

REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Petition 178 of 2011
IN THE MATTER OF
GAZETTE NOTICES NUMBER 3640, 9230, 7751 AND 13104

BETWEEN

POWER TECHNICS LIMITED PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

JUDGMENT

Introduction

1. This judgment concerns several petitions that have been consolidated for hearing because they raise common issues of fact and law. The issue to be decided is whether the Registrar of Titles (“the Registrar”) has the power to revoke titles issued under the *Registration of Titles Act (Chapter 28 of the Laws of Kenya)* by way of a notice published in the Kenya Gazette and whether such action constitutes a breach of the petitioners’ fundamental rights and freedoms.

2. Each petitioner challenges **Gazette Notices Numbers 3640, 9230 issued on 29th July 2011, 7751 issued on 9th July 2010 issued on 1st April 2012 and 13104 issued on 21st October 2011** in respect of their properties as follows;

PETITION	PETITIONER	PETITION DATED	GAZETTE NOTICE NUMBER	LR NO.
167/2011	COMPAR INVESTMENTS LIMITED	21st	9230	209/12686

179/2011	PHILIPS HEALTHCARE SERVICES LIMITED	September, 2011 30 th September, 2011	9230	209/12071/2
186/2011	CURZON PROPERTIES LIMITED	10 th October, 2011	9230	209/15663 (FORMERLY 209/12037)
225/2011	PARKVIEW SHOPPING ARCADE LIMITED	31 st October, 2011	3460	209/12174
228/2011	BRAMPTON INVESTMENTS LIMITED	31 st October, 2011	72	209/12071/3
229/2011	PLACID VIEW PROPERTIES LIMITED	1 st November, 2011	9230	209/12367 209/12148.
230/2011	KELLICO LIMITED	2 nd November, 2011	9230	209/14096 209/14097(FORMERLY 209/12032/1).
231/2011	ARYAN LIMITED & 2 OTHERS	2 nd November, 2011	9230	209/11801/13 209/11801/14 209/11801/15 209/11801/16 209/11801/17 209/11801/18 209/11801/19 209/11801/20.
241/2011	NANDLAL AND COMPANY LIMITED	8 th November, 2011	9230	209/11880
242/2011	KENYA REINSURANCE CORPORATION LTD	9 th November, 2011	7751	27269(FORMERLY 21194)
245/2011	SAMCO HOLDINGS LIMITED	14 th November, 2011	9230	209/14066
257/2011	RISING FREIGHT LIMITED	21 st November, 2011	9230	209/11967
259/2011	THORENE COMPANY LIMITED & 3 OTHERS	21 st November, 2011	9230	209,11801/2 209/11801/3 209/11801/4 209/11801/5(FORMERLY 209/11801).
284/2011	POLYTHENE INDUSTRIES LIMITED	28 th	9230	209/14835/4

		November, 2011		
285/2011	ASL LIMITED	28 th November, 2011	9230	209/12089 209/12091 209/14835/5 209/14835/6. 17864/4 17864/24 17864/9 17864/12 17864/19 17864/10 17864/15 17864/21.
286/2011	CHARWINS LIMITED & 8 OTHERS	24 th November, 2011	13104	17864/7 17864/20.
300/2011	HENRY WALLACE MAINA & KENMARK TRADING COMPANY LIMITED	5 th December, 2011	13104	
303/2011	ROSEWOOD OFFICE SYSTEMS LIMITED	9 th December, 2011	9230	209/11801
329/2011	NIZARALI RAJABALI VIRANI & PRAPHULBALA NIZARALI VIRANI	21 st December, 2011	9230	209/11801/6 209/11801/7.

3. The Gazette Notice were on the following general terms;

Gazette Notice _____

NOTIFICATION OF REVOCATION OF LAND TITLES

WHEREAS the parcel 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 titles.

[SCHEDULE OF TITLES]

All the above land was reserved for [XXXXXXX].

G.G. GACHIHI

Registrar of Titles, Nairobi

4. For purposes of this judgment it is not disputed that the petitioners are the registered owners and possess the titles to their respective properties and the legal determination that follows flows from this uncontested fact.

