



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 58 of 2010

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF: REGISTRATION OF TITLES ACT (CAP 281 OF THE LAWS OF
KENYA)**

**IN THE MATTER OF: LETTER OF REVOCATION OF PARCEL OF LAND REFERENCE
NUMBER 28279 GARISSA MUNICIPALITY DATED APRIL 13, 2010**

AND

**IN THE MATTER OF: A REGISTERED GRANT OF 99 YEARS DATED DECEMBER 15 2010
BETWEEN MUNICIPAL COUNCIL OF**

GARISSA AND MOHAMED MAHAT KUNO OVER LR 28279 (IR NO. 6290, GARISSA)

THE REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF LANDS.....RESPONDENT

MOHAMED MAHAT KUNO.....EX PARTE APPLICANT

JUDGEMENT

By his Motion on Notice dated 3rd July 2010, the *ex parte* applicant, **Mohamed Mahat Kuno**, herein seeks the following orders:

- 1. That an order of Certiorari to issue to remove into the High Court and quash the letter ref: 271876/8 dated April 13,2010, by the Commissioner of lands seeking to cancel/revoke a registered instrument of grant being L.R. No. 28279 Garissa, Grant No. I.R.N 6290, in favour of MOHAMED MAHAT KUNO.**
- 2. That an order of certiorari to issue to remove into the High Court and quash the decision of the commissioner of lands to call for the cancellation/revoking of the instrument of Grant in L.R No. 28279 Garissa, Grant No. I.R.N 6290, in favour of MOHAMED MAHAT KUNO.**
- 3. That an order of prohibition to issue prohibiting the Commissioner of Lands by himself, or anyone authorized by him from cancellation of instrument of Grant/Title in L.R. No. 28279 Garissa, Grant No. I.R.N 6290 registered on January 13, 2010 in favour of Mohamed Mahat Kuno.**
- 4. That the costs of this application be provided for.**

On 8th December 2010 consent order was recorded in this filed on the following terms:

“By consent leave be and is hereby granted to the ex parte applicants to file and serve their submissions and lists of authorities within the next 30 days. That the respondents do respond thereto and serve within 2 days of service. That this file be used as a test case and that the decision that will be arrived at be binding in JR application nos. 59/2010, 60/2010 and 61/2010”

The Motion is based upon the grounds and matters set out in the Statutory Statement and the applicant’s verifying affidavit filed in Court on 20th July, 2010.

According to the *ex parte* applicant, it is the registered proprietor of Land Reference Number 28279, Garissa, situated in Garissa Township, suit premises, pursuant to a Grant issued to the applicant under the Registration of Titles Act (Cap 28 Laws of Kenya) on January, 2010 (the Suit property) following the approval of its Application for Allocation of Land for Proposed Real Estate Development Projects in Garissa Town dated August 2008 after meeting all the approval requirements. Subsequently the applicant was granted authority/consent/ no objection to the intended development by all the authorities including Ministry of Lands, Local Administration, Ministry of Planning and the Local Authority. Despite the invitation to the public through Kenya Gazette to object to the intended development, no such objection was received from the members of the public and vide a letter dated August 24, 2009, from the Commissioner of Lands, the applicant was allotted the suit parcel of land vide a Letter of Allotment ref 111303/XIV/9 for the proposed site for Low Density Housing Estate-Garissa and he was issued with a Grant for Land Reference Number 28279, registered as IRN No. 6290 on January 13, 2010 under Cap 281. However the suit parcel has been invaded by a Member of Parliament interested therein but who failed to get the same allotted to him and has used his powers to harass and frustrate the applicant and bar the applicant from enjoying quiet possession thereof.

Vide a letter dated April 13, 2010, the Commissioner of Lands sought to revoke the title to the said land on the ground that the process of acquisition thereof and its documentation contravened the provisions of the Local Government Act Cap 296 Laws of Kenya and the Trust Land Act Cap 288 yet the said Local Authority has not objected to the said allotment and grant and has in fact endorsed the same and the development to ensue therefrom. It is the applicant’s case that:

- (a) THAT the Commissioner of Lands acted in excess of its jurisdiction as provided by Registration of Titles Act in issuing a notice/letter seeking to cancel a Registered instrument of Grant.**
- (b) THAT the Commissioner of Lands is acting out of purview of the Registration of Titles Act and**

the Local Government Act in seeking to determine the process acquisition and documentation under claim by the Local Government on the authenticity of the Registered Grant in LR No. 28279 Garissa, Grant No. IR N 6290 in favour of Mohamed Mahat Kuno.

