



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC APPLICATION NO. 30 OF 2010

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI TO MOVE INTO THIS HONOURABLE COURT AND QUASH THE DECISION OF DISTRICT LAND REGISTRAR THIKA WHICH WAS GAZETTED ON 1ST APRIL 2010 REVOKING APPLICANT'S TITLE THIKA MUNICIPALITY/BLOCK 10/440

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR.....RESPONDENT

EX PARTE STANLEY KIPTANUI ROP

JUDGEMENT

1. By a Notice of Motion dated 20th May 2010 filed on 2nd June, 2010, the *ex parte* applicant herein, **Stanley Kiptanui Rop**, seeks the following orders:
 1. **That an order of certiorari do issue to move this Honourable Court and quash the decision of District Land Registrar Thika which was Gazetted on 1st April 2010 revoking the applicant's title Thika Municipality/Block 10/440.**
 2. **That costs be borne by the respondent.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 19th May, 2010 and a verifying affidavit sworn on 18th May 2010 by **Stanley Kiptanui Rop**. According to the applicant, on 28th November 1995, he was issued with an allotment letter by the Commissioner of Lands and thereafter a certificate of lease under the **Registered Land Act** (Cap 300) on 29th August 2000, after proper application and paying the value of the said property being Thika Municipality/Block 10/440 for Kshs 353,017/=. However, on 19th March 2010 and 1st April 2010, the District Land Registrar without according the applicant an opportunity to be heard, cancelled the applicant's title

- to the said property vide Kenya Gazette dated 19th March 2010 and 1st April 2010.
3. According to the applicant, he was never given an opportunity to explain his case before cancellation and or revocation of his said title and therefore the rules of natural justice were never followed.

RESPONDENT'S CASE

4. In opposition to the application, the Respondent on 11th December 2012 filed the following grounds of opposition:
 1. **That the application as drawn and taken out is incurably defective for non-compliance with the mandatory provisions of Order 53 of the Civil Procedure Rules and Law Reform Act Cap 26 Laws of Kenya.**
 2. **That the actions of the Respondent were within the law and in line with constitutional mandate to protection and safeguard public land and public interest.**
 3. **That issues in question is that of ownership and the best remedy lies in the private law.**

EX PARTE APPLICANT'S SUBMISSIONS

5. While reiterating the contents of the Motion, the Statement and the Affidavit, it is submitted on behalf of the ex parte applicant that the decision of the District Registrar was illegal because there was no court (sic) to back his or her decision as per section 143 of the **Registered Land Act**.
6. Despite the respondent having been served and several adjournments granted to enable the respondent to respond, it is submitted that no replying affidavit has been filed to contradict the averments raised by the applicant.

RESPONDENT'S SUBMISSIONS

7. On behalf of the Respondent, it is submitted that the Respondent having filed grounds of opposition that the action of the Respondent was in public interest and protection of public property, judicial review proceedings is not the best remedy but an ordinary civil court where the alleged ownership document and procedure leading to the issuance of the document will be interrogated. According to the Respondent, the issue of public interest is paramount and supersedes that of private interest. The suit land having been reserved for public purpose, public interest demands that any allocation of such land to private individual is null and void.
8. It is submitted that public land as defined in the Constitution of Kenya requires to be protected. The suit land having been public land within the definition under Article 61(b) of the Constitution any disposition or allocation must comply with Article 61(4) of the Constitution failure to which renders transaction thereof unconstitutional and hence null and void to that extent. In support of his submissions, the ex parte applicant relied on **Kenya Allied Guards Allied Workers Union vs. Security Services & 38 Others High Court Miscellaneous Application No. 1159 of 2003.**
9. Since the issue before court is of ownership of land between the government and the ex parte applicant, the issue cannot be subject of judicial review proceedings, the best forum is an ordinary civil court whether evidence both oral and documentary shall be tested and interrogated and it cannot be determined by way of affidavits as in the case herein. Since the title allegedly lawfully issued to the applicant has been put to doubt and its validity and authenticity was and is under question, it is submitted that it cannot be protected under the doctrine of sanctity of title. It will require to be interrogated and hence the best forum lies in the ordinary civil courts. In the ex parte applicant's view, the Court should safeguard and protect public interest and public land on and above the alleged undue process.

DETERMINATION

10. I associate myself with the decision in **Kenya Allied Guards Allied Workers Union vs. Security Services & 38 Others** (supra) that:

“public interest must be engine of the millennium and it must where relevant occupy the centre stage in the courts...should the land acquisition act give shelter to the land grabbers of public land or are courts going to invent equally strong public interest vehicles to counter this, should individual land rights supersede the communal land, catchments and forests? How far are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indivisibility of title? Are courts going to stay away and refuse to rise to the greater public good call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the constitution. I venture to suggest that such titles ought to be nullified on this ground and thrown to the dustbins”.

