REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JR.NO.44 OF 2012

WALTER EDWIN OMINDE OGUTU.....PLAINTIFF

VERSUS

THE DISTRICT LAND REGISTRAR

THE MINISTER FOR LAND & SETTLEMENT

THE ATTORNEY GENERAL.....DEFENDANT

J U D G M E N T

The applicant in this suit – **WALTER EDWIN OMINDE OGUTU –** filed this application for Judicial Review on 21/9/2012. The application is dated 14/9/2012 and is brought by way of a motion on notice. It is brought under Order 53 Rules 3,5 and 7 of Civil Procedure Rules and Sections 8 and 9 of Law Reform ACT (Cap 26).

In essence, the following is sought:

1. That the Court grant an order of Judicial Review in the nature of **CERTIORARI** to remove to the Court and quash Gazette Notice Number 11484 published on 17/8/2012 touching on and/or concerning revocation of title in respect of **LR NO.EAST GEM/JINA/769** registered in the name of, and belonging to, the applicant, which notice was published without following due process and in contravention of article 40(3) of the Constitution, 2010.
2. That the Court grant an order of judicial review in the nature of **PROHIBITION** prohibiting the respondents jointly and severally from further publishing and/or gazetting notices, purporting to

revoke and/or cancel the applicants title in respect of **LR NO.EAST GEM/JINA/769** and/or interfering with applicants rights and/or interests over the suit land without due regard to the due process of law and in contravention of article 40(3) of the Constitution, 2010.

3. That the Court grant an order of Judicial review in the nature of **MANDAMUS** compelling and/or directing the 1st respondent to restore and/or reinstate the title instruments in favour of the applicant, in particular, the Land Registrar and the Green card, in respect of **L.R.NO.EAST GEM/JINA/769** showing the names of the applicant as the lawful owner thereof, subject to the due process of law.
4. Costs of the application be borne by the respondents and the interested party jointly and severally.
5. Such further or other orders as the Court may deem fit and expedient.

This application was done posthaste for leave to bring it was granted on 11/9/2012 and on 14/9/2012 the application had already been prepared with filing subsequently taking place on 21/9/2012.

The gravamen of the application is to be found in the statement of facts and verifying affidavit accompanying the application for leave filed on 7/9/2012 and dated 5/9/2012.

The applicant has spelt out grounds on which the instant application is brought on the face of the application. That is procedurally improper and superfluous. Order 53(4) (1) of Civil Procedure Rules and Section 9(1) (c) of Law Reform Act (Cap 26) envisage that only the grounds stated in the application for leave and the verifying affidavit accompanying it are to be relied on in the application filed after leave is granted. If the applicant wants to adduce further grounds, leave of Court is required and such leave appears not to have been sought in this case.

Be that as it may, this Court still deems the application sound having regard to provisions of article 159(d) of our new Constitution, 2010.

It is now necessary to state in concise form what the statement of facts and the verifying affidavit accompanying the application for leave contain. The narrative is partly historical, partly an articulation of applicable law, and in part also an averment of past and current facts.

The applicant applied to be allocated the suit land on 16/9/1976. The application was made to Siaya County Council, which was an entity created to take over from Kisumu County council in the area. Thereafter the process of alienating the suit land to him started culminating in issuance of title deed to him.

The applicant then went into possession of the suit land and commenced development which included, in partnership with others, construction of a hydro-electric power plant at Ndanu falls.

But it appears that along the way, the allocation of the suit land to the plaintiff was challenged. This was done vide **KISUMU HCC NO.243/2000,** which ended in plaintiff's favour.

In spite of this however, the 1st respondent – the **DISTRICT LAND REGISTRAR, SIAYA** – purported to issue a gazette notice No.11481 published on 17/8/2012 revoking and/or rescinding the title deed issued to the applicant. This, it was asserted, was done without any lawful cause and in absence of any investigation.

It was pointed out that the title deed sought to be impugned was regularly and validly executed by authorized officers of the government and none of these officers has been indicted or charged for any criminal offence.