Petitioners' Case

5. The petitioners contend that they have absolute and indefeasible title to the property and that they enjoy the protection of **Article 40** of the Constitution. As the registered owners, they are all entitled to protection in accordance with the provisions of **section 23** of the *Registration of Titles Act*. This position supported by several cases of our courts; *Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)*, *Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported)*, *Parkview Shopping Arcade v Kang'ethe and Others KLR (E& L) 591*, *Njilux Motors Ltd v Kenya Power and Lighting Company Ltd [2000] 2 EA 470* and *Joseph N K arap Ng'ok v Justice Moijo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997(Unreported)*.

6. The petitioners aver that the Registrar does not have power to revoke their title and that it is only the High Court that has authority to revoke title to land. This proposition is supported by the following decisions; *Republic v Kisumu District lands Officer and Another HC Misc. Appl. No. 80 of 2010 (Unreported)*, *Kenya Breweries Limited v Municipal Council of Mombasa & Others HC Misc. Application No. 244 of 2001 (Unreported)* and *Kuria Greens Limited v Registrar of Titles and Commissioner of Lands Nairobi HC Petition No. 107 of 2010 (Unreported)*.

7. The petitioners' case is that their right to protection of property protected under **Article 40** has been infringed in so far as the revocation of titles to their property constitutes an arbitrary taking of their property. They also claim that there is a breach of **Article 47(1)** as the Registrar has no authority to cancel their titles and has failed to follow due process in exercising an administrative authority.

8. The petitioners' plea in their respective petitions to this court is to revoke the offensive Gazette Notices and declare that they are the owners of their respective properties. The petitioner rely on the case of *Kuria Greens Limited v Registrar of Titles and Commissioner of Lands (Supra)* where the High Court (Justice Musinga) held that the revocation of titles by the Registrar of Titles is a breach of **Articles 40** and **47(1)** and therefore unconstitutional.

Respondents' Case

9. These suits were filed in October and November 2011 and the matters were consolidated and came up for directions on several occasions. The respondents applied for and were given the time and opportunity to file their replying affidavits. Unfortunately nothing was done such that when the matter came up for hearing on 20th March 2012, I rejected an application for adjournment. I however permitted the counsel for the respondents, Mr Njoroge, to raise matters of law in response to the petitioners' case.

10. Mr Njoroge contended that the titles were illegally or unlawfully acquired and as such the Registrar has authority under the provisions of **section 60(1)** of the *Registration of Titles Act* to cancel registration. Counsel added that in addition, the Registrar under **section 65** has power to call documents, summons witnesses, cancel entries and revoke the titles issued. Hence there registrar was within his power to cancel the titles on the ground that they were invalid.

11. Mr Njoroge further argued that **Article 40(6)** applied to the circumstances of these cases as the allocation of the properties was fraudulent and illegal and as such the petitioners were not protected by the Constitution. The respondents' relied on the case of *Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)* where the court held that it could not validate the titles of the petitioners where it was clear that they property had been obtained unlawfully.

12. Finally, counsel contended that the court must take into account public interest which is paramount. According to counsel, the State through the Registrar acted in public interest in revoking the titles which were acquired fraudulently.

Determination

13. I have considered the submissions, oral and written, made by the various counsels who appeared on behalf of the petitioner's and in my view, the issue of the constitutionality of the revocation of titles by the Registrar was decided in ***Kuria Greens Limited v Registrar of Titles and Commissioner of Lands (Supra)***. Though the case is not binding on me, I think it sets out the proper legal position as regards the legality of the actions of the Registrar.

14. In that case the Registrar issued a Notice in the Kenya Gazette titled, "*Notification of revocation of Land Titles,*" wherein he purported to revoke certain titles on the basis that they had been reserved for public purposes under the provisions of the ***Government Lands Act (Chapter 280 of the Laws of Kenya)*** and the ***Trust Land Act (Chapter 288 of the Laws of Kenya)***. The court concluded that the Registrar has no authority under the ***Registration of Titles Act*** to revoke the titles.

15. Hon. Justice Musinga also held that the Registrar's decision was contrary to the petitioner's constitutional right to the protection of its property under **Article 40** as the revocation amounted to taking away the petitioner's titles as protected by the provisions of **section 23** of the ***Registrations of Titles Act***.

