



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Application 132 of 2010

REPUBLIC APPLICANT

V E R S U S

LAND REGISTRAR MOMBASA 1ST RESPONDENT

THE COMMISSIONER OF LANDS 2ND RESPONDENT

MINISTER OF LANDS 3RD RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

EX PARTE: BHANGRA LIMITED

JUDGMENT

(1) On 1st October 2010, The Land Registrar Mombasa published a notice being Gazette Notice No. 11533 in which the Registrar announced that the Government had revoked Titles to various parcels of land listed in the schedule to that Notice. Amongst them were parcels of land known and described as Mombasa/Block XI/936, Mombasa/Block XI/937 and Mombasa/Block XI/939 (together jointly referred to as “**The Suit Properties**”). These suit properties are registered in the name of Bhangra Limited, the Exparte Applicant herein.

(2) Displeased with the action of the Registrar, the Exparte Applicant commenced these Judicial Review proceedings and in Notice of Motion dated 20th December 2010 sought the following orders-

(a) That an order for Certiorari do issue to remove into this

Honourable Court for the purposes of being quashed the decision of the Land Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein contained in the Gazette Notice No. 11533 published in the Kenya Gazette dated 1st October, 2010 revoking the Applicant’s Titles to parcels of land known as Mombasa/Block XI/936, Mombasa/Block XI/937 and Mombasa/Block XI/939;

(b) That an order of Prohibition do issue prohibiting the Land

Registrar, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein,

their servants and/or agents from alienating, allocating, handing over possession of or vesting the Titles of the parcels of land known as Mombasa/Block XI/936, Mombasa/Block XI/937 and Mombasa/Block XI/939 to any other person and from having any other dealing with the said properties or taking any further proceeding or action in relation thereto;

(c) That an order of Mandamus do issue directed at the Land

Registrar, Mombasa and the Commissioner of Lands, the 1st and 2nd Respondents herein commanding them to reinstate the Applicant's Titles over the parcels of land known as Mombasa/Block XI/936, Mombasa/Block XI/937 and Mombasa/Block XI/939 by, inter alia, reinstating the Applicant's name in the registers of the said properties as the proprietor of the Leasehold interests therein and to revoke and/or cancel any dealing with the said Title and any entry in the registers of the said properties made pursuant to the purported revocation of the Applicant's Titles."

(3) In the Statutory Statement filed at the leave stage the Exparte Applicant lists 13 grounds in support of the application. The long and short of it is that the Land Registrar does not have Constitutional or legal authority to cancel Title and even if there was authority, the Land Registrar breached the rules of natural justice by failing to afford the Applicant a hearing.

(4) It is common ground, I think, that The Land Registrar has no power either under the Constitution or The Registered Land Act (now repealed) to revoke Title. A string of decisions have restated this rather uncontested position of the law. That power has until recently rested exclusively with the Court. From 2nd May 2012, when The National Land Commission Act commenced, power to review grants or dispositions of public land was given to The National Land Commission. Section 14 of The Act makes provision on how that power is to be exercised. Sections 14(1), (4) and (5), (6) provides as follows-

14. (1) Subject to Article 68 (c)(v) of the Constitution, the

Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(4) After hearing the parties in accordance with sub-section (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

So in respect to public land the Court shares this authority with the National Land Commission.

(5) Even if the Land Registrar had such power, he exercised it in a manner that abridged the Applicants right to Fair Administrative action. Article 47(1) of The Constitution provides-

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

The Article underlines the need to observe the rules of Natural Justice in exercise of administrative authority. Even before, and without, this Constitutional requirement it had long been accepted that where a public officer makes a decision affecting the rights of a person the public officer must act within the rules of Natural Justice. To do otherwise would be to act outside jurisdiction (**Attorney General –Vs- Ryan (1980)AC 718**). It being agreed that the 1st Respondent took a unilateral decision without affording the Applicant a hearing, then the 1st Respondent act ultra vires.

(6) So for lack of Authority and breach of the Rules of Natural Justice the decision of the 1st Respondent carried in Gazette Notice No. 11533 in respect to the suit properties is ultra vires.

(7) The more vexing question is whether this Court should interpose and grant the relief's sought. That is where the real battle lines were drawn. A short background to the dispute explains this. The suit properties were created from a public road reserve. Even the Exparte Applicant acknowledges this, but in the affidavit of Ashok Labshanker Doshi sworn on 31st May 2012 offers the following explanation-

“11. THAT it is clear from the Gazette Notice No. 1099 dated 25th February, 1994 annexed to the Replying Affidavit at page 4 that the road reserves were duly closed in accordance with the provisions of The Local Government Act, Cap. 265, Laws of Kenya before the same were converted to residential plots for allocation to among others the Ex-parte Applicant.”