(c) THAT the Office of the Commissioner of Lands, the Municipal Council of Garissa and/or the Office of the Deputy Prime Minister and the Minister for Local Government are functus officio in seeking to revoke and/or cancel the instrument of Grant in favour of the Ex-parte Applicant.

(d) THAT the Office of the Commissioner of Lands, the Municipal Council of Garissa and the Office of the Deputy Prime Minister and the Minister for Local Government can only challenge the issue of the process of acquisition and documentation and authenticity of the registered instrument of Grant through the Court.

(e) THAT it follows that the Commissioner of Land's decision to issue notice of revocation/cancellation citing grounds that the process of acquisition and documentation contravened the Provisions of the Local Government Act Cap 296 and the Trust Land Act Cap 28, in determining authenticity of the instrument of Grant and intention to cancel the said instrument are nullities in line with the principle of *ex nihilo nihil fit* (out of nothing comes nothing).

(f) THAT the competent authority to revoke and/or cancel subsisting instrument of title is this Honourable Court.

(g) THAT the Commissioner of Lands has a duty to maintain the integrity of the Registrar and shall not register any decision that is a nullity.

Notwithstanding the foregoing, it is deposed that the Ministry of Lands, through the Director of Physical Planning have acknowledged the part Development Plan No. 32/2009/03 for the proposed site for Low Density Housing Estate Garissa in a Notice of Approval of Development Plans published in the Daily Nation of 23rd June 2010.

In opposition to the application, the Respondent on 2nd October 2010 filed the following grounds of opposition:

- 1. That the suit is premised on misconception of the law and powers of the respondent and his agents.**
- 2. That the respondent and his agents have authority under section 60 of the Registration of Titles Act where it appears that the grant was wrongly or fraudulently granted to summon the person to whom the grant is issued to deliver it up for the purpose of being corrected.**
- 3. That the Respondent has legal authority and acted in good faith in calling for the grant from the Ex parte Applicant.**
- 4. That the actions of the Respondent having been taken within the confines of the law the suit has no basis.**
- 5. The reasons for the calling of the grant were given to the Ex parte applicant.**
- 6. The actions of the respondent were in public interest.**
- 7. That in the circumstances the suit lacks merit and should be dismissed with costs.**

The application was prosecuted by way of written submissions. On behalf of the ex parte applicant it was submitted, while reiterating the contents of the supporting affidavit, that Section 75 of the former Constitution provided for the protection from deprivation of property while Article 40 of the correct Constitution provides for the express rights of the ex parte applicant to own property and accords

protection from deprivation of that property which must be jealously protected by the Constitution. Section 23(1) of the Registration of Titles Act (Cap 281), the governing Act in respect of the suit title, accords an absolute and indefeasible title to the holder of a certificate of Title issued by the Registrar. The ex parte applicant also relies on **Dr. N K Arap Ngok vs. Justice Moijo Ole Keiwua & 5 Others Nairobi Civil Application No. 60 of 1997** and **Nairobi Permanent Markets Society & Others vs. Salima Enterprise & Others & Others [1995-1998] 1 EA 232**. It is therefore submitted that the title of the applicant is sacrosanct and indefeasible.

It is therefore submitted that based on **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji & 9 Others Nairobi Civil Appeal No. 266 of 1996** that the decision of the Respondent made on 13th April, 2010, should be brought forth to this Court and quashed by an order of certiorari and that the prohibition sought ought to issue.

Since the respondent has only filed grounds of opposition, it is submitted that the pertinent facts set out in the supporting affidavit have not been controverted by the Respondent.