16. The court further held that Registrar's action violated the right to fair administrative action protected under **Article 47(1)** were breached as the petitioner was not given a hearing having regard to the far reaching ramifications of the decision.

17. In my view, the finding of the ***Kuria Greens Limited v Registrar of Titles and Commissioner of Lands (Supra)*** applies with equal force to the facts and circumstances of this case and I see no reason to depart from it. Counsel for the respondents argued that the case should not be followed as it was determined *ex-parte*. I take the position that a judgment of the court is valid, *ex-parte* or otherwise. What is important is the reasoning behind it and which I have set out. The respondents have not shown that the decision was overturned by the appellate court or that there are other decisions of the High Court that take a contrary position or that the case is distinguishable on the facts. There are no reasons why I cannot apply the principles it enunciates to this case.

18. The same reasoning was applied by Hon. Justice Musinga in the case of ***Sound Equipment Limited v Registrar of Titles and Commissioner of Lands Nairobi Petition No. 106 of 2010 (Supra)*** where the Registrar once again purported to revoke titles by way of a Gazette Notice. The court stated, "*However, in view of the court's finding that the 1st respondent exceeded his power in publishing the said Gazette Notice, this court has power to declare the said notice invalid in law, null and void Though an order of certiorari as sought may not issue, I am satisfied that Gazette Notice No. 3460 dated 1st April, 2010 is of no legal validity to the extent that it purported to unlawfully revoke the petitioner's title to the suit land and hereby make a declaration to that effect. This court is empowered by Article 23(d) of the Constitution to make a declaration of invalidity of any law that denies or violates a right or fundamental freedom in the Bill of Rights.*" For the benefit of the respondents, this particular decision was not *ex-parte*.

19. I would like to comment on the provisions of **sections 60** of the ***Registration of Titles Act*** relied upon by the respondent. It is part of the Act that deals with "**wrongful or fraudulent entries or retention of documents.**" **Section 60** provides 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.*

19. A plain reading of **section 60** will show that the powers of the Registrar are limited to correcting errors and misdescription of land or boundaries or where entries or endorsements to any grant or certificate of title are made in error or are fraudulent. This is a limited jurisdiction that does not include cancellation of titles. Even where the Registrar exercises such powers granted to him the facts that are condition precedent of the exercise of such power must be shown to exist and the party against whom the power invoked must be given an opportunity to be heard. **Section 65** empowers the Registrar to do all things that are necessary to ensure that there is a fair hearing.

20. What is clear though is that **section 60** is not applicable to the facts and circumstances of these cases. In any case, the cases cited at paragraph 5 above are clear that the Registrar does not have the power to cancel titles as he purported to do.

21. I also note that the impugned Gazette Notices are stated to be made under the **Government Lands Act** and the **Trust Land Act**. The Notices do not specify the particular section invoked to justify the actions taken by the Registrar. I have read these Acts and they do not empower the Registrar of Titles to revoke titles issued under the **Registration of Titles Act** nor do they grant authority to any person to revoke a title so issued.

22. There are no facts before the court upon which I can conclude that the petitioners' properties were illegally or unlawfully acquired. Even if these facts were before me, the conclusions I have reached would not make a difference because the Registrar had no power to cancel titles and the cancellation was contrary to **Article 40** is so far as the action constituted an arbitrary taking of property. It was also a contravention of **Article 47(1)** as the action was not lawful and did not meet the due process requirements.

23. In **Chemei Investments Limited v The Attorney General & Others (Supra)** the court emphasized that even where property is acquire unlawfully, the finding of "*unlawful acquisition*" contemplated in **Article 40(6)** must be through a legally established process and not by whim or revocation by Gazette Notice (see also **Electrical Options Limited v The Attorney General & Another Nairobi Petition No. 23 of 2011 (Unreported)**).

24. In considering a case where the District Land Registrar purported to cancel titles by Gazette Notice, Hon. Lady Justice H. Omondi in **Fahim Yasim Twaha & Another v District Land Registrar Lamu Malindi JR App. No, 17 of 2010 (Unreported)** observed that, "*I doubt that an illegality or what is deemed as irregular or an act of impunity can be cured by another irregular action of impunity. Just because the ex-parte applicants may have obtained the plot using improper process does not mean that the same has to be taken away from them using equally improper process.*" I agree with these sentiments.