(8) The Ethics and Anti-Corruption Commission (The Interested Party) on the other hand has placed before Court considerable evidence to prove that suit properties are still part of Tom Mboya Road, a public road. Nzioki wa Makau (then an Advocate with the Interested Party) swore an affidavit on 14th May 2012 explaining why the suit properties remain part of a public road-

“8. The Council, vide Gazette Notice number 1099 dated 25th February 1994, published a proposal to close the road reserve abutting on plot numbers 160, 572 and 573, Section XI, Tom Mboya Avenue, Tudor, and invited any person intending to raise objections to do so. A copy of the gazette notice is at pages 4 to 5 of the exhibit.

9. The investigations conducted by the Commission shows that due to public outcry, the proposed closure of the road was never effected. There are no council resolutions nor is there any Ministerial consent authorizing the said closure. A copy of the affidavit of Edward M. J. Kiguru who surveyed the Suit Properties is at pages 6 to 7 of the exhibit.”

(9) It is then common ground that Kenya Anti-Corruption Commission (predecessor to the Interested Party) instituted three suits for the recovery of the suit properties. These are-

(i) High Court Civil Case No. 201 of 2007 (Mombasa), Kenya Anti-Corruption Commission V Bhangra Limited and Sammy Silas Komen Mwaita (for recovery of Mombasa Island/Block XI/936);

(ii) High Court Civil Case No. 202 of 2007 (Mombasa), Kenya Anti-Corruption Commission V Bhangra Limited and Sammy Silas Komen Mwaita (for recovery of Mombasa Island/Block XI/937); and

(iii) High Court Civil Case No. 204 of 2007 (Mombasa), Kenya Anti-Corruption Commission V Bhangra Limited, Wilson Gacanja and Barclays Bank of Kenya Limited (for recovery of Mombasa Island/Block XI/939)”

These suits (hereinafter the “**Civil Suits**”) are still pending the hearing and final determination.

(10) The Exparte Applicant is clear in its mind about the role of a Court sitting in Judicial Review. I am reminded that I should only concern myself with the procedure adopted by the 1st Respondent and not the merits of the decision reached. That in any event the question of the legality or otherwise of the Titles to suit properties will be determined in the Civil Suits.

(11) The Respondent joined hands with the Interested Party in beseeching this Court not to intervene on the side of the Applicant. It was argued that it would be contrary to public policy for this Court to grant the relief when the Titles are founded on a fraud to the public. The Court's attention was drawn to this ever fresh passage in **Scott –Vs- Brown [1892]2 QB 724-**

“No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly

brought to the Notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.”

This passage has been often quoted with approval by our Courts. One such occasion was in **Nrb Misc. Application No. 807 of 2004 R –Vs- The Commissioner of Lands Exparte Somken Petroleum Company Ltd**, where Nyamu J (as he then was) added the following observation-

“Even in Judicial Review I find that a transaction tainted with fraud or illegality cannot be enforced and the damage if any must lie where it fell unless it can be recovered without pleading, illegality or fraud, when the party purporting to enforce took part.”

(12) In addition this Court was asked to strike a blow for Public Interest. The Court was asked to go the way of Meoli, J when she declined to grant Judicial Review orders to impeach a decision similar to that made by the 1st Respondent. The Judge in **Malindi Misc. Application No. 27 of 2010 Republic –Vs- The Land Registrar Ex-parte Mohamed Tariq Khan and Ms Fedrica Ferro** said-

“Adopting the same logic, I have to ask what the priority in this matter ought to be: the preservation of the Lamu Crescent which is a lifeline to Lamu, a World Heritage Site or the right of the Applicants to their alleged, “investment”. The answer is compelling. The public interest element in this matter is both vivid and significant and must take priority. So that even if the Applicants had brought themselves within the requisite grounds, this Court would have been extremely reluctant to exercise its discretion in their favour. (See Bogonko’s Case).”

(13) This Court is keenly aware that it is not its duty in proceedings of this nature to evaluate rival evidence and to reach a decision on facts. It is appreciated that the forum for making a firm decision of the legitimacy of the Titles to the suit properties is in the Civil Suits which are yet to be heard and determined. Yet even without going into any detail of the evidence I am prepared to find like the Court of Appeal in **Civil Application Nrb 185 of 2009 Kenya Anti-Corruption Commission –Vs- 1) Bhangra Limited 2) Sammy Silas Komen Mwaita**, that the Interested Party’s claim that the suit properties were not available for alienation and are still public land is not a trifle. The Court of Appeal then proceeded to grant an order of injunction against the Ex-parte Applicant in respect to the suit properties. I reach that finding because although the Ex-parte Applicant pegs its hopes on the Gazette Notice No. 1099 of 25th February 1992 which invited objections to the proposal to close the road reserve nothing was shown by the Ex-parte Applicant to prove that the notice was formally followed through. The Court notes the Interested Party’s uncontested contention that there is no Council Resolution or consent of The Minister authorizing and formalizing the closure. I say this with some caution because the Civil Court will eventually make a firm determination as to the legitimacy of Titles after receiving and evaluating evidence from the rival parties.