According to the ex parte applicant section 60 of the Registration of Tiles Act relied upon by the Respondent attends to fraudulent entries or retention of document in which case the Registrar is accorded power to summon the person to whom the grant, certificate or instrument has been so issued for the purposes of it being corrected and in the vent that the person summoned fails to attend the summons the Registrar may apply to the court to issue summons why the grant, certificate, or other instrument should not be delivered up to be corrected and failure to show cause the court may issue a warrant authorising and directed the person in default to be apprehended and brought before court for examination. The said section, it is submitted does not donate the powers to the registrar to revoke or cancel title. It is therefore submitted based on ***Sir William Wade and Forsyth: Administrative Law, 7th Edn. Page 42 at 43*** that the action was carried out in excess of jurisdiction, was illegal, unreasonable, was undertaken in frustration of legislative purpose, went against legitimate expectation of the applicant and was in breach of the rules of natural justice hence the application ought to be allowed. The ex parte applicant relies on **Olinda De Souza Figueiredo vs. Kassamali Nanji [1962] EA 756; Nyongesa & Others vs. Egerton University College [1990] KLR 692; Republic vs. Commissioner of Co-operatives Ex parte Kirinyaga Tea Growers Co-operative Sacco Ltd [1999] 1 EA 245** and **Halsbury's Laws of England, 3rd Edn. Vol. II para 122 at 65.**

On the part of the respondent, it is submitted that the letter by the Commissioner of Lands is not a revocation of the grant but simply a call for the return of the grants for cancellation. It is contended that under the Registration of Titles Act, the Commissioner of Lands through the Registrar can call for a grant to be returned for purpose of correction which includes amendment or cancellation under section 60 of the said Act. Relying on the definition of "correction" by the Concise Oxford Dictionary and Black's Law Dictionary, it is submitted that the Commissioner was legally within his powers to call for the delivery of the grant for the purposes of cancellation and the Court has no basis for interfering with the statutory mandate of the respondent. In the event that the ex parte applicant refuses to deliver up the grant section 61 of the Act will become operational with the result that the court will be invited to issue orders cancelling the grant in which event the respondent will be acting within the law in calling for the delivery of the grant for purposes of correction of wrong by way of cancellation. The Respondent having complied with section 60 of the Act on process of cancellation or any other amendment to the grant the suit has no merit and the respondent relies on **Commissioner of Lands and Kunste Ltd Civil Appeal No. 234 of 1995** and **Chief Constable of North Wales Police vs. Evans [1982] WLR 1155.**

Having considered the foregoing it is clear that the factual basis of the ex parte applicant's case is not challenged. The determination of the court will largely depend on the interpretation of the effect, tenure, intent and meaning of the letter dated 13th April 2010 from the Respondent to the Applicant. Section 23(1) of the Repealed Registration of Titles Act provide as follows:

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances,

easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

Before dealing with the issue it is important to recap the historical underpinning of section 23 of the Registration of Titles Act. It is trite law that the Registration of Titles Act is based on the Torrens system of registration and its prime principle is the sanctity of the register. See **Popatlal vs. Visandjee [1960] EA 361, 365; [1959] EA 372, 376 (PC). Impeachment of Title Page 241; Souza Figueiredo vs. Moorings Hotel [1960] EA 926; Cross vs. Great Insurance Company Limited of India [1966] EA 94.** The title of a person appearing on the register as proprietor is, as against third parties, conclusive of that fact and a charge created by such a proprietor is valid notwithstanding a defect in title. Indeed, were it otherwise the principle object of the Registration of Titles Act, which is founded on the Torrens system of land registration, would be defeated. See **Govindji Popatlal vs. Nathoo Visandji [1962] EA 372 at 376** and **Dinshaw Byramjee & Sons Ltd vs. The Attorney General of Kenya [1966] EA 198.**

Back to the letter dated 13th April 2010. In that letter the Respondent stated as follows:

The Government has hereby revoked the allocation and title to the above plot as the process and documentation contravened the provisions of the Local Government Act Cap 296 and Trust Land Act Cap 288.

The Office of the Deputy Prime Minister and the Minister for Local Government was not consulted in line with the provisions of the Local Government Act Cap 296 and thus rendering the process invalid.

Accordingly arrange to return the Grant/Title for cancellation.

According to the above letter the Government had already made a decision to revoke the Title in respect of the suit parcel of land on the ground of the aforementioned purported irregularities. The only action pending was for the cancellation of the Grant/Title once the ex parte applicant surrendered the same. There was no issue of the ex parte applicant showing cause why the revocation should not be done.

Section 60 of the Registration of Titles Act states as follows:

(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.

