REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW 102 OF 2010

IN THE MATTER OF AN APPLICATION BY PETER MUREITHI NGATIA TO THE HIGH COURT FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND
IN THE MATTER OF CONSTITUTION OF KENYA
AND

IN THE MATTER OF GOVERNMENT LANDS ACT, CHAPTER 280 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TRUST LAND ACT, CHAPTER 288 OF THE LAWS OF KENYA

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT, CHAPTER 281 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

REPUBLIC .....APPLICANT

VERSUS

THE ATTORNEY GENERAL .....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

EX-PARTE.....PETER MUREITHI NGATIA

JUDGEMENT

The subject of this judgment is the notice of motion dated 12th January, 2011 brought by Peter Mureithi Ngatia (the ex-parte applicant) pursuant to the leave granted by this court on 24th December, 2010. In the application the ex-parte applicant prays for orders as follows:-

1. THAT the Honourable Court be pleased to grant an order of *Certiorari* and remove into the High Court and quash the decision of the Registrar of Titles who is represented in the proceedings by the 1st Respondent to publish Legal Notice Number 15580 of 26th November, 2010 purporting to revoke the Ex-parte Applicants' Lease over Land Reference Number 209/12539/143 without complying with the duly stipulated procedures set out in the Constitution of Kenya, the Government Lands Act, the Registration of Titles Act and the Trust Land Act.

2. THAT the Honourable court be pleased to grant an Order of *Certiorari* and remove into the High Court and quash the decision of 2nd Respondent to issue the Notice to Vacate-24 Hours dated 17th November, 2010 to the Ex-parte Applicant relating to Land Reference Number 209/12539/143, which parcel of land the 2nd Respondent voluntarily and in compliance with the law sold to the *Ex Parte* Applicant and for which the *Ex Parte* Applicant has been paid full consideration.

3. THAT the Honourable Court be pleased to grant an order of Prohibition to stop and/or refrain the Registrar of Titles who is represented in the proceedings by the 1st Respondent from undertaking an illegal process to acquire Land Reference Number 209/13539/143 or from publishing any other or further notices in Kenya Gazette purporting to cancel the *Ex Parte* Applicant's Lease over Land Reference Number 209/13539/143 and to prohibit the Minister for Lands from making any entries relating to Land Reference Number 209/13539/143 at the Registry of Titles in Nairobi or elsewhere.

4. THAT the Honourable Court be pleased to grant an Order of Prohibition to stop and/or refrain the 2nd Respondent from issuing other or further Notices to Vacate to the *Ex parte* Applicant or to AGNES WAKURAYA NGATIA relating to the Suit Premises or purporting to collect monthly rent from a parcel of land known as Land Reference Number 209/13539/143

The application is supported by the application for leave dated 22nd December, 2010, the supporting affidavit sworn by Macharia Nderitu on the same date, the statement of facts dated 21st December, 2010 and a verifying affidavit sworn by the applicant on even date.

The application is opposed by the 1st respondent (the Attorney General) through written submissions filed on 28th February, 2012. The 2nd respondent (the City Council of Nairobi) appointed W. S. Ogola advocate to act on its behalf but the said advocate did not file any papers apart from a notice of appointment.

The ex-parte applicant is a joint administrator with Agnes Wakuraya Ngatia of the estate of the late Joseph Mute Ngatia. Among the properties of the deceased is a half share of L.R. No. 209/13539/143. The other half share belongs to the ex-parte applicant.

On 20th November, 2010 the Registrar of Titles through Gazette Notice number 15580 revoked the said title, among others, using the following words:-

"WHEREAS the parcels of land whose details are described under the Schedule herein below were allocated and title issued to private developers, it has come to the notice of the Government that the said parcels of land were reserved for public purpose under the relevant provisions of the Constitution, the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288). The

allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of the public need and interest, the Government revokes the said title."

The parcel of land belonging to the deceased and the ex-parte applicant is found in the schedule.

The ex-parte applicant has therefore moved to this court to challenge the said Gazette Notice. According to the ex-parte applicant the Registrar of Titles has no powers to cancel a title and his purported revocation of the title in question is ultra vires, unreasonable made in bad faith and a denial of the ex-parte applicant's right to natural justice.

The 1st respondent opposes the application on the grounds that the same is incompetent; bad in law and inept; the issues raised involve contested issues of fact and hence not amenable to judicial review; and that it lacks merit.

Looking at the arguments put forward by the parties, it is clear that the only question to be decided in this case is whether the Registrar of Titles has powers to revoke a title. The Registrar of Titles is a creature of the Registration of Titles Act, Cap 281. Part XIII of the Act provides for rectification of titles: cancellation of entries and correction of instruments. Section 60 gives power to the Registrar as follows:-

"60(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 said section only allows the Registrar to cancel a title with the cooperation of the person in whose name the title is registered. Where the person refuses to cooperate the Registrar has no option but to involve the court. There is no evidence that the ex-parte applicant herein was involved in the process that led to the revocation of the title in question. There is also no evidence that the court was involved in the cancellation of the ex-parte applicant's title.

