respondents. In the absence of any response by the Respondents, the court cannot make a determination on whether the property was ever reserved for public purpose and consequently the title should be left to stand as it is.

24. There has been a long chain of authorities by the High Court which have stated that the Registrar of Titles or the Registrar of Lands, as the case may be, has no authority to cancel a title. My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in the Constitution and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.

25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is *null* and *void ab initio*. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a “title,” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.

26. This is the position that was taken by Justices J.G. Nyamu and R. Wendo in Miscellaneous Civil Application No. 1732 of 2004; **James Joram Nyaga & Another -Vs- The Hon. Attorney General** and two others where they held as follows:-

“The Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act or the Registration of Titles Act when acting contrary to the express constitutional provisions. The question of fraud under section 23 of the Registration of Titles Act does not therefore arise and there would be no need to prove it in this case..... The applicants have challenged the process by which the land was repossessed from them. From our findings above, the Applicants had no title to the land and the result is that the action of the Respondent was not a compulsory acquisition of that land. The land belonged to the public and the custodians were the Respondents. The notices issued by the Respondent were proper and sufficient time was given for verification for those who ought to have been in doubt of their titles.....Due process was followed in the repossession of the suit land.”

27. However, such an administrative action by the Commissioner of Lands or the Registrar of Titles has to recognise the rules of natural justice and abide by the provisions of Article 47 of the Constitution. Article 47 (2) of the Constitution states as follows:-

47 (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.”

28. In the case of Attorney General Vs. Ryath (1980) AC 718, Lord Diplock, at page 730 held as follows:

“It has long been settled, that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority.”

29. The right to a hearing has also been examined by David Foulkes in his book “*introduction to administrative Law.*” 4th Edition (Butterworths) at page 158, where it states as follows:

“In a number of cases, Lord Denning has suggested that whether or not a person is entitled to a hearing depends on whether or not he has some right, interest or legitimate expectation of which it would not be fair to deprive without hearing what he has to say.”

30. Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect to the suit property. No notice was given to the Petitioners either by way of a letter or otherwise informing them of the action that the Respondents intended to take vis a vis cancellation of the title to the suit property. The failure by the Respondents to inform and hear the Petitioners before the revocation of the title *vide* a Gazette Notice Number 1557 and the failure by the Respondents to inform the Petitioners the public purpose for which the suit property was reserved for thus necessitating the administrative action that was taken *vide* the Gazette Notice No. 1557 was an affront to the Petitioners right to a fair hearing. No such evidence was placed before the court and in the circumstances, I allow the Petitioners Petition in the following terms:

(a) The action of the Respondents in revoking the Petitioners title to property Title CR. No. 28017 L.R. No. Portion No. 10400 unilaterally were illegal and unconstitutional and violated the Petitioners fundamental right to title and fair administrative practices.

(b) A writ of certiorari directed to the 1st and 2nd Respondent do and is hereby issued to remove into this court the Registrar of Titles actions and to quash any entry therein of the decision of the 1st and 2nd Respondents revoking or cancelling or deleting the Petitioners' names as owners of title No. CR. No. 28017 L.R. No. 10400 Malindi Municipality.

(c) The Respondents are hereby restrained by themselves or by any servant or agent of them from howsoever preventing the Petitioners from accessing or entering upon or exiting from their property title No. CR No. 28017 Portion No. 10400 Malindi.

(d) This judgment does not inhibit or injunct the constitutional and legislative mandate of the National Land Commission or any other constitutionally mandated body to review the Grant or disposition herein with a view of establishing its propriety or legality.

(e) The Respondents to pay the costs of this Petition.

Dated and Delivered at Malindi this 15th day of March, 2013.

O. A. ANGOTE

JUDGE