Such officers included the Commissioner of lands, Chief land Registrar, the District land Registrar, Siaya, and the County Council of Siaya. The import of all this is that everything was done with the blessings, authority and/or mandate of the government.

The applicant averred that the relevant law at the time – Section 53 of Trust Land Act (Cap 288 Laws of Kenya) and Section 116 of the now repealed Constitution of Kenya – were complied with.

The 1st respondents move therefore to purport to revoke the applicants title is in violation of article 40(1) (2) and (3) of our new Constitution, 2010, and is also **ULTRA -VIRES** the provisions of Section 25 of the Land Registration Act No.3 of 2012. Further still, the applicant was not given a hearing.

The applicant availed various annextures to enrich and give succour to his application. It is worth noting them:

- WE001, which is a letter dated 16/9/1976 applying for allocation of the suit land.

- WE002 (a) (b) and (c) which are all documents from Lands office comprising of green cards, title deed and certificate of official search.

- WE003, comprising photographs of hydro-electric dam under construction.

- WEOO4, which is a letter showing the applicants partnership with others to develop the suit land.

- WE005, which are two letters dated 28/4/1999 and 8/6/2000 from Chief land Registrar confirming private ownership of the suit land by the applicant.

- WE006, which is a Court ruling in **KISUMU HCC NO.243/2000.**

- WE007, which is a copy of gazette Notice purporting to revoke the applicant's title.

The applicant availed two decided authorities to guide the Court; they are:

1. ***ISAAC GATHUNGU WANJOHI & Another***

VERSUS

THE ATTORNEY GENRAL and 6 others:

NAIROBI HCC PETITION NO.154/2011 (Unreported)

2. KURIA GREENS LIMITED VS THE REGISTRAR OF TITLES & ANOTHER.

NAIROBI HCC PETITION NO.107/2010 (Unreported)

I have assiduously read the two authorities and will come to them at a later stage.

In the meantime, it is necessary to look now at the responses made by various parties. The 1st respondent – **THE DISTRICT LAND REGISTRAR, SIAYA** – filed a replying affidavit. It was stated, inter alia, that the suit land was reserved for **KISUMU COUNTY COUNCIL** for purpose of cattle grazing in 1970; that **SIAYA COUNTY COUNCIL** then transferred the land to the applicant in 1976 despite the same being registered in the name of **KISUMU COUNTY COUNCIL;** that Siaya/Bondo District Land Registrar then issued a new gazette Notice in 1999 – Gazette Notice No.2542 – for issuance of title deed to the applicant; that following that gazette notice objections were raised by YALA **TOWN COUNCIL** and Ndanu falls Community; that Siaya County Council did not have the capacity to transfer the land as the same was reserved for Kisumu County Council; that the applicant submitted plans to Siaya County Council to build an hotel in 1976 but has never developed the land and his allegations of

building a hydro power station are not supported by any documents proving change of user; and finally, that the 1st respondents office received a letter from Chief Land Registrar's office directing expunging of the applicant's title and the letter itself was based on an internal memo from the minister for Lands to that effect.

It would appear that 1st respondents replying affidavit covered the other respondents – **MINISTER FOR LANDS & SETTLEMENT AND THE HON. ATTORNEY GENERAL** – for there is no other response in the Court file attributed to the other respondents.

The 1st interested party – **COUNTY COUNCIL OF SIAYA –** didn't file a response while the second interested party – **COUNTY COUNCIL OF KISUMU** filed its response through a **MR. BEN O. OPIYO.**

The essence of Ben Opiyo's response is that the suit land was still vested in the 2nd respondent when the 1st respondent purported to transfer it to the applicant.

BUT this response, which was by way of a lengthy replying affidavit followed by another supplementary affidavit, must be held to count for nothing in light of later developments that I will shortly mention. The application was heard by the Court on 11/3/2012.

Ogutu for the applicant said much that is already in the statement of facts and verifying affidavit that accompanied the application for leave.

