



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 77 of 2010

**REPUBLIC.....APPLICANT
VERSUS**

THE SENIOR REGISTRAR OF TITLES.....RESPONDENT

EX PARTE: BROOKSIDE COURT LIMITED

JUDGMENT

Brookside Court Limited, the ex-parte Applicant herein moved this court by way of a Notice of Motion dated 5th October 2011 seeking the following orders:

- a) An order of certiorari to remove into this Honourable Court the decision of the Senior Registrar of Titles contained in the Kenya Gazette Notice Number 3460 dated the 1st of April 2010 revoking the land title to Land Reference number 209/10345/9 for the reason that the same was illegally and unconstitutionally allocated to the first registered owner, one Maxwell Maurice Ombogo by the City Council of Nairobi on 2nd March 1998 (which land is currently registered in the name of the Ex-parte Applicant) for the purposes of quashing the decision.**
- b) An order of prohibition be issued prohibiting the Senior Registrar of Titles from recalling, cancelling and/or impeaching the Ex-parte Applicants title to Land Reference number 209/10345/9 and/or making any entry in the Register in respect of Land Reference Number 209/10345/9 and/or in any other way prejudicial to and/or inconsistent with the ex-parte Applicant's proprietorship of Land Reference Number 209/10345/9**
- c) That costs of this application be provided for.**

The application is supported by the statutory statement dated 29th September 2010 as well as the Verifying Affidavit of Edward Albert Ayres sworn on 29th September 2010, and is based on the grounds that:

- i) The Applicant is registered as proprietor of the reversionary interest of the suit property (being a leasehold interest from the City Council of Nairobi);**
- ii) The Respondent revoked the title to the suit property on the grounds that:**

(a) The parcel of land known as Land Reference Number 209/103465/9 was allocated and title issued to the first registered proprietor, Maxwell Maurice Ombogo illegally,

(b)The suit property was reserved for public purposes under the relevant provisions of the Constitution, the Government Lands Act and the Trust Land Act

(c) The allocation and issuance of the title to the suit property was illegal and unconstitutional

(d)In view of the public need and interest, the Government had revoked the said title.

iii) The said gazette notice is vague and does not specify the specific provisions of the Constitution, the Government Lands Act and the Trust Land Act under which the notice is issued

iv) The Senior Registrar of titles had not given the Applicant prior notice of the intended revocation of its title to the suit property;

v) The suit property is not Trust Land neither was it allocated to the City Council of Nairobi by the government as stated in the Gazette Notice and the Government Lands Act and the Trust Lands Act therefore do not apply to this land;

vi) The Respondent has no power under the Constitution, the Government Lands Act or the Trust Land Act to revoke the Applicant's title to land and the decision to do so is in excess of the powers conferred therein.

vii) The Respondent has not revoked titles of the parcels of land adjacent to the Applicant's land which lands are also situate along Brookside Drive, Westlands:

(a) Land Reference Number 209/10345/3

(b)Land Reference Number 209/10345/4

(c) Land Reference Number 209/10345/8

(d)Land Reference Number 209/10345/10

(e) Land Reference Number 209/10345/11

(f) Land Reference Number 209/10345/12

(g) Land Reference Number 209/10345/14

viii) The Respondent's decision to revoke the Applicant's title to land to the property is biased, arbitrary and made in bad faith towards the Applicant

ix) On the suit property, there are erected twelve apartments , and each of the owners of the said apartments is a shareholder in the applicant company

x) The Respondent has levied and accepted land rent over the suit property over the past years

xi) The Respondent in making the said decision has acted contrary to the legitimate expectations of the applicant that it held the title to the land known as Land Reference number 209/10345/9 and that the Respondent would not make a decision to take away its private property unconstitutionally, unlawfully and without giving the Applicant a hearing.

The application is opposed. The Respondent filed grounds of opposition dated 29th November 2010. The main grounds of opposition are that the application was filed out of time, the Respondent had power to act as he did and that the Respondent was not biased.

The facts leading up to this application are fairly simple. On 1st April 2010 the Respondent published in the Kenya Gazette Volume CXII – No. 35 Notice Number 3460 in which he revoked the land titles relating to several parcels of land. Among these was L.R. No. 209/10345/9. This is the decision that the

Applicant takes issue with.

The title to this property is I.R. number 43896 which is a lease from the City Council of Nairobi dated 2nd March 1998 for the term of 99 years from 1st January 1987. The lease was initially issued by the City Council of Nairobi to Maxwell Maurice Ombogo. The land has been sold and re-sold various times and as a result, several transfers have been registered by the Respondent on the property. On 21st July 2009, the Respondent registered a transfer of the property in favour of Executive Properties Limited who developed the land and erected thereon twelve apartments. These apartments were sold to various individuals who incorporated the Applicant as a management company. The Applicant holds the reversionary interest in the suit property.

The parties filed submissions to advance their respective positions. The Applicant relies on the submissions dated 7th February 2011 and the supplementary submissions dated 22nd November.

