



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Application 2 of 2011**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, THE GOVERNMENT LANDS ACT  
CAP 280, REGISTRATION OF TITLES ACT CAP 281, LOCAL GOVERNMENT ACT CAP 265,  
LAW OF CONTRACT ACT CAP 23**

**IN THE MATTER OF GAZETTE NOTICE NO 15580 IN VOLUME CXII – NO 124 OF THE  
KENYA GAZETTE OF 26TH NOVEMBER 2010 AND THE PURPORTED REVOCATION OF  
LAND TITLES BY THE REGISTRAR OF TITLES NAIROBI.**

**CHARLES MALENYA.....1<sup>ST</sup> APPLICANT**

**PHANUEL MBUVA NZIOKA.....2<sup>ND</sup> APPLICANT**

**WILSON KANYORO NJORA.....3<sup>RD</sup> APPLICANT**

**MARGARET MBUYA JOBITA.....4<sup>TH</sup> APPLICANT**

**BEDAN KARIUKI GICHIMU.....5<sup>TH</sup> APPLICANT**

**JOSEPH WANJAU MWANGI.....6<sup>TH</sup> APPLICANT**

**JOHN M. KUNGA.....7<sup>TH</sup> APPLICANT**

**SABINA ANGWENI.....8<sup>TH</sup> APPLICANT**

**MARY W. KAITTANY .....9<sup>TH</sup> APPLICANT**

**THOMAS KOROS.....10<sup>TH</sup> APPLICANT**

**RICHARD KARUGU.....11<sup>TH</sup> APPLICANT**

**MARTIN O. KORE.....12<sup>TH</sup> APPLICANT**

**ALBINA GICHIKU KOSKEY .....13<sup>TH</sup> APPLICANT**

**PRUDENTIAL NOMINEES LIMITED.....14<sup>TH</sup> APPLICANT**

CHARLES M. KAMAU.....15<sup>TH</sup> APPLICANT  
CELESTINE PETER NJAGI.....16<sup>TH</sup> APPLICANT  
DENNIS MBICHI MBOROKO.....17<sup>TH</sup> APPLICANT  
PETER MBURU.....18<sup>TH</sup> APPLICANT  
JENNIFER WANJIRU MACHARIA.....19<sup>TH</sup> APPLICANT  
MOHAMMED ALI NOOR.....20<sup>TH</sup> APPLICANT  
WINNIE WAIRIMU KABUGUA.....21<sup>ST</sup> APPLICANT  
GEOFFREY NG'ANG'A MUNGAI.....22<sup>ND</sup> APPLICANT  
ALEXANDER CHARLES WAINAINA.....23<sup>RD</sup> APPLICANT

**VERSUS**

THE REGISTRAR OF TITLES NAIROBI.....1<sup>ST</sup> RESPONDENT  
THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

For determination is the Notice of motion dated 18<sup>th</sup> October 2011 and filed in this court on 2<sup>nd</sup> November 2011. The orders sought are:

- a) **An order of certiorari to remove into this Honourable Court and quash the decision and notice of the Registrar of Titles Nairobi, revoking the Applicant's land titles vide Gazette Notice No 15580 in Volume CXII \_ No 124 of the Kenya Gazette of 26<sup>th</sup> November 2010**
- b) **An order of prohibition to prohibit the Registrar of Titles Nairobi revoking the Applicants' land title, evicting the Applicants or interfering with or dealing the Applicant's proprietary rights in any manner as long as the same is done pursuant to a purported revocation of the Applicant's title to land**
- c) **An order of mandamus do issue commanding the Registrar of Titles Nairobi, and the Commissioner of Lands either by themselves or their agents and or servants to reinstate or maintain the leasehold titles of the Applicants and to allow them quiet enjoyment of their property for which they are entitled through their valid long-term leases over the same.**

The grounds relied upon are that:

- a) **That the City Council of Nairobi which is registered as the proprietor as lessee from the Government of Kenya for the term of ninety nine years from the 1<sup>st</sup> of October 1950 of all that piece of land known as L.R. No 11927 within the City of Nairobi, with all the requisite approvals and procedurally adhering to the relevant provisions of the Local Government Act, did cause the same parcel of land to be subdivided into separate portions and some of these were leased for the residue of the Council's term of its lease to the Applicants**

- b) **The Applicants were issued with valid titles to the said leases under the Registration of Titles Act Cap 281 having made all the premium payments and dutifully paying the relevant rent and rates payments pursuant to the said leases and proceeded to build and make extensive improvements and renovations to the homes upon which parcels they stood**
- c) **On or about 26<sup>th</sup> November 2010, the Respondent, vide Gazette Notice no 15580 in the Kenya Gazette purported to revoke inter alia the Applicants' land titles validly issued after the Applicants legal acquisition of parcels of land from the council as valid purchasers for value having fulfilled all their contractual obligations.**
- d) **That the said Gazette Notice is illegal as Respondent does not have the power or authority under the existing law of the Republic of Kenya to revoke the Applicant's titles in the manner that is purported in the said notice.**

The matter came up for oral submissions on 13<sup>th</sup> November 2012. Mr. Wasuna, counsel for the Applicants argued that the Applicants are the registered proprietors of leaseholds which they purchased from the City Council of Nairobi and as such, all the Applicants hold certificates of lease. They purchased houses from the City Council of Nairobi and made the payments required of them in full.