Ogutu made reference to the various annextures availed by the applicant and reiterated the lawfulness of the whole process leading to the issuance of the title deed to the applicant. He then went on to observe that the respondents purported action of revoking the applicant's title deed lacked the necessary statutory and/or legal mandate under the now repealed Registered Land Act (Cap 300), or Land Registration Act No.3 of 2012, or land Act No.5 of 2012 or even under our new Constitution, 2010.

At the hearing, Aliongo from Attorney General's office represented all the respondents. She said, inter alia, that the suit land was initially trust land set aside for public use, specifically for Ndanu Community living in the area. The suit land was registered, she said, in the name of Kisumu county council on behalf of Ndanu Community. She argued that the process of giving the land to the applicant was questionable as the requisite consents were not obtained from Commissioner of Land and Kisumu County Council.

Aliongo also observed that that the applicant has not shown how the land converted from public user to private/Commercial user. She then pointed out that the suit land was initially under Kisumu County Council, then under Siaya County Council and ultimately under Yala Town Council.

Aliongo termed as lawful the revocation of the applicant's title and said that it was all within the lawful mandate of 2nd respondent to do so. And the 1st respondent, she pointed out, was merely acting on instructions of 2nd respondent while revoking the title.

Two decided authorities were availed by the applicants side in support of the case. The Respondent's side availed no decided authorities. I have already mentioned the authorities availed elsewhere. I mentioned that I would comment on the authorities at a later stage and that stage is now.

The first case, which I will call ***ISAAC GATHUNGU's*** case, involved, just like this one, a purported revocation of the two petitioners title Vide Gazette Notice No.9230 in the issue dated 29/7/2011 that had been done without following due process. The Court declared the purported revocation as null and void.

The second case, the ***KURIA GREEN's*** Case, was not very much different from the first. In the

case, the 1st respondent – ***REGISTRAR OF TITLES*** – had purported to revoke the petitioner's title vide gazette Notice No.15584 dated 26/11/2010. The petitioner went to court challenging that move. No due process had been followed. The Court declared the 1st respondent's action as unconstitutional, null and void. The two cases are applicable here.

These two cases were not breaking new ground. They merely followed a corpus of a growing genre of case law – See for instance ***R V KISUMU DISTRICT LANDS OFFICER & ANOTHER; MISC App. No.80 of 2010 (eKLR)*** – expressing disapproval of executives interference with title to private land without following due process.

I mentioned earlier that I would give reason why the 2nd interested party's written reply to the application herein must be held to count for nothing.

When this matter came for hearing on 11/3/2013, M/s Omondi appeared for the interested parties. She intimated that she was not opposing the application because it was mainly directed at the respondents. She however went further and said they had filed written responses and asked the Court to rely on them.

This prompted Ogutu for the applicant to rise up and seek clarification as to what M/s Omondi meant by not opposing the application while the written responses she was alluding to were actually opposing. M/s Omondi then clarified that she was not opposing the application at all. The Court understood that to mean that all opposition had been abandoned.

In this matter, it is not in dispute that the 1st respondent caused to be published gazette Notice Number 11494 on 17/8/2012 revoking the applicant's title to **LR No. EAST GEM/JINA/769.** That move was a culmination of various other moves in the various other and higher offices in the Ministry of Lands and Settlement, starting with the minister himself.

The decision made had devastating and far reaching consequences to the applicant. It seemed to extinguish the applicant's rights to the suit land and threw into a spin the development agenda that he had over the land.

And though the decision was that weighty, it was made in a somewhat simple manner. From what emerged, it all started with an internal memo from the Minister for lands which referred to a complaint from one Hon. Jakoyo Midiwo concerning the suit land. The memo then went on to raise various issues whose total sum was that the change of user from public to private land was unlawful.

The memo then went on to raise the concept of radical title and ended with a directive that the applicants title be expunged from the records.