The Applicant submits that the regime of law that governs the suit property is the Registration of Titles Act (RTA)(now repealed), and that under the RTA, all registered instruments were deemed valid by virtue of section 32 (1) of the Act. Section 23 (1) of the RTA gives the registered owner of land an indefeasible title in the land, and the only ground on which the title can be revoked is on grounds of fraud or misrepresentation. The Applicant contends that in this case, there have been no allegations of fraud or misrepresentation. The Applicant further submits that position is that where the Registrar feels that there has been fraud or misrepresentation, then he ought to approach the court for redress.

The Applicant also stated that the suit property is also subject to the provisions of the Government Lands Act (also repealed). Section 130 of the Government Lands Act gave the Commissioner of Lands the power to file suit for the recovery of government land which was unlawfully occupied. Under this Act, it is only the court which has the power to decree that title to land is expired, forfeited or cancelled.

The Applicant submits that the provisions of the Trust Land Act would not apply to the suit property because there is no indication in the lease that the property forms part of trust land. The Applicant is of the view that by purporting to apply an act of parliament that is not applicable, the Respondent acted unreasonably and considered irrelevant matters. In support of this the Applicant referred the court to the decision of ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 ALL ER 680***. Counsel is also of the view that the Respondent acted in a biased manner because he did not revoke the titles of other properties in the area surrounding the suit property, and that the rules of natural justice have not been complied with because the Applicant was also not accorded a hearing or even informed of the impending revocation.

The Respondent had raised the issue that the application offends the mandatory provisions of Order 53 rule 3 (2) of the Civil Procedure Rules because the City Council of Nairobi had not been joined as a party to this suit. In response, the Applicant submitted that the City Council of Nairobi need not be joined to the application because the reversionary interest in the property was acquired by the Applicant. As a result, the applicant acquired overriding and exclusive proprietary interest in the suit property. Therefore, it would serve no purpose to have joined the City Council of Nairobi to these proceedings. I agree with counsel for the Applicant on this point. After all, the revocation of title did not in any way affect the City Council of Nairobi, and any order made by this court would not affect the City Council of Nairobi.

The Respondent relied on the submissions dated 7th July 2011 and the supplementary submissions dated 15th April 2012.

The first point raised is that the application offends the mandatory provisions of Order 53 Rules 3 (2) because all parties directly affected in the proceedings have not been served. In this case, the suit property is on lease from the City Council of Nairobi, and failure to join the city council of Nairobi is fatal.

The second issue is that the dispute involves proprietary rights in the subject land and hence it is not fit for judicial review proceedings.

The Respondent is of the view that the lease to Maxwell Maurice Ombogo was irregular, as were all the subsequent transfers, and that in the same spirit, the reversionary interest of the applicant is equally irregular. The Respondents guide this court to Article 159 of the constitution. They submit that public land has been unfairly alienated, and urge this court to interpret the Constitution in favour of the Respondent.

Having read all the pleadings, submissions and authorities filed in court by the parties, I am of the view that the main question that comes up for determination is whether the Respondent acted *ultra-vires* in issuing the gazette notice in which the title of the Applicant was revoked.

The offending gazette notice reads as follows:

GAZETTE NOTICE NO. 3460

**THE CONSTITUTION OF KENYA
THE GOVERNMENT LANDS ACT
CAP 280
THE TRUST LAND ACT
CAP 288
REVOCATION OF LAND TITLES**

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

...

L.R. NO 209/10345/9

...

G.G. GACHIHI

Senior Registrar of Titles, Nairobi

The Registration of Titles Act and the Government Lands Act have since been repealed by the Land Registration Act (No. 3 of 2012). However, for the purposes of this decision, they will apply because the action of the Respondent was taken before the repeal of these statutes.

Section 23 of the Registration of Titles Act provided for the sanctity of titles. It stated:

23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

This means that the title of a purchaser can only be challenged on the grounds of fraud or misrepresentation, to which the purchaser is proved to be a party. This position has been reinforced in case law. In **Nairobi Permanent Markets Society and 11 Others versus Salima Enterprises & 2**

Others, Civil Appeal Number 185 of 1997 (unreported) Omolo, Pall and Bosire JJ.A said:

“...Under section 23 of [the RTA] a certificate of title issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party...”

This was also the position in the case of *Samuel Murimi Karanja & 2 Others v Republic Criminal Application Number 412 of 2003* wherein the learned judges cited the court of appeal holding in *Joseph Arap Ngo’k Vs Justice Moiwo Ole Keiwua, Nairobi Civil Application No. 60 of 1997* as follows:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy”

It is therefore clear that the title of a registered proprietor of land can only be subjected to challenge on the grounds of fraud or misrepresentation, and can only be challenged in accordance with the process outlined by the law.