Disposition

25. The court exercising jurisdiction under **Article 23** is entitled to frame an appropriate remedy to give effect to the rights and fundamental freedoms breached. In the case of **Renton Company Limited v George Gachiri & Another Nairobi Petition No. 215 of 2010 (Unreported)**, the Registrar of Titles issued a notice in the Kenya Gazette purporting to revoke the title of the petitioner on the ground that it was a public utility plot. The court held, "*it is clear from the material before me that the respondents have acted in total disregard as the provisions of the Constitution which dictates no one shall be deprived of his right land without compensation This renders their decision null and void.*" The court proceeded to quash the Gazette Notice but declined to award damages as the quashing had the effect had the effect of revoking the cancellation.

26. Likewise the most appropriate relief that will cure the respondents' breach of the petitioners' rights is that I will quash **Gazette Notice Numbers 9230, 7751, 3640 and 13104**. I shall not award damages because the petitioners are still in possession of their respective properties and a case for damages has not been established.

27. I would be remiss if I did not comment on the actions by the Registrar of Lands. In the case of **Kuria**

Green Limited v Registrar of Titles and Commissioner of Lands (Supra), the Gazette Notice that was revoked by the court was dated 10th November 2010 and signed by G A Gachihi, the Registrar of Titles, Nairobi. The judgment declaring such action unconstitutional was delivered on 14th June 2011. A declaration of unconstitutionality is a declaration of the legal status of the impugned action. Instead of acting in accordance with the directions of the court, the self-same Registrar continued to issue similar Gazette Notices.

28. In fact in **Sound Equipment Limited v Registrar of Titles and Commissioner of Lands (Supra)**, apart from making the finding, the court had already declared **Gazette Notice Number 3640** unconstitutional null and void. I would have expected that in the face of two clear decisions of the High Court, the Registrar would have reviewed his decision to continue revoking titles by way of Gazette Notice and acted in deference to the decisions of the Court.

29. This action is clearly contemptuous of the decisions of the court. The court, particularly the High Court, is given responsibility by the Constitution under **Article 165** to interpret the Constitution and declare what the law is and in addition to enforce fundamental rights and freedoms. It is expected that in this dispensation that values the rule of law, public officers and their legal advisers, that is the Office of the Attorney General, will ensure that all State and public officers not only acquaint themselves with the directions and decisions of this court but also follow then to the letter. I must warn State officers and public officers that this is the kind of conduct that may invite the court to invoke the provisions **Chapter 6** of the Constitution and making appropriate declarations. It is for this reason that I have am constrained to make the orders (a) and (g).

30. I therefore make the following orders;

(a) A declaration be and is hereby issued declaring that the revocation of titles issued under the Registration of Titles Act (Chapter 281 of the Laws of Kenya) by the Registrar of Titles, the Commissioner of Lands or any other officer authorised by them by way of publication of a Gazette Notice under the provisions of the Government Lands Act (Chapter 280 of the Laws of Kenya) and the Trust Land Act (Chapter 288) or any other law is contrary to Article 40 and 47(1) of the Constitution and is therefore null and void.

(b) A declaration be and is hereby issued declaring that the petitioners' rights under Article 40 and 47(1) of the Constitution were violated by the publication of Gazette Notices Number 9230, 7751, 3640 and 13104.

(c) A declaration be and is hereby issued declaring that Gazette Notices 9230, 7751, 3640 and 13104 are null and void and of no effect.

(d) The Registrar of Titles be and is hereby directed to cancel, delete and or remove all entries giving effect or made pursuant to Gazette Notices Numbers 9230, 7751, 3640 and 13104 in the titles to all the properties listed in the Gazette Notices.

(e) The Registrar of Titles, the Commissioner of Land or any other person authorised on their behalf, be and are hereby restrained from giving effect or implementing in any manner whatsoever the contents of Gazette Notice Numbers 9230, 7751, 3640 and 13104.

(f) The petitioners be and are hereby awarded costs of the respective petitions.

(g) The Registrar of Titles is directed to publish these orders in the Kenya Gazette within 21 days from the date hereof.

DATED and DELIVERED in NAIROBI this 15th day of June 2012

D.S. MAJANJA

JUDGE