(14) That said, in a country which has been traumatized by rampant “Land grabbing” strong evidence that public land is under threat may be sufficient for a Judge to decline to intervene in Judicial Review. I would have on the evidence before me refused to interpose on the side of Ex-parte Applicant, but this is not the end of the matter.

(15) I must also bear in mind that the broader and underlying question (but is not for these proceedings) between the parties is the legality of the Titles. The question as to whether the Titles are legal will continue to linger on whether or not this Court quashes The Registrar’s decision. That will remain unresolved until the Civil actions are heard and determined. The Gazette Notice sought to be impugned clearly stated that the Titles were being revoked as the land was reserved for public purpose. That also is the basis of the Civil Suits. No reason was given by the parties as to why the issue of the revocation of Titles (which came after the Civil Suits had been filed) was not brought to the attention of the Civil Court. That may have necessitated an amendment in the Exparte Applicant’s pleadings in those proceedings. But some effort should have been made as the Civil Suits could, in my view, deal with the issue of legality of the Titles as well as the latter conduct of the 1st Respondent. That would have been an effective forum for dealing with both issues with some finality.

(16) Which brings me to some other matter of concern. The 1st Respondent published the Gazette Notice when he knew or ought to have known of the pendency of the Civil Suits. I may be forgiven if I take it that for the 1st Respondent the outcome of the Civil Suits did not matter. This surely has the effect of undermining Court process. This is what Korir W. (J) said of a similar position in **Nairobi E & L Case No. 56 of 2011 Republic –Vs- (1) The Attorney General (2) The Registrar of Titles and Kenya Railways Corporation;**

“The Court will consider the facts of each case in deciding whether or not to grant the reliefs sought. For example, in Nrb HCC ELC No. 91 of 2011 Republic –Vs- Registrar of Titles Nairobi & 3 Others Exparte Major General Rtd Dedan Gichuru, this Court quashed the decision of The Registrar of Titles to revoke a Title. In that case the Registrar had proceeded to revoke a Title while there was 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.” (my emphasis)

More recently Justice Majanja in **Nrb Petition No. 217 of 2011 Satima Enterprises Ltd –Vs- Registrar of Titles & 2 Others** held-

“... there is in fact a case pending between the parties in respect of the suit property to wit; Nairobi HCC No. 663 of 2004 Satima Enterprises Ltd –Vs- Kenya Revenue Authority & The Commissioner of Lands. In that case the same issues of fraud alleged in this suit have been raised and the Court adjudicating over that suit will no doubt deal with them. I therefore find and hold that the issuance of Gazette Notice No. 6332 in relation to the suit property was in fact an attempt to undercut the pending proceedings and also a breach of the Petitioners right under Articles 40 & 47(1) of The Constitution.”

(17) In deciding which way to go three things weigh on my mind-

- Strong evidence that the suit property may well be a public road and therefore the need to protect public interest.
- An unacceptable conduct of the 1st Respondent who in disregard of the law and a pending Court cases has proceeded to cancel the Titles.
- The pendency of the Civil Suits which offers the parties herein a real opportunity of resolving the substantive issues with finality.

(18) I will quash the decision of the Land Registrar contained in Gazette Notice No. 11533 published in the Kenya Gazette dated 1st October 2010 in respect to revocation of the suit properties. I do this so as to protect the dignity of the Court in the pending Civil proceedings. But I have not lost sight of the public interest. The order of injunction granted in **Civil Application No. 185 of 2009** protects the public interest in the land as parties await a determination of the legitimacy of the Titles in the Civil Suits. It is also for this reason that I will not grant prayers (2) and (3) of the Motion dated 20th December 2010 and clarify that this decision does not in any way affect the injunction in place.

(19) Each party shall bear its own costs.

Dated and delivered at Mombasa this 25th day of October, 2012.

**F. TUIYOTT
JUDGE**

**Dated and delivered in open court in the presence of:-
Karesa for the Applicant
Mola holding brief for Eredi for the Respondent**

**Mola for the Interested Party
Court clerk - Moriasi**

**F. TUIYOTT
JUDGE**