Following that directive the Chief land Registrar – Vide a letter dated 19/6/2012 – wrote to District Land Registrar, Siaya, directing that appropriate action be taken. When that happened, the Land Registrar, Siaya, then caused to be published the gazette notice that the applicant has complained of.

In all this, the applicant was never called to give his side of the story. It seems to me that according to the minister, and the officers acting at his direction, radical title can be realized through executive or administrative fiat.

But no matter what the minister for lands may think, it is clear that the applicant's title was not given **PER INFORTUNIUM.** There was a process and that very ministry was centrally involved.

In the internal memo that the minister wrote, he pointed out that there was no authority of any kind

enabling Siaya County Council to transfer the land as opposed to Kisumu county Council. This same point was emphasized in the first respondents replying affidavit sworn in opposition to the applicant's application and was emphasized again by Aliongo for respondents during hearing.

The argument here is that the suit land was never transferred to Siaya County Council from Kisumu County Council when Siaya Council was hived off from Kisumu Council.

But there are other things that point to a different position and these things are from the respondent's side. For instance, during hearing, while still maintaining that Siaya county council didn't have authority to transfer the land, Aliongo still pointed out in a rather contradictory way that the suit land was initially under Kisumu County Council, then under Siaya County Council, and ultimately under Yala Town Council.

While one may take issue with the vesting of land under Yala Town council bearing in mind that the law does not vest trust land in any other council apart from County Councils, there is no disputing that Aliongo did concede that the land was once under Siaya County Council. But there is even more. In a letter annexed to the 1st respondent's replying affidavit dated 12/7/1999, P. Ochieng Advocate, then representing the residents of the area where the suit land is situated, pointed out that the suit land was originally under the trusteeship of Kisumu Council and was later entrusted to Siaya Council.

All this information is not from the applicant's side. It is from the respondent's own side. It therefore raises concern when the respondents engage in double-speak. This does not inspire belief in what they say.

BUT there is still more that raises eye-brows. In the ministers memo, it is stated that there is no evidence of an order of the Court or the Chief Land Registrar lifting the restriction against the applicant's title to the suit land.

BUT let us now look at letter dated 8/6/2000 which is from the Chief Land Registrar – a Mr. Ngatia – to District Land Registrar, **SIAYA/BONDO DISTRICTS**. The relevant part states as follows:

"After consultations with the Commissioner of lands and considering the appeals made by WALTER E.O OGUTU, you should now lift the restriction on any dealings involving the title unless otherwise advised through a lawful order.

We note that Mr. Ogutu was lawfully issued with a title pursuant to a transfer by the Siaya County Council on 10/11/1976; approximately 24 years ago."

For the avoidance of doubt, the Ogutu mentioned in the letter is the applicant in this case and the title mentioned is that of the suit land.

When the minister then asserts there is no order or directive to lift restriction, he was being less than honest. But the apparent shenanigans from the Lands office do not end there. The minister's directive was made because the land was allegedly acquired illegally.

But let's look at a letter availed by the applicant dated 28/4/1999 which is from the then Chief Land Registrar – a Mrs Okungu – concerning the suit land and the applicant. The relevant part reads as follows:

"Mr. Ominde, the registered proprietor had already been given a title on 10/11/1976 after having been in the register on the same date. The question of land grabbing in my opinion should not arise because for the part 23 years, this has been private land.

I therefore have no objection to you issuing another title deed to Mr. Walter Edwin Ominde

Ogutu after gazetting the loss of the title deed issued earlier in the Kenya Gazette in accordance with the normal registration practice".

This letter was also addressed, like the other one, to Land Registrar, Siaya. The minister asserts that the land was allocated to Mr. Ominde, the applicant, illegally. **BUT** the **IPSISSIMA VERBA** of the two letters mentioned here show that Mr. Ominde is not a land grabber and was in fact lawfully allocated the land. These letters are from the ministers own offices and were not given a response by Aliongo during hearing or any other time.

BUT more weakness is even shown in the respondents case in that while Kisumu County Council was trumpeted as the true trustee of the suit land, that council abandoned all opposition to the applicant's application during hearing. On it's part, Siaya County Council did not even bother to respond or participate.