The foregoing provision sets out the steps the Registrar is to take if he deems that there is 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 is obligated to 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. The summons ought to be very clear that the Registrar requires that the Grant, certificate or instrument be delivered for the purpose of being corrected. Therefore at that stage the issue of revocation of the tile does not arise. In default of honouring the summons the Registrar then moves to the next stage

which is to apply to the Court for the issuance of summons to issue to the person why the same cannot be delivered for correction. It is only in default of honouring the Court summons that the warrants are issued for the persons to be apprehended for examination.

Section 61 of the Act then provides as follows:

Upon the appearance before the court of any person summoned or brought by virtue of a warrant the court may examine that person on oath or affirmation, and may order him to deliver up the grant, certificate of title or other instrument, and, upon refusal or neglect to deliver it up pursuant to the order, may commit him to prison for any period not exceeding six months, unless the grant, certificate of title, or instrument is sooner delivered up; and in that case, or where the person has absconded so that a summons cannot be served upon him as hereinbefore directed, the court may direct the registrar to cancel or correct any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute and issue such certificate of title or other instrument, or make such entry, as the circumstances of the case may require.

These strict provisions clearly recognise that before a person is deprived of his title to property the due process which includes an opportunity to be heard must be followed. There is no power, however, conferred upon the Registrar or the Government before the due process is adhered to for the revocation of a person's title.

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.

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

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. To do so Article 24(1) provides:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

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.”

In my view the decision of the Registrar or the Government was clearly tainted with irrationality, illegality and procedural impropriety. The said decision was clearly *ultra vires* the powers conferred by section 60 of the said Act. The grounds on which the said decision were based being *inter alia* that the Local Government was not consulted in light of the uncontroverted averments that the blessing of the Local Government were sought and received were clearly unreasonable. The failure to comply with the clear provisions of section 60 with respect to adherence to the rules of natural justice clearly established the procedural impropriety of the decision making body.

Dealing with the provisions of section 23 aforesaid **Kimaru, J** in **Punda Milia Co-Operative Society vs. Savings & Loan (K) Limited Nairobi HCCC No. 273 of 2008** expressed himself as follows:

“Section 23 of the Registration of Titles Act requires the court to consider a certificate of title issued under that act as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements, restrictions and conditions contained therein. The said section prohibits the challenge to such certificate of title on any other ground than that of fraud or misrepresentation to which the registered owner is proved to be party.”

This is not to say that Registration under section 23 of the said Act or any other provision replacing the said provision but on similar terms cannot be challenged. It must also be remembered that under the provisions of Article 40(6) of the Constitution, the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. In arriving at that finding the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard and any purported action which does not comply with the law must be set aside based on the three “I’s” aforementioned.

It follows that the applicant's Motion on Notice dated 3rd July 2010 is merited and is unassailable. Accordingly the same is allowed with the result that:

- 1. An order of Certiorari is hereby issued to removing into the High Court and quashing the letter ref: 271876/8 dated April 13,2010, by the Commissioner of lands seeking to cancel/revoke a registered instrument of grant being L.R. No. 28279 Garissa, Grant No. I.R.N 6290, in favour of Mohamed Mahat Kuno.**
- 2. An order of Certiorari is hereby issued to removing into the High Court and quashing the decision of the commissioner of lands to call for the cancellation/revoking of the instrument of Grant in L.R No. 28279 Garissa, Grant No. I.R.N 6290, in favour of Mohamed Mahat Kuno.**
- 3. An order of prohibition is issued prohibiting the Commissioner of Lands by himself, or anyone authorized by him from cancellation of instrument of Grant/Title in L.R. No. 28279 Garissa, Grant No. I.R.N 6290 registered on January 13, 2010 in favour of Mohamed Mahat Kuno.**

I also award the costs of the Motion to the applicant.

Pursuant to the consent recorded herein on 8th December 2010, it follows that Judicial Review Application Nos. 59 of 2010, 60 of 2010 and 61 of 2010 are similarly allowed with costs to the ex parte applicants in the Motions therein.

Dated at Nairobi this 11th day of March 2013

G V ODUNGA
JUDGE

Delivered in the presence of:

Mr Mureithi for the Applicant

Ms Chilaka for Mr Masaka for the Respondent