REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 1460 of 2004

IN THE MATTER OF AN APPLICATION BY ADILA ALI BASHIR FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF PROHIBITION AND CERTIORARI DIRECTED TO THE PERMANENT SECRETARY MINISTRY OF LANDS AND HOUSING

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT, CAP 40 OF THE LAWS OF KENYA AND THE REGISTRATION OF TITLES ACT CAP 281 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC…….....……APPLICANT
AND
THE PERMANENT SECRETARY, MINSITRY OF LANDS AND HOUSING….RESPONDENT

EX PARTE: ADILA ALI BASHIR

JUDGMENT

The Applicant, Adila Ali Bashir, approached this court by way of the Notice of Motion dated 17th November 2004 in which she seeks the following orders:

a) An order of prohibition be and is hereby issued to prohibit the Respondent Permanent Secretary in the Ministry of Lands and Housing and/or its officers, servants and agents whomsoever from dispossessing the Applicant ADILA ALI BASHIR of or otherwise evicting her from L.R. No 209/13765 (HG 709B) Kileleshwa, Nairobi in execution of the decision by the Respondent entailed in its letter of 09/09/2004 ref No. CON/LS/A/2/7/102 or at all AND/OR otherwise howsoever from interfering with the Applicant's quiet possession, use and enjoy of the said immovable property and all improvements erected and being thereon;

b) An order of certiorari do hereby issue to remove to the High Court for purposes of the same being quashed the decision and Notice entailed in the letter referenced CON/LS/A/2/7/102 of 09/09/2004 by the Respondent Permanent Secretary Ministry of Lands and Housing demanding for the Applicant's relinquishment of ownership or written acceptance to purchase her property in L.R. No 209/13765 (House No 709B) on 31/10/2004 or thereabouts or at all;

c) That the costs of this application be provided for.

The application is supported by the verifying affidavit and a further affidavit sworn by the Applicant, and is based on grounds on its face and in particular that:

a) The Applicant had applied for and was lawfully and properly allotted House No HG 709 B Kandara Road, Kileleshwa Nairobi by the Ministry of Lands and Settlement (as it then was) by a letter of Allotment Ref 64082/VI/28 25th September 1998 prior to which she had occupied this property as a government officer since 6th September 1985 when it was allocated to her by the Ministry of Roads, Public Works and Housing under Ref. No. H/COM. 61/429

b) The Applicant was asked by the government to pay Stand Premium, Land Rent, Conveyancing Fees, Registration Fees, Stamp Duty, Survey Fees, Road and Road Drains Charges, and other approval and planning fees totalling to Kshs 510,190.00 to cover those charges

c) The Applicant was thereafter issued with a titled deed for the property by the Government of Kenya dated March 2000 being a grant registered on 14th March 2000 as Number I.R. 83141/1 which she holds in her custody;

d) The said grant was issued to the Applicant under the provisions of the Registration of Titles Act of the Laws of Kenya and is still subsisting, has neither lapsed nor been revoked/cancelled in accordance with the law or at all yet the Respondent is treating it as "government property" in utter disregard of the law and the rule of law

e) The conveyance is neither illegal nor irregular and the subject property is not a government house. The government house had lawfully allotted it to the Applicant in 1998 and issued her with a title deed for it. The Applicant is the absolute and duly registered proprietor holding an indefeasible title to the subject property under the provisions of the Registration of titles act Cap 281 of the Laws of Kenya

f) The Respondents thinly veiled eviction notice of 09/09/04 in reference No. CON/LS/A/2/7/102 dated 09/09/04 is arbitrary, unfair, against subsisting court orders, unreasonable in the circumstances and should be quashed for being null and void, ultravires and repugnant to the rule of law, the principles of natural justice and the Constitutional right to ownership of and quiet possession and enjoyment of privately acquired property.

The Respondent is the Permanent Secretary in what was at the time called the Ministry of Lands and Housing.

The genesis of this application is the final eviction notice issued to the Applicant by the Respondent in his letter referenced CON/LS/A/2/7/102 dated 9th September 2004. In this letter, the Respondent informed the Applicant that House No HG 709 B was alienated to her without following the laid down procedure governing the disposal of government assets. The Respondent then offered the Applicant an opportunity to buy the house and informed her that should she not remit to the Respondent the sum of Kshs 512,933.30 together with a letter of acceptance of the Respondent's demand for relinquishing of her title/ownership and agreeing to "regularise and validate" her proprietorship of the suit property by paying Kshs 5,129,133.00 then the house would be declared available for sale to other civil servants.

The background of the case is given by the Applicant in her statutory statement and verifying affidavit. The Applicant states that she is the registered owner of the suit property being L.R. No 209.13765 upon which is built her house number HG 709B off Kandara Road, Kileleshwa Nairobi.