The Gazette Notice indicates that the Respondent revoked the title because it had come to the notice of the government that the land was reserved for public purposes under the Constitution, the Government Lands Act and the Trust Lands Act. The Applicant has submitted that the property in question falls outside the realm of the Trust Lands Act. I have perused the Certificate of Title and the Transfer of Reversionary Interest that is annexed to the Applicants pleadings. The Transfer is subject to the leases and statutes which are set out in the Memorandum. These statutes are the Government Lands Act and the Registration of Titles Act. Section 130 of the Government Lands Act outlined the procedure for the recovery of government lands that were in unlawful occupation:

130. (1) When any person without right, title or licence, or whose right, title or licence has expired or been forfeited or cancelled, is in occupation of unalienated Government land, the Commissioner or some person appointed by him in writing may enter a suit in any court of competent jurisdiction to recover possession thereof.

This section clearly indicates that for any recovery of land, the procedure to be followed must begin through the court process.

According to the Respondent, the revocation has been done pursuant to the powers granted by the Registrar at section 60 of the RTA. The Applicant is of the view that no such power exists under this section. The question therefore is whether the Respondent had power under the Registration of Titles Act to revoke title to land. The office of the Respondent was created under the section 4 of the Registration of Titles Act. Section 60 of the Act gives the procedure to be followed where the Registrar is of the view that a grant of a title has been made in error.

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.

This section clearly shows that the Registrar of titles has no power to cancel a title to land. This means that the Respondent acted *ultra-vires*. Where the Registrar is satisfied that a grant of title has been issued illegally, or that there has been fraud, then the procedure to be followed is that the Registrar ought to summon the person in whose name the title is registered so that the same can be corrected.

The Applicant has referred me to the case of **Kuria Greens Limited v Registrar of Titles & Another (2011) eKLR (Petition No. 107 of 2010)** in which Musinga J dealt with an issue similar to the one presented in this case. Having read through the full decision, I believe that the exposition of Justice Musinga was entirely correct. Justice Musinga had this to say with regard to a revocation of title through a Gazette Notice:

“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.”

(emphasis mine)

A similar position was taken by Okwengu J, as she then was, in **Kongowea Market Estate Ltd V Registrar Of Titles [2011] eKLR (Miscellaneous Application 92 of 2010)** wherein she stated:

“Moreover none of the laws cited in the Gazette Notice i.e. The Constitution of Kenya, the Government Lands Act or the Trust Land Act, gives any power to the Registrar of Titles or the commissioner of Lands or the Minister for lands to take away private land through revocation of title by way of gazette notice. (emphasis added)

Further even assuming that the respondents had the powers to revoke the Title, the ex-parte applicant whose interest was likely to be adversely affected had to be given a hearing. This not having been done, there was a breach of the rules of natural justice.

I come to the conclusion that in revoking the ex-parte applicant’s title to the suit property the respondents acted outside their jurisdiction, as it was not within their powers to revoke the title, secondly the revocation of the ex-parte applicant’s title was unlawful as it was contrary to Article 40 of the Constitution of Kenya, and thirdly the respondents breached the rules of natural justice by failing to give the ex-parte applicant a hearing before revoking the title.

Justice Musinga in the **Kuria Greens case** (supra) further demonstrated how the Respondent, or the government for that matter ought to have proceeded if he was satisfied that a title had been fraudulently acquired:

“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 ..., 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 fully agree with the sentiments of Musinga J in the **Kuria Greens case** and Okwengu J in the **Kongowea Case (supra)**.

In this case, it is clear that the process outlined in the law was not followed. The Respondent did not even give the Applicant notice of the intended revocation. Like Musinga J in the **Kuria Greens Case**, I hold the opinion that before taking the decision to cancel the Applicant's title, the Respondent ought to have given the Applicant an opportunity to state how it acquired the suit property. Failure to do this was a violation of the rules of natural justice.

The rules of natural justice demand that first, a man cannot be a judge in his own cause, and second that all parties to be affected by a decision should be accorded a fair hearing in matters where legal rights are likely to be affected. Fair hearing means that all parties are told of the case before them and are given an opportunity to make their own representations on the case. Where this is not done, then the rules of natural justice will have been violated. A decision made in violation of the rules of natural justice is unlawful, and falls outside the jurisdiction of the decision making body. See the **Fahim Yasin Twaha & Another V District Land Registrar - Lamu [2011] eKLR (Miscellaneous Application 17 of 2010)** wherein Omondi J adopted the statements of Lord Diplock in **Attorney General v Ryath (1980) AC 718 at page 730:**

"it has long been settled, that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority"

In my view, the Applicant has demonstrated to the court that he is deserving of the order of certiorari sought.

With regard to the prayer of prohibition, I am not inclined to grant the same. The Respondent maintains that the initial allocation was illegal and unconstitutional, and that the revocation was done in the public interest. If this position is true, then the Respondent ought to follow the correct procedure in law to address this issue. A grant of the order of prohibition as prayed would hinder this lawful process should the Respondent desire to exercise it.

I therefore make orders as follows:

a) I grant an order of certiorari quashing the decision of the Senior Registrar of Titles contained in the Kenya Gazette Notice Number 3460 dated the 1st of April 2010 revoking the land title to Land Reference number 209/10345/9;

b) The Applicant shall have the costs of the Application

DATED, SIGNED and DELIVERED this 17th day of OCTOBER 2012

M. WARSAME

JUDGE