As pointed out earlier, the minister's directive can only amount to executive or administrative Fiat, if one considers the manner in which it was made.

The realization of radical title cannot take place without due process. Executive and/or administrative fiat is not due process.

The minister ought to have proceeded on the presumption that as the applicant had title he was protected under Section 25 of the land Registration Act, 2012 and article 40(3) of our new constitution, 2010. This would have made him to be more cautious and circumspect.

And if the minister felt that the title was illegally acquired and therefore contravened article 40(6) of our constitution, 2010, it behoved him to approach the issue with full understanding of Article 47 the constitution which, among other things, entitled the applicant to reasonable, fair and lawful administrative action. Unilateral decisions or administrative fiat do not amount to such action.

The action envisaged by the Constitution is one where the affected person is given a hearing or subjected to due process.

The action taken by the minister and the officers under him, if repeated many times, can imperil good order. And it appals to realize that such actions are taken at the behest of government functionaries who pride themselves as ardent respecters of the rule of law.

During hearing, it came to light that the applicants hold onto the land has not been without challenges. One such challenge led to the institution of a case – **WALTER EDWIN OMINDE VS YALA TOWN COUNCIL: HCC NO.243/2000, KISUMU** – which, according to the ruling availed here as annexture WE006, ended in the applicant's favour.

It also came to light that the applicant is being faulted for instituting development projects on the suit land without the necessary approval or endorsement from the relevant government agencies. But the applicant himself explained that his project, which is a hydro power station undertaking, has all the the requisite approvals from the relevant quarters.

Those asserting that he didn't have such approval never gave him a hearing and they expect the Court to believe their story. There is, in fact, a sense in which some of these allegations can be seen as a desperate attempt to cast the applicant in bad light. On the one hand, the applicant is faulted for not carrying out development on the land and on the other hand he is faulted for carrying out development project without the requisite approval. Which is which!

The applicant availed photographs of a stalled or on-going hydro electric power project. It seems to the Court that something was going on in the suit land. But the minister's decision threw a spanner in the works.

In my considered view, the minister and the officers under him head 3 options.

1. Initiate a process of investigation and consultation that would involve the applicant and observe all the tenets of fairness. Such process would then institute a two pronged inquiry namely:

- That the process of acquisition of title by the applicant was illegal.

- That the process of acquisition of title by the applicant was legal.

2. Invoke the law of compulsory land acquisition and follow it to the letter.

3. Move to court to prove the alleged illegality surrounding acquisition to the suit land by the applicant.

None of this was done. The applicant's title was unilaterally cancelled and, as shown in our analysis, that move was devoid of legal merit.

As an aside, I must point out that the applicant, barring other attributes of his character that have not come to light, is very much a development conscious person. The hydro-electric power undertaking, shown in the annextures availed as photographs, seems to be a big project that would not only make a positive contribution to this country but also make a positive impact on the local economy of the area in which it is being undertaken.

In this sense therefore, the applicant needs to be celebrated, not antagonized. He needs support, not vilification.

But this aside is not what drives the court's decision. The decision of the Court is based purely on the shortcomings and shenanigans exhibited by the ministry of lands. And as pointed out, the decision made was devoid of legal merit.

Bearing all this in mind, I find the applicant deserving of the prayers stated in his application and spelt out at the beginning of this judgment.

All these prayers are hereby granted and the respondents, **NOT THE INTERESTED PARTIES**, are condemned to pay costs.

A.K. KANIARU – JUDGE

25/6/2013

25/6/2013

A.K. Kaniaru – Judge

Dianga – C/C

Applicant – present

Respondent – Absent

Interested party – Absent

M/s Suna for Madialo for Respondent

Ondego for Ogutu for applicant

Court: Judgment on application dated 14/9/2012 and filed on 21/9/2012 read and delivered in open court.

Right of Appeal – 14 days.

A.K. KANIARU – JUDGE

25/6/2013