



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 129 of 2011

IN THE MATTER OF AN APPLICATION BY **JOHN KARUMO MACHARIA, CHARLES KIMANI KIMOTHO, MICHAEL MWANGI NDUNGU, RICHARD NJOROGE NG'ANG'A AND PURITY MUMBI NGUNJIRI** FOR JUDICIAL REVIEW ORDERS OR PROHIBITION, MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300, LAWS OF KENYA
AND IN THE MATTER OF THE TRUST LANDS ACT CAP 288, LAWS OF KENYA
IN THE MATTER OF THE GOVERNMENT LANDS ACT, CAP 280 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACQUISITION ACT, CAP 295, LAWS OF KENYA

**REPUBLICAPPLICANT
VERSUS**

THE COUNTY COUNCIL OF OLKEJUADO.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR, KAJIADO.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL4TH RESPONDENT

AND

1. PETER MUNYAO MUENDO

2. BENEDICT MUNYAO MUENDOINTERESTED PARTIES

EX PARTE

1. JOHN KARUMO MACHARIA

2. CHARLES KIMANI KIMOTHO

3. MICHAEL MWANGI NDUNGU

4. RICHARD NJOROGE NG'ANG'A

5. PURITY MUMBI NGUNJIRI

RULING

Before Court is a Notice of Motion application dated 30th May, 2011 in which the applicants seek the following orders

- a) That this honourable court be pleased to grant an order of prohibition to restrain the 2nd respondent from illegally and or unlawfully depriving the applicants from the lawful proprietorship of their parcels of land save as provided in law.
- b) That this honourable court be pleased to grant an order of certiorari to remove to this court and to quash the decision of the 2nd respondent, as contained in the Kenya Gazette Notice No. 15581 and published on 26th November 2010, to unilaterally and without following due process revoke the applicants' lawfully acquired titles.
- c) That this honourable court be pleased to grant an order of mandamus compelling the 1st respondent to forthwith accept payments from the applicants and/ or their servants and/or agents in respect of rent, rates and licence fees payments.
- d) That the costs of this application be borne by the respondents jointly and severally.

The application is made on the grounds that;-

§ The applicants are the proprietors of the following parcels of land

1st applicant -Ngong Township/Block 2/522

2nd applicant -Ngong Township/ Block 2 487

3rd applicant -Ngong township Block 2/585

4th applicant -un-serviced commercial plot Ngong Township

5th applicant -un-serviced commercial plot Ngong township

- The applicants are aggrieved by the unilateral decision of the 1st and 2nd respondent's to revoke titles in respect of the aforesaid parcels land on unsubstantiated allegation that the same were or had been reserved for various public needs and interests including a car park, a bus terminus and or community center.
- The applicants had been paying all relevant statutory payments including rent and rates and had also developed them by putting up buildings at a considerable expense and with the approval of the 1st respondent.
- The applicants too had contractual obligations with various tenants who occupied and carry on business in the buildings.
- The applicants were not granted an opportunity to be heard before the said unilateral decision was made and published.
- The respondents' said unilateral decisions was illegal, discriminative, malicious and calculated to

intimidate the applicants so as to force them to give up possession of the said parcels of land which are ear-marked for allocation to other individuals known to the respondents.

- The respondents had since declined to accept any licence fees, rates or rent payments from the applicants and or their tenants.
- The applicants' buildings and developments were under threat of demolition and or illegal alienation to 3rd parties notwithstanding that they had invested heavily in the buildings and developments and no proceedings for the acquisition of the parcels of land had been commenced.
- The 2nd respondent has powers under the law to revoke titles to the property; such powers were only vested in the High Court or the Commissioner of Lands under the relevant laws governing acquisition of land.
- In purporting to revoke duly issued titles, the 2nd respondent acted *ultra vires* his powers under the Registered Land Act.

In support of the motion, each applicant swore an affidavit. Those affidavits explain in detail the process by which the applicants became the proprietors of their respective parcels of land. Attached to the affidavits are several documents of title relating to each of the applicants. They had faithfully been paying their annual rents and are in quite occupation of the parcels of land. However, by a Gazette Notice dated 26th November, 2010, the 2nd respondent purported to revoke their said titles to the parcels of land. The action of the 2nd respondent was capricious, illegal, *ultra vires* the powers granted to him under the law and was drastic and contrary to rules of natural justice as they were not given opportunity to be heard

The application was duly served on the respondents. However none of the respondents saw the need to respond and or rebut the factual averments of each of the applicants. Indeed, the 1st respondent apart from merely filing a notice of appointment of advocate filed no grounds of opposition nor replying affidavit. As for the 2nd to 4th respondent, they only filed grounds of opposition to wit:-

- That the dispute before court was one of title and hence cannot be dealt with by way of prerogative orders sought under Judicial Review mechanism
- That the applicants lacked the requisite *locus standi* to institute the present suit
- That the threshold for the orders sought had not been met
- Otherwise the application had been filed malafides.