11.However, in making a decision either way, the Courts must uphold the provisions of the Constitution and the laws of the land. Article 47(1) of the Constitution provides as follows:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

12.Further under Article 10 of the Constitution, the Court must be guided by national values and principles of governance one of which is the rule of law. 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.

13.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.

14.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.

15.It is not disputed that the legal regime under which the titles to the disputed parcel of land fell at the time of the impugned decision was the **Registered Land Act**, Cap 300 Laws of Kenya.

16.In this case it is not in dispute that the vide Gazette Notice of 1st April 2010 the District Land Registrar purported to revoke the applicant’s title Thika Municipality/Block 10/440. Section 142(1) of the **Registered Land Act** provided as follows:

The Registrar may rectify the register or any instrument presented for registration in the following cases –

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all persons interested;

(c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

17. It is clear that the grounds upon which the said Land Registrar purported to revoke the ex parte applicant's title were not the one mentioned herein above.

18. Section 143 of the said Act on the other hand provides as follows:

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

19. It is clear from the foregoing provisions that only the Court can rectify the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

20. 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.

21. The *ex parte* applicants submitted that the rules of natural justice were not adhered to when their title was revoked and relied on the provisions of the Constitution which grant every person right to a fair administrative action and fair hearing respectively. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

22. In **Republic vs. Land Registrar Kwale Land Registry & Others Ex Parte Mutuku Ngei Mombasa HCMCA No. 110 of 2006** it was held:

“The Land Registrar has no powers to cancel a title deed, which has been issued whether lawfully or otherwise. A reading of section 142 of the Registered Lands Act clearly shows that the powers of the Registrar is restricted and the power to cancel such questionable titles is expressly given to the court under section 143 of the Act.

The moment a Land Registrar has performed his duty by issuing a title deed he become functus officio and hence he cannot undo the same by cancelling and the remedy to such a person is to seek for redress in the civil process or other lawful means to cancel the title. The remedy of mandamus in such a case is not available.”

23. Whereas it is true that under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired, the said Article however employs the use of the words **“found to have been unlawfully acquired”**. Therefore there must be a finding that the property in question was unlawfully acquired and in my view this finding can only be made by the Court and pursuant to the rule of law which encompasses the need to comply with the rules of natural justice.
24. It has however, been contended on behalf of the Respondent that the issues herein should not be ventilated in a judicial review but should be the subject of a civil suit. I am cognisant of the position stated in ***Halsbury’s Laws of England 4th Edition Vol. II page 805 paragraph 1508***, that the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. See **Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203.**
25. In the present case, however, apart from the grounds of opposition and submissions which have no evidential value there is no evidence before the Court that the ex parte applicant’s title to the suit property was unlawfully obtained since the Respondents opted not to file an affidavit disclosing their factual position. The said submissions themselves are, with due respect, so sketchy that they cannot reasonably be the basis upon which the Court can find that there are serious issues to be determined by way of a suit. I must, however, stress that judicial review is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

26. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration, for example, does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge**

Nairobi Remand and Allocation Prison [2007] 1 EA 354.

27. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.
28. Whereas the respondents contend that the suit property was acquired illegally, as I have stated hereinabove they did not file any affidavit to dispute the factual allegations made by the ex parte applicant. It follows that the issues of fact raised in the verifying affidavit are largely uncontroverted and in the absence of any affidavit to the contrary the Court would have no basis for finding that the said factual averments are disputed. This is not to say that Registration under section 27 and 28 of the **Registered Land Act** or any other provision replacing the said provision but on similar terms cannot be challenged. It must 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. Therefore the only issue that the Court would be entitled to determine in this application is whether based on the uncontroverted facts before the Court the decision made by the Respondent should be allowed to stand and not whether or not the applicant's title is lawful.
29. In my view the decision of the Registrar was clearly tainted with irrationality, illegality and procedural impropriety. The said decision was clearly ultra vires the powers conferred by section 27 and 28 of the said Act. Since there were no grounds disclosed by the Respondents for taking such an action the said decision was clearly unreasonable. The failure to comply with the rules of natural justice clearly established the procedural impropriety of the decision making body.

ORDER

30. Consequently, the order that commends itself to me is that an order of certiorari is hereby issued calling into this Court the decision of District Land Registrar Thika which was Gazetted on 1st April 2010 revoking the applicant's title Thika Municipality/Block 10/440 for the purposes of being quashed and the same is hereby quashed.
31. The applicants will have the costs of this application.

Dated at Nairobi this 29th day of April 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Achoki for the Applicant and Miss Kenyani for Miss Masaka for the Respondent