She states that she was lawfully and properly allotted the house by the government of Kenya by a letter of allotment ref: 64082/VI/28 on 25th September 2008. As part of the conditions of allotment, she was required to make pay a stand premium, conveyancing fees, registration fees, survey fees and other sums, which she made. These payments all totalled 510,190.00. After this, the Applicant was issued with a title deed for the property, being grant number I.R. Number 83141 which she holds to-date. She states that despite all this, the Respondent issued two demand letters to her, one in February 2004 and another September 2004.

The Applicants case is that the property in question was properly allocated to her. By virtue of this, she holds an indefeasible title as the absolute and registered proprietor to the land, which has not been cancelled or revoked, and that the property has not been compulsorily acquired by the Kenyan government. In these circumstances, she states that the action of the Respondent is ultra vires the Registration of Titles Act and section 75 of the Constitution of Kenya.

The Respondent opposed the application by way of a Replying Affidavit sworn by Engineer Erastus Mwongera on 3rd August 2005. At the time, he was the Permanent Secretary in the Ministry of Lands and Housing. He states that as the permanent secretary, he is the custodian and trustee of all the houses owned by the Kenyan government and maintains a register of all government buildings. The Respondent states that the house in question forms part of the Kileleshwa Pool Housing Phase I which was set up by the Kenyan government through the National Housing Corporation 30th June 1979 and 12th April 1983. The project was undertaken at a cost of Kshs 616,922 and was to enable the government provide housing to its senior civil servants within Nairobi. The Respondent maintains that the house in question belongs to the Kenyan government as it is recorded in the register of buildings and houses.

The Respondent also states that he is a stranger to the letter of allotment dated 25th September 1998 and the purported title designated as L.R. No 209/13765.

He has stated that the government policy is to sell its houses at prevailing market rates and not by way of allocation through alienation by the Commissioner of Lands. The Respondent maintains that the alleged allocation and the grant to the Applicant is illegal, null and void ab initio and is contrary to the provisions for the Government Lands Act, Chapter 280 of the Laws of Kenya. This is because the alleged grant held by the applicant is contrary to the government procedures and guidelines for disposal of government houses, assets and property and the same were not followed in this case.

The Respondent states that there are government procedures are in place to protect public property and ensure transparency and accountability to the public. These procedures are outlined in Chapter 19 of the Government Financial Regulations and Circular No 2 of 1958 dated 1st March 1958. He has outlined the process to be taken before the disposal of any government building or land and maintains that the suit property has never been taken through the process outlined in the regulations.

He further states that grant in the possession of the Applicant is void and invalid as neither the president nor the commissioner of lands have any authority to alienate government property without following the laid down procedure and getting approval from treasury.

The Respondent has questioned the transfer to the Applicant, and stated that it cannot bestow on the Applicant absolute rights over a government house that has not been properly disposed of. He states that the demand for rent is legal and proper as the applicant occupies the house as a tenant and not a proprietor.

I have considered the pleadings of the parties and the submissions of the Applicant. The main issue that arises for determination is whether Respondent acted improperly, procedurally or irrationally in issuing the notice dated 9th September 2004 to the Applicant.

The statute that was obtaining at the time of the occurrence of these events was the Registration of Titles Act. These laws have since been repealed but they will apply for the purposes of this decision.

The Applicant has stated that she is the registered owner of the suit property and annexed a copy of certificate of title of the grant. The grant is in her name. It was issued under the Government Lands Act and the Registration of Titles Act. The Respondent contends that this grant is illegal because it was issued unprocedurally. He has annexed some guidelines that outline the procedures to be followed by government departments in the disposal of real property that belongs to the government.

However, there is no evidence as he has alleged, that there has been fraud. In any case, by this assertion

by the Respondent invites the court to justify his action – basically the Respondent is asserting that his decision was meritorious.

It is trite law that judicial review does not deal with the merits of the action of an inferior tribunal, but rather with the process of making of the decision. This position has been stated over and over again. In **Republic V Kenya Revenue Authority Ex-Parte Yaya Towers** ***Limited [2008] eKLR (Misc Civil Application 374 of 2006)***Justice Nyamu (as he then was) stated that***"Judicial review proceedings are directed to the decision making process as opposed to the merit of the decision."*** The learned judge adopted the findings of the High Court in***Republic v Judicial Service Commission ex parte Pareno [2004] 1 KLR 203***, which is also called the Pareno case where the court stated that:

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question."

It is now important to consider whether the Respondent had any power to make the decision that he made with regard to the suit property.

