REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 56 OF 2011

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR OF TITLES.....2ND RESPONDENT

AND

KENYA RAILWAYS CORPORATION.....INTERESTED PARTY

EX-PARTE

SAMUEL KAZUNGU KAMBI

JUDGEMENT

After obtaining the leave of this court to commence judicial review proceedings, Samwel Kazungu Kambi (the ex-parte applicant) filed a notice of motion dated 26th May, 2011 in which he seeks an order of certiorari quashing the decision of the Registrar of Titles (the 2nd respondent) made on 26th November, 2010 vide Gazette Notice No. 15580 revoking his title to L.R. No. 209/19703. He further seeks an order of mandamus directed at the respondents to cancel and de-gazette the said Gazette Notice. He also wants the respondents prohibited from cancelling I.R. No. 123186 for the land registered as L.R. No. 209/19703.

Through the statutory statement dated 25th May, 2011 and the supporting affidavit sworn on the same date, the applicant informed the court that sometimes in 1999 he approached the Permanent Secretary for the Ministry of Land seeking allocation of land to develop oil storage facilities. He was informed that the only land available was in Makadara area although the same was reserved for Kenya Railways Corporation (hereinafter simply referred to as the Corporation) under vesting order or authority. Kenya Railways Corporation is the interested party herein. He then approached the then Managing Director of the Corporation who informed him that the land was indeed available but since the Corporation was not using the same it was in the process of surrendering it back to the Government. In January, 2010 he was informed by the Commissioner of Lands that the Corporation had surrendered the land and he was at liberty to apply for the same. He applied for the parcel of land on 24th March, 2010 and received a letter

of allotment from the Commissioner of Lands on the same day. He later paid Kshs.287, 915/= as stamp duty and kshs.390, 915/= as contribution in lieu of rates. After making the said payment he collected a title deed. He was later approached by the Kenya Pipeline Corporation (KPC) with a view to entering into a joint venture to develop facilities thereon. KPC sought his permission to conduct due diligence on the parcel of land but the file could not be traced. The applicant later learned that the file was with the Minister for administrative action. He eventually realized that the 2nd respondent had revoked his title to the parcel of land vide Notice No. 15580 in the Kenya Gazette. His advocates wrote a letter to the Minister but there was no response.

The applicant's case is premised on four grounds namely:-

(i) He was never given an opportunity to be heard before the decision was taken and executed.

(ii) The 2nd respondent has no powers to cancel and/or revoke a title deed once issued.

(iii) The conclusion by the 2nd respondent that the allotment was illegal and or unconstitutional had no legal basis; and

(iv) The decision was arrived at without following any due process of the law.

The 2nd respondent opposed the application through a replying affidavit sworn on 5th December, 2011 by Gordon Ochieng the Chief Land Administration Officer. It is the 2nd respondent's case that L.R. No. 209/19703 is alienated and reserved by the Government of Kenya for the Corporation. The 2nd respondent also argues that according to records held by his office, the Corporation has not surrendered the said parcel of land for reallocation and neither has its use been changed from public to private. He also submits that even if there was change of user, then the said change was not done in accordance with the relevant laws and in particular the Physical Planning Act. The 2nd respondent finally argues that there was no way that the use of the land could have been changed without the participation of the public in the decision making process.

The interested party opposed the application through an affidavit sworn by its Senior Legal Officer Mr. Stanley Gitari on 22nd June, 2011. It is the interested party's case that the parcel of land in question was not surrendered back to the Government and the same was therefore not available for allocation to the applicant or any other person. The interested party also argues that the 2nd respondent has power to cancel titles that have been illegally, irregularly, fraudulently and/or corruptly obtained and therefore the revocation of the title by the 2nd respondent was merely procedural as the applicant had not acquired a title capable of protection under the law.

The issues for determination in these proceedings are:-

1. Does the 2nd respondent have the power to revoke a title once issued?

2. Did the 2nd respondent breach the rules of natural justice in revoking the applicant's title?

3. Is judicial review the most efficacious remedy in this matter?

4. Who should meet the costs of the application?

It should be noted that this application was made when the old land laws regime was in situ. Whatever comments are made in this judgement are therefore in respect of land laws that were in place at the time the 2nd respondent made the challenged decision.

On the first issue the applicant submitted that the 2nd respondent has no power to cancel or revoke a title deed once issued. The respondents and interested party submitted that the 2nd respondent can revoke a

title resulting from a fraudulent process. I think enough has been said on this issue. The 2nd respondent has no power to revoke a title to land. In **KURIA GREENS LIMITED V REGISTRAR OF TITLES & ANOTHER [2011] eKLR** where the court was faced with a similar issue, Musinga, J observed that:-

"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 registered title in the absence of a court order to that effect."