In the case of **KURIA GREENS LIMITED v REGISTRAR OF TITLES & ANOTHER (2011) eKLR** the Applicant's title had been revoked by the 1st Respondent through a Gazette Notice. Musinga, J quashed the Gazette Notice in so far as it related to the revocation of the title of the Applicant and in doing so he had this to say on the powers of the Registrar of Titles:-

"In Gazette Notice No. 15584 vide which the 1st respondent purported to revoke the petitioner's title to the suit land he did not indicate the provisions of law that he invoked as the basis for his decision. Was that an omission? I do not think so. This is simply because there is no provision under the Registration of Titles Act or any other Act that bestows on the 1st respondent or the Commissioner of Lands or the Government power to revoke a registered title in the absence of a court order to that effect. I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the Registered Land Act and

the Land Control Act and I did not come across any provision that grants power to a Registrar of Titles or Commissioner of Lands to arbitrarily revoke a valid land title."

Musinga, J went ahead to show the Government the legal path that it could have taken to lay its hands on private property:-

"Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the state through unlawful decisions taken by public officers. If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state or to the Kenya Agricultural Research Institute, appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options:

(a) Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner or

(b) File a suit in the High Court challenging the petitioner's title and await its determination, one way or the other.

Short of that, the respondents' purported action of revoking the petitioner's title is an affront to private proprietary rights which are guaranteed by our Constitution and such an action must be frowned upon by the law."

I agree with Musinga, J on his exposition of the law as it prevailed at the time he made his decision. It is noted that there are laws relating to land which have been passed since that decision was made. The laws applicable to this case are those that were in place at the time the decision in **Kuria Greens Ltd** was made. It is therefore clear that the Registrar of Titles has no power to revoke a valid title deed without following the process laid down by Section 60 of the Registration of Titles Act. Where the registered proprietor does not voluntarily surrender the title, the only avenue open to the Registrar of Titles is to go to court.

Even assuming that the Registrar of Titles had the power to revoke a title to land without involving the courts, I would still have invalidated his decision in this particular case for failure to comply with rules of natural justice. There is no evidence that he complied with the natural justice doctrine of *audi alteram partem* (no man shall be condemned unheard). The ex-parte applicant was never given an opportunity to explain how the title was acquired.

I therefore agree with the ex-parte applicant that the Registrar of Titles acted ultra vires by revoking the title to the land in question. The Registrar also failed to comply with the rules of natural justice by not giving the ex-parte applicant a hearing before revoking the title.

As can already be seen, the order called for in this case is for the application to be allowed as prayed. However, one of the grounds on which the 1st respondent has opposed this claim for judicial review is that the same is bad in law and therefore an abuse of the court process. The Registrar of Titles whose decision is being challenged has not been made a party to these proceedings. According to the statement of facts, the 1st Respondent is sued "on behalf of the Registrar of Titles who published Legal Notice Number 15580 of 26th November, 2010." In **ADMINISTRATIVE COURT: PRACTICE AND PROCEDURE, BLACKSTONE CHAMBERS** it is stated at page 57 paragraph 3-61 that:-

"The defendant will be the public body that has taken the decision complained of or has acted or failed to act in a way that is said to be unlawful. This might be an inferior court or tribunal or any public body performing public functions."

The decisions in **MOHAMED AHMED v REPUBLIC** [1957] E.A. 523 (C.A.), **FARMERS BUS SERVICE AND OTHERS v THE TRANSPORT LICENSING APPEAL TRIBUNAL** [1959] E.A.

779 (C.A.) and **WELAMONDI v THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA**, [2002] 1 KLR 486 all give the format of instituting judicial review proceedings. They allude to the fact that the proceedings are to be directed to the person or persons who are to comply with the orders. Only in cases where the applicant is in doubt as to which public body to sue can the applicant directly sue the Attorney General. Where the maker of the decision being challenged is known, that decision-maker should be made a respondent. Failure to enjoin the public body whose decision is being challenged can in certain cases be fatal to the application.

The rationale behind making the decision-maker a respondent is that whatever decision the court will make has to be acted upon by the decision-maker. In a case like the one before me, the court cannot reach the Registrar of Titles in case of non-compliance with the court order.

Judicial review orders are discretionary in nature. One of the reasons for denying judicial review orders is where the same may not be enforceable. Issuing an order to a public body which was not made a party to the proceedings is not fair to the public body. For the above reason I decline to issue the orders prayed for by the ex-parte applicant. The application is therefore dismissed. Considering the reason that has led to the dismissal of the application, I make no order concerning costs.

Dated and signed at Nairobi this 20th day of June , 2012

W. K. KORIR

JUDGE