The Applicant has annexed to her pleadings a certified copy of the grant for the property that she claims belongs to her. The certificate of title was certified on 12th February 2004 by the Registrar of Titles. This means that the Applicant has proved that she holds a certificate of title to the property in question. Section 23 of the RTA made provision for the conclusiveness and sanctity of title. Where a person holds a certificate of title to a property, then the courts are to take this as conclusive proof of evidence of ownership. This section stated as follows:

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 <u>therein as proprietor of the land is the absolute and indefeasible owner thereof</u>, 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.

(2) A <u>certified copy of any registered instrument, signed by the registrar</u> and sealed with his seal of office, shall be received in evidence in the same manner as the original.

(emphasis added)

This position has been upheld in various cases as well. In ***Joseph Arap Ng'ok Vs Justice Moijo Ole Keiwua, Nairobi Civil Application No. 60 of 1997, (unreported)*** the Court of Appeal at Nairobi had this to say with regard to sanctity of title:

"Section 23(1) of the Act [the RTA] 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"

This section was also considered by the by the Court of Appeal in ***Nairobi Permanent Markets Society and 11 Others versus Salima Enterprises & 2 Others, Civil Appeal Number 185 of 1997 (unreported)*** wherein the learned judges expressed themselves as follows:

"…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…"

It must be noted that these decisions emphasise that the only ground upon which a certificate of title can be challenged is if it has been obtained through fraud or misrepresentation, and if it is proved that the person registered as proprietor was a party to that fraud or misrepresentation.

It has been alleged by the Respondent that the Applicant must have obtained the certificate of title through illegal means. However, there is nothing before the court to show what illegality or fraud was committed by the Applicant. Charges of fraud and illegality are serious. It is my considered view that for a court to take such charges with the seriousness they deserve, then the Respondent ought to have made some representations or provided some proof. I am guided by the statements of the ***Central Kenya Ltd V Trust Bank Limited & 4 Others [1996] eKLR (Civil Appeal 215 of 1996)*** where the court stated that

"The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case."

I hold a similar view. In the absence of any proof from the Respondent on the manner in which the Applicant is supposed to have sustained a fraud or illegality, I find that the Applicant's sanctity of title cannot be challenged.

The Applicant has also alleged that the Respondent acted ultra vires. A person acts ultra vires when he does something that he does not have the power, jurisdiction or authority to do so.

I have read through the RTA and the GLA under which the property in question was registered. It is my considered view that the Respondent did not have any power to perform any dealings with property that had been registered under these acts.

The correct procedure to be followed where fraud or misrepresentation is alleged or where there is an error is provided for in the RTA under section 60 which reads:

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.

Section 60 (2) of the RTA provided that:

(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.

61. Upon the appearance before the court of any person summoned or brought by virtue of a warrant the court may examine that person on oath or affirmation, and may order him to deliver up the grant, certificate of title or other instrument, and, upon refusal or neglect to deliver it up pursuant to the order, may commit him to prison for any period not exceeding six months, unless the grant, certificate of title, or instrument is sooner delivered up; and in that case, or where the person has absconded so

that a summons cannot be served upon him as hereinbefore directed, the court may direct the registrar to cancel the title.

These sections of the law are very clear. In relation to registered property, it is the Registrar, and not the Respondent, who may initiate procedures in court for the correction of the register where a title has been issued in error, through fraud or misrepresentation. In other words, the sanctity of title of a registered owner can only be challenged through a court process. This position has been stated many times before. In the recent case of ***Kuria Greens Limited v Registrar of Titles & another [2011] eKLR (Petition No. 107 of 2010).*** In this case, the Registrar of Titles had purported to revoke the Petitioner's title to land by way of a Gazette Notice. The Registrar alleged the property in question had been unlawfully alienated to the Petitioner. Justice Musinga stated that where it is suspected that there has been unlawful alienation of land, then one of two options should be taken:

"(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 wait its determination, one way or the other."

From the pleadings of the Applicant, it is clear that the fact that there had been a registration of the property was brought to the attention of the Respondent. The Respondent was therefore aware of the Applicant's claims. I therefore find the allegation that he is a stranger to the letter of allotment and the certificate of title to be baseless. Even after being informed of the Applicant's title to the land, the Respondent did not take any action, save to issue another demand notice. In my view, if the Respondent was of the view that the Applicants title to the suit property was illegal or had been obtained by fraud then the rational thing to do would have been to follow the procedure that is laid down in section 60 of the RTA.

Lord Diplock in the famous case of ***Council of Civil Service Unions Vs Minister for Civil Service (1985) AC 374 at 410*** summarised the grounds upon which judicial reviewremedies will issue. These grounds are illegality, irrationality and procedural impropriety. In this case, I find that the Respondent acted without jurisdiction to do so, that his actions were illegal and improper.

The Applicant's motion is therefore allowed in terms of prayers (1) and (2).

There shall be no order to costs. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED this 29th day of NOVEMBER 2012

M. WARSAME
JUDGE