Sometime in 2010, the 1<sup>st</sup> Respondent gave notice purporting to revoke the Applicants' title because the properties form part of public land that was reserved for public purposes.

Mr. Kaumba, counsel for the Respondents submitted that there is no absolute protection of the right to property under the Constitution, the limitation is in regards to titles illegally or fraudulently acquired. He submitted that the applicable law, under the Gazette Notice was issued, is the RTA at section 60 (1), and that the Registrar has the power to correct or nullify an entry in the register which is illegally or fraudulently obtained.

Counsel also submitted that under the doctrine of collective responsibility, the court must take active steps to recover all public land it suspects to have been fraudulently or illegally acquired within its province. Counsel also submitted that since the Ndungu Land Report has been published, the Applicants had the opportunity to contest the issues, and as such, there was no need for the Registrar to accord the Applicants an opportunity to once again be heard. Moreover, it was submitted that the Registrar was entitled to cancel the titles to the suit properties.

Extensive submissions setting out the position of the parties were made filed during the leave stage.

The Applicant's case is that the City Council of Nairobi on diverse dates in 1994 caused L.R. No 11927 to be divided into separate portions which were leased of the residue of the councils term of its least for a consideration of Kenya Shillings One Million One Hundred Thousand. The 2<sup>nd</sup> Respondent was duly notified of the said sub-division and approved the same.

Some of the Applicants purchased the subdivided plots. They therefore state that they were all issued with grants of leas as valid titles to the said leases, under the RTA having been made all the requisite payments. Sometime in 2003, the City Council of Nairobi issued the Applicants with letters purportedly cancelling their title to land.

The Applicants, together with others not before the court, brought suit to challenge the purported cancellation of the leases through *Miscellaneous Application No 224 of 2003 Charles Malenya & Others versus The City Council of Nairobi*. The suit is still pending.

On 26<sup>th</sup> November 2010, the Respondent herein issued a notice in the Kenya Gazette in which he revoked several parcels of land, among them the Applicants' premises, and stated that the property in question had been kept aside for Dagoretti Estate.

The Applicants position is that the Respondent does not have the power to revoke titles under the cited laws (the GLA and the RTA). The Applicants further state that the gazette notice purports to revoke the titles pursuant to the Trust Lands Act yet the subject properties do not form a part of unalienated land. They further submit that the Gazette Notice is pre-emptive of a matter in the high Court, and therefore read mischief in the revocation.

The Respondent opposed this application by way of grounds of opposition. The Respondents position is that the title to the property was illegally acquired and that the 1<sup>st</sup> Respondent has power to revoke title to illegally acquired land through a Gazette Notice.

The first issue for determination is whether the 1<sup>st</sup> Respondent acted ultra vires in issuing the Gazette Notice in question. This question has been the subject of a number of decisions of this court. See the cases of *Kuria Greens Limited v Registrar of Titles & Another (2011) eKLR (Petition No. 107 of 2010)*, *Kongowea Market Estate Ltd V Registrar Of Titles [2011] eKLR (Miscellaneous Application 92 of 2010)*.

The Principles all running through these cases is that the Registrar of Titles, on his own motion, has no power to cancel or revoke a title to land by way of a Gazette Notice. Musinga J in the *Kuria Greens Case* supra properly set out the procedure through which the Registrar of Titles should act where he is of the view that a title to land has been fraudulently or illegally acquired. The learned judge stated as follows:

***“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.”***

It is undisputed that the Applicants holds a certificate of titles for the suit properties. Section 23 of the RTA provided for the sanctity and conclusiveness 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 also means that a title to land can only be challenged on the grounds of fraud or misrepresentation, to which the registered owner is proved to be a party. 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 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.***

The principle of sanctity was also discussed in the case of *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 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...***

In ***Joseph Arap Ng'ok Vs Justice Moiwo 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”***

Since the Act was very clear on the issue of sanctity of title, it gave the procedure to be followed a title had been issued in error, or fraudulently. This procedure is provided at section 60 of the RTA. Under this section, the Registrar is to approach the court for orders to revoke title to land. This is the procedure that ought to have been followed by the Registrar in this case. It is therefore well settled that the Registrar of Titles does not have any power to revoke a title by way of Gazette Notice. This was declared by the court in ***Power Technics Limited V The Hon. Attorney General & 2 Others [2012] eKLR (Petition 178 of 2011)*** where the constitutional court issued a declaration as follows:

***“A declaration be and is hereby issued declaring that the revocation of titles issued under the Registration of Titles Act (Chapter 281 of the Laws of Kenya) by the Registrar of Titles, the Commissioner of Lands or any other officer authorised by them by way of publication of a Gazette Notice under the provisions of the Government Lands Act (Chapter 280 of the Laws of Kenya) and the Trust Land Act (Chapter 288) or any other law is contrary to Article 40 and 47(1) of the Constitution and is therefore null and void.”***

It is therefore my finding that the 1<sup>st</sup> Respondent acted ultra vires in issuing the Gazette Notice, and the same is null and void to the extent that it purports to revoke the Applicants' title to their respective properties.

The Respondent submits that the said revocation was done in the public interest. On this I wish to state that even where a revocation needs to be done for the greater good, the 1<sup>st</sup> Respondent would still need to go through the proper procedure that is outlined in the law to do so. See the holding of Justice Mwongo in ***Republic V The Registrar Of Titles, Mombasa & 2 Others Exparte Emfil Limited [2012] eKLR (Miscellaneous Civil Application 84 of 2011)*** wherein he stated:

***“I have considered the respective submissions by counsel on the main issue of the Registrar's power to revoke title to land and the justification of public interest and I have to find that there is unanimity among the courts that the Registrar has no authority in law to revoke or cancel titles to land, whether in public interest or otherwise....”***

***... I find that the government cannot revoke title to land even for “public need and interest” or for alleged illegality. The Government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the court in an appropriate case in making an order for cancellation of title or in authorizing subject to due compensation the compulsory acquisition or takeover of private property.” (emphasis mine)***

I am in total agreement with this position. Even where the Respondent purports to act in the public interest and need, it must do so within the law that is in place. After all the court cannot sanction an illegal or ultra vires act for the public good or public interest. The court will also not uphold an illegality for the reason that it could correct another wrongdoing.

Moreover, in this case, it is clear that the rules of natural justice were clearly ignored. The Gazette Notice in question, as has been the case with other gazette notices issued by the Respondent, was issued without consultation of the affected parties. In this case, the publication of the Gazette Notice was intended to dispossess the Applicants of their property, yet they were not informed of this. The Applicants were not given an opportunity to present their claims, and or defend themselves against the Respondent claim that the property had initially been set aside for Dagoretti Estate.

In *Fahim Yasin Twaha & Another V District Land Registrar - Lamu [2011] eKLR (Miscellaneous Application 17 of 2010)* the court adopted the statement 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”**

I too adopt these sentiments as good law. It is therefore my finding and decision that the 1<sup>st</sup> Respondent acted outside the law in purporting to revoke the Applicants titles by way of Gazette Notice. The Applicants prayer for an order of certiorari therefore succeeds.

The Applicants have prayed for an order of prohibition and mandamus. Judicial review orders are discretionary orders, and they must be granted prudently. It is my view that in the instant case, it would not be prudent to grant an order of prohibition. An order of prohibition as prayed for would prohibit the Respondents from taking an action that would result in stripping the Applicants of the property in question. In view of the Respondents claims that the titles to the property were fraudulently acquired, it is my decision that such an order would not be in the interests of justice. Since there is a legal process in which the Respondents can establish who the owners of the property are, this order cannot lie.

As regards the order of mandamus, it is clear that the applicants were not accorded a fair hearing before their titles were revoked. In law a party cannot be condemned unheard or without being given an opportunity to put his side of the dispute. By unilaterally cancelling or revoking the leases granted to the applicants, the respondents violated a fundamental principle in the administration of justice. It is the case of the applicants, that they obtained the suit properties in a fair and transparent manner and that they were not a party to any fraud or malpractices. It is therefore my decision that they were entitled to be given an opportunity to respond to any adverse allegations before their leases were cancelled. That was not done, consequently I grant an order of mandamus.

I therefore make orders as follows:

- a) **I grant an order of certiorari to remove into this and quash the decision and notice of the Registrar of Titles Nairobi, revoking the Applicant’s land titles vide Gazette Notice No 15580 in Volume CXII \_ No 124 of the Kenya Gazette of 26<sup>th</sup> November 2010.**
- b) **An order of mandamus directed to the Registrar of titles by himself, servants, agents and/or other person or officer acting under him or through him to forthwith ensure that the Register of Titles is restored to bear the name of the Applicant as the proprietor of the subject land.**
- c) **Each party to bear own costs.**

Dated and signed this 10<sup>th</sup> day of December, 2012.

**M. WARSAME  
JUDGE**

Delivered at Nairobi this 13<sup>th</sup> day of December 2012.

**W. KORIR**  
**JUDGE**