



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. CIVIL APPLICATION NO. 34 OF 2011

REPUBLIC APPLICANT

V E R S U S

LAND REGISTRAR, MOMBASA 1ST RESPONDENT

THE COMMISSIONER OF LANDS 2ND RESPONDENT

MINISTER OF LANDS 3RD RESPONDENT

JUDGMENT

By a Kenya Gazette Notice published on 26th November 2010, the Land Registrar, Mombasa made a public pronouncement that the Government had revoked title to Mombasa Island Block XXVI/973 (*the property*) as the land was reserved for public purpose, specifically for Municipal Council Houses. The notice is said to have been made in pursuance to the provisions of The Constitution, The Government Lands Act (Cap 280) and The Trust Land Act (Cap 288).

Briefly, on 8th August 1997 the Municipal Council of Mombasa sub-let the property to the *exparte* applicant for a term of ninety nine (9) years with effect from 1st January 1969. As a result the *exparte* applicant was registered as a leasehold proprietor of the property under The Registered Lands Act and has had possession since. The Gazette Notice revoking that title has irked the *Exparte* Applicant.

Although served, neither the Land Registrar, The Commissioner of Lands nor the Minister of Lands responded to the application. At the hearing, Ms Lutta representing the Attorney General did not contest the application and left its fate at the hands of the Court without advancing any arguments.

The procedure adopted by the Land Registrar in revoking title to the property has been the subject of numerous judicial decisions. What is emerging is a near consensus that the procedure violates the Constitution and is an affront to the provisions of statute. It is therefore possible that the issue raised by this application is neither unsettled or novel.

The Constitution 2010 in Article 40 promises and assures the protection of the right to property. The state cannot deprive a person of property of any description without compliance with Sub Article (3) therefore which provides as follows:

“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 5: 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.”

Of course, there is Sub Article 6 to Article 40 which provides that the right to property does “*not extend to any property that has been found to have been unlawfully acquired.*” But a finding of unlawful acquisition can only be made by a process permitted by law. It cannot be arbitrary.

The reason given by the Land Registrar for revoking the exparte applicants title is that the allocation were illegal and unconstitutional. Article 68(c)(v) requires Parliament to enact legislation to “*enable the review of all grants or dispositions of public law to establish their propriety or legality.*” As I write this ruling Parliament is in the process of enacting legislation on land as required by Article 68 of the Constitution

As of now neither the Constitution nor the Statutes quoted in the Notice gives the Registrar power to revoke a title. The power to declare a title null and void lies with a Court of Law (see for example **Mbsa Misc 133/2010 Republic –Vs- The Registrar of Titles Ex-parte Comen Ltd**). The action of the Registrar is contrary to the Constitution and Statute and is without doubt *ultra vires*. Secondly even in this illegal process no opportunity was given to the exparte applicant to explain or defend the title to the property. The Registrar acted unilaterally and breached the rules of natural justice.

For the above reasons I allow the application and grant the orders of certiorari, prohibition and mandamus as sought in prayers 1, 2, 3 and 4 of the Notice of Motion of 5th April 2011. Counsel for the Exparte applicant did not insist on costs given that the Attorney General did not oppose the application. Each party shall bear its own costs.

Dated and delivered at Mombasa this 19th day of March, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Okongo for Applicant

No appearance for Respondent

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**