I entirely agree with Musinga, J on this issue. The 2nd respondent (Registrar of Titles) can only revoke a title by involving the registered owner or through a court order. I therefore agree with the applicant that the 2nd respondent acted *ultra vires* when he purported to revoke his title without a court order.

Secondly, the applicant submitted that the decision of the 2nd respondent flew in the face of the rules of natural justice since he was not given an opportunity to be heard before the same was made. The respondents and the interested party did not respond specifically to this argument. One of the pertinent rules of natural justice is that no man should be condemned unheard. From the evidence placed before this court, it is clear that the 2nd respondent did not ask the applicant to explain how he acquired the said title before cancelling it. This is one case where the applicant's rights to own property was interfered with and yet he was not even made aware about the adverse decision that the 2nd respondent was about to take in respect of his property. The 2nd respondent therefore contravened the rules of natural justice.

It has been argued that the 2nd respondent acted in the public interest. It is true that at times the public interest should supersede individual interests. In my view however the ultimate deference to public interest is adherence to the law. He who upholds the rule of law is a champion of public interest. When a person employed in the public service acts against the law, such person cannot be said to be serving the public interest.

In **Civil Appeal No. 234 of 1995, THE COMMISSIONER OF LANDS V KUNSTE HOTEL LIMITED** the Court of Appeal outlined the purpose of judicial review thus:-

"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."

It is immaterial that the 2nd respondent may have had valid reasons for revoking the title. He ought to have complied both with the law and the rules of natural justice.

The third question is whether the applicant is entitled to the orders sought. It must be borne in mind that judicial review remedies are discretionary in nature. The court must always exercise its discretion judiciously in deciding whether or not to grant judicial review remedies. The applicant before me was alerted by the 2nd respondent through the Gazette Notice that the reason for revoking his title was that the allocation of the land to him was illegal and unconstitutional. He was therefore put on notice about the respondents' defence. He had two options. The first option was to proceed by way of judicial review as he has done and have the decision of the 2nd respondent quashed. Such an option would still leave the alleged illegality and unconstitutionality of the acquisition unaddressed. It is well-known that the scope of judicial review is limited in nature. The second option would have been to file a civil suit and seek a declaration that the said parcel of land belongs to him. A fully fledged hearing would have ensued where all the parties would have had the opportunity to present evidence. At the end of the day the court would have made a decision on the ownership of the land and the applicant if unsuccessful could have been compensated for the expenses incurred in the acquisition. The best option would have been to file a civil suit. In **Nairobi H. C. Misc. Application No. 99 of 2006, SANGHANI INVESTMENT LIMITED v THE OFFICER IN CHARGE NAIROBI REMAND AND ALLOCATION PRISON,** Wendoh, J correctly observed that:-

"Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of REP V EX-PARTE KARIA MISC APPLICATION 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced."

The observation of the learned Judge, tallies with judicial review practice. Where there is an alternative remedy which is more suitable, the court will deny an applicant orders. The main issue to be considered by the court is whether the alternative remedy adequately protects the rights and interests of the applicant.

I am aware that the availability of an alternative remedy is not a bar to the commencement of judicial review proceedings. An applicant should always go for the most efficacious remedy. I believe that this is what the Court of Appeal meant when it stated in **Civil Appeal No. 84 of 2010 REPUBLIC V NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY** that:-

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it - see for example R V BIRMINGHAM CITY COUNCIL, EX PARTE FERRERO LTD. case."

In this case I am of the view that judicial review is not the most efficacious remedy because at the end of the day the ownership of the land in question is left undetermined. This does not however mean that in all cases of unlawful cancellation of title judicial review is not the most efficacious remedy. The court will consider the facts of each case in deciding whether or not to grant the reliefs sought. For example, in **Nairobi H. C. ELC No. 19 of 2011, REPUBLIC V REGISTRAR OF TITLES NAIROBI REGISTRY & 3 OTHERS ex-parte MAJOR GENERAL (RTD) DEDAN NJUGUNA GICHURU** this court quashed the decision of the Registrar of Titles to revoke a title. In that casethe Registrar of Titles had proceeded to revoke a title while therewas a case in the High Court concerning the legitimacy of the title. It was therefore necessary to quash the decision in order to protect the dignity of the courts. In this case however there are no proceedings on the legality of the title.

In short, I find that judicial review was not the best option for the applicant herein. As such I exercise my discretion and decline to grant the applicant the orders sought. The application is therefore dismissed with no orders as to costs.

Dated and signed at Nairobi this 26th day of July , 2012

W. K. KORIR, J