Ofcourse the application was filed pursuant to leave granted by **Kihara Kariuki, J** (as he then was) on 26th May, 2011. On 25th April 2012, the application came before me for *interpartes* hearing. **Mr. Gichuru** and **Ms Shivika** learned counsel for the applicant and respondents respectively agreed to canvass the same by way of written submissions. However it was not until 19th July, 2012 that respective submissions were on board.

The applicant has quite correctly set out the issues for determination and I wholly adopt them. Those issues are:-

- Whether the District Land Registrar, Kajiado had the requisite legal authority to revoke and cancel duly issued titles to land.
- Whether, assuming that the District Land Registrar, Kajiado had such revocation /cancellation powers, due process was followed in acquiring and or cancelling the applicants' titles.
- Whether the Gazette Notice No. 15581 is valid in law and whether it ought to remain in effect

- Costs

I will deal with the issues globally. It is imperative to note that our constitution has a bill of rights. The bill of rights applies and binds all state organs and all persons. For purposes of this case, Articles 19, 20, 40 and 60 are pertinent. These articles are clear as to what the right of citizens and more importantly land owners are and they also set out the manner and mode in which such rights can be infringed upon. Indeed Article 40 of the Constitution sets out and guarantees the right to own property and also dictates as to how such property may be taken away by the state or any other state organ under written law.

It is common ground that the parcels of land in dispute were trust land. Under the then Trust Land Act, all trust land vested in local authorities. By section 4 thereof, a council could set apart the trust land as appear to it to be necessary or expedient. There is ample evidence that the parcels of land were trust land which was subdivided by the 1st respondent. All the parcels of land are commercial in nature and the applicants use them as such and have been paying annual rents and rates. It is also not in dispute that the applicants have put up commercial buildings and have let them out to various tenants who by law are required to obtain licenses and permits from the 1st respondent to enable them carry out their business.

Once the parcels of land were set apart, the applicants were duly issued with documents of title under the Registered Land Act. The applicants having legally acquired their parcels of land as aforesaid, they are protected by the mandatory provisions of section 28 of the Registered Land Act (*now repealed*). That section provides *inter alia*:-

“the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as proved in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever...”

From the foregoing it is obvious that a title once issued can only be revoked and or cancelled in line with the provisions of the said Act. The powers of the 2nd respondent in relation to Land Registered under the Registered Land Act are found in Section 8 thereof. It is limited to requiring a person to produce documents in respect of a parcel of land, summons on any person to appear before him and give information relating to the land, register or refuse to register any instrument with regard to the land, administer oath and may orders costs to be paid.

A careful perusal of the above powers, plainly show that the 2nd respondent does not have any statutory power to revoke and or cancel a title that has been issued. The powers to cancel or rectify titles, is vested in the court by virtue of section 143 of the said Act. However, if the powers of court to order cancellation or rectification are circumscribed, the register cannot be rectified so as to affect the title of a proprietor who is in possession and acquired the land for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. See section 143(2) of the Registered Land Act. It would appear therefore that only the court has powers to cancel a title. However, in exercising those powers, the person whose title is under threat must be given an opportunity of being heard before any decision adverse to his title is made. In the instant case, the cancellation was initiated by the 2nd respondent. There is no evidence that the applicants were afforded any opportunity to be heard before the adverse decision touching on their titles was made. Nor is there mention of any omission, fraud or mistake by the applicants in the acquisition of their respective parcels of land. What simply happened was that a Gazette Notice purporting to cancel and or revoke the applicants' titles was published without the slightest regard to the applicants' right to be heard. In so acting, the 2nd respondent ran foul of section 154 of the Act. In the premises the Gazette Notice is a nullity.

It is not in doubt that each of the applicants have been in possession of their respective parcels of land and they have documents to back up their ownership. There is no suggestion that any one of them acquired the same by way of fraud. The applicants having title and possession of the parcels of land, the same could

only be taken away from them in accordance with the law. This could be under the Land Acquisition Act. But even under this Act, compulsory acquisition of any kind can only be initiated by the Minister of Lands and no one else, although the minister can delegate those powers in writing and only to the Commissioner of Lands. Once a decision to acquire land has been made by the minister, the decision must be Gazetted and any person interested in the land must be served with a copy of the Notice.

In the instant case, assuming even that it was a case of compulsory acquisition, the 2nd respondent has not demonstrated that he complied with the law.

In view of all the foregoing, I am satisfied that the applicants have made out a compelling case for the issuance of the Judicial Review Orders of *Prohibition*, *certiorari* and *mandamus*. Those orders shall issue forthwith as prayed in the notice of motion application dated 30th May, 2011. I make no order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 31ST